

California Votes 2016:
An Analysis of the Competing
Death Penalty Ballot Initiatives

Paula M. Mitchell
Executive Director, Alarcón Advocacy
Center & Legal Director, Loyola Project for
the Innocent & Adjunct Law Professor

Nancy Haydt
Board of Governors
California Attorneys for Criminal Justice

Overview

California voters will decide the fate of the state's death penalty this November. There is now a broad consensus that California's death penalty system is broken. Voters will be asked to choose between two starkly different proposals to address its dysfunction and failures. Competing ballot initiatives will ask voters either to replace the death penalty with life without the possibility of parole, or to double down on the failed system by spending millions more to modify and expand it.

Voters can either support YES on Prop 62, which will replace the death penalty with life without parole and save the state \$150 million per year. Or, voters can support Prop 66 to keep the death penalty system and implement multiple changes to how it operates. Each proposition would make substantial and far reaching changes to California's criminal justice system. But only one can pass into law: if both propositions receive more than 50% of the vote, then the one with most votes will become law and the other will not.

This Report analyzes the competing initiatives. It looks at the current state of the death penalty system in California and analyzes how each initiative will work in practice. In particular it looks at whether the initiatives will achieve their stated goals, and whether there would be other, perhaps unintended, consequences to their passage into law.

This Report concludes that Prop 66's proposed "fixes" to the current system will cost millions more than the already expensive death penalty system and will not speed up executions. In fact, Prop 66 will only make matters worse by creating more delays and further clogging the state's over-burdened court system. Prop 66 will add layers of appeals to a system already facing an insurmountable backlog of decades of death penalty appeals waiting to be decided.

Prop 66 contains other provisions that proponents claim will speed up executions, such as keeping the lethal injection protocols secret and out of the public's purview, exempting them from the Administrative Procedures Act. This and other key features of Prop 66 will certainly be subject to litigation challenging the provisions on constitutional and other grounds, should Prop 66 pass, adding yet more delays to death penalty cases.

The Report further finds that Prop 66 fails to make the constitutional changes required to deliver the results it promises. At the same time, its proposals are so convoluted that they are likely to create many new problems that will not only complicate the administration of the death penalty system, but will also impact and harm the rest of California's legal system.

This Report finds that Prop 62, by contrast, is straightforward and transparent. It replaces the death penalty with life without the possibility of parole, saving the state \$1.5 billion in the next ten years alone. Prop 62 requires inmates to work and increases the victim compensation rate. Prop 62 ensures that the state never executes an innocent person, without jeopardizing public safety.

Prop 62	Prop 66
<ul style="list-style-type: none"> • <i>Replaces the death penalty with life imprisonment without the possibility of parole (LWOP).</i> • <i>The Legislative Analyst says that ending the death penalty will save the state \$150 million per year starting right away.</i> • <i>Applies retroactively.</i> • <i>Directs appeals in all first-degree murder cases to the Courts of Appeal where they are concluded in 3 to 5 years, instead of 15 to 25 years now needed for death penalty cases.</i> • <i>Provides victims' family members with justice and a speedy resolution of the appeals process.</i> • <i>Requires inmates sentenced to LWOP (including current death row inmates) to pay 60% of the wages they earn while working in prison toward victim restitution fines and orders.</i> • <i>Guarantees the state will never execute an innocent person.</i> • <i>Ends the racially discriminatory application of the death penalty, which disproportionately impacts African-Americans, Latinos, and other minorities.</i> 	<ul style="list-style-type: none"> • <i>Claims it will speed up the system.</i> • <i>The Legislative Analyst says it will cost tens of millions of dollars per year to implement with future costs to the state unknown.</i> • <i>Proposes unworkable time frames for appeals and habeas proceedings.</i> • <i>Adds layer of habeas review in trial courts that are already over-burdened, and are forced to drop criminal charges in many cases due to lack of resources to hear cases.</i> • <i>Transfers death row inmates from San Quentin's death row to "mini-death rows" created at prisons across the state.</i> • <i>Increases amount of income death row inmates may be ordered to pay to victim restitution orders to 70%.</i> • <i>Changes procedures for appointing counsel and forces attorneys to take death penalty cases or face expulsion from the court's panel.</i> • <i>Keeps lethal injection protocols secret and out of public's purview so the public will not know what goes into the lethal "cocktails" used by the Department of Corrections for executions.</i> • <i>Does not eliminate the risk that the state will execute an innocent person.</i> • <i>Retraumatizes victims' family members who do not wish to suffer through the lengthy appeals process involved in all death penalty cases.</i>

Contents

Introduction.....	5
I. Background.....	7
A. History of the Death Penalty in California	7
B. California Current Death Penalty Procedures: The Role of the Courts	9
1. Superior Courts: Death Penalty Trials.....	9
2. California Courts of Appeal.....	13
3. California Supreme Court.....	15
C. Recent Legal Challenges to the Death Penalty.....	22
1. Lethal Injection Protocols.....	22
2. Eighth Amendment’s Prohibition on Cruel & Unusual Punishment.....	23
3. Judicial Action Limiting Availability of the Death Penalty	24
4. Ineffective Assistance of Counsel	25
5. Actual Innocence Claims & Exonerations of Persons Sentenced to Death.....	29
D. Shifts in Popular Support Toward Repealing the Death Penalty	33
1. California Polls Show Likely Voters Increasingly Favor Ending the Death Penalty	33
2. National Trend Shows States Increasingly Support Ending the Death Penalty.....	35
3. Prominent Voices Questioning the Use of Capital Punishment	39
II. The Pressure Builds: California Death Penalty Voter Initiatives in 2012 & 2014.....	41
A. SAFE California Campaign of 2012 To End the Death Penalty: Nearly Passed By Voters	41
B. Death Penalty Reform and Savings Act of 2014 To Speed Up Executions: Fails to Gather Enough Signatures	44
III. Battleground 2016: End the Death Penalty and Replace It with LWOP (Prop 62), Or Try to Fix the Failed System By Amending State Laws & Court Rules (Prop 66).....	45
A. The Justice That Works Act of 2016—Yes on Prop 62	45
B. Death Penalty Reform and Savings Act of 2016—Yes on Prop 66	49
1. Prop 66 Will Cost - Not Save - Taxpayers Tens Of Millions Of Dollars.....	52
2. Prop 66’s Proposed “Fixes” Will Add Layers Of Review And Will Cost Tens of Millions of Dollars to Implement.....	54
3. Prop 66’s Key Features Are Unworkable, Unconstitutional, and Will Not Speed Up Appellate Review Or Executions	57
4. There Is A Critical Disconnect Between What Prop 66 Promises and What it Can Legally Achieve, Both in Terms of Savings and Expediting the Process	68
Conclusion	69

Introduction

In November 2016, California voters will decide whether it is time to replace the death penalty with life without the possibility of parole (LWOP) and save California taxpayers \$1.5 billion over the next ten years, or whether the state should double down on its failed death penalty system and spend hundreds of millions more in an attempt to speed up executions. The Justice That Works Act of 2016, Prop 62, will end the state's death penalty and replace it with LWOP, saving about \$150 million annually, according to the Legislative Analyst's Office (LAO). It requires inmates sentenced to LWOP (including current death row inmates) to pay 60% of the wages they earn while working in prison toward victim restitution fines and orders. Prop 62's supporters say it's time to end California's death penalty because it is broken beyond repair, it is not a deterrent, it is unfairly applied, a few counties send a disproportionate number of individuals to death row, and it can never eliminate the risk of executing an innocent person.

The Death Penalty Reform and Savings Act of 2016, Prop 66, proposes to implement various amendments to state law aimed at speeding up the judicial review process and speed up the rate of executions. It proposes time frames and limitations on direct appeal and habeas corpus proceedings, changes the process to appoint counsel in direct appeals and habeas corpus petition proceedings, shifts initial jurisdiction for habeas corpus petitions, and makes various changes to the laws and procedures easing adoption of regulations controlling lethal injection protocols developed and employed by the California Department of Corrections and Rehabilitation (CDCR). The LAO estimates that the changes in this so-called "Savings Act" will increase state costs by tens of millions of dollars annually for several years related to direct appeals and habeas corpus proceedings, with fiscal impact on such costs being unknown in the longer run. Prop 66's supporters acknowledge that the system is broken and has cost taxpayers hundreds of millions of dollars, but they argue that it can be fixed by legal reforms. They say these reforms will speed up the system and eventually will result in savings to the state, but the LAO has found no evidence supporting their claims that the system can be fixed or that doing so will ever save money for the state.

California now has the largest and most expensive death row in the western hemisphere. With 747 inmates, the state has spent roughly \$5 billion over the last forty years on a system that has produced only 13 executions. There is no dispute that California's death penalty system is a multi-billion dollar failure. The question is whether the state should end it—as many other states are now doing, or continue spending hundreds of millions in taxpayer dollars on a measure that attempts to fix the system. If passed, the "fixes" proposed will not survive the significant legal challenges they will face, will cost the state even more to operate, and will not reduce the delays or address the other serious problems in the system.

This Report will provide a brief history of the death penalty in California and discuss the legal procedures in place. The authors will discuss how the current system evolved and the roles the various courts play at each stage of the process. We will look at recent challenges to death penalty laws in California and nationwide, including challenges to California’s lethal injection protocols and claims that the state’s system violates the Eighth Amendment’s prohibition on cruel and unusual punishment. We will also review the voter initiatives proposed in California’s last two election cycles, and trends nationwide, to discern whether popular support for the death penalty is increasing or decreasing.

Against this historical backdrop, the authors will provide an in-depth analysis of the provisions set forth in the competing death penalty initiatives. This paper will provide voters with a fuller understanding of the initiatives and present information necessary to decide whether it is time to end the death penalty in California, or whether the state should double down on the failed program by investing millions more in an effort to resuscitate California’s capital punishment system.

The authors conclude that by all objective measures, California’s failed system is—in fact—broken beyond repair.¹ Ending the death penalty is the only real option at this point and Prop 62 will do that. Regardless of one’s view on the death penalty as an appropriate punishment in certain cases, Prop 66’s proposed “fixes”: will not remedy the systemic and longstanding problems; will not save money; will not ensure that innocent people are not executed; and, will not speed up executions in any significant way because the backlog is too severe. The proposed “fixes” are, at best, temporary bandages that are certain to exacerbate the flaws in the system and increase its costs. By contrast, Prop 62 will end the wasteful spending of hundreds of millions of dollars on the state’s failed system, while ensuring that the state never executes an innocent person, and without compromising public safety.

¹ Prop 62 has been endorsed by the California Democratic Party platform for 2016, which is committed to ending mass incarceration, “support[ing] abolishing capital punishment,” and prioritizing “building schools, not jails,” <http://www.cadem.org/our-california/platform/2016-platform-criminal-justice> (last visited Jul. 15, 2016). Prop 62 has also received early endorsements from numerous editorial boards across the state, including: *Death penalty is destructive to California*, THE SACRAMENTO BEE, Jul. 7, 2016, available at <http://www.sacbee.com/opinion/op-ed/soapbox/article88282707.html> (last visited Jul. 17, 2016); *Mercury News editorial: Abolish the death penalty; Vote yes on Proposition 62*, SAN JOSE MERCURY NEWS, Jul. 15, 2016 available at http://www.mercurynews.com/opinion/ci_30129818/mercury-news-editorial-abolish-death-penalty-vote-yes (last visited July 17, 2016); *Editorial: Abolish death penalty; pass Proposition 62*, EAST BAY TIMES, July 16, 2016 available at http://www.eastbaytimes.com/editorial/ci_30133445/editorial-abolish-death-penalty-pass-proposition-62 (last visited Jul. 17, 2016). See also, *Editorial: The same of state-sponsored killing*, LOS ANGELES TIMES, December 22, 2015, available at <http://www.latimes.com/opinion/editorials/la-ed-death-penalty-20151222-story.html> (last visited July 17, 2016).

I. Background

A. History of the Death Penalty in California

Death by hanging was authorized in California under the Criminal Practices Act of 1851. There are no records indicating how many people were executed in California between 1851 and 1891.² The Sheriffs in the state's 58 counties were charged with overseeing executions until the legislature amended the law in 1891 and required that the Warden replace the Sheriff as the overseer of executions. Between 1893 and 1942, that state executed 307 people by hanging. The gas chamber was installed at San Quentin State Prison in 1938 and over the next thirty years—between 1938 and 1967, the state executed 194 people with lethal gas.³ Condemned inmates' appeals were reviewed and they were executed within two years (or less) from conviction.⁴

In February 1972, the California Supreme Court held that the death penalty constituted cruel and unusual punishment under the state constitution.⁵ Later that year, in June 1972, the United States Supreme Court held, in *Furman v. Georgia*, that death penalty statutes allowing for unguided jury discretion in capital cases violated the Eighth Amendment's prohibition against cruel and unusual punishment as applied to the states through the Fourteenth Amendment of the U.S. Constitution.⁶ In November 1972, California voters overrode the California Supreme Court to make the constitutional infirmity disappear by amending the state constitution to provide that the death penalty was not cruel and unusual punishment. In 1973, the California legislature adopted a mandatory death penalty scheme, which was also held to be unconstitutional by the California Supreme Court in 1976, under another recently decided U.S. Supreme Court case, *Woodson v. North Carolina*, holding that mandatory death penalty statutes are unconstitutional.⁷

In May 1977, the California legislature passed new legislation restoring the state's death penalty. Governor Jerry Brown refused, as a matter of conscience, to agree to re-establish the death penalty in California and vetoed the bill four hours after it reached his desk.⁸ “Statistics can be marshaled and arguments propounded but at some point each of us must decide for himself what sort of future he

² See *The History of Capital Punishment in California*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/Capital_Punishment/history_of_capital_punishment.html (last visited Jul. 15, 2016) (CDCR explains that “[t]he various counties may have some records of the executions conducted under the jurisdiction of the counties, but the department knows of no compilation of these.”)

³ *Id.*

⁴ See *People v. Anderson*, 493 P.2d 880, 894 n.37 (Cal. 1972).

⁵ See *People v. Anderson*, 493 P.2d 880 (Cal. 1972).

⁶ See *Furman v. Georgia*, 408 U.S. 238 (1972).

⁷ See *Rockwell v. Super. Ct.*, 556 P.2d 1101 (Cal. 1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁸ *California; Brown Still Astonishes*, *ECONOMIST*, Jan. 29, 1977, at 34.

would want,' Brown said in a brief veto message. 'For me, this would be a society where we do not attempt to use death as a punishment.'"⁹

The legislature overrode Governor Brown's veto and the death penalty was reestablished in 1977. The sentence of life without the possibility of parole (LWOP) was also added to the Penal Code in 1977.¹⁰ In 1978, an initiative was passed that increased to 28 the number of crimes eligible for the death penalty.¹¹ California's death penalty is now applicable to "special circumstances" including special victims – law enforcement officers, government officials¹², child victims of sex crimes¹³, witnesses¹⁴; special defendants - those with prior homicide convictions¹⁵, those who are in gangs¹⁶; and, non-intentional killings which occur in the commission of certain felonies.¹⁷

Since 1967, the state has sentenced over 1,000 people to death and executed 13.¹⁸ Between 1992 and 1996, California carried out two executions by cyanide gas, before the United States Court of Appeals for the Ninth Circuit held that lethal gas constituted cruel and unusual punishment.¹⁹ Between 1996 and 2006, California carried out 11 executions by lethal injection.²⁰ Because the lethal injection protocols are now facing legal challenges, no executions have taken place in the last ten years. Since the death penalty was re-established in California, 104 inmates have died on death row of natural and other causes, many still waiting for the courts to hear their direct appeal or habeas petition, including in some cases claims of actual innocence. Seven hundred forty-seven inmates are currently on California's death row.²¹

⁹ *Death Row Population Decreases Reported*, FACTS ON FILE, WORLD NEWS DIGEST, Aug. 6, 1977, 593, at F3; ASSOCIATED PRESS, May 27, 1977.

¹⁰ CAL. PENAL CODE § 190(a) ("Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life.")

¹¹ Abbreviated Listing, Proposition 7, California Ballot Propositions (1911–Present),

<http://library.uchastings.edu/cgi-bin/starfinder/17676/calprop.txt> (last visited June 4, 2011).

¹² CAL. PENAL CODE §§ 190.2(a)(7), 190.2(a)(8), 190.2(a)(9), 190.2(a)(11), 190.2(a)(12), 190.2(a)(13).

¹³ CAL. PENAL CODE §§ 190.2(a)(17)(E), 190.2(a)(17)(F).

¹⁴ CAL. PENAL CODE § 190.2(a)(10).

¹⁵ CAL. PENAL CODE § 190.2(a)(2).

¹⁶ CAL. PENAL CODE § 190.2(a)(22).

¹⁷ CAL. PENAL CODE §§ 189, 190.2(a)(17).

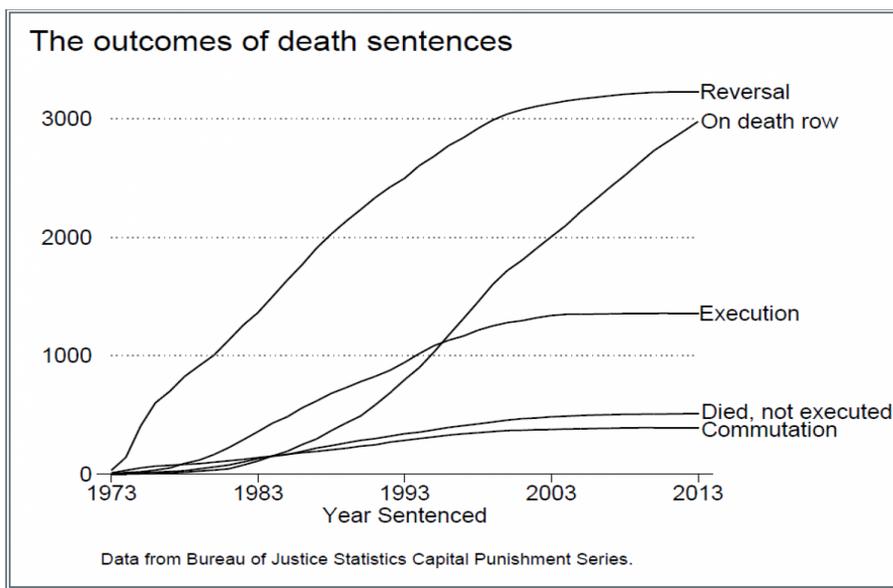
¹⁸ See *Capital Punishment Number of Executions, 1893 to Present*, CAL. DEP'T. OF CORR. & REHAB., http://www.cdcr.ca.gov/Capital_Punishment/Number_Executions.html (last visited Jul. 15, 2016).

¹⁹ See *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996) ("In short, we hold that the district court's extensive factual findings concerning the level of pain suffered by an inmate during execution by lethal gas are not clearly erroneous. The district court's findings of extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes require the conclusion that execution by lethal gas is cruel and unusual. Accordingly, we conclude that execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth amendments.")

²⁰ See *Inmates Executed 1978 to Present*, CAL. DEP'T. OF CORR. & REHAB., http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited Jul. 15, 2016).

²¹ See *Death Row Tracking System Condemned Inmate Summary List*, CAL. DEP'T. OF CORR. & REHAB. (July 5, 2011), http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf?pdf=Condemned-Inmates.

While California’s death row is by far the largest in the western hemisphere, its ever-increasing execution backlog is not unique. Nationwide, jurisdictions with capital punishment do not execute the vast majority of those condemned to death by execution. Since 1973, 8,466 defendants have been sentenced to death nationwide and of those, more than 3,000 death sentences have been reversed, while 1,359 inmates - only 16 percent – have been executed.²² The graph below illustrates the outcomes of death sentences nationwide between 1973 and 2013.



B. California’s Current Death Penalty Procedures: The Role of the Courts

1. Superior Courts: Death Penalty Trials

Under current law, death penalty cases are prosecuted in the superior court located in the county where the crime or crimes were committed. California has 58 trial courts, one in each county.²³ There is no real dispute that capital trials are costly endeavors for the counties. They typically take significantly longer than non-capital first-degree murder trials and cost much more to conduct, largely because the sentence of “death by execution” is on the table. As a result, trial preparation and jury selection take much longer, and there are two trials instead of one: a guilt phase trial and a punishment phase trial. By one estimate, capital trials cost approximately \$1 million *more* to prosecute than non-

²² Tracy L. Snell, *Capital Punishment, 2013 – Statistical Tables*, U.S. DEPT. OF JUSTICE, <http://www.bjs.gov/content/pub/pdf/cp13st.pdf> (rev. Dec. 19, 2014.).

²³ See <http://www.courts.ca.gov/superiorcourts.htm>.

capital first degree murder trials carrying a sentence of LWOP.²⁴ Importantly, these extraordinarily expensive—and many would argue politically popular—death penalty trials are funded out of county coffers, and are prosecuted solely at the discretion of the county district attorneys who are elected officials.

Impact on County Budgets. Death penalty cases hit smaller counties with smaller budgets particularly hard. One capital trial can wreak havoc on a county’s annual budget. For example, in 2013, the El Dorado County District Attorney filed a death penalty case stemming from a 1981 cold case that resulted in the county sending a 62-year-old man, Joseph Nissensohn, to death row.²⁵ In that case, the cost to El Dorado County for pre-trial proceedings through guilt and penalty phases at trial was \$2,700,000, in a county whose entire contingency fund is \$3.4 million.²⁶ Such expenditures are difficult to justify in California’s smaller, cash-strapped counties, particularly given the current backlog in death penalty appeals, which make it a virtual certainty that Nissensohn—who is already in poor health—will die on death row of other causes, long before he is executed.²⁷

Larger counties with bigger budgets may have an easier time justifying large expenditures on death penalty trials. The Los Angeles County DA’s Office, for example, is the largest prosecutorial agency in the United States and sends more people to death row than any other county.²⁸ As in the Nissensohn case, the Los Angeles County DA recently obtained a death sentence for 63-year-old defendant Lonnie Franklin who, like Nissensohn, is all but certain to live out the rest of his natural life on California’s death row where he will die of other causes before the courts have decided his appeals.²⁹

Moreover, while costs related to capital trials are borne by the counties, the hundreds of millions of dollars expended in the decades of appeals and post-conviction proceedings in state and federal courts that follow a conviction are also paid for by the taxpayers, but those proceedings are currently charged to state of California, rather than to the counties.³⁰

²⁴ Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature’s Multi-Billion-Dollar Debacle*, 44 Loy. L.A. L. Rev. S41, S621 n.624 (2011) (hereafter “*Executing the Will of the Voters?*”) (“California taxpayers have spent approximately \$1.94 billion on pre-trial and trial costs associated with the prosecution of an estimated 1,940 death penalty trials conducted since 1978.”)

²⁵ Ron Briggs, *California’s Death Penalty by the Numbers*, Budget Watchdogs, <http://www.budgetwatchdogs.org/californias-death-penalty-by-the-numbers-2/> (last visited Jul. 15, 2016).

²⁶ *Id.*

²⁷ Julia Reynolds, *Killer of Monterey County Girls in 1981 gets death penalty*, Monterey Herald, Dec. 11, 2013, <http://www.montereyherald.com/article/ZZ/20131211/NEWS/131218319>. (victim’s mother explaining “Given Nissensohn’s poor health . . . it wouldn’t have mattered much whether he got the death penalty or just life in prison.”)

²⁸ See L.A. CNTY. DIST. ATTORNEY’S OFFICE, <http://da.lacounty.gov/default.htm> (last visited Sep. 23, 2012).

²⁹ Emanuella Grinberg, *Jury recommends death sentence for ‘Grim Sleeper’ serial killer*, CNN.com, <http://www.cnn.com/2016/06/06/us/grim-sleeper-sentence/> (last visited Jul. 15, 2016).

³⁰ See Gerald F. Uelmen, *The Conversation: Can California Confront Costs of the Death Penalty?*, SACRAMENTO BEE, Oct. 10, 2010, at 1E (“Among California’s 58 elected district attorneys, many choose to pursue politically popular death

Impact on Trial Courts—“Superior Courts”—by County. Statewide, the superior courts charged with handling death penalty trials have 1,705 authorized judges.³¹ But death penalty cases are not evenly distributed by county. Nearly half (47.95%) of all death sentences come from just three counties: Los Angeles County (233 death sentences for 30.86% of the statewide total), Riverside County (89 death sentences for 11.79% of the statewide total), and San Bernardino County (40 death sentences for 5.30% of the statewide total).³²

There is already a serious shortage of superior court judges in California’s busiest death penalty counties—dubbed by some a “judicial crisis.”³³ Los Angeles County is understaffed and under-authorized for judges by 7%.³⁴ “Riverside County has one of the highest caseloads per judge in the state, second only to San Bernardino County, a substandard ratio that has led to significant delays in court proceedings in superior courts.”³⁵ Each of Riverside County’s superior court judges has a caseload of over 5,570 filings. To make the ratio acceptable, the state estimates an additional 51 judges must be hired in Riverside County—a 40% increase over the current 76 judges sitting in the county.³⁶ San Bernardino also needs an additional 60 judges—also a 40% increase—to handle its current workload.³⁷

The acute shortage of criminal court judges is not new. **Between January 2007 and June 2009, 350 criminal cases in Riverside County were thrown out because no judge was available to hear them.**³⁸ Despite this longstanding issue, lengthy capital trials continue to consume the state criminal court system’s scarce resources, leaving those courts unable to handle other important criminal and civil cases. The very courts called upon to hear the majority of death penalty cases in California have long been understaffed and ill equipped to handle their caseloads.

sentences with extravagant frequency. Why not? Most of the \$54.4 million we spend each year for capital appeals and habeas reviews comes out of the state budget, not county coffers.”)

³¹ In 2007, AB 159 (Stats. 2007, ch. 722) created an additional 50 judgeships, pending appropriation by the Legislature. Funding has been delayed for these judgeships, so although the 50 judgeships are included in the total number of authorized judgeships, the positions cannot be filled until funding is provided by the Legislature.

³² See *Death Row Tracking System Condemned Inmate Summary List*, CAL. DEP’T. OF CORR. & REHAB. (July 5, 2011), http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf?pdf=Condemned-Inmates.

³³ Anna Rumer, *Indio Highlights Riverside County Judge Shortage*, THE DESERT SUN, March 17, 2016, available at http://www.desertsun.com/story/news/crime_courts/2016/03/16/judge-crisis-could-inspire-indio-council-act/81871058/.

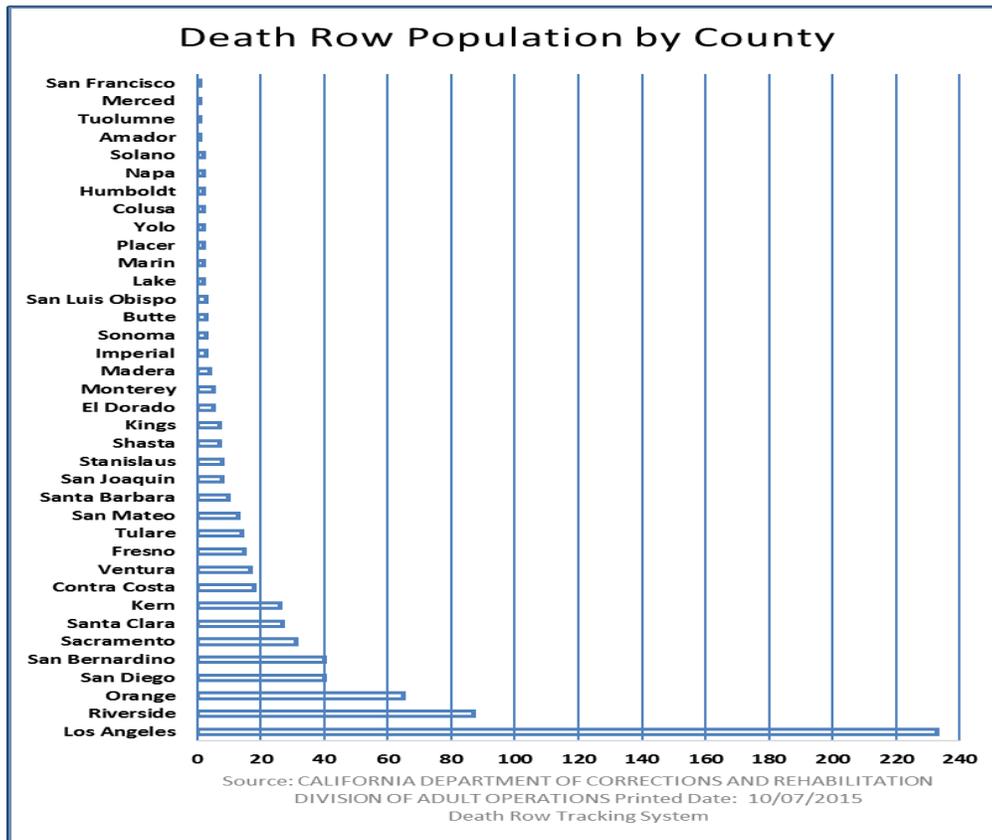
³⁴ *Fact Sheet: New Judgeships*, JUDICIAL COUNCIL OF CALIFORNIA, Nov. 2015, <http://www.courts.ca.gov/documents/fact-sheet-new-judgeships.pdf>.

³⁵ *Id.*

³⁶ *Id.* (explaining that “[a]ll civil cases in Riverside Superior Court were suspended for more than a month in 2005 while overtaxed judges worked to chip away at the backlog of criminal cases,” and that “[a] bill introduced . . . in 2015 . . . offered \$5 million in funding for 12 more superior court judgeships . . . but when it made it to Brown’s desk on Oct. 8, he refused to sign it.”) Trial court judges are also resisting efforts to transfer judgeships among county courts. See, e.g., <http://www.courthousenews.com/2016/05/31/ca-judges-oppose-bill-to-transfer-judgeships.htm>.

³⁷ Michael P. Neufeld, *Critical Judicial Shortage In San Bernadino County: Obernolte Intorduces A.B. 2341*, ROTWNEWS.com, May 27, 2016, available at <http://rotwnews.com/2016/05/27/critical-judicial-shortage-in-san-bernardino-county-obernolte-introduces-a-b-2341/>.

³⁸ Richard K. DeAtley, *High Court Shuns DA’s Bid*, PRESS-ENTERPRISE, Oct. 26, 2010 at A1.



In November 2015, the Judicial Council of California again warned that the consequences of too few judicial officers leave the judicial branch “unable to provide an adequate level of justice and service to the public,” endangers public safety “when there are too few judicial officers to hear criminal cases,” and “put[s] pressure [on prosecutors] to plea bargain because these cases must be dismissed if they are not heard within specified time frames, due to Constitutional protections.”³⁹ The Council also warned that “[d]elays in criminal cases due to an insufficient number of judges can force delays in civil case processing,” which “harm civil litigants and create uncertainty and instability for the business community.” Making matters worse, the number of filings of complex criminal cases in superior courts are on the rise. Felony filings increased by 4 percent in fiscal year 2013–14, while filings involving mental health were up 9 percent, probate filings were up 7 percent, and dependency filings were up 4 percent.⁴⁰

³⁹ *Fact Sheet: New Judgeships*, JUDICIAL COUNCIL OF CALIFORNIA, Nov. 2015, <http://www.courts.ca.gov/documents/fact-sheet-new-judgeships.pdf>.

⁴⁰ Judicial Council, *Complex Court Filings Continue to Rise Decrease in limited jurisdiction case filings slows*, (Sep. 21, 2015), <http://newsroom.courts.ca.gov/news/complex-court-filings-continue-to-rise>.

For these and other reasons, discussed *infra*, the provisions in Prop 66 that would increase the workload of these trial courts, such as moving original jurisdiction for capital habeas corpus to superior court, are highly problematic because these courts are already facing a “judicial crisis” due to acute shortages in the number of authorized judgeships in the state’s busiest death penalty counties.⁴¹

2. California Courts of Appeal

Courts of Appeal have appellate jurisdiction when superior courts have original jurisdiction, and in certain other cases prescribed by statute. The Courts of Appeal have original jurisdiction in non-capital habeas corpus, mandamus, certiorari, and prohibition proceedings.⁴² In every case in which a defendant is sentenced to life without the possibility of parole (LWOP), the Courts of Appeal review the conviction and sentence, typically within three years or less. Under current law, the only death penalty cases the Courts of Appeal now considers are those in which the jury returned declined to impose a death sentence and instead imposed a sentence of LWOP. If California voters decide to end the death penalty and replace it with LWOP, all future appeals in those cases will go directly to the Courts of Appeal to be resolved, rather than to the California Supreme Court.

The state constitution requires, however, that the California Supreme Court review all death penalty cases automatically on direct appeal.⁴³ Unlike *non-capital* first-degree murder convictions and sentences, which are reviewed by the California Courts of Appeal, death sentences are constitutionally required to be automatically appealed to the California Supreme Court.

There are 105 full-time justices on the California Courts of Appeal.⁴⁴ Cases are decided by three-judge panels. In the 2013-2014 term, there were 15,213 notices of appeals in civil and criminal cases filed statewide and dispositions were entered in 14,998 appeals.⁴⁵ Written opinions were issued in roughly 10% of those cases. Opinions are published if the case establishes a new rule of law, involves a legal issue of continuing public interest, criticizes existing law, or contributes to legal literature.⁴⁶ All opinions of the Courts of Appeal are reviewable by the California Supreme Court.

The California Courts of Appeal typically file opinions in well under three years from the filing of the notice of appeal, including criminal cases in which the defendant was sentenced to life imprisonment without the possibility of parole (LWOP). **If voters pass Prop 62, appeals will be decided in under three years; family members of victims in death penalty cases will no longer wait**

⁴¹ *Fact Sheet: New Judgeships*, JUDICIAL COUNCIL OF CALIFORNIA, Nov. 2015, <http://www.courts.ca.gov/documents/fact-sheet-new-judgeships.pdf>.

⁴² Cal. Const., art. VI, § 10.

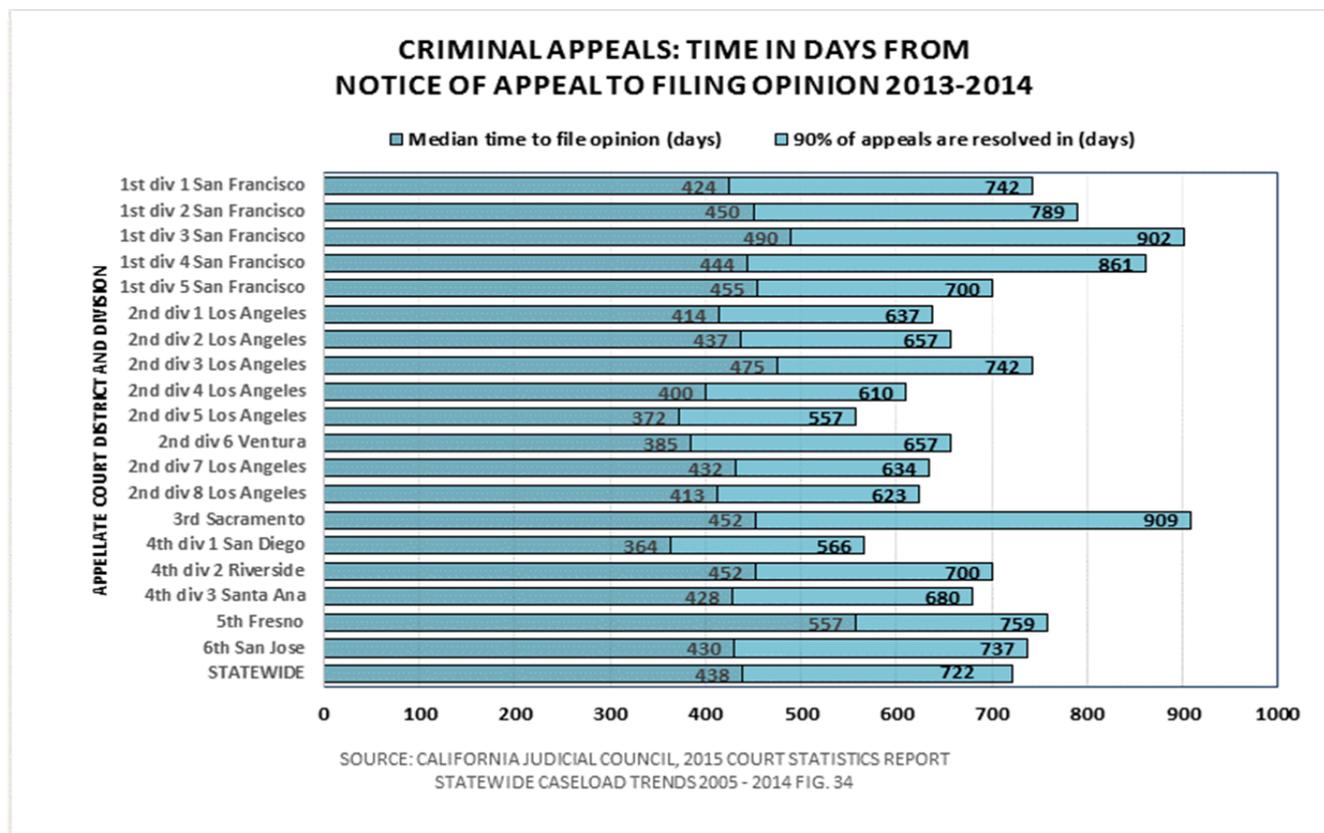
⁴³ CAL.PENAL CODE, § 190.6(a).

⁴⁴ Workload 2013-2014, p. 21, <http://www.courts.ca.gov/27369.htm>.

⁴⁵ *Id.*

⁴⁶ CAL. CONST., art. VI, § 14; CAL. RULES OF COURT 8.1105(c).

decades to learn the outcome of these appeals, which the California Supreme Court now requires 15 to 25 years to resolve.



There are several reasons why it takes longer to review appeals in death penalty cases than in non-capital murder cases. First, the trial records are much longer in capital cases because jury selection can take weeks to conduct since the jury must be “death qualified”—meaning that jurors with strong views about the death penalty who cannot set aside those views when the deciding the case must be excused from the jury. In non-capital murder cases, the jury selection process is typically much faster because the death penalty is not an issue.⁴⁷ Jury selection is a critical issue on appeal because a trial court’s erroneous excusal of a prospective juror due to his or her views about capital punishment requires *automatic reversal of the death sentence*, which means the case must be re-tried. Also, death penalty cases take longer to review on appeal because there are two phases, the guilt phase and the punishment phase. During the punishment phase, the defense typically puts on numerous expert

⁴⁷ Paula Mitchell, *Are Trial Courts Even-Handed in Excusing Jurors Based on their Views on the Death Penalty?*, Oct. 9, 2013, <https://verdict.justia.com/2013/10/09/trial-courts-even-handed-excusing-jurors-based-views-death-penalty> (explaining that as California Supreme Court Justice Goodwin Liu noted in a concurring opinion in *People v. Whalen*, “the record from voir dire alone consumed more than 1,000 pages of the approximately 2,500 total pages in the trial court transcript.” Most of the voir dire was focused on “reviewing [jurors’ responses to the] written questionnaires and conducting individual questioning of the 158 members of the jury pool who remained after hardship excusals.”)

witnesses, in an effort to present mitigating evidence that will persuade the jury to spare the life of the defendant.⁴⁸ The process adds thousands of pages to the already lengthy trial records in death penalty cases, which the courts must review in their entirety before reaching a disposition and issuing an opinion.

Because the California Courts of Appeal have far more justices than the California Supreme Court, and because non-capital murder trials typically have much shorter trial records, the time it takes to review first degree murder cases—including LWOP cases—is less than three years. Death penalty appeals in the Supreme Court take an average of 15 years and can take as long as 25 years to be decided.

The Constitution requires capital cases go directly to the California Supreme Court for review, and that law cannot be changed without an amendment to the constitution. In 2007, the California Supreme Court announced that it had studied the possibility of seeking an amendment to article VI, section 12, of the California Constitution that would permit transfer of death penalty appeals to the Courts of Appeal and that the justices unanimously endorsed the proposal. But the following year, the Chief Justice announced it would defer the proposal, citing California’s budget situation.⁴⁹ As set forth *infra*, a constitutional ballot initiative to amend the constitution was proposed in 2014, but failed to gather the signatures required to make it onto the ballot.

The full weight of death penalty appeals continues to fall to the California Supreme Court. With only seven justices, the court issues far fewer opinions each year—usually fewer than 100—than does the Courts of Appeal, which files roughly 1,500 opinions each year. Under current law, the Courts of Appeal also plays no role in review of capital habeas corpus petitions. The California Supreme Court has the additional burden of reviewing lengthy and complex habeas litigation.

3. California Supreme Court

Because the California Constitution directs the Supreme Court to review all cases in which the trial court has pronounced a judgment of death, that court’s seven justices automatically review all death penalty cases.⁵⁰ The Supreme Court has original jurisdiction in capital habeas corpus

⁴⁸ *Executing The Will Of The Voters*, 44 Loy. L.A. L. Rev. at S77. (“There are numerous areas in which the services of an expert may be required in a capital trial, including: mitigation specialists, social historians, child abuse experts, addiction experts, institutional adjustment experts, psychologists, psychiatrists, neuropsychologists, neuropsychiatrists, toxicologists, pathologists, ballistics experts, fingerprint analysts, criminologists, mental health experts, atomic absorption experts, statisticians, criminalists, fair cross-sections experts, trial experts, fetal alcohol experts, hypnosis experts, sociological experts, gunshot residue experts, human vision experts, DNA experts, forensic serologists, eyewitness/memory experts, correctional consultants, jury selection experts, psychopharmacologists, serology experts, polygraph experts, blood spatter experts, social anthropologists, and rape experts.”)

⁴⁹ Lynn Holton, *Supreme Court Proposes Amendments to Constitution in Death Penalty Appeals*, Judicial Council of Cal., News Release No. 76, Nov. 19, 2007, available at <http://www.courts.ca.gov/xbcr/cc/NR76-07.PDF>.

⁵⁰ CAL. CONST., art. VI, § 11; CAL. PENAL CODE, § 1239(b).

proceedings.⁵¹ The Supreme Court also has authority to review all decisions of the state Court of Appeal⁵² and also has sole authority to appoint attorneys to represent clients in capital direct appeals and capital habeas corpus. The Supreme Court has guidelines and a roster of attorneys who meet the guidelines for appointment.

The death penalty case backlog at the Supreme Court has been significant for a more than a decade. In 2008, then Chief Justice Ronald M. George testified that

even if the Supreme Court were to become solely a death penalty court and were to completely put aside proceedings related to all civil and criminal matters other than capital appeals and related habeas corpus petitions, it would probably take a minimum of three to four years to process the existing backlog of death-penalty-related appeals and habeas corpus petitions. During that time, petitions for review in other types of cases would continue to be filed, and additional death penalty and other cases would become fully briefed. The backlog would continue to grow, and the systemic costs of this narrow focus on death penalty cases would be profound.⁵³

Automatic Appeals. As predicted, the backlog of automatic appeals has continued to grow with each passing year. In January 2006, opinions in automatic appeals were issued after an average delay of about 12 years from the imposition of a death sentence.⁵⁴ Then there were 650 inmates on death row. Fast forward ten years, and there are now an additional 100 inmates on death row—747 as of July 17, 2016. There have been no executions in that time. Of the 747 death row inmates, only 279 have had their sentences affirmed on direct appeal by the Supreme Court.⁵⁵ In the last decade, the time it is taking the Court to review automatic appeals is increasing, not decreasing.

Based on opinions in automatic appeals from death penalty cases in 2012, 2013, and 2014, those cases now take 15.3 years on average,⁵⁶ with some inmates waiting 18 to 25 years for the Court to

⁵¹ CAL. CONST., art. VI, § 10.

⁵² CAL. CONST., art. VI, § 12.

⁵³ Chief Justice Ronald M. George, Testimony Before the California Commission on the Fair Administration of Justice 43 (Jan. 10, 2008), available at www.ccfaj.org/documents/reports/dp/expert/Chief'sTestimony.pdf (hereafter "Final Report").

⁵⁴ Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 731 (2007).

⁵⁵ CDCR, Condemned Inmates Summary List, p. 4, (May 12, 2016) available at http://www.cdcr.ca.gov/Capital_Punishment/index.html.

⁵⁶The California Supreme Court decided the following automatic appeals in death penalty cases in 2012, 2013, and 2014: [2012] Watkins (S026634); Homick (S044592); Valdez (S062180); Duenas (S077033); Houston (S035190); Gonzales (S067353); McKinzie (S081918); Tully (S030402); Thomas (S067519); Riccardi (S056842); Lightsey (S048440); McDowell (S085578); Streeter (S078027); Souza (S076999); Jones (S076721); Livingston (S090499); Myles (S097189); Weaver (S033149); Abel (S064733); Thomas (S048337); Enraca (S080947); Fuiava (S055652); Elliot (S027094); Brents (S093754); and, Pearson (S120750); [2013] Williams (S118629); Contreras (S058019); Manibusan (S094890); Jones (S042346); Harris (S081700); Mai (S089478); Edwards (S073316); Maciel (S070536); Rogers (S080840); DeHoyos (S034800); Nunez (S091915); Linton (S080054); Lopez (S073597); Rountree (S048543); Williams (S030553); Pearson (S058157); Williams (S093756); Whalen (S054569); and, Satele (S091915); [2014] Adams (S118045); Bryant (S049596); Wheeler (S049596);

decide their claims.⁵⁷ See e.g., *Lucas* (S012279), judgment entered on September 19, 1989 and opinion issued twenty-five years later, on August 21, 2014); *Williams* (S030553), judgment entered on December 17, 1992 and opinion issued twenty years later, on May 6, 2013); *Watkins* (S026634), judgment entered on May 11, 1992 and opinion issued more than twenty years later, on December 17, 2012).

Also as predicted, **the Court cannot meaningfully reduce the current backlog because new death penalty cases are added to the Supreme Court docket every year. The constant addition of new capital cases prevents the Court from having any hope of catching up.** In 2010, for example, despite the Court devoting nearly *half* of all published opinion pages to death cases, “the crushing backlog on the death docket was barely diminished: Seventy-seven death appeals and 89 habeas petitions - *all fully briefed* - remain on the court’s calendar, where a two-year wait still separates the filing of final briefs from oral argument.”⁵⁸ Scores of cases were *fully briefed* and waiting to be argued. The same is true today.

Smith (S049596); Merriman (S097363); McCurdy (S061026); Carrasco (S077009); Capistrano (S067394); Weatheron (S106489); Avila (S135855); Trinh (S115284); Brown (S052374); Hajek (S049626); Vo (S049626); Suff (S049741); Montes (S059912); Rodriguez (S122123); Duff (S105097); Lucas (S012279); Banks (S080477); Hensley (S050102); Boyce (S092240); Sattiewhite (S039894); Debose (S080837); Chism (S101984); and, Jackson (S086269). See California Supreme Court docket database available at <http://appellatecases.courtinfo.ca.gov/>.

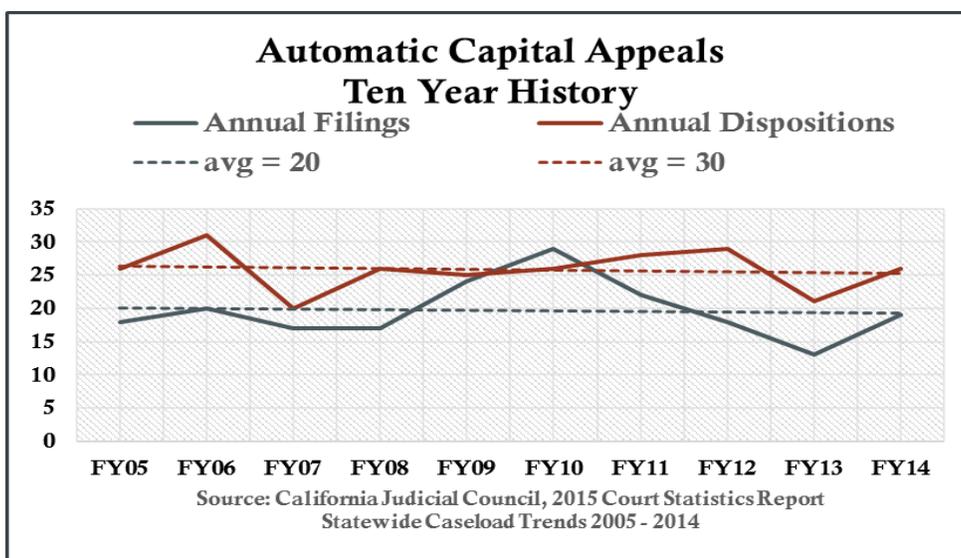
A review of the dockets in these automatic appeals (AA) indicates that the California Supreme Court now requires an average of 15.3 years to issue opinions in death penalty appeals. The Supreme Court has a backlog of 1,074 years of automatic death penalty appeals.

Year	Appeals Decided	Years btwn Conviction & AA Counsel Annt'd (avg)	Yrs for AA Briefing (avg)	Yrs btw Conviction & AA Opinion (avg)	Yrs of Supreme Court AA Backlog
2012	26	4.5	3.5	15.8	410
2013	19	4.7	2.7	15.5	292
2014	25	5.4	2.8	14.86	372
Totals	70	4.6	3.0	15.3	1,074

⁵⁷ See *Bryant* (S049596); *Wheeler* (S049596); *Smith* (S049596); *Brown* (S052374); *Hajek* (S049626); *Vo* (S049626); *Suff* (S049741); *Lucas* (S012279); *Hensley* (S050102); *Sattiewhite* (S039894); *Jones* (S042346); *DeHoyos* (S034800); *Rountree* (S048543); *Williams* (S030553); *Watkins* (S026634); *Homick* (S044592); *Houston* (S035190); *Tully* (S030402); *Weaver* (S033149); *Elliot* (S027094), dockets available at <http://appellatecases.courtinfo.ca.gov/>.

⁵⁸ Gerald F. Uelman, *The End of an Era*, CALIFORNIA LAWYER, Sept. 2010, available at https://ww2.callawyer.com/Clstory.cfm?eid=911409&wteid=911409_The_End_of_an_Era.

With only seven justices to hear these cases, in which briefs are typically several hundreds of pages in length on each side, the Court will never be in a position to overcome the growing backlog.⁵⁹ In 2012, death penalty cases made up 34% of the Court's cases and accounted for over 50% of the Court's written opinion pages.⁶⁰ In the 2013-2014 term, the California Supreme Court issued 85 opinions, 26 of which were capital appeals.⁶¹ During that same time, nineteen new capital appeals were filed. While the average ratio of new cases filed to dispositions averaged 20:30 between 2005 and 2014, it now appears that the number of opinions the Court issues each year may be decreasing soon, including in death penalty cases, as the Court's priorities change with the addition of new justices, among other reasons.⁶² Once the California Supreme Court has issued an opinion on appeal, the U.S. Supreme Court may grant discretionary review of the Court's opinion.



While some are quick to point the finger at inmates' lengthy appeal briefs as the cause of delays in the appellate process, that is a gross over-simplification and is not an accurate assessment.⁶³ Half of the 15.3 years required for a direct appeals – 7.6 years on average – was time spent waiting for the for

⁵⁹ *Executing The Will Of The Voters?*, 44 Loy. L.A. L. Rev. at S187. (“The average opening brief in an automatic appeal from a judgment of death is between 250 and 350 pages long and includes 30 to 40 claimed errors.”)

⁶⁰ Gerald F. Uelmen, *The CA Supreme Court Reviewed*, CALIFORNIA LAWYER, Sept. 2012, available at http://callawyer.com/Clstory.cfm?eid=924435&wteid=924435_The_CA_Supreme_Court_Reviewed.

⁶¹ California Judicial Report, available at <http://www.courts.ca.gov/33183.htm>.

⁶² Emily Green, *Vacancies, changed priorities lead to fewer state Supreme Court opinions*, LOS ANGELES DAILY JOURNAL, December 12, 2014, at 1 (noting that the state Supreme Court is issuing 25 percent fewer opinions each year than it was a decade ago).

⁶³ *Executing The Will Of The Voters?*, 44 Loy. L.A. L. Rev. at S187 (“The average opening brief in an automatic appeal from a judgment of death is between 250 and 350 pages long and includes 30 to 40 claimed errors.”)

the Court to appoint counsel or issue opinions in fully briefed cases.⁶⁴ No one benefits from these lengthy delays.⁶⁵

As discussed *infra*, the Prop 66 proposes to speed up the appointment of appellate counsel in direct appeals by implementing several rule changes that would force attorneys to take on death penalty cases against their will, or face removal from the Court's panel of attorneys in all other cases.⁶⁶ As will be seen, that proposed, "fix" to the dearth of available appellate counsel to handle capital cases will not remedy the problem for several reasons. As already noted, with scores of cases fully briefed and awaiting review, simply briefing more cases faster will do nothing to address the Court's current backlog, nor will it address the fact that there are still only seven justices to review these lengthy and complex appeals.

State Capital Habeas Corpus. Once the direct appeal is filed, death row inmates in California are entitled to file a petition for writ of habeas corpus, seeking relief in the California Supreme Court.⁶⁷ Claims raised in capital habeas petitions include violations in trial processes and procedures and government misconduct,⁶⁸ which violate the federal and state constitutions. Capital habeas corpus requires investigation to develop information outside the appellate record and prove this evidence caused an unfair trial.⁶⁹ These claims often involve claims that a defendant was denied effective representation at the trial or appellate stages of the proceedings—claims that could not have been raised in earlier appeals. **These petitions are granted with great frequency once the claims make their way to the federal courts**, an indication that the state courts are already giving short shrift to the claims raised in these petitions, i.e., **the state courts are already conducting a relatively cursory review of the constitutional claims raised in many California death penalty cases.**

⁶⁴ See, *supra*, n. 54.

⁶⁵ See, California Supreme Court dockets for Case Nos.: Weatherton (S106489) – biased juror; Hensley (S050102); Riccardi (S056842) – jury selection error; Brents (S093754); and, Pearson (S120750) – improperly excused juror, available at <http://appellatecases.courtinfo.ca.gov>. In *Lightsey* (S048440), the court reversed the conviction and death sentence after a 17 year appeal ("defendant might have been incompetent [to stand trial] and was denied a fair opportunity to establish that fact").

⁶⁶ The initiative contemplates mandatory acceptance of court appointment as post-conviction counsel. CAL. PENAL CODE § 987.2 disallows such a practice. "Nothing in this subdivision shall be construed to require the appointment of counsel in any case in which the counsel has a conflict of interest." CAL. PENAL CODE § 987.2 subds. (d), (e).

⁶⁷ CAL. CONST. art. VI, § 10; CAL. PENAL CODE § 1473; CAL. CONST. of 1849, art. I, § 5. "Furthermore, to file an application for federal habeas relief pursuant to 28 U.S.C. § 2254(a), a prisoner must first file a state petition and exhaust all claims before the California Supreme Court. 28 U.S.C. § 2254(b)(1)."

⁶⁸ In addition to being a common factor leading to wrongful convictions, prosecutorial misconduct is a major factor for reversals in capital cases. In a national study of 5760 capital cases from 1973 to 1995, researchers found that prosecutorial misconduct was a major factor contributing to a 68 percent rate of reversible error. See JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 4-5 (2000), available at <http://justice.policy.net/jpreport/executivesummary.html>. In an Illinois study of capital appeals, which showed a 66 percent reversal rate, prosecutorial misconduct accounted for 21 percent of all reversals. See *Marshall J. Hartman & Stephen L. Richards, The Illinois Death Penalty: What Went Wrong?*, 34 J. Marshall L. Rev. 409, 409, 423 (2001).

⁶⁹ *People v. Pope*, 23 Cal.3d 412, 426 (1979); *In re Darlice C.*, 105 Cal. App. 4th 459, 463 (2003) (explaining that a claim of ineffective assistance of counsel is often based on information that is not in the appellate record).

As with the direct appeal, capital habeas corpus petitions are filed directly in the California Supreme Court, which is required by law to review every state habeas petition in capital cases.⁷⁰ By necessity, state habeas corpus petitions are voluminous, as they must state every constitutional claim and substantiate the claim with evidence.⁷¹ Habeas corpus petitions and their exhibits can exceed one thousand pages.⁷² The California Supreme Court may order any or all claims returned to the trial court for evidentiary hearings.^{73,74} In response, the trial court conducts limited hearings on the referred claims and returns findings to the California Supreme Court. A petitioner may file an appeal in the California Supreme Court contesting the trial court findings. Few cases are reversed by the California Supreme Court based on trial court findings in habeas corpus.⁷⁵

In the 2013-2014 term, the Court issued dispositions in twenty-eight capital habeas corpus cases.⁷⁶ Five were disposed of by written opinion; twenty-three were disposed of by order, with no written opinion.⁷⁷ In that same time, forty-one new capital habeas corpus petitions were filed.⁷⁸

⁷⁰ CAL.PENAL CODE § 1506.

⁷¹ Review in federal court is limited to those issues that were presented to the highest state court. “[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The federal courts are not required to conduct evidentiary hearings. It is presumed that the necessary evidence is in the state court record. “When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits.” *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

⁷² The habeas corpus petition in *In re Jesse Morrison*, No. 115559, (filed May 2, 2003) challenging a 1991 conviction and death verdict, was 341 pages in length with more than 600 pages of exhibits. On July 15, 2009, the Supreme Court issued an order to show cause on the issue of Intellectual Disability. Due to the Supreme Court’s failure to pay for legal services and expenses, the evidentiary hearing has not been held and the matter is on hold indefinitely. [Note: one of the authors is habeas corpus counsel in this case.]

⁷³ CAL.PENAL CODE § 1508.

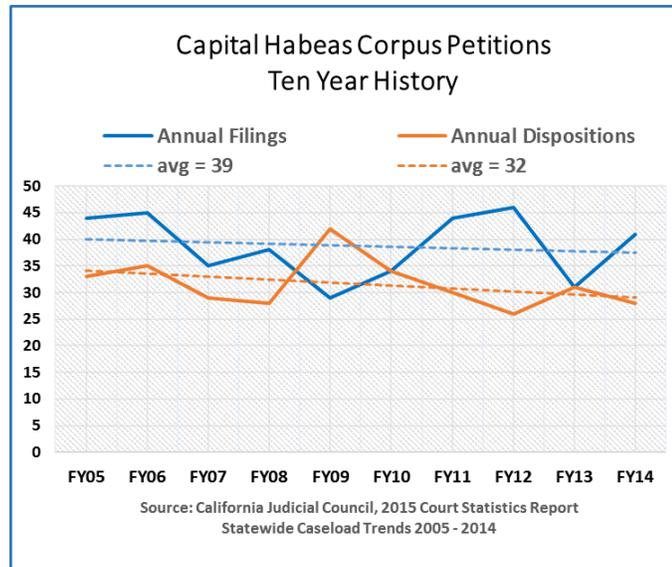
⁷⁴ California Judicial Report, *supra*.

⁷⁵ *Id.*; When a petition for writ of habeas corpus is denied without issuing an order to show cause, the court does not issue an opinion and no further hearings occur.

⁷⁶ *Id.*

⁷⁷ *Id.*; When a petition for writ of habeas corpus is denied without the issuance of an order to show cause, the court does not issue an opinion and instead disposes of the matter by order.

⁷⁸ *Id.*



From 2005 to 2014, the Court received an average of 39 habeas corpus filings per year and disposed of an average of 32 habeas corpus petitions per year.⁷⁹

As with automatic appeals, there are many death row inmates awaiting appointment of counsel to represent them in their state habeas proceedings. In 2006, there were 156 death row inmates without state habeas counsel; by 2008, the figure had nearly doubled to 291 without habeas counsel; and by 2014, the figure reached 352 waiting for counsel to be appointed.⁸⁰

Federal Habeas Corpus. When all state claims are exhausted in the California Supreme Court, a petitioner may file for relief with the U.S. District Court.⁸¹ Federal court review is critical to address the shortcomings of the California death penalty review process.⁸² Federal courts have granted habeas relief to California death row inmates in seventy percent of the cases in which review has been completed.⁸³ Again, **this reveals that there are numerous and significant flaws present in California’s death penalty system.** When relief is granted in these complex cases, as the system is forced to go back and try again to get it right.

A petitioner may appeal the ruling to the Ninth Circuit Court of Appeals, but review in the Circuit Court is discretionary. Should the petitioner not prevail in the Circuit Court, he or she may file a petition for a writ of certiorari in the U.S. Supreme Court, however, the Supreme Court rarely grants

⁷⁹ *Id.*

⁸⁰ Dan Morain, *Attorney helps sound the death knell for capital punishment*, SACRAMENTO BEE, July 27, 2014, <http://www.sacbee.com/opinion/opn-columns-blogs/dan-morain/article2604915.html>.

⁸¹ *See* n.16.

⁸² 28 U.S.C.S. § 2254(a).

⁸³ *See, supra* n.25, at S55, n.26 (noting that as of 2008, federal courts had granted “[r]elief in the form of a new guilt trial or a new penalty hearing . . . in 38 of the cases, or 70%,” and by 2011, habeas relief had been granted in five additional cases) (*citing* Final Report at 114, *available at* <http://www.ccfaj.org/>).

review. If review is granted, the Supreme Court may affirm the Circuit Court’s opinion, or overturn the opinion in whole or part, remanding the case to the lower courts for further proceedings consistent with the order of the Supreme Court.

There is no longer any dispute that the delays inherent in the administration of the death penalty in California are unworkable. One hundred and eighteen inmates have died on death row. Seventy died of natural causes.⁸⁴ Forty-eight have died on death row with a pending direct appeal, habeas corpus petition, or both pending before the California Supreme Court.

As the backlogs grow with each passing year and taxpayers grow ever more weary of footing the bill for a dysfunctional program, popular support for capital punishment is declining in California, as it is nationwide. Capital punishment is coming under increasing attack on multiple fronts. The question for Californians in November is whether it is time to end the death penalty or whether the state should spend more money trying to fix problems that cannot be fixed—at least not by the proposals offered in Prop 66.

C. Recent Legal Challenges to the Death Penalty

1. Lethal Injection Protocols

Since execution by lethal injection was introduced in 1980, a recent study estimates that 75 of the 1,054 executions carried out—over 7 percent—have been “botched.”⁸⁵ If a vein cannot be found, executioners may have to use a scalpel to cut into an arm or leg to find a vein.⁸⁶ In other cases, the inmate has an adverse reaction to the drugs, such as convulsions. Because the American Medical Association opposes its doctors participating in executions, prisons often have untrained personnel trying to do these executions and when these problems arise things quickly go from bad to worse because staff members are beyond their level of competence and training.⁸⁷

In 2006, a death row inmate filed a federal suit challenging California’s lethal injection protocol as violative of the Eighth Amendment and the federal court agreed.⁸⁸ Specifically, the court found that

⁸⁴ CDCR, *Condemned Who have Died Since 1978*, (May 12, 2016) *available at* http://www.cdcr.ca.gov/Capital_Punishment/index.html.

⁸⁵ Austin Sarat, a professor of jurisprudence and political science at Amherst College researched the history of botched executions in the United States. Austin Sarat, *Gruesome Spectacles: Botched Executions and America’s Death Penalty*, Stanford University Press, (2014).

⁸⁶ Oklahoma Department of Public Safety, *The Execution of Kevin D. Lockett*, Case Numer 14-0189SI.

⁸⁷ American Medical Association Ethics Opinion 2.06 - Capital Punishment. Opinion 2.06 - Capital Punishment An individual’s opinion on capital punishment is the personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution. AMA Code of Medical Ethics, AMERICAN MEDICAL ASSOCIATION, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page>.

⁸⁸ *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006).

⁸⁸ *Id.* at 979.

the CDCR has inconsistently and unreliably screened execution team members; failed to provide meaningful training, supervision, and oversight of execution teams; maintained inconsistent and unreliable records; improperly mixed, prepared, and administered the sodium thiopental used by the execution team; and provided inadequate lighting, overcrowded conditions, and poorly designed facilities in which the execution team must work.⁸⁹ In response, the CDCR constructed a new lethal injection facility at San Quentin State Prison at a cost of \$853,000.⁹⁰

In November 2007, a state court judge ordered that the CDCR had to promulgate its lethal injection protocols as a regulation. In 2012, the state court found that the CDCR had violated the Administrative Procedures Act (APA) when it promulgated its lethal injection regulations and enjoined the CDCR from executing anyone until new lethal injection regulations were promulgated in compliance with the APA. The order was affirmed on appeal in 2014.

In November 2015, the Office of Administrative Law published the CDCR's notice of proposed adoption of lethal injection regulations. The public comment period for the proposed regulations, which was originally set to expire February 2016, has been extended four times and is extended to July 11, 2016.⁹¹ In February 2016, the state court ordered the CDCR to release thousands of documents related to its proposed lethal injection protocol. The documents produced by the CDCR reveal that California's state government understated the cost of procuring lethal injection drugs by over \$100,000 per execution; flouted federal prohibitions on illegal supplies of lethal injection drugs; contemplated purchasing lethal injection drugs from dubious online marketplaces and veterinary pharmacies; and dismissed concerns brought by botched executions in other states like Florida, Oklahoma and Arizona.⁹²

Eighteen California inmates have exhausted all appeals and will be executed as soon as the state can legally do so, unless the voters opt to repeal the law and end capital punishment in California.⁹³

2. Eighth Amendment's Prohibition on Cruel & Unusual Punishment

Because so many have been sentenced to death in California and so few have been executed, in 2014, a federal district judge ruled that California's death penalty violated the Eighth Amendment's prohibition against cruel and unusual punishment. U.S. District Judge Cormac J. Carney⁹⁴ explained

⁸⁹ *Id.* at 979-980.

⁹⁰ Kevin Fagan, *San Quentin Gives Glimpse of New Injection Space*, SFGATE, Sept. 22, 2010, <http://www.sfgate.com/news/article/San-Quentin-gives-glimpse-of-new-injection-space-3173547.php>.

⁹¹ See *Am. Civil Liberties Union Found. of S. Cal. v. Super. Ct.*, No. S227106, 2016 Cal. LEXIS 2807 (Feb. 10, 2016).

⁹² Linda Lye & Ana Zamora, *Our Fears Confirmed: Proposed Lethal Injection Regulations Fraught with Deep and Troubling Flaws*, ACLU, May 10, 2016, <https://www.aclunc.org/blog/our-fears-confirmed-proposed-lethal-injection-regulations-fraught-deep-and-troubling-flaws>.

⁹³ A claim is exhausted when the highest state court has had a fair opportunity to rule on it, either on direct appeal or through the post-conviction process. *Justices of Boston Mun. Ct. v. Lydon*, 466 U.S. 294, 302 (1984).

⁹⁴ *Jones v. Chappell*, 31 F.Supp.3d 1050 (C.D.Cal.2014).

that the lengthy delays in the process and other dysfunctional features built into the system make it impossible to predict how and when an inmate will be selected for execution. He wrote that “[i]n California, 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. Such an outcome is antithetical to any civilized notion of just punishment.” In November 2015, the Ninth Circuit Court of Appeals reversed the district court’s ruling on jurisdictional grounds, but did not dispute the Judge’s opinion that lengthy delays and arbitrary procedures suggest that the California death penalty practice is unconstitutional.⁹⁵

Echoing Judge Carney’s concerns, U. S. Supreme Court Associate Justices Breyer and Ginsberg stated in recent dissents that the death penalty, in their view, likely violates the Eighth Amendment.⁹⁶ In May, 2015, Justice Breyer specifically called out “California’s costly ‘administration of the death penalty,’” which he stated “likely embodies ‘three fundamental defects’ about which [he has] previously written: ‘(1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose.’”⁹⁷ This term, in dissent from a denial of certiorari, Justice Breyer commented, “I would grant certiorari in this case to confront the first question presented, *i.e.*, whether imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”⁹⁸

Lengthy delay between death sentence and execution will continue to be raised in death penalty cases. This term, in *Moore v. Texas*⁹⁹, capital petitioner asked the U.S. Supreme Court to decide if 35 years of incarceration between a death verdict and execution violated the Eighth Amendment’s protection against cruel and unusual punishment. Justices Breyer and Ginsberg were in favor hearing the claim, but certiorari was denied on the issue.

3. Judicial Action Limiting Availability of the Death Penalty

The United States Supreme Court has continued to limit the availability of the death penalty in a growing list of cases. In 2002, in *Atkins v. Virginia*, it barred the execution of murders with certain intellectual disabilities.¹⁰⁰ In 2005, in *Roper v. Simmons*, the high court barred the execution of those who committed murder when they were under the age of 18.¹⁰¹ In 2013, in *Hall v. Florida*, the Court held unconstitutional Florida’s law setting a strict 70-point cutoff on IQ test scores to qualify inmates for execution. In 2016, in *Hurst v. Florida*, the Court struck down Florida’s death sentencing scheme

⁹⁵ *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

⁹⁶ *Glossip v. Gross*, 576 U. S. ___, ___ (2015) (BREYER, J., dissenting) (slip op., at 2).

⁹⁷ *Boyer v. Davis*, 578 U.S. __ (2016), available at No. 15–8119 *Boyer v. Davis* (05/02/2016).

⁹⁸ *Tucker v. Louisiana*, 578 U.S. __, ___ (May 31, 2016) (BREYER, J., dissenting) (slip op., at 2), available at 15-946 *Tucker v. Louisiana* (05/31/2016).

⁹⁹ *Moore v. Texas*, 195 L.Ed.2d 779 (U.S. 2016).

¹⁰⁰ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁰¹ *Roper v. Simmons*, 543 U.S. 551 (2005).

because it determined that jurors, and not a judge, have ultimate responsibility for capital sentencing.¹⁰² And also in 2016, in *Foster v. Chatman*, the Court reversed the conviction of an intellectually limited black teenager charged with killing an elderly white woman, and who was convicted by an all-white jury, after Georgia prosecutors struck every black member of the jury pool in violation of *Batson v. Kentucky*.¹⁰³

4. Ineffective Assistance of Counsel

Objective data now shows that ineffective assistance of counsel is the primary ground upon which death verdicts and sentences are reversed. As Justice Ruth Bader Ginsburg bluntly put it: “People who are well represented at trial do not get the death penalty. I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial.” If she had her way, “there would be no death penalty.”¹⁰⁴

The Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution guarantee a defendant the right to counsel. The U.S. Supreme Court has held that the right to counsel is a right to *effective assistance* of counsel.¹⁰⁵ The ultimate purpose of this right is to protect the defendant’s fundamental right to a trial that is both fair in its conduct and reliable in its result.¹⁰⁶ The right to counsel entitles a defendant to “the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.”¹⁰⁷ Competent representation means the defendant can reasonably expect counsel will undertake only those actions that a reasonably competent attorney would undertake.¹⁰⁸ The defendant can also reasonably expect that counsel will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation.

To prove ineffective assistance, a defendant must show (1) that their trial lawyer’s performance fell below an “objective standard of reasonableness” and (2) “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹⁰⁹ A petition for writ of habeas corpus is the universally accepted method of raising claims of ineffective assistance of counsel.¹¹⁰ Examples of ineffective assistance of counsel in capital cases include:

¹⁰² *Hurst v. Florida*, 136 S.Ct. 616 (2016).

¹⁰³ *Foster v. Chatman*, 136 S.Ct. 1737 (2016). See also, Paula Mitchell, *Frivolity & The Death Penalty*, Nov. 9, 2015, available at <https://casetext.com/posts/frivolity-the-death-penalty>.

¹⁰⁴ *Ginsburg Backs Ending Death Penalty*, ASSOCIATED PRESS, Apr. 9, 2001, available at <http://www.truthinjustice.org/ginsburg.htm>.

¹⁰⁵ *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984).

¹⁰⁶ *Id.* at 684-687.

¹⁰⁷ *U.S. v. De Coster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973).

¹⁰⁸ *In re Marquez*, 1 Cal.4th 584, 602 (1992); see also *In re Lucas*, 33 Cal.4th 682, 721-22 (2004).

¹⁰⁹ *Strickland v. Washington*, 466 U.S. 668 (1984).

¹¹⁰ See, n. 44.

1. Failure to file a habeas corpus petition on time.¹¹¹
2. Failure to challenge racial discrimination in jury selection.¹¹²
3. Failure to investigate third party culpability.¹¹³
4. Failure to challenge admissibility of eyewitness ID.¹¹⁴
5. Failure to investigate family history of abuse, neglect and mental illness.¹¹⁵
6. Failure to present evidence of schizophrenia¹¹⁶
7. Failure to request funds for investigation and minimal use of an investigation.¹¹⁷
8. Eliciting prejudicial hearsay from victim's eight-year-old child during cross-examination.¹¹⁸
9. Failure of habeas corpus counsel to investigate and failure to timely filed habeas corpus petition.¹¹⁹
10. Failure to present case in mitigation.¹²⁰
11. Court appointed attorney so drunk he was held in contempt and sent to jail. Attorney failed to find hospital records documenting injuries from domestic abuse. Didn't meet with client until 8 p.m. on the evening of trial.¹²¹
12. Failure to present evidence of intellectual disability.¹²²
13. Failure to present alibi witness.¹²³

The evidence of trial attorney ineffectiveness is rarely a part of the trial record, and defendants often cannot raise effective challenges to their trial attorneys' performance on direct appeal. A defendant's ability to reinvestigate the case and demonstrate that the trial attorney was ineffective dwindles with time. Witnesses die or disappear. Evidence is lost. Memories fade. With appointment

¹¹¹ Armstrong, K., *When Lawyers Stumble, Only Their Clients Fall*, Washington Post (Nov. 16, 2014), reporting that 37 of 80 missed-deadline Supreme Court habeas corpus petitions arose from the state of Florida.

¹¹² *Birt v. Montgomery*, 725 F.2d 587, 598 n.25 (11th Cir. 1984), cert. denied, 469 U.S. 874 (1984); *Smith v. Kemp*, 715 F.2d 1459, 1469 (11th Cir.), application for cert. denied, 463 U.S. 1344, 1345, cert. denied, 464 U.S. 1003 (1983). *Taylor v. Louisiana*, 419 U.S. 522 (1975). *Smith v. Kemp*, 715 F.2d 1459, 1470 (11th Cir.), application for cert. denied, 463 U.S. 1344, 1345, cert. denied, 464 U.S. 1003 (1983).

¹¹³ *In re Hardy*, 163 P.3d 853 (Cal. 2007).

¹¹⁴ *People v. Nation*, 604 P.2d 1051 (Cal. 1980).

¹¹⁵ *Wiggins v. Smith*, 539 U.S. 510 (2003).

¹¹⁶ *Thomas v. Kemp*, 796 F.2d 1322, 1324 (11th Cir. 1986), cert. denied, 479 U.S. 996 (1986).

¹¹⁷ *In re Jones*, 917 P.2d 1175 (Cal. 1996).

¹¹⁸ *Id.*

¹¹⁹ *In re Sanders*, 981 P.2d 1038 (Cal. 1999).

¹²⁰ *Schriro v. Landrigan*, 550 U.S. 465 (2007), *Cullen v. Pinholster*, 563 U.S. 170 (2011).

¹²¹ The Alabama Court of Criminal Appeals, *Haney v. State*, 603 So. 2d 368 (Ala. Crim. App. 1991), and the Alabama Supreme Court, *Ex parte Haney*, 603 So. 2d 412 (Ala. 1992), upheld the conviction and death sentence in the case.

¹²² Peter Applebome, *Two Electric Jolts in Alabama Execution*, N.Y. TIMES, July 15, 1989, at A6; *Holloway v. State*, 361 S.E.2d 794, 796 (Ga. 1987); *Smith v. Kemp*, 664 F. Supp. 500 (M.D. Ga. 1987) (setting aside death sentence on other grounds), aff'd sub nom. *Smith v. Zant*, 887 F.2d 1407 (11th Cir. 1989) (en banc); *Thomas v. Kemp*, 796 F.2d 1322, 1324 (11th Cir. 1986), cert. denied, 479 U.S. 996 (1986).

¹²³ *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992); habeas relief granted in *Martinez-Macias v. Collins*, 810 F. Supp. 782, 786-87, 796-813 (W.D. Tex. 1991), aff'd, 979 F.2d 1067 (5th Cir. 1992).

of counsel taking years, the delay drastically decreases the likelihood that defendants can mount effective challenges to their trial attorneys' performance.

It is universally acknowledged that ineffective counsel is the primary reason so many defendants are sentenced to death.

In these examples, imposition of the death penalty was not so much the result of the heinousness of the crime or the incorrigibility of the defendant -- the factors upon which imposition of capital punishment supposedly is to turn -- but rather of how bad the lawyers were. In consequence, a large part of the death row population is made up of people who are distinguished by neither their records nor the circumstances of their crimes, but by their abject poverty, debilitating mental impairments, minimal intelligence, and the poor legal representation they received.¹²⁴

It is not unreasonable to conclude that ineffective assistance of post-conviction counsel prevents capital petitioners from properly preserving and presenting their claims of unconstitutional practice and procedure in their death penalty trial.

Under current procedures, cases filed by private counsel, who are typically underfunded and under-resourced, often are inadequately investigated or briefed. After these cases enter federal courts and are provided greater resources, they are sent back to the state court for further proceedings, known as "exhaustion" proceedings. Since 1995, more than 65 percent of the petitions filed by private counsel have returned to state court for exhaustion proceedings -- taking an average of 3.4 years for further briefing and review by the state court. By contrast, petitions filed by HCRC or other agency counsel have a much lower rate of subsequent state proceedings, because those attorneys have more comprehensive training and more fulsome resources to accomplish the work in the initial petition required by federal courts.¹²⁵

Habeas petitioners who comply with state procedural rules and adequately preserve their ineffective assistance of trial counsel claims for federal review face further procedural hurdles to obtaining relief on a claim of ineffective assistance of trial counsel. By statute, if a defendant fails to develop the factual basis for a claim in state court, the federal habeas courts may not grant an evidentiary hearing unless the defendant can show (1) by clear and convincing evidence that he or she is innocent of the underlying offense and (2) that the claim relies on either (a) a new rule of constitutional law made retroactive by the U.S. Supreme Court or (b) a factual predicate that could not have been discovered previously through due diligence. (See 28 U.S.C. § 2254(e)(2).)

¹²⁴ Bright, S., *ESSAY: Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *Yale L.J.* 1835, 1840.

¹²⁵ From HCRC Response to Legislative Analyst's Office Questions About Proposed Death-Penalty Procedure Initiative, Jan. 7, 2014.

Ineffective assistance of counsel is a significant factor in the increasing rate of exonerations. Of 1,849 exonerations nationwide, 433 defendants—nearly 25% had cases involving ineffective assistance of counsel.¹²⁶ There were 165 California exonerations with 53 defendants—or 32%--having inadequate legal defense.¹²⁷ In California death penalty cases, the situation is just as acute if not more so.

By January 2011, federal courts had granted habeas corpus relief in 43 California capital cases and in 25, the courts granted relief because the defendant’s appointed counsel was constitutionally ineffective.¹²⁸

	Nationwide	California
Exonerees	1,849	165
Cases where IAC was a factor	433	53
Percentage	25%	32%

Source: National Registry of Exonerations

Despite the fact that the California Supreme Court has established a minimal set of qualifications for attorneys appointed to represent clients in capital appeals and capital habeas corpus, these statistics make clear that **even attorneys who meet the current requisite qualifications are not necessarily providing competent representation.** Far too often, they are not. The skills required for capital appeals and post-conviction proceedings are unique.

There are 332 active criminal law specialists in California. There are 292 active appellate law specialists.¹²⁹ Even among specialists, few have sufficient experience with death penalty cases to perform competently in the representation of capital post-conviction clients.¹³⁰ Often, attorneys accept appointment on a capital habeas corpus case, and never accept capital habeas corpus appointment again.¹³¹ Private attorneys who nominally meet the Supreme Court qualifications do take appointment

¹²⁶ National Registry of Exonerations “NRE”, NRE exonerations with Inadequate legal defense as of July 15, 2016, available at http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={FAF6EDDB-5A68-4F8F-8A52-2C61F5BF9EA7}&FilterField1=ILD&FilterValue1=8_ILD (last checked July 15, 2016).

¹²⁷ NRE, California cases with inadequate legal defense, available at http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&&SortField=ST&SortDir=Asc&FilterField1=ST&FilterValue1=CA&FilterField2=ILD&FilterValue2=8_ILD (last checked July 15, 2016).

¹²⁸ <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1030&context=llr>, at n.26.

¹²⁹ These figures were obtained on the website of the California State Bar Board of Legal Specialization, <http://ls.calbar.ca.gov/LegalSpecialization/BoardofLegalSpecialization.aspx> on June 12, 2015.

¹³⁰ An informal poll of criminal law and appellate law specialists members of California Attorneys for Criminal Justice resulted showed that even among highly experienced specialists, few felt qualified to competently represent a capital defendant on habeas corpus.

¹³¹ See, Michael A. Kroll, *Death Watch*, CAL. LAW., Dec. 1987, at 24-27 (describing unwillingness of some lawyers in California to take capital cases because of emotional toll and “burnout.”)

on capital habeas corpus, often with poor results. This situation creates an increase in claims of ineffective assistance of habeas corpus counsel.¹³²

To the extent Prop 66 seeks to revise the procedures to appoint counsel in capital cases by lowering the standards to permit more attorneys to “qualify” as counsel in these cases, discussed *infra*, that approach appears to be another “fix” that will fall short of solving the problem. Rather, it will likely increase the number of cases reversed on appeal due to ineffective assistance of counsel.

5. Actual Innocence Claims & Exonerations of Persons Sentenced to Death

We now know that wrongful convictions are far more common than once believed, and the number of exonerations is increasing yearly. Since 1973, 156 people were sentenced to death and were later exonerated.¹³³ As retired Supreme Court Justice Sandra O’Connor explained: “If statistics are any indication, the system may well be allowing some innocent defendants to be executed.”¹³⁴ “She went on to note that last year [in 2000] six death row inmates were exonerated, bringing the total to 90 since 1973.”¹³⁵

The National Registry of Exonerations¹³⁶ reports that in 2015, 149 individuals nationwide—*nearly 3 per week*—were exonerated in cases in of wrongful conviction.¹³⁷ These individuals were cleared of all charges based on new evidence of innocence. In 2015 alone, fifty-eight defendants were exonerated in homicide cases, fifty-four for murder and four for manslaughter.¹³⁸ Forty-four homicide cases involved known government misconduct.¹³⁹ In 2015, five defendants sentenced to death were

¹³² *Martinez v. Ryan, supra*, opened the door for federal review of claims of ineffective assistance of habeas corpus counsel. See *Runnigeagle v. Ryan*, ___ F.3d ___ (9th Cir. June 10, 2016). The federal review claims of IAC on postconviction a return to state court for further briefing and hearings. The findings from these hearings can again be appealed to the California Supreme Court.

¹³³ <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.

¹³⁴ *Justice O’Connor on Executions*, NEW YORK TIMES, Jul. 5, 2001, Opinion, available at <http://www.nytimes.com/2001/07/05/opinion/justice-o-connor-on-executions.html>.

¹³⁵ *Id.*

¹³⁶ The National Registry of Exonerations [NRE] is a project of the University of Michigan Law School. The Registry provides detailed information about every known exoneration in the United States since 1989. <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>

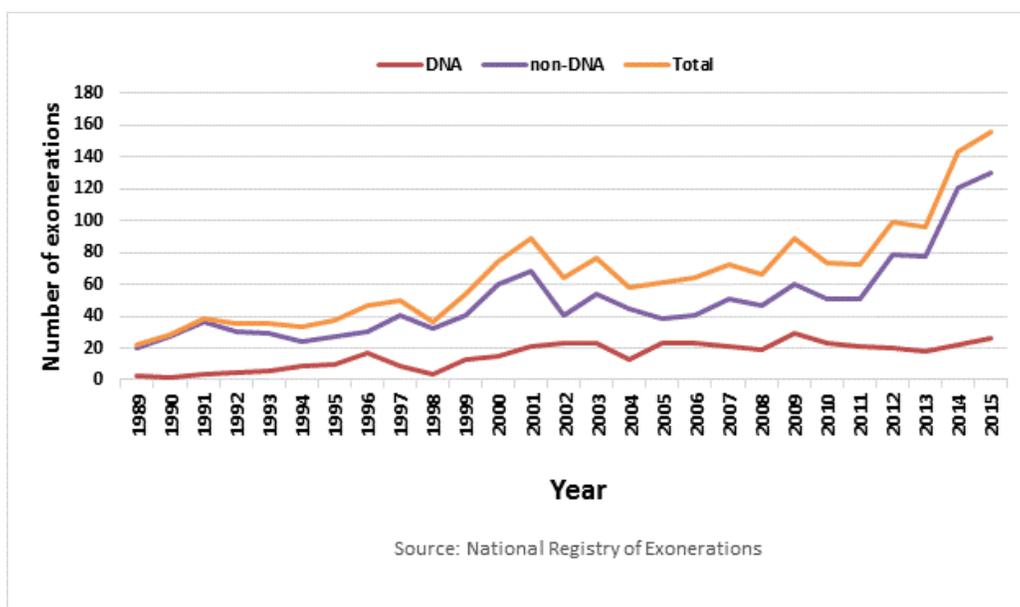
¹³⁷ NRE, *Exonerations in 2015*, 1 (Feb. 3, 2016).

¹³⁸ *Id.*

¹³⁹ *Id.*

exonerated; nineteen people sentenced to life in prison were exonerated.¹⁴⁰ In 2015, six California defendants were exonerated; one defendant spent 35 years in prison.¹⁴¹

The 2013 Proceedings of the National Science Academy reported that rate of erroneous conviction of innocent criminal defendants, often described as not merely unknown but unknowable, was at least 4.1%. Based on statistical analysis, it was determined that this is a *conservative* estimate of the proportion of false conviction among death sentences in the United States.¹⁴² There is no data that suggests that California's rate of erroneous capital conviction is any lower than the national average.



¹⁴⁰ *Id.*, p. 4.

Hanline	Michael	31	Caucasian	CA	Ventura	CIU, H	Murder	Life without parole	1980	2015
Pohlschneider	Larry	33	Caucasian	CA	Tehama	CV, NC	Child Sex Abuse	24 years	2001	2015
Trulove	Jamal	25	Black	CA	San Francisco	H	Murder	50 to life	2010	2015
Valentine	Ray	55	Hispanic	CA	Contra Costa	M, NC	Other	110 days	2014	2015
Vargas	Luis	29	Hispanic	CA	Los Angeles	CV	Sexual Assault	55 years	1999	2015
Williams	Richard	18	Black	CA	Sacramento	CV, H	Murder	Life without parole	1998	2015

available at <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&FilterField1=ST&FilterValue1=CA&&SortField=Exonerated&SortDir=Desc>.

¹⁴² Gross, S., et al, *Rate of False Conviction of Criminal Defendants Who are Sentenced to Death*, Proceedings of the National Academy of Sciences Vol. 111, No.20 (2014), available at <http://www.pnas.org/content/111/20/7230.full>.

California has sentenced three men to death, who were subsequently exonerated: (1) Ernest Graham, convicted in 1976, reversed by the California Supreme Court in 1979, and subsequently acquitted in a fourth trial; (2) Troy Lee Jones, convicted in 1982, reversed by the California Supreme Court in 1996, prosecution dropped all charges; and, (3) Oscar Morris, convicted in 1983, new trial granted in 2000, prosecution dropped all charges in 2000.¹⁴³ There is also strong evidence supporting the actual innocence claim of Dennis Lawley, who was sentenced to death and whose post-conviction counsel discovered potentially exonerating evidence but no until after Lawley passed away on death row.¹⁴⁴ Others have lingering doubts over whether California executed an innocent man when it put Thomas Thompson to death in 1998, a man with no criminal record and whose case involved serious questions about two jailhouse informants who testified against him.¹⁴⁵

In response to the realization that our criminal justice system can make serious errors in the cases it prosecutes, jurisprudence surrounding actual innocence claims and the standards that must be met to show a wrongful conviction has occurred are evolving rapidly. In California, Penal Code section 1473 was recently amended to expand the grounds upon which post-conviction relief may be sought to include actual innocence due to a conviction by false evidence that includes “opinions of experts that have either been repudiated by the expert” or “whose opinion has been undermined by later scientific research or technological advancement.”¹⁴⁶ Relief may also be sought where there is newly discovered evidence of government misconduct.¹⁴⁷

When a prisoner files a habeas corpus petition on the grounds of false evidence, however, proof must show that the evidence was “material or probative on the issue of the [prisoner’s] guilt.”¹⁴⁸ A petitioner can prevail in an actual innocence case only “if the new evidence casts fundamental doubt on the accuracy and reliability of the proceedings. At the guilt phase, such evidence, if credited, must undermine the entire prosecution case and point unerringly to innocence or reduced culpability.”¹⁴⁹ To qualify as “new” evidence for newly discovered evidence purposes, it must be “evidence that [the petitioner] could not have discovered with reasonable diligence prior to judgment.”¹⁵⁰ California’s requirement that the new evidence “point unerringly to innocence” exceeds the standard used in other habeas claims, which use the civil law standard “preponderance of the evidence.” In California, actual innocence claims are exceptionally difficult to prove.

¹⁴³ <http://www.deathpenaltyinfo.org/node/4900#20>.

¹⁴⁴ Maura Dolan, *Client dies in prison, but lawyer still seeks to prove innocence*, LOS ANGELES TIMES, May 8, 2012, <http://articles.latimes.com/2012/may/08/local/la-me-death-appeal-20120509>.

¹⁴⁵ Darrell Satzman, *Did an innocent man go to his death at San Quentin?*, KCRW, June 2, 2015, <http://curious.kcrw.com/2015/06/did-an-innocent-man-go-to-his-death-at-san-quentin>.

¹⁴⁶ CAL. PENAL CODE § 1473(e).

¹⁴⁷ CAL. PENAL CODE § 1473.6.

¹⁴⁸ *In re Bell*, 170 P.3d 153, 157 (Cal. 2007).

¹⁴⁹ *In re Clark*, 5 Cal.4th 750, 766 (1993).

¹⁵⁰ CAL. PENAL CODE § 1473.6; *In re Hardy*, 41 Cal. 4th 997, 1016 (2007).

In *In re Clark*, a death row inmate was convicted and sentenced to death primarily on the weight of bite-mark evidence. In habeas corpus, the petitioner presented evidence from bite-mark experts explaining that the trial testimony was not based on scientific evidence. The petitioner was exonerated until the Supreme Court determined that the bite-mark evidence did not “point unerringly to innocence.”¹⁵¹ The result in *Clark* might be different today under California’s recently amended standard in section 1473(e), as seen in *In re William Richards*¹⁵², in which the California Supreme Court recently overturned a murder conviction after new scientific evidence demonstrated that the bite-mark evidence introduced at the petitioner’s trial was false. The new evidence was based in new science and technology, which undermined the prosecution’s evidence purportedly showing that the bite mark came from Mr. Richards, who spent 15 years in custody while habeas corpus was pending.

The *Richards* case is but one illustration of the way evolving standards for forensic sciences used in prosecuting criminal cases are affecting outcomes in individual cases. As legislatures increasingly demand more uniformity and more reliability in the standards used to introduce “scientifically sound” evidence in criminal prosecutions, we will see increasing cases in which convictions are overturned.¹⁵³ In many capital cases too, individuals have been convicted on the basis of scientific evidence that was believed to be sound during at the time of trial, but what was previously accepted by judges and juries as “sound science” would be considered “junk science” today.¹⁵⁴

DNA testing alone has exonerated over 300 people nationwide, due to post-conviction DNA testing. California law authorizes petitioners’ access to DNA testing of crime scene evidence.¹⁵⁵ A court *may*, but is not required to, order a prosecutor to provide copies of all DNA testing, evidence and evidence logs.¹⁵⁶ The law does not provide for appointment post-conviction counsel to represent the petitioner in DNA evidentiary hearings or exoneration litigation. Exonerating DNA evidence also

¹⁵¹ *Id.* at 768.

¹⁵² *In re Richards*, No. S223651, 2016 Cal. LEXIS 3594 (May 26, 2016).

¹⁵³ See *Strengthening Forensic Science in the United States: A Path Forward*, Committee on Identifying the Needs of the Forensic Sciences Community, National Research Council, ISBN: 0-309-13131-6, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>. See also, National Institute of Standards and Technology, working with the forensic science community to establish the new Organization of Scientific Area Committees for Forensic Science (OSAC). OSAC will coordinate development of standards and guidelines for the forensic science community to improve quality and consistency of work in the forensic science community. <http://www.nist.gov/forensics/osac.cfm>.

¹⁵⁴ The National Institute of Standards and Technology [NIST] has created working groups in most areas of forensic science “to support the development and promulgation of forensic science consensus documentary standards and guidelines, and to ensure that a sufficient scientific basis exists for each discipline.”¹⁵⁴ NIST intends to promulgate standards and best practices in DNA, Chemical and Instrumental Analysis, Physics and Pattern Recognition, Crime Scene Investigation, and Digital Evidence.

¹⁵⁵ CAL. PENAL CODE § 1405.

¹⁵⁶ CAL. PENAL CODE § 1405(c).

does not guarantee release from custody.¹⁵⁷ Importantly, the vast majority of death penalty cases in California do not involve DNA evidence, making wrongful convictions more difficult to prove.

The wrongful conviction cases now being tracked and analyzed by the in the United States by The National Registry of Exonerations illustrate the numerous and varied flaws in our criminal justice system that result in perverse outcomes. The Registry continues to reveal more ways in which the system fails to get it right. The Registry's valuable assessment tools reveal that what is needed in our criminal justice system is more care, more prudence, better and more uniform standards for introducing scientific evidence in criminal prosecutions, and better representation for criminal defendants.

The Registry also reveals that many of the wrongful convictions it documents have taken *decades* to uncover. If accuracy of outcomes is the goal in our system, and it certainly should be, we cannot rush to execute those who are sentenced to death. If we are going to retain the death penalty, and ensure that we do not execute innocent people, the system must allow for the time we now know it takes to uncover the miscarriages of justices we know take place in our system every day.

D. Shifts in Popular Support Toward Repealing the Death Penalty

1. California Polls Show Likely Voters Increasingly Favor Ending the Death Penalty

Polling in California indicates that the needle has been moving *away* from support for the death penalty and *toward* ending it and replacing it with LWOP. When California voters were asked in 1986 whether they favored keeping or doing away with the death penalty, 83% said they favored keeping it.¹⁵⁸ That was when support was at its peak in the state. When voters were asked the same question in a 2014 Field Poll, support for keeping the death penalty had dropped to 52%. Not since 1965 has support for the death penalty in California been so low.

Polls can be misleading, however, because for the death penalty voters give different responses depending on how the questions are asked. For example, when given the choice in a September 2011 Field Poll between LWOP or the death penalty as the punishment for first degree murder, 48% of

¹⁵⁷ Wilton Dedge served twenty-two years of a life sentence for a crime he did not commit. Dedge requested DNA testing in 1996. DNA evidence proved Dedge's innocence in 2001. He was not released until 2004. The State of Florida continued to object to his release on procedural grounds, admitting at one point that they "would oppose Dedge's release even if they knew that he was absolutely innocent." Wilton Dedge, Innocence Project, <http://www.innocenceproject.org/cases/wilton-dedge/>.

¹⁵⁸ Mark DiCamillo & Mervin Field, *Voter Support for the Death Penalty Declines in California*, THE FIELD POLL, Sept. 12, 2014, <http://www.field.com/fieldpollonline/subscribers/RIs2486.pdf>.

voters polled said they would prefer LWOP over the death penalty, while only 40% preferred the death penalty.¹⁵⁹

Similarly, in a 2014 Field Poll, when asked to choose between simply ending the death penalty, or ending it and placing it with LWOP as the state’s harshest punishment for murder, an *increasing* number of likely voters favored the latter—ending the death penalty and replacing the death penalty with LWOP. Compare: only 34% of registered voters stated they would “do away with it” (with no mention of the LWOP sentence), while 40% stated they would end it and “replace it with [LWOP].”¹⁶⁰

By January of this year, support for replacing the death penalty with LWOP had jumped 7 points to 47%, while those in favor of keeping the death penalty had declined to 48%.¹⁶¹

Field Polls of California voters illustrate the trend.

Voters Will Vote to:	1986	1997	2006	2012 (Replace with LWOP – Vote on Prop 34)	2014 (Replace with LWOP)	January 2016 (Replace with LWOP)
Repeal/Do Away With It	14%	20%	29%	48%	40%	47%
Keep It	83%	74%	67%	52%	52%	48%

California voters’ views are consistent with recent national polls. In an ABC News/Washington Post poll taken in mid-2014, most Americans favored life imprisonment without parole over the death penalty for convicted murderers.¹⁶² “Given the choice between the two options, 52 percent pick life in prison as the preferred punishment, while 42 percent favor the death penalty—the fewest in polls dating back 15 years.”¹⁶³ The polling shows that the strong shift away from the death penalty is attributable to offering LWOP as an alternative to death. As the ABC News/Washington Post poll showed, “when offered the option of life imprisonment with no chance of parole, 29 percent of death penalty supporters prefer the alternative.”¹⁶⁴

¹⁵⁹ Marisa Lagos, *Field Poll: Less voter support for the death penalty*, SAN FRANCISCO CHRONICLE, Sept. 29, 2011, http://www.deathpenaltyinfo.org/documents/SF_chron_poll.pdf.

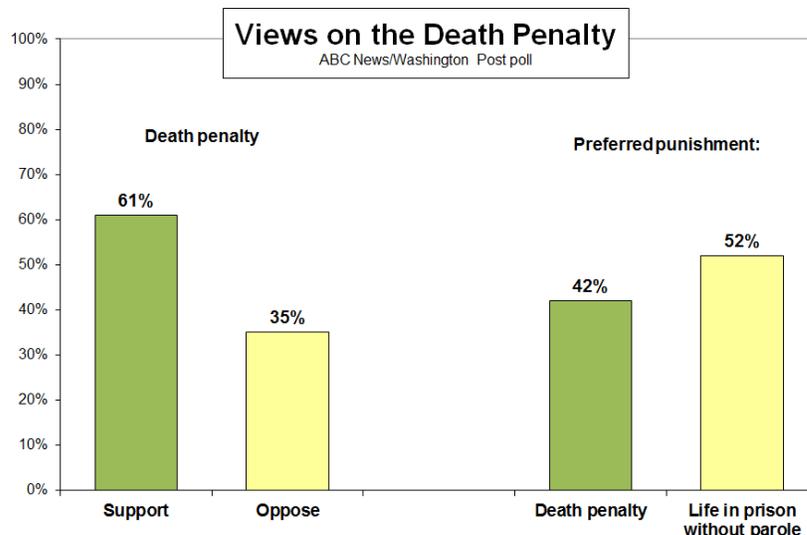
¹⁶⁰ *Id.*

¹⁶⁰ Mark DiCamillo, *Californians Sharply Divided About What to do With the State’s Death Penalty Law*, THE FIELD POLL, Jan. 15, 2016, <http://www.field.com/fieldpollonline/subscribers/R1s2528.pdf>.

¹⁶² Damla Ergun, *New Low in Preference for the Death Penalty*, ABC News, Jun. 5, 2014, *available at* <http://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty/>

¹⁶³ *Id.*

¹⁶⁴ *Id.*



2. National Trend Shows States Increasingly Support Ending the Death Penalty

Eleven states in the last ten years have either repealed the death penalty or placed a moratorium on executions. New York, New Jersey, New Mexico, Illinois, Connecticut, Maryland, and Nebraska have all repealed. Nebraska’s recent repeal grabbed headlines because it was enacted by the state legislature, which is controlled by Republicans on both sides.

SEVEN STATES HAVE RECENTLY ENDED THE DEATH PENALTY		
New York	2007	NY high court invalidated provisions of the death penalty statute. The legislature has not acted to amend the statute. ¹⁶⁵
New Jersey	2007	Abolished by legislation. ¹⁶⁶
New Mexico	2009	Abolished prospectively by legislation. ¹⁶⁷
Illinois	2011	Abolished by legislation; sentences of all death row inmates commuted by governor. ¹⁶⁸
Connecticut	2012	Abolished prospectively by legislation. ¹⁶⁹ In 2015, Conn. Supreme Court found death penalty unconstitutional for remaining condemned inmates. ¹⁷⁰

¹⁶⁵ *People v. Taylor*, 878 N.E.2d 969 (2007).

¹⁶⁶ Henry Weinstein, *New Jersey Lawmakers Vote to End Death Penalty*, L.A. TIMES, Dec. 14, 2007; Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007.

¹⁶⁷ Associated Press, *Death Penalty Is Repealed in New Mexico*, Mar. 18, 2009.

¹⁶⁸ Christopher Wells, *Illinois Gov. Pat Quinn abolishes death penalty, clears death row*, WASH.POST, Mar. 9, 2011.

Maryland	2013	Abolished prospectively by legislation. ¹⁷¹ In 2014, outgoing governor commuted death sentences of remaining inmates. ¹⁷²
Nebraska	2015	Abolished by legislation over governor's veto. DP reinstatement is an initiative on November 2016 ballot. ¹⁷³
NINE STATES WHERE THE DEATH PENALTY IS CURRENTLY ON HOLD		
California	2006	Death penalty on hold due to failure in administration procedure.
Oregon	2011	Governor declared a moratorium. In 2013 the Oregon supreme court upheld the moratorium. ¹⁷⁴ In 2015 his successor promised to continue the moratorium. ¹⁷⁵
Colorado	2013	Governor imposed a moratorium for the duration of his term in office, which ends in 2018. ¹⁷⁶
Washington	2014	Governor declared a moratorium, stating that he would issue a reprieve for any case that came before him. ¹⁷⁷
Pennsylvania	2015	Governor imposed a moratorium pending a report from a bi-partisan commission. PA Supreme Court upheld moratorium. ¹⁷⁸
Montana	2015	District court judge permanently enjoined the use of pentobarbital as an execution drug. Executions are on indefinite hold. ¹⁷⁹
Louisiana	2016	Federal judge approved at request by the LA Attorney General to postpone all executions until at least January 2018 due to drug unavailability. ¹⁸⁰

¹⁶⁹ Jon Lender & Daniela Altimari, *Death penalty abolition gets final legislative approval in Senate*, HARTFORD COURANT, May 22, 2009.

¹⁷⁰ *State v. Santiago*, 305 Conn. 101, 117–18 (2015)

¹⁷¹ Ian Simpson, *Maryland becomes latest U.S. state to abolish death penalty*, Reuters, May 2, 2013, <http://www.reuters.com/article/us-usa-maryland-deathpenalty-idUSBRE9410TQ20130502>.

¹⁷² Alan Blinder, *Life Sentences for Last Four facing death in Maryland*, NY TIMES, Dec. 31, 2014.

¹⁷³ Julie Bossman, *Nebraska to Vote on Abolishing Death Penalty After Petition Drive Succeeds*, NY TIMES, Oct. 16, 2015, <http://www.nytimes.com/2015/10/17/us/politics/nebraska-to-vote-on-abolishing-death-penalty-after-petition-drive-succeeds.html>.

¹⁷⁴ *Haugen v. Kitzhauber*, 306 P.3d 592 (2013).

¹⁷⁵ Shelby Sebens, *New Oregon Governor Kate Brown to extend death penalty moratorium*, Reuters, Feb. 20, 2015, <http://www.reuters.com/article/us-usa-politics-oregon-idUSKBN0LO2E420150220>.

¹⁷⁶ Exec. Order No. D 2013-006, at 2 (Colo. May 22, 2013), <http://www.cofpd.org/docs-dun/governor-executive-order.pdf>.

¹⁷⁷ Maria LaGanga, *Washington state governor declares moratorium on death penalty*, L.A. TIMES, Feb. 11, 2014, <http://articles.latimes.com/2014/feb/11/nation/la-na-death-penalty-20140212>

¹⁷⁸ Matthew Santoni, *PA Supreme Court upholds Gov. Wolf's Death Penalty Moratorium*, PITT. TRIBUNE, Dec. 21, 2015, <http://triblive.com/news/adminpage/9672521-74/wolf-pennsylvania-court>.

¹⁷⁹ Jon Herskovitz, *Montana judge rules lethal injection drug violates state law*, Reuters, Oct. 6, 2015, <http://www.reuters.com/article/usa-execution-montana-idUSL1N1262RV20151006>.

¹⁸⁰ Michael Kunzelman, *State asks to rule out next Louisiana execution before 2018*, Associated Press, May 31, 2016, <http://m.washingtontimes.com/news/2016/may/31/state-asks-to-rule-out-next-louisiana-execution-be/>.

Delaware	2016	All death penalty trial and post-conviction cases are on hold pending state Supreme Court review of the death penalty because of <i>Hurst v. Florida</i> ¹⁸¹ , and <i>Kansas v. Carr</i> ^{182 183} .
Alabama	2016	The U.S. Supreme Court ordered Alabama to reconsider the constitutionality of its death penalty because of <i>Hurst v. Florida, supra</i> . ¹⁸⁴

Nationally, among political conservatives, there is a growing movement toward abolishing capital punishment. One national organization, Conservatives Concerned about the Death Penalty, reasons that opposition to the death penalty is justified by its high cost and history of wrongful convictions. The *ABA Journal* cited Marc Hyden, the national Conservatives Concerned advocacy coordinator who explained it this way: “There is no bigger government program than one that can kill you.”¹⁸⁵ The main conservative arguments against the death penalty are: “incompatibility with (1) limited government, (2) fiscal responsibility, and (3) promoting a culture of life.”¹⁸⁶



Internationally, religious organizations and leaders have publicly opposed the death penalty. Most notably, on September 24, 2015, Pope Francis addressed a joint session of Congress and called on them to support “global abolition of the death penalty . . . [because] every human life is sacred, every human person is endowed with an inalienable dignity, and society can only benefit from the rehabilitation of those convicted of crimes.”¹⁸⁷ Former House Speaker, Newt Gingrich, told reporters he is “more open” to eliminating the death penalty after hearing Pope Francis’s address to Congress. “I very deeply believe we need to profoundly rethink what we’ve done over the past 25 years in criminal

¹⁸¹ __ U.S. __, 2016 WL 112683 (Jan. 12, 2016).

¹⁸² __ U.S. __, 2016 WL 228342 (Jan. 12, 2016).

¹⁸³ *Rauf v. State of Delaware*, Cr. ID No. 1509009858, Jan. 25, 2016.

¹⁸⁴ K. Faulk, U.S. Supreme Court vacates judgment in case of man who killed Pelham police officer, AL.com, May 2, 2016; C. Geidner, Supreme Court Calls For Alabama Courts To Review State’s Death Sentencing Process, BuzzFeed, May 2, 2016. c.f., U.S. Supreme Court Orders Alabama to Reconsider Constitutionality of its Death Penalty Procedure, <http://www.deathpenaltyinfo.org/node/6447>.

¹⁸⁵ Kevin Davis, Faith and Fiscal Responsibility Cause Many Conservatives to Change their View of the Death Penalty, American Bar Association Journal, June 2015.

¹⁸⁶ Ben Jones, *Opinion: Ending the Death Penalty Because of, not in Spite of, Conservative Principles*, Harv.L.Rec., Nov. 17, 2015.

¹⁸⁷ Mark Berman, Pope Francis tells Congress 'every life is sacred', says the death penalty should be abolished, WASH. POST, Oct. 19, 2015.

justice,” Gingrich told Huff Post Live.¹⁸⁸ Former Los Angeles District Attorney Gil Garcetti, has openly supported abolition of the death penalty.¹⁸⁹

The board of directors of the National Association of Evangelicals took no firm position against the death penalty but issued a resolution recognizing those in their membership who opposed the death penalty. “For evangelicals, one of the core tenets of our faith is that no one is beyond redemption,” a spokesman said. “The death penalty raises one of the most fundamental questions for evangelicals: Do we have the right to rob someone of the possibility of redemption?”¹⁹⁰

Declining support for the death penalty is also evidenced by the fact that it has been imposed with decreasing frequency throughout the United States in the last two decades. Death sentences reached their annual peak nationwide in 1996 when 315 people were sentenced to death.¹⁹¹ In 2014, only 73 defendants were sentenced to death nationwide. By 2015, the number had fallen to 49 defendants, who were sentenced to death by states that continue to have the death penalty.

Despite this clear downward trend nationally, in 2015, California led the nation in sentencing by sending 14 more defendants to death row—27% of all death sentences nationwide. Riverside County alone handled for more half of those, sending 8 more inmates to California’s death row. Los Angeles County sentenced 3 defendants to death, while Kern, Orange, and Fresno counties each sentenced a single defendant to death.¹⁹² California is home to five of the top ten death penalty counties in the nation.

¹⁸⁸ http://www.huffingtonpost.com/entry/newt-gingrich-death-penalty-pope_us_56046ecbe4b0fde8b0d1f375.

¹⁸⁹ Garcetti, G., Opinion, Los Angeles Times, Mar. 25, 2011, available at <http://opinion.latimes.com/opinionla/2011/03/gil-garcetti-californias-death-penalty-doesnt-serve-justice.html>.

¹⁹⁰ Sarah Pulliam Bailey, The National Association of Evangelicals has Changed its Position on the Death Penalty, WASH. POST, Oct. 19, 2015.

¹⁹¹ Death Penalty Information Center, *The Death Penalty in 2015: Year End Report*, 1-2 (2015), <http://www.deathpenaltyinfo.org/YearEnd2015>.

¹⁹² *Id.*; Scott Schwebke, *Study: O.C. among counties leading nation in death sentences*, O.C. Register, Oct. 7, 2013, available at <http://www.ocregister.com/articles/death-529560-penalty-study.html>.

Counties with the most prisoners on death row

About 2 percent of all U.S. counties account for 56 percent of the inmates on death row. Here are the top 10:

County	Inmates on death row as of Jan. 1	County population
Los Angeles	228	9.96 million
Harris, Texas	101	4.25 million
Philadelphia	88	1.55 million
Maricopa, Ariz.	81	3.94 million
Riverside	76	2.27 million
Clark, Nev.	61	2 million
Orange	61	3.09 million
Duval, Fla.	60	879,602
Alameda	43	1.55 million
San Diego	40	3.18 million

Source: The Death Penalty Information Center

The Register

Source: Death Penalty Information Center, Year End Report 2015.

3. Prominent Voices Questioning the Use of Capital Punishment

State and national leaders from all branches of government are increasingly voicing concerns over the use of the death penalty. In addition to recent statements by U.S. Supreme Court Justices Breyer and Ginsberg expressing concerns over capital punishment generally, and California’s failed system specifically, referenced *supra*, others in high office have also been taking to the national stage to voice concerns and call for an end to the death penalty. In the 2016 presidential campaign, two candidates openly called for an end to the death penalty in the United States: Governor Martin O’Malley of Maryland, who oversaw the end of the death penalty in his state and commuted in 2014; and, Sen. Bernie Sanders of Vermont, a state which still has the death penalty law on the books but which executed no one since 1954.

In a 2014 interview, U.S. Attorney General Eric Holder told The Marshall Project he

"disagree[d] very much with Justice Scalia’s certitude that we have never put to death an innocent person. It’s one of the reasons why I personally am opposed to the death penalty. We have the greatest judicial system in the world, but at the end of the day it’s made up of men and women making decisions, tough decisions. Men and women who are dedicated, but dedicated men and women can make mistakes. And I find it hard to believe that in our history that has not happened."¹⁹³

¹⁹³ Bill Keller and Tim Golden, *Eric Holder on His Legacy, His Regrets, and His Feelings About the Death Penalty*, The Marshall Project (Nov. 17, 2014) available at <https://www.themarshallproject.org/2014/11/17/eric-holder-on-his-legacy-his-regrets-and-his-feelings-about-the-death-penalty>.

In 2015, amid new scrutiny of capital punishment in the United States, President Barack Obama said in an interview that he was disturbed by the practical effects of the death penalty.¹⁹⁴

In 2011, Chief Justice Tani Cantil-Sakauye of the California Supreme Court urged Californians to reconsider the death penalty. “I don’t know if the question is whether you believe in [capital punishment] anymore. I think the greater question is its effectiveness and given the choices we face in California, should we have a merit-based discussion on its effectiveness and costs?”¹⁹⁵ The Chief’s predecessor, former Chief Justice Ronald M. George, is on record lamenting the dysfunctional nature of California’s death penalty. Former California Attorney General and death penalty prosecutor John Van de Kamp stated, “there is a strong economic argument for doing away with capital punishment.”¹⁹⁷

According to the final report of the California Commission on the Fair Administration of Justice, which I chaired from 2006 to 2008, the cost of a murder trial goes up by about half a million dollars if prosecutors seek the death penalty. Confinement on death row (with all the attendant security requirements) adds \$90,000 per inmate per year to the normal cost of incarceration. Appeals and habeas corpus proceedings add tens of thousands more. In all, it costs \$125 million a year more to prosecute and defend death penalty cases and to keep inmates on death row than it would simply to put all those people in prison for life without parole¹⁹⁸

Donald Heller, author of California’s current death penalty law told the New York Times that “[t]he cost of our system of capital punishment is so enormous that any benefit that could be obtained from it — and now I think there’s very little or zero benefit — is so dollar-wasteful that it serves no effective purpose.”¹⁹⁹

Former California Deputy District Attorney Darryl Stallworth explained in a 2008 interview that he “now understand[s] that the death penalty is an ineffective, cruel and simplistic response to the complex problem of violent crime. Our limited resources could be better spent on programs that focus on stopping violence before it starts, such as preventing child abuse and drug addiction – programs that will prevent another child from becoming the next [murderer].”²⁰⁰ Police Chief James Abbott of West

¹⁹⁴ Kevin Liptak, *Barack Obama says death penalty ‘deeply troubling’*, CNN Politics, Oct. 23, 2015, available at: <http://www.cnn.com/2015/10/23/politics/obama-death-penalty-deeply-troubling/>.

¹⁹⁵ Tani Cantil-Sakauye, Chief Justice of California’s Supreme Court (M. Dolan, “California chief justice urges reevaluating death penalty,” Los Angeles Times, December 24, 2011.)

¹⁹⁶ Ronald M. George, *Reform Death Penalty Appeals*, Los Angeles Times (Jan. 7, 2008).

¹⁹⁷ John Van de Kamp, *California Can’t Afford the Death Penalty*, Los Angeles Times (June 10, 2009).

¹⁹⁸ *Id.*

¹⁹⁹ Adam Nagourney, *Seeking an End to an Execution Law They Once Championed*, New York Times, April 6, 2012.

²⁰⁰ D. Stallworth, *Death penalty perpetuates vicious cycle of violence*, San Jose Mercury News, July 6, 2008.

Orange, New Jersey, put it this way: “Give a law enforcement professional like me that \$250 million, and I’ll show you how to reduce crime. The death penalty isn’t anywhere on my list.”²⁰¹

II. The Pressure Builds: California Death Penalty Voter Initiatives in 2012 & 2014

A. SAFE California Campaign of 2012 To End the Death Penalty Nearly Passed By Voters

Former Warden of San Quentin State Prison, Jeanne Woodford, proposed an initiative asking voters to repeal the death penalty as maximum punishment for persons found guilty of murder and replace it with life imprisonment without possibility of parole. The initiative was on the ballot in November 2012. As someone who had overseen four executions, Ms. Woodford firmly believed that the system was not working and was a tremendous waste of money. The new law, if passed, would have applied retroactively to persons already sentenced to death. It also required that persons found guilty of murder work while in prison, with their wages subject to deductions to be applied to any victim restitution fines or orders against them. Finally, the measure would have directed \$100 million in savings from repealing the death penalty to a fund created for law enforcement agencies to assist them in fighting crime.

The LAO estimated that state and county savings related to murder trials, death penalty appeals, and corrections would be about \$100 million annually in the first few years, growing to about \$130 million annually thereafter. The LAO further stated there would be a one-time state costs totaling \$100 million for grants to local law enforcement agencies to be paid over the next four years.

Prop 34 received endorsements from 1,467 organizations, governmental bodies, agencies, and individuals, including judges, law enforcement officers, former prosecutors, former California Attorney General John Van de Kamp, and media outlets, including the LA Times, Sacramento Bee, Oakland Tribune, San Francisco Chronicle and Examiner, San Jose Mercury News, and many others across the state.²⁰² Voters were provided with these arguments for and against Prop 34.²⁰³

When Prop 34 was announced, many thought it would be easily defeated because Californians had long expressed a preference for the death penalty. Polling showed, however, that support for the death penalty was waning and opponents mounted a vigorous campaign to defeat Prop 34. As expected, given the strong feelings held by some on capital punishment, the campaigns for and against Prop 34 produced the rhetoric that typically surrounds arguments concerning the pros and cons of the death penalty. While those arguments were dramatic and often-grabbed headlines, they created a

²⁰¹ James Abbott, *Less money, more pain and injustice*, Fort Worth Star-Telegram, January 20, 2008.

²⁰² <http://www.safecalifornia.org/about/endorsements>.

²⁰³ <http://vigarchive.sos.ca.gov/2012/general/propositions/34/arguments-rebuttals.htm>.

certain tone deafness that made it difficult for voters to sort through what was fact and what was fiction. Proponents of Prop 34 would likely argue that elevating histrionics over substance was the goal of the opposition campaign, which relied on misleading and sometimes entirely false arguments hoping to confuse voters into voting against Prop 34.

Arguments For and Against Prop 34. On the one hand, Prop 34 hoped to persuade voters that ending the death penalty would eliminate the risk that the state would execute an innocent person and save taxpayers tens of millions of dollars each year, \$100 million of which would go to a fund for law enforcement “for more DNA testing, crime labs, and other tools that help cops solve rapes and murders,” and therefore “NOT LET BRUTAL KILLERS EVADE JUSTICE.” Its supporters relied, in part, on a comprehensive cost study published in a law review (and co-authored by Senior Circuit Judge Arthur L. Alarcon and Paula M. Mitchell, one of the co-authors of this Report) that explained why the problems in the system are costing hundreds of millions of dollars per year. Prop 34 was also supported by people in the faith communities, among others, concerned about wrongfully executing an innocent person, and experienced prosecutors and corrections officers, like the former Warden of San Quentin, who believe that the death penalty does not work and does not really keep us safer.

The opposition pro-death penalty campaign kept the voting public focused on the nature and graphic details of the horrendous crimes committed by some the state has sentenced to death and told voters that rather than save the state money, “Abolishing the death penalty costs taxpayers \$100 MILLION OVER THE NEXT FOUR YEARS AND MANY MILLIONS MORE IN THE FUTURE.” There was no factual support, however, for the statement that ending the death penalty would cost the state many millions of dollars.

Opponents of Prop 34 also argued that instead of providing justice, repealing the death penalty means that “killers get lifetime housing/healthcare benefits.” That argument was also disingenuous because the death penalty system California has—and the system pro-death penalty advocates were fighting to maintain—*already provides lifetime housing and healthcare benefits to everyone it houses on death row* because over 100 of those the state has sentenced to death by execution have died in prison of natural or other causes before the state could execute them.

Ironically, that includes death row inmate Richard “The Night Stalker” Ramirez, whom pro-death penalty advocates specifically identified as one reason the state needs a death penalty. But not long after Prop 34 was defeated, Ramirez died at Marin General Hospital in Greenbrae, California, where he was receiving treatment for B-cell lymphoma, after having spent nearly a quarter of a century on death row working with his attorneys on his appeals, at great expense to taxpayers.

Had Ramirez been sentenced to life imprisonment without the possibility of parole (LWOP), instead of death, his appeal would not have taken 21 years for the California Supreme Court to decide because non-capital cases are much more streamlined and are decided by the Court of Appeals, most often in under two years.

It is helpful to review the arguments put forth in during the 2012 campaign, as many of the same arguments are sure to be resurrected in the campaigns leading up to the 2016 ballot.

ARGUMENT IN FAVOR OF PROPOSITION 34	ARGUMENT AGAINST PROPOSITION 34
<p>Evidence shows MORE THAN 100 INNOCENT PEOPLE HAVE BEEN SENTENCED TO DEATH in the U.S., and some have been executed!</p> <p>Prop. 34 means WE'LL NEVER EXECUTE AN INNOCENT PERSON in California.</p> <p>Franky Carrillo was 16 when he was arrested and wrongly convicted of murder in Los Angeles. It took 20 years to show his innocence! Cameron Willingham was executed in 2004 in Texas for an arson that killed his children; impartial investigators have since concluded there was no arson.</p> <p>"If someone's executed and later found innocent, we can't go back."—Judge LaDoris Cordell, Santa Clara (Retired)</p> <p>California's death penalty is TOO COSTLY and BROKEN BEYOND REPAIR.</p> <p>Only 13 people have been executed since 1967—no one since 2006. Most death row inmates die of old age.</p> <p>WE WASTE MILLIONS OF TAX DOLLARS on special housing and taxpayer-financed appeals that can last 25 years.</p> <p>Today, death row inmates can sit around doing nothing.</p> <p>34 MAKES CONVICTED KILLERS WORK AND PAY into the victims' compensation fund, as ordered by a judge.</p> <p>It keeps killers who commit heinous crimes IN PRISON UNTIL THEY DIE.</p> <p>It frees up millions of WASTED TAX DOLLARS—to help our kids' schools and catch more murderers and rapists—without raising taxes.</p> <p>34 SAVES MONEY.</p> <p>California is broke. Many think the death penalty is cheaper than life without parole—that's just NOT true.</p> <p>An impartial study found California will SAVE NEARLY \$1 BILLION in five years if we replace the death penalty with life in prison without possibility of parole. Savings come from eliminating lawyers' fees and special death row housing.</p> <p>http://media.ils.edu/documents/Executing_the_Will_of_the_Voters.pdf</p> <p>Those wasted tax dollars would be better spent on LAW ENFORCEMENT and OUR SCHOOLS.</p> <p>WE CANNOT LET BRUTAL KILLERS EVADE JUSTICE.</p> <p>Every year, almost half of all murders and over half of all rapes GO UNSOLVED. Killers walk free and often go on to rape and kill again. Thousands of victims wait for justice while we waste millions on death row.</p> <p>Killers who commit monstrous acts must be swiftly brought to justice, locked up forever, and severely punished.</p> <p>34 SAVES TAX DOLLARS and directs \$100 million in savings for more DNA testing, crime labs, and other tools that help cops solve rapes and murders.</p> <p>34 makes killers who commit horrible crimes spend the rest of their lives in prison with NO HOPE OF EVER GETTING OUT. It makes them WORK so they can PAY restitution to their victims.</p> <p>That's JUSTICE THAT WORKS.</p> <p>Every person justly sentenced to life in prison without possibility of parole since 1977 is still locked up or has died in prison. Life without possibility of parole works and ensures we will NEVER EXECUTE AN INNOCENT PERSON in California.</p> <p>"The death penalty doesn't make us safer—better crime-solving does."—Former Attorney General John Van de Kamp</p> <p>"I am troubled by cases like Willingham's—of innocent people who may have been executed. I support 34 because it guarantees we will never execute an innocent person in California." —Bishop Flores, San Diego Diocese</p> <p>Vote YES on 34.</p> <p>GIL GARCETTI, District Attorney Los Angeles County, 1992-2000 JEANNE WOODFORD, Warden California's Death Row prison, 1999-2004</p>	<p>California is broke. Abolishing the death penalty costs taxpayers \$100 MILLION OVER THE NEXT FOUR YEARS AND MANY MILLIONS MORE IN THE FUTURE. Instead of justice, killers get lifetime housing/healthcare benefits.</p> <p>PROP. 34 ISN'T ABOUT SAVING MONEY. It's about the ACLU's agenda to weaken public safety laws. They're desperate to convince you that saving murderers from justice is justified. Or, if you don't believe that, they claim it saves money!</p> <p>THE ACLU'S EFFORTS ARE INDEFENSIBLE, CRUEL TO LOVED ONES OF VICTIMS, MISLEADING AND INSULTING TO VOTERS AND DANGEROUS FOR CALIFORNIA.</p> <p>Prop. 34 lets serial killers, cop killers, child killers, and those who kill the elderly, escape justice. Proponents don't acknowledge that when California's death penalty was eliminated before, condemned criminals were released only to rape and kill again!</p> <p>Voters had to restore capital punishment to restore justice.</p> <p>HERE ARE THE FACTS. The death penalty is given to less than 2% of murderers whose crimes are so shocking that juries of law-abiding citizens unanimously delivered the sentence.</p> <p>Richard Allen Davis: kidnapped, raped and murdered 12-year-old Polly Klaas.</p> <p>Richard "The Night Stalker" Ramirez: kidnapped, raped, tortured and mutilated 14 people and terrorized 11 more including children and senior citizens.</p> <p>Gang Member Ramon Sandoval: ambushed and shot Police Officers Daryle Black (a former U.S. Marine) and Rick Delfin with an AK-47, killing Black, shooting Delfin in the head and wounding a pregnant woman.</p> <p>Serial killer Robert Rhoades, a child rapist, kidnapped 8-year-old Michael Lyons. Rhoades raped and tortured Michael for 10 hours, stabbing him 70 times before slitting his throat and dumping his body in a river.</p> <p>Alexander Hamilton: executed Police Officer Larry Lasater (a Marine combat veteran). Lasater's wife was seven months pregnant at the time.</p> <p>Capital murder victims include: 225 CHILDREN 43 POLICE OFFICERS 235 RAPED/murdered 90 TORTURED/murdered</p> <p>THE ACLU IS THE PROBLEM: They claim the death penalty is broken and expensive. What hypocrisy! It's the ACLU and supporters who have disrupted fair implementation of the law with endless delays. Other states including Ohio and Arizona give criminals full rights and fairly enforce the death penalty. California can too.</p> <p>PLAYING POLITICS: Marketing Prop. 34, supporters make cost claims based on newspaper articles and "studies" written by the ACLU or other death penalty opponents.</p> <p>Department of Corrections data suggests abolishing capital punishment will result in increased long-term costs in the tens of millions, just for housing/healthcare. Taxpayers will spend at least \$50,000 annually to care for each convicted killer who didn't think twice about killing innocent children, cops, mothers and fathers.</p> <p>DO YOU THINK GIVING VICIOUS KILLERS LIFETIME HOUSING AND HEALTHCARE BENEFITS SAVES MONEY? OF COURSE NOT!</p> <p>THAT'S THE SECRET PROP. 34 PROPONENTS DON'T WANT YOU TO KNOW. It's not about money . . . it's about their political agenda.</p> <p>Prosecutors, cops, crime victims and community leaders across California are urging you to vote NO on 34. Stop the ACLU. Preserve the death penalty. Protect California.</p> <p>Visit waitingforjustice.net. Please join us. Vote NO on 34.</p> <p>HON. PETE WILSON Former Governor of California</p>

JENNIFER A. WAGGONER, President
League of Women Voters of California

MARC KLAAS
Father of 12-Year-Old Murder Victim Polly Klaas
KEITH ROYAL, President
California State Sheriffs' Association

It is easy to see how voters could be confused by the arguments put forth in the campaigns. Both sides agreed that “California is broke.” Yes on 34 told voters that Prop 34 would save money. Opponents of Prop 34 told voters “Abolishing the death penalty costs taxpayers \$100 MILLION OVER THE NEXT FOUR YEARS AND MANY MILLIONS MORE IN THE FUTURE.” Which statement was the truth? How are voters to know? **Understanding the answers to these questions is critical because the same confusion is sure to surface in the current campaigns for the competing initiatives on the ballot this November.**

Prop 34 nearly passed. It received 5,885,080 yes votes, which was 48%, and failed to pass by roughly 250,000 votes. Since the defeat of Prop 34 in November 2012, the state has continued to pour millions of dollars into its failed system. The public is not safer, death row inmates can continue to work on their appeals, and virtually all will die of natural or other causes long before they are executed by the state.

It is clear in hindsight—even if it was not during the campaign—that Prop 34 had the better and the more truthful arguments. In the last four years, California has sentenced another 53 people to death row. It has spent an additional \$800 million to \$1 billion on a failed system, which has accomplished none of its stated objectives. Ironically, even though most Los Angeles County voters supported Proposition 34—53.7 percent—the Los Angeles County DA’s Office continues to send people to death row at record pace.

B. Death Penalty Reform and Savings Act of 2014 To Speed Up Executions: Fails to Gather Enough Signatures

With the narrow defeat of Prop 34, pro-death penalty advocates took stock of their position and had to acknowledge that California’s system is undeniably broken. Claiming that the death penalty system can be “fixed,” death penalty supporters announced that the “Death Penalty Reform and Savings” Initiative (#13-0055). The measure was approved for circulation in California as a contender for the November 4, 2014, ballot as a combined initiated constitutional amendment and state statute. To qualify for the ballot, the measure needed 800,000 signatures supporting it, because it sought to amend the California constitution and redirect death penalty appeals away from the California Supreme Court to the Courts of Appeal.

Former governors George Deukmejian, Pete Wilson, and Gray Davis backed the death penalty measure, which in theory would have required the California court system to finish death penalty appeals in about five years. This would have been a profound shift for a state that currently requires 15 years to complete automatic appeals in death penalty cases, which then move on to state and federal

habeas proceedings, where cases take another decade or more before being resolved. The initiative was officially filed by Kermit Alexander, a victims' family member who lost four family members in a shooting in South Central Los Angeles.

On January 23, 2014, the LAO summarized the initiative to the California Attorney General explaining that the “measure amends the California Constitution and state law to (1) shift initial jurisdiction for direct appeals and habeas corpus petitions, (2) impose timeframes and limitations on such proceedings, (3) change the process for the appointment of counsel in direct appeals and habeas corpus petition proceedings, and (4) make various other changes.”²⁰⁴ On May 9, 2014, backers of the initiative announced that they would not try to place it on the ballot until 2016. Prop 66, however, is *not* a constitutional amendment initiative. The 2014 proposed measure arguably could have alleviated some of the pressure on the California Supreme Court by directing death penalty appeals first to the California Courts of Appeal but which would have put added pressures on the Courts of Appeal. As discussed *infra*, however, Prop 66 merely directs the California Supreme Court to *work faster*—while adding additional layers of appeals and appropriating no increased funding to the courts. It further mandates that the Court finish death penalty cases—which currently require 15 to 25 years to resolve—in five years or less. Prop 66 is not a constitutional amendment.

III. Battleground 2016: Will California Voters Replace the Death Penalty with LWOP (Prop 62), or Try to Fix the Failed System By Amending State Laws & Court Rules (Prop 66)



VS.



A. The Justice That Works Act of 2016—Yes on Prop 62

Continuing the forward movement toward ending the death penalty in California, on September 15, 2015, lifelong death penalty abolitionist advocate Mike Farrell submitted a request to the Attorney General for a Title and Summary for “the Justice That Works Act of 2016,” a measure that would amend the Penal Code to replace the death penalty with the sentence of life without the possibility of parole as the state’s harshest sentence. The stated Purpose and Intent of the initiative is:

²⁰⁴ <http://www.lao.ca.gov/ballot/2013/130749.pdf>, at p. 3.

1. To end California’s costly and ineffective death penalty system and replace it with a common sense approach that sentences persons convicted of first degree murder with special circumstances to life imprisonment without the possibility of parole (LWOP) so they are permanently separated from society, and required to pay restitution to their victims.

2. To require everyone convicted of first-degree murder and sentenced to life imprisonment without the possibility of parole to work while in prison, and increase to 60% the portion of wages they must pay as restitution to their victims.

3. To eliminate the risk of executing an innocent person.

4. To end the decades long appeals process in which grieving family members attending multiple hearings are forced to continually relive the trauma of their loss.

5. To achieve fairness and uniformity in sentencing, through retroactive application of this act to replace the death penalty with life in prison without the possibility of parole.²⁰⁵

On November 4, 2015, the LAO summarized the initiative (A.G. File No. 15-0066) to the California Attorney General explaining that the “measure repeals the state’s current death penalty statute [and] generally requires murderers to work while in prison and increases the amount of victim restitution that can be deducted from the wages of inmates sentenced to life in prison without the possibility of parole.”²⁰⁶ The LAO estimates that the change in the law would save the state “potentially around \$150 million annually within a few years due to the elimination of the death penalty.”²⁰⁷

How Will Prop 62 Work? Prop 62 is straightforward. Unlike other initiatives that seek to direct savings to specified funds or programs, the savings accrued by the state by replacing the death penalty with LWOP will go directly to the state’s general fund to be used by the state when and as needed.

The state will save \$150 million per year by eliminating the death penalty because:

- Counties will no longer be required to fund lengthy, costly (often multi-million dollar) death penalty trials, which require hundreds of jurors in the venire, additional trial counsel for defendants, and two separate trial phases—one for guilt and a separate one for punishment. Without the death penalty, these costly death penalty trial features will no longer be burdens on the taxpayer.

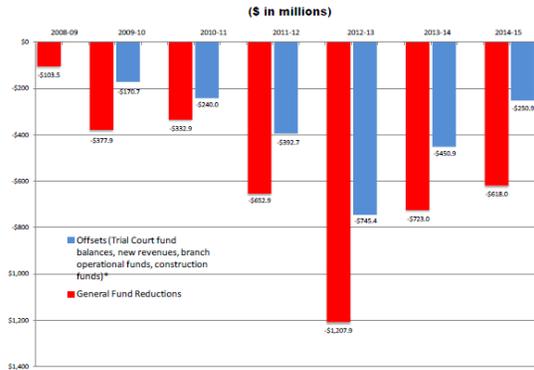
²⁰⁵<https://oag.ca.gov/system/files/initiatives/pdfs/15-0066%20%28Death%20Penalty%29.pdf>, at p. 3.

²⁰⁶[https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report\(15-0066\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report(15-0066).pdf), at p. 2.

²⁰⁷ *Id.* at p. 5.

- Eliminating death penalty trials will also relieve the burden on California’s cash-strapped and understaffed superior courts, particularly in the most active death penalty counties, like Los Angeles County, Riverside County, and San Bernardino County.²⁰⁸

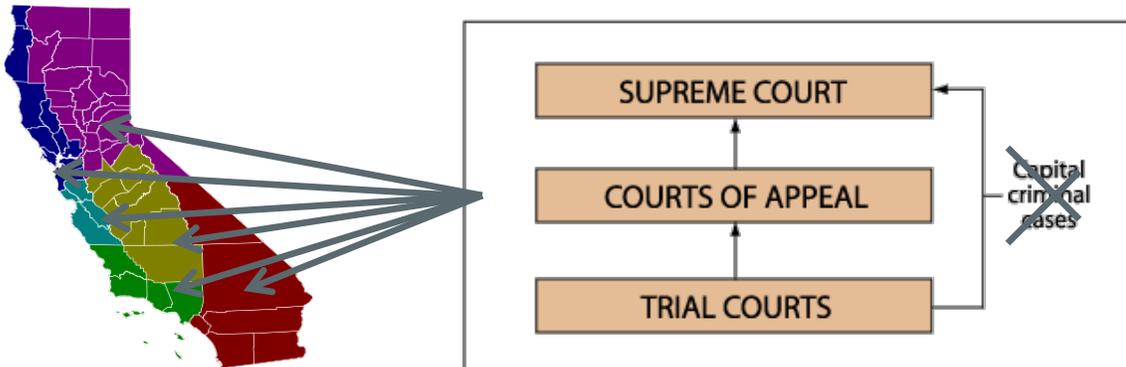
General Fund Reductions to the Judicial Branch Since 2008



*The amounts shown as Offsets for 2012-13 and 2013-14 include \$200 million from trial court fund balances.



- All first-degree murder cases will be treated alike for purposes of appeals, regardless of the sentence imposed. By eliminating the death penalty as a sentence under state law, the current backlog of death penalty appeals pending in the California Supreme Court will automatically vanish as those cases are redirected and redistributed to the 105 justices sitting in the Six District Courts of Appeal across the state.²⁰⁹



- Instead of dedicating a third of its docket and one half of its published opinion pages to death penalty cases, the state’s highest court will be free to manage its docket and grant

²⁰⁸ *In Focus: Judicial Branch Budget Crisis*, available at <http://www.courts.ca.gov/partners/1250.htm> (noting that the Judicial Branch receives only one penny of every general fund dollar and Chief Justice Tani G. Cantil-Sakauye’s comment in the 2013 State of the Judiciary that “I submit to you, in the most diverse state in the union, that a penny on the dollar is insufficient to provide justice.”)

²⁰⁹ <http://www.courts.ca.gov/2113.htm>

review in the many other civil and criminal cases needing the Court's attention but which the court cannot now consider due to its heavy death penalty case load. The Supreme Court may still grant review in any of the former death penalty cases, and prospective LWOP cases, at its own discretion.

- The current shortage of death-qualified, available appellate counsel to handle capital appeals and post-conviction cases will no longer be an issue when the death penalty is repealed. Counsel on the Court's panel of attorneys qualified to accept first degree murder appeals will be appointed to represent defendants appealing their murder convictions and LWOP sentences. Unlike the current situation in which death row inmates must wait for years before counsel is appointed, without the death penalty specially trained, death-qualified, counsel will no longer be required to handle those appeals.
- Defendants convicted of first-degree murder and sentenced to LWOP, and their victims' family members, will no longer be forced to wait decades to learn whether their convictions will be upheld on appeal. This will bring finality to victims' family members within a few years, rather than making them wait decades to learn the fate of the person convicted of killing their loved ones, i.e., whether the conviction and sentence will be affirmed or, as often happens, whether a new trial will be required due to constitutional violations, such as ineffective assistance of trial counsel.
- In LWOP cases, unlike in death penalty cases, criminal defendants are not automatically entitled to the appointment of taxpayer-funded post-conviction counsel for their state and federal habeas proceedings. Instead, once a conviction and sentence have been affirmed on appeal, inmates must petition the courts to appoint counsel for post-conviction proceedings. Where a petitioner can make a showing of a colorable claim for relief, courts may appoint counsel at their discretion.
- Under current law, death row inmates are technically required to work while in prison and to pay a portion of their wages toward victim restitution orders and fines. However, due to their status as death row inmates, there are few opportunities for employment. Other safety concerns prevent condemned inmates from working while in prison. Prop 62 requires that convicted killers who are sentenced to LWOP, rather than death row, work while in prison and that they pay most of their wages—60%—to the victims' family and to restitution fines and orders.

B. Death Penalty Reform and Savings Act of 2016—Prop 66

On October 16, 2015, proponent Kermit Alexander submitted a request to the Attorney General for a Title and Summary for the “Death Penalty Reform and Savings Act of 2016.” On December 9, 2015, the LAO summarized the initiative to the California Attorney General explaining that the “measure would amend state law as follows: (1) shifts initial jurisdiction for habeas corpus petitions, (2) imposes timeframes and limitations on direct appeals and habeas corpus proceedings, (3) changes the process for the appointment of counsel in direct appeals and habeas corpus petition proceedings, and (4) make various other changes.

The proponent submitted no statement of purpose and intent with the initiative but stated in the Findings and Declarations that:

1. California’s death penalty system is ineffective because of waste, delays, and inefficiencies. Fixing it will save California taxpayers millions of dollars every year. These wasted taxpayer dollars would be better used for crime prevention, education, and services for the elderly and disabled.

2. Murder victims and their families are entitled to justice and due process. Death row killers have murdered over 1000 victims, including 229 children and 43 police officers; 235 victims were raped and 90 victims were tortured.

3. Families of murder victims should not have to wait decades for justice. These delays further victimize the families waiting for justice. For example, serial killer Robert Rhoades, who kidnapped, raped, tortured, and murdered 8-year-old Michael Lyons and also raped and murdered Bay Area high school student Julie Connell, has been sitting on death row for over 16 years. Hundreds of killers have sat on death row for over 20 years.

4. In 2012, the Legislative Analyst’s Office found that eliminating special housing for death row killers would save tens of millions of dollars every year. These savings could be invested in our schools, law enforcement, and communities to keep us safer.

5. Death row killers should have to work in prison and pay restitution to their victims’ families consistent with the Victims’ Bill of Rights (Marsy’s law). Refusal to work and pay restitution should cause loss of special privileges.

6. Reforming the existing inefficient appeals process for death penalty cases will ensure fairness for both defendants and victims. Capital defendants wait five years or more for appointment of to appoint their appellate lawyer. By providing prompt appointment of attorneys, the defendants’ claims will be heard sooner.

7. A defendant’s claim of actual innocence should not be limited, but frivolous and unnecessary claims should be restricted. These tactics have wasted taxpayer dollars and delayed justice for decades.

8. The state agency supposed to expedite secondary review of death penalty cases is operating with no effective oversight, causing long-term delays and wasting taxpayer dollars. California Supreme Court oversight of this state agency will ensure accountability.

9. Bureaucratic regulations have needlessly delayed enforcement of death penalty verdicts. Eliminating wasteful spending on repetitive challenges to these regulations will cause the fair and effective implementation of justice.

10. The California Constitution gives crime victims the right to timely justice. A capital case can be fully and fairly reviewed by both the state and federal courts within ten years. By adopting state rules and procedures, victims will receive timely justice and taxpayers will save hundreds of millions of dollars.

11. California's Death Row includes serial killers, cop killers, child killers, mass murderers, and hate crime killers. The death penalty system is broken, but it can and should be fixed. This initiative will ensure justice for both victims and defendants, and will save hundreds of millions of taxpayer dollars.²¹⁰

- Prop 66 acknowledges that the current system is not working, and has not worked for some time.
- Prop 66 further acknowledges that the current system wastes taxpayer dollars, including tens of millions of dollars being spent every year on special housing for death row inmates, which would be better used for many other social and criminal justice purposes, including crime prevention, education, and services for the elderly and disabled.
- Prop 66 adopted the view articulated in Props 34 and 62 that inmates who are currently on death row must work in prison, like everyone else in prison, and compensate their victims' families for their losses.
- Prop 66 acknowledges that victims' family members should not have to wait decades for justice.
- Prop 66 further acknowledges that the current appellate process does not ensure fairness for either the defendants or the victims and their family members.

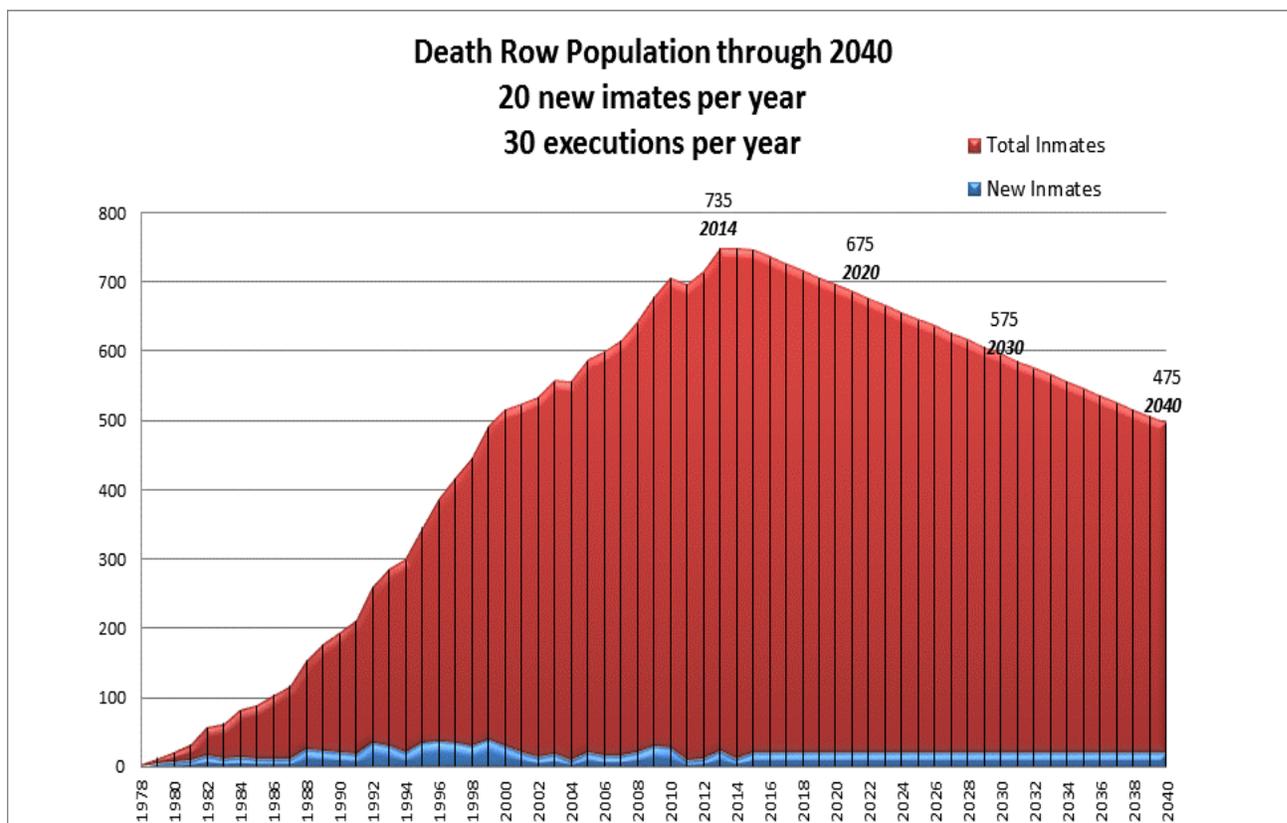
Prop 66 argues that California's death penalty system is not so far gone that it cannot be saved. The theory behind Prop 66 is that the current backlogs and delays have been caused (1) by frivolous appeals and claims drawn out longer than necessary due to the California Supreme Court's failure to provide oversight to the state agency responsible for expediting secondary review, and (2) there is too much bureaucracy surrounding the procedures for getting administrative approval of the state's lethal injection protocols.

Prop 66 argues that all of these problems can be fixed through changes in statutes and court rules, which will bring the delays down to an average of 15 years between conviction and execution by: (i) forcing appellate attorneys to take capital cases or face removal from the court's list of panel

²¹⁰ [https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report\(15-0096\).pdf](https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report(15-0096).pdf), at p. 3.

attorneys (73% of appellate attorneys surveyed have said that they will retire or leave the panel rather than be forced to take on capital cases); (ii) requiring that the California Supreme Court complete all capital appeals and habeas proceedings within 5 years of the death sentence (it is unclear how this would be accomplished because this now takes between 15-25 years); (iii) requiring habeas petitions to be filed in the trial court within one year of appointment of counsel (there is currently a significant shortage of both trial judges in California’s busiest death penalty counties and appellate counsel qualified and available to take capital cases, so it is unclear how this could be accomplished).

Prop 62 maintains that the proposed “fixes” are neither realistic nor workable. Even if they were feasible, the system is so far gone that these fixes would not result in either faster review or cost savings. As this chart illustrates, if there were 30 executions per year (a number that is more than double the number of executions in Texas in 2015²¹¹) and 20 new death row inmates per year, there would still be 475 inmates on death row in 2040.²¹²



²¹¹ In 2015 there were a total of 28 executions nationwide. In 2015 Texas executed 13 inmates. Fact sheet available at <http://www.deathpenaltyinfo.org>.

²¹² If there were 20 executions per year and 20 new inmates per year, the number of inmates on death row would never change.

Supporters of Prop 62 further argue that some of Prop 66’s key provisions will not survive court challenges, should the measure pass in November.

The second fundamental difference between the competing initiatives—and it is a considerable one—is that Prop 62 will save \$150 million per year, while Prop 66 will cost millions more to implement. **It must be noted that while the LAO has estimated Prop 66 will cost taxpayers tens of millions of dollars each year, Prop 66’s campaign co-chairman publically and inexplicably continues to tell voters that the measure will “save tens of millions of dollars for the citizens of the state of California.”**²¹³ These arguments will be addressed in reverse order.

1. Prop 66 Will Cost - Not Save - Taxpayers Tens Of Millions Of Dollars

Contrary to the proponent’s findings in Nos. 1, 4, 10, and 11 above, the LAO’s stated in its December 9, 2015 letter to the Attorney General that the measure would cause “[i]ncreased state costs that could be in the tens of millions of dollars annually for several years related to direct appeals and habeas corpus proceedings, with fiscal impact on such costs being unknown in the longer run.”²¹⁴ The LAO further estimated that the measure *might* save tens of millions of dollars *eventually* due to increased executions. This estimate can hardly be squared with Prop 66’s claims that it will “*save* hundreds of millions of taxpayer dollars.”

The LAO’s assessment of cost to implement Prop 66 underestimates the additional costs that the state will incur when it distributes the 747 *death row inmates* - as opposed to LWOP prisoners - among the CDCR prisons across the state. Death row inmates require special housing.²¹⁵ Specialized training is required for corrections officers assigned to guard death row inmates.²¹⁶ Many state prisons do not have security level IV, required for death row inmates.²¹⁷ Many inmates have special medical needs with 164 inmates age 60 or over.²¹⁸ Approximately 100 death row inmates are confined in the "Adjustment Center" in individual windowless cells for extended periods.²¹⁹ In 2012, the average stay

²¹³ See, e.g., San Bernardino County D.A. Mike Ramos, co-chairman of the Death Penalty Reform and Savings Act of 2016, on KFI AM 640 radio, Jun. 30, 2016 (stating that Prop 66 is “going to save tens of millions of dollars for the citizens of the state of California,”) (last visited Jul. 17, 2016). See also, *To “do or Die” California Ballot*, Talk Radio 790 KABC, Jun. 23, 2016) (D.A. Ramos tells listeners Prop 66, if passed, will “save millions,”) available at <http://www.kabc.com/2016/06/23/a-do-or-die-california-ballot/> (last visited Jul. 17, 2018).

²¹⁴ *Id.*

²¹⁵ Cal.Pen.Code § 3600.

²¹⁶ Cal.Pen.Code § 3600(b)(3).

²¹⁷ Cal.Pen.Code § 3600(d).

²¹⁸ CDCR Condemned Inmate Summary.

²¹⁹ See pleadings for class action lawsuit *Lopez v. Brown*. <http://sfbayview.com/2015/06/death-row-prisoners-challenge-torturous-conditions-in-san-quentins-adjustment-center/>.

in the adjustment center was over 200 days. In 2014, the average stay had declined to approximately 100 days.²²⁰

Prop 66 is silent on these and other housing issues that arise with condemned inmate transfer. These are critical issues, which increase the cost even further. There are no procedures in place to classify process or transfer inmates to other facilities. The human resources and cost required to create programs for classification, processing and transfer are condemned inmates are not accounted for in the LAO's estimated costs to implement the measure. The costs will be significant.

Other expenditures associated with implementing Prop 66 were not accounted for by the LAO. Documents recently produced by the CDCR in a Freedom of Information Act request by the ACLU indicated that the actual cost of the lethal injection drugs needed to carry out pending executions are higher than previously stated by the CDCR and considered by the LAO.²²¹

Prop 66's intends to add an additional layer of post-conviction review. It requires experienced appellate panel attorneys to agree to capital case appointments or else face removal from the panel (discussed *infra*). This will not result in any savings but will instead add to the already exorbitant costs the state incurs to administer the death penalty and to litigate cases returned for ineffective assistance of appellate counsel. This fiscal reality was pointed out to the LAO by numerous credible stakeholders in response to the similar initiative filed by the same proponent in 2013, Initiative # 13-0055. The LAO estimated that the Prop 66 could cause "additional savings" to the state, without consideration of how *remote* the odds of any such savings would likely be.

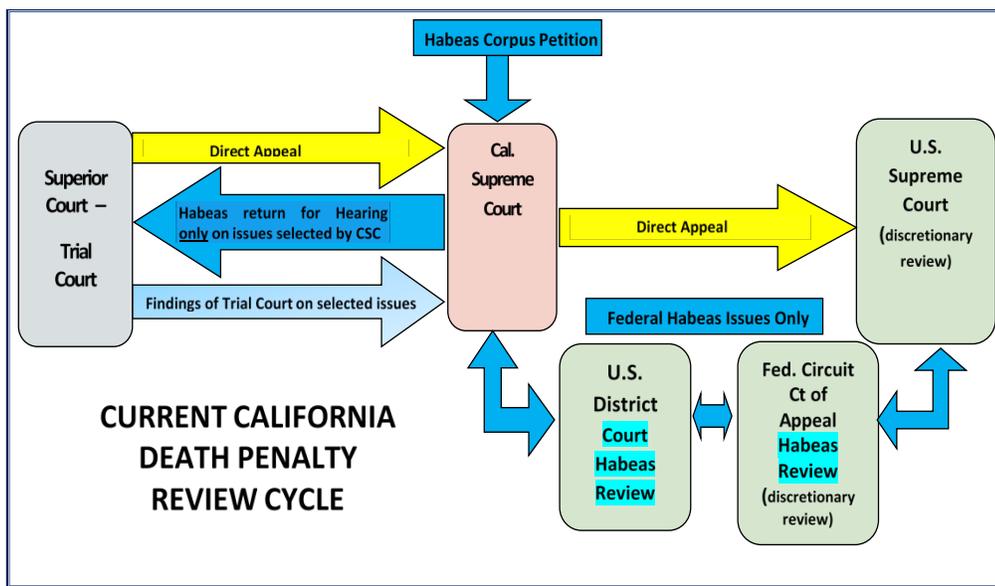
Since 1978 when voters first expanded California's death penalty under the Briggs Initiative, the LAO has repeatedly issued fiscal estimations stating that numerous death penalty initiatives either would cost no money, or could "save" the state money. That notion is by now demonstrably *false*. The promised savings in Prop 66 (and other death penalty voter initiatives before it) are based on an unrealistic scenario, which will never happen, because the death penalty in California, *by its very structure*, takes many years to carry out. Despite the vague promises of "savings" contained in the materials submitted with the initiative, the authors have found no evidence—specific or general—supporting the contention that Prop 66 will "save" millions. Instead, the evidence indicates that the proposed changes to the law will *cost* the state many millions of dollars to implement.

²²⁰ Reports available from CDCR at <http://www.cdcr.ca.gov/COMPSTAT/>.

²²¹ The cost for drugs to execute 18 inmates who have exhausted all appeals is estimated to be \$718,632 plus other unspecified fees. Maura Dolan, *The drugs to execute criminals could cost hundreds of thousands of dollars, California prison agency records show*, Los Angeles Times (July 8, 2016).

2. Prop 66’s Proposed “Fixes” Will Add Layers Of Review And Will **Cost** Tens of Millions of Dollars to Implement

As explained in this Report above, the current legal structure in place for reviewing death penalty cases is already layered and convoluted.



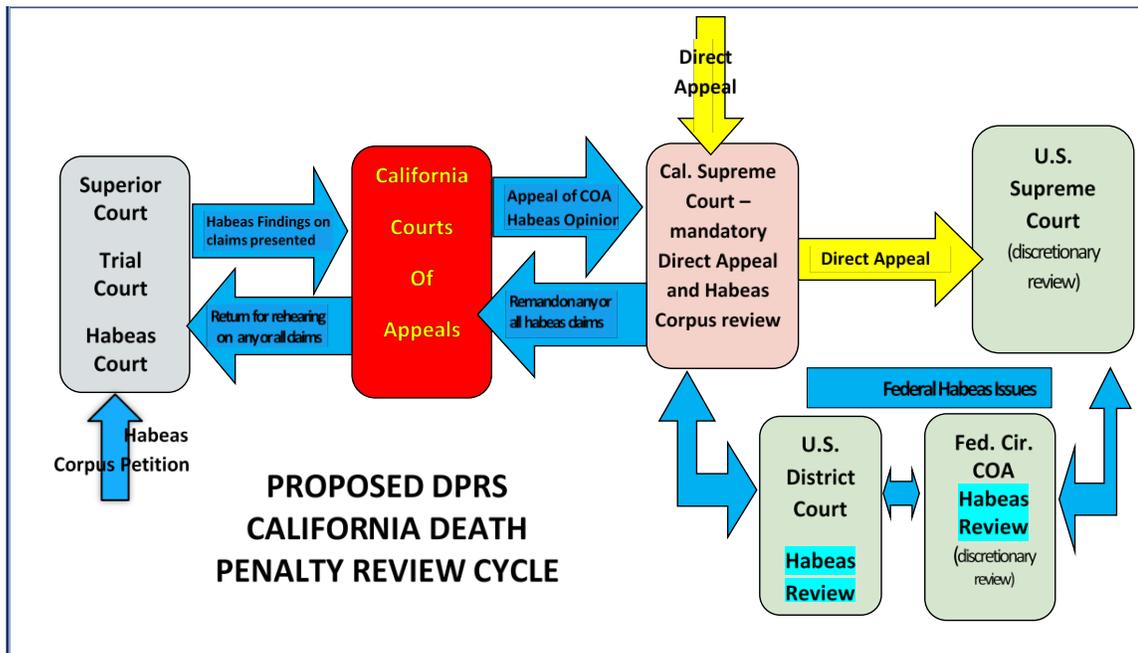
Prop 66 proposes to “shorten” the time required for a complete state review of a death verdict by amending laws to: (1) grant initial jurisdiction over habeas corpus proceedings to the trial court; (2) grant original appellate jurisdiction for capital habeas corpus to the Courts of Appeals; and, (3) impose abbreviated timeframes (five years total) and sanctions on habeas corpus proceedings, and, on direct appeal. Prop 66 proposes to facilitate expedited death penalty review by (4) using lower standards for appointment of counsel on direct appeals and habeas corpus petition proceedings, and (5) making other changes to accomplish its goal. (See, *infra.*)

Prop 66 requires that petitioners first file their habeas corpus petitions in the trial courts—the same courts which are already struggling to eliminate backlogs, and laboring under conditions described by some as a “judicial crisis.” The trial courts, rather than the Supreme Court, will appoint habeas corpus counsel. (See, *infra.*) The trial court will be called upon to correct and amend the record; to resolve evidentiary issues including discovery and legal privilege; and, to conduct adversarial hearings. The trial court will have to review every claim in a petitioner’s capital habeas corpus petition and make findings on every claim.

Under Prop 66, appeal of the findings of the trial court will be filed in the state district Courts of Appeal, which will review the trial court proceedings and findings—both proper subjects of appellate challenge.²²² The Courts of Appeal will then be required to file an opinion on the rulings of the trial court before the Supreme Court reviews the case, which the California Constitution requires in all cases resulting in a death verdict.²²³

The California Supreme Court may agree with the appellate court and issue an affirmance, or it may reverse the appellate court and send the matter back for modification or for return to the trial court for further hearings on any or all of the habeas corpus claims raised in the petition. The Supreme Court is not limited in the number of claims returned for further hearing, or the number of times a claim may be returned for rehearing.

Thus, Prop 66 will impose *two additional layers of review* by directing petitioners to first file their post-conviction habeas petitions in the superior courts, which—as discussed above—are already significantly underfunded and under staffed. From there, Prop 66 will have petitioners file their direct appeals of the superior court’s denial of their capital habeas corpus petitions in the Courts of Appeal. And all of this work is to be performed in *less* time and with no additional funding appropriated to the courts to carry out this additional work. The schematic proposed by Prop 66 illustrates, even at first glance, that the additional layers of review will not “shorten” the time it takes to review death penalty cases.



²²² For example, a petitioner may challenge the trial court ruling on limiting what evidence may be presented in support of a petitioner’s claim. A petitioner may challenge the trial court finding as being inconsistent with the weight of the evidence.

²²³ Cal. Const., art. VI, § 11.

Statistics from the Judicial Council indicate that Prop 66 will create a major shift in the workload of the Courts of Appeal. Even if the appellate courts can dispose of a capital habeas corpus petitions without a written opinion, the review process is time-consuming and resource intensive. On behalf of the Supreme Court, the California Judicial Branch explained:

[E]ven when no opinion results, the preparation of internal memoranda and the related disposition of death-penalty-related habeas corpus petitions draws heavily upon the court's resources, because the petitions and records in such cases frequently are very lengthy and complex and are analyzed in internal memoranda that often exceed 75 to 100 pages in length.²²⁴

Equally problematic is the fact that there are currently 355 inmates needing state habeas counsel, many of whom have been waiting years for appointment of counsel. Prop 66 will have the superior courts take on this new responsibility of appointing counsel for these inmates, but it allocates no additional funding to these courts to carry out this enormous task, nor does it indicate where or how the superior courts are supposed to locate qualified habeas counsel to take on these cases, which is concerning given that the California Supreme Court, and other state entities dedicated to carrying out that task, have been unsuccessful in finding qualified, available counsel.

Prop 66 requires that state habeas counsel file petitions within one year of appointment, and it also requires that hearings in the superior courts be completed within one year. If 355 habeas corpus petitions are processed within the same timeframe, 355 courtrooms and judges will be occupied concurrently. The impact on superior courts will vary. This chart shows the potential effect on the superior court judiciary if habeas corpus petitions are distributed based on the counties issuing the death sentences.²²⁵

²²⁴ Workload 2013-2014, *supra*, <http://www.courts.ca.gov/27369.htm>.

²²⁵ The number of superior court judges was obtained from the Supreme Court Judicial Roster.

County	Nbr. Of County Habeas Corpus Petitioners	Total County Judges	Percentage of Judicial Resources required for capital habeas corpus	County	Nbr. Of County Habeas Corpus Petitioners	Total County Judges	Percentage of Judicial Resources required for capital habeas corpus	County	Nbr. Of County Habeas Corpus Petitioners	Total County Judges	Percentage of Judicial Resources required for capital habeas corpus
Alameda	15	72	21%	Madera	1	9	11%	San Mateo	1	26	4%
Colusa	2	2	100%	Marin	1	11	9%	Santa Barbara	2	20	10%
Contra Costa	9	37	24%	Monterey	3	19	16%	Santa Clara	7	75	9%
El Dorado	2	8	25%	Orange	37	118	31%	Shasta	3	9	33%
Fresno	2	40	5%	Riverside	65	61	107%	Solano	1	19	5%
Imperial	3	10	30%	Sacramento	9	60	15%	Sonoma	1	20	5%
Kern	9	35	26%	San Bernardino	27	68	40%	Stanislaus	1	21	5%
Kings	5	7	71%	San Diego	17	127	13%	Tulare	5	17	29%
Lake	1	4	25%	San Joaquin	4	27	15%	Ventura	9	29	31%
Los Angeles	109	459	24%	San Luis Obispo	2	11	18%	Yolo	2	11	18%

As this table illustrates, in Riverside County, the capital habeas caseload would demand 107% of the county’s current superior court judicial resources. Prop 66 allocates no funding for the additional litigation burden on the superior courts. Nor does it appear that the LAO has factored that consideration into its costs estimates.

3. Prop 66’s Key Features Are Unworkable, Unconstitutional, and Will Not Speed Up Appellate Review Or Executions

Dictating to the Supreme Court How to Manage Its Docket. Prop 66 will mandate that the California Supreme Court move all death penalty cases to the top of the Court’s docket, to the exclusion of other important cases, by amending Penal Code section 190.6 (d) to require that the Judicial Council “adopt initial rules and standards of administration designed to expedite the processing of capital appeals and state habeas corpus review,” such that “the state courts shall complete the state appeal and the initial state habeas corpus review in capital cases” within five years.

That change cannot be enforced. Enforcement violates the separation of powers for a legislative enactment to dictate to the California Supreme Court how to manage its docket. Further, Prop 66 makes no provision to enforce its mandate that the Court speed up review of capital cases. Hastening review of capital cases *cannot* be accomplished without a constitutional amendment, which assigns jurisdiction over the automatic appeals exclusively to the California Court of Appeal. Prop 66 cannot enlarge the size of the California Supreme Court to expedite cases without a constitutional amendment.

Deciding all capital appeals and state post-conviction petitions within five years is not only not feasible or advisable—it is *not possible*. The California Supreme Court is *required* under the California Constitution to hear all direct appeals in capital cases, but it cannot keep up with the pace of new death

sentences. The Court currently has a backlog of over 150 fully briefed capital appeals and habeas petitions that are awaiting oral argument and final disposition. Hundreds more are in the pipeline, many where counsel has yet to be appointed, and a steady stream of new cases behind those with no end in sight.

The backlog will not magically resolve itself with only seven justices on the Court. As discussed *supra*, the trend is such that the Court requires *more* time each year to resolve capital cases, not less—inmates convicted between 1978-1989 had their automatic appeals decided in 6.6 years on average; those convicted between 1990-1996 had their automatic appeals decided in 10.7 years; by January 2006, the average delay was more than 12 years. The current backlog is so extensive that automatic appeals now take over 15 years on average to be resolved. Often, the Court requires 20 to 25 years to resolve death row appeals.

The Supreme Court cannot reasonably dedicate more time to resolving death penalty appeals than it currently does: a full one third of the Court's current docket and *half* of all published opinion pages are already devoted exclusively to death penalty cases. Even if voters could legally tell the Court that it must stop working on all of other cases and devote itself entirely to death penalty cases—which constitutional limits preclude—it would still be *years* before the Court could clear its capital case docket. During that time, there would be no “savings” to the state, which has a continuing mandate to provide appellate and post-conviction counsel to all death row inmates for decades to come as they exhaust their appeals. For these and other reasons, the California Supreme Court cannot comply with a five-year mandate to resolve all capital appeals.

To satisfy the five-year capital case review requirement, the California Supreme Court must dedicate its full attention to capital cases for many years to come, to the exclusion of other pressing matters needing the Court's time and attention and that would impermissibly impair an essential government function.²²⁶ The Supreme Court's work cannot be dictated or commandeered by the objectives of a relatively small group of aggrieved citizens, no matter how genuine their cause, nor can the state's electoral mechanisms be misused to attain these ends.

Prop 66 requires the Supreme Court to give priority to the rights of victims of capital offenses, when there are other victims and parties no less deserving of the Court's time and attention, contrary to what the measure suggests. Permitting the Court's docket to be gerrymandered by well-funded initiative proponents is beyond the voter initiative, even in California.

²²⁶ See, *Brosnahan v. Brown*, 32 Cal.3d 236 (1982) (Mosk, J., dissenting) (explaining that “[a] democratic government must do more than serve the immediate needs of a majority of its constituency—it must respect the ‘enduring general values’ of the society. Somehow, a democracy must tenaciously cling to its long-term concepts of justice regardless of the vacillating feelings experienced by a majority of the electorate.”) (quoting Donald R. Wright, *The Role of the Judiciary*, 60 CALIF. L. REV. 1262, 1267 (1972)).

The enormous toll California's death penalty initiatives have taken on the California Supreme Court has been apparent since at least 1988, when the number of automatic appeals in death penalty cases was already so overwhelming that it prompted California Supreme Court Justice Stanley Mosk to comment that: "The tragic fact is that important civil cases are not being heard because of the overwhelming presence of death penalty cases . . . I think we have to take some drastic step . . . or civil cases will not be heard for years into the future and the development of civil law in California will be a casualty of the death penalty."²²⁷

In its Final Report of 2008, the California Commission on the Fair Administration of Justice reiterated those concerns when it concluded that the demands of the capital caseload were affecting the Court's ability to carry out its constitutional responsibilities. The "Court now faces a crisis, in which the death penalty backlog is threatening the Court's ability to resolve other statewide issues of law and settle conflicts at the appellate level, which is its primary duty and responsibility."²²⁸

Prop 66, if passed, would be subject to extensive legal challenges prior to its implementation.

Prop 66's Changes to the Appellate Review System Will Compromise Due Process Protections And Create Additional Reversals of Convictions. California must provide death row inmates with appellate review, which satisfies due process requirements of the United States and California constitutions.²²⁹

To understand why the California Supreme Court should be permitted to take whatever time it needs to decide capital cases—and not be forced to decide the fates of the individuals the state has sentenced to death by execution within five years—voters need look no further than the arguments the Office of the California Attorney General (OAG) raised in its Opening Brief in *Jones v. Davis*, Case No. 14-56373, a death penalty case in which the OAG explained that "California's system for carefully reviewing capital convictions and sentences takes time....The time it takes to review and implement a capital sentence in California results from the interaction of legal rules, procedural protections, and practical accommodations that are designed to protect individual and government interests of surpassing importance."²³⁰

As the OAG asserted in *Jones*, "California's system recognizes the profound importance of providing careful judicial review before carrying out a capital sentence."²³¹

²²⁷ Lorie Hearn, Execution Decisions Strain Court; Other Key Issues in State Get Shunted Aside, Experts Warn, SAN DIEGO UNION-TRIB., Sept. 25, 1988, at A3.

²²⁸ Final Report, at 147, available at <http://www.ccfaj.org/>.

²²⁹ See *People v. Anderson*, 25 Cal. 4th 543, 606 (2001) ("[T]he automatic appeal process following judgments of death is a constitutional safeguard, not a constitutional defect.")

²³⁰ See *Jones*, *supra*, Opening Brief in *Jones v. Davis*, Case No. 14-56373, at pp. 43-44.

²³¹ *Id.* at 44.

California’s system of post-conviction review in capital cases is designed to ensure that the ultimate criminal sanction is imposed only on individuals who have been convicted and sentenced in full accordance with the law, and that the sanction is carried out through a method that complies with legal and constitutional guarantees. The State properly provides capital defendants with opportunities and resources for challenging their convictions. And the California Supreme Court carefully reviews those challenges in every capital case.²³²

The OAG also noted in *Jones* that “[a]s a result of this robust system of post-conviction review and the vigorous challenges mounted by capital defendants through state-funded counsel, a significant number of capital defendants obtain some relief from the California Supreme Court.”²³³ The safeguards provided by the capital post-conviction process are necessary, as they frequently result in findings of error that demonstrate overreaching by the state and require death sentences to be overturned.

As the OAG explained, “[t]his process for reviewing capital cases is not quick or casual—*nor should it be.*”²³⁴ “The California Supreme Court carefully reviews every capital case on direct appeal. Its opinions often exceed 100 pages, identifying errors where they exist and assessing whether they were prejudicial.”²³⁵ “The pace of post-conviction review for any particular capital defendant will depend on myriad case-specific factors, including the factual and legal complexity of the case; the number and nature of the claims presented by the defendant on direct appeal and state habeas; the number of extensions requested and received by the parties; the availability of qualified counsel; whether the defendant exercises his right to obtain new counsel on state habeas; intervening factual and legal developments; and so forth.”²³⁶

“Each of these factors can prolong the review process in a particular capital case, as compared with another, different capital case. In every case, however, the delay occasioned by these factors *serves purposes of great importance: affording capital defendants a fair chance to frame and present challenges to their convictions and sentences, and then ensuring careful review of every legal challenge to a capital defendant’s conviction or sentence.*”²³⁷

Prop 66 would eviscerate “the power of judicial review of death sentences” reposed in the California Supreme Court by the California Constitution, by precluding the Court from fulfilling its

²³² *Id.*

²³³ *Id.* at 46 (explaining that since California reinstated the death penalty in 1977, the California Supreme Court has granted relief in over 110 capital cases.)

²³⁴ *Id.* at 47 (emphasis added.)

²³⁵ *Id.* (citing *People v. Bryant*, 60 Cal. 4th 335 (2014); *People v. Lucas*, 60 Cal. 4th 153 (2014)).

²³⁶ *Id.* at 48.

²³⁷ *Id.* (citing *In re Reno*, 55 Cal. 4th 428, 456 (2012) (explaining that California’s post-conviction review process ensures that the capital defendant “has had ample opportunity to raise all meritorious claims, the adversarial process has operated correctly, and both this court and society can be confident that, before a person is put to death, the judgment that he or she is guilty of the crimes and deserves the ultimate punishment is valid and supportable”) (emphasis added).

duty to review death sentences in a manner that respects fundamental due process rights.²³⁸ Passing Prop 66 would undermine the very legal principles cited by the OAG as critical to the constitutionality of its death penalty system.

Prop 66 Fails to Establish a Funding Source for Appointment of State Habeas Counsel By the Superior Courts. The California Supreme Court acknowledged that the long delays caused by its inability to appoint counsel in capital cases are not by design and do not further prompt and fair review.²³⁹ Under current law, Government Code section 68662 authorizes the superior court to appoint counsel to represent an indigent prisoner.²⁴⁰ Prop 66 anticipates mandatory acceptance of appointments in capital habeas proceedings, unless counsel has a conflict. Since county public defenders are not chartered to represent clients in capital habeas corpus proceedings, under section 68662 as amended by Prop 66, the superior courts must rely on an assigned private counsel system. Yet, there is no provision in Prop 66 for compensating privately appointed habeas counsel appointed by the superior courts.

Because Penal Code section 987.2, 987.3, and 987.6 limits reimbursement to counties in such situations to 10 percent of the cost of representation, under Prop 66, the counties will foot the bill for the remaining 90% of the cost of all state habeas counsel appointed in capital cases.²⁴¹

²³⁸ See *People v. Frierson*, 599 P.2d 587, 614 (Cal. 1979).

²³⁹ *In re Morgan*, 50 Cal.4th 932, 940-41 & n.7 (2010).

²⁴⁰ See, n. 62, *supra*.

²⁴¹ **§ 987.2 Compensation of assigned counsel; Attorney panels**

Subd. (c): In counties that utilize an assigned private counsel system as either the primary method of public defense or as the method of appointing counsel in cases where the public defender is unavailable, the county, the courts, or the local county bar association working with the courts are encouraged to do all of the following:

- (1) Establish panels that shall be open to members of the State Bar of California.
- (2) Categorize attorneys for panel placement on the basis of experience.
- (3) Refer cases to panel members on a rotational basis within the level of experience of each panel, except that a judge may exclude an individual attorney from appointment to an individual case for good cause.
- (4) Seek to educate those panel members through an approved training program.
- (5) Establish a cost-efficient plan to ensure maximum recovery of costs pursuant to Section 987.8.

§ 987.3. Factors determining reasonable compensation for court appointed attorney

Whenever in this code a court-appointed attorney is entitled to reasonable compensation and necessary expenses, the judge of the court shall consider the following factors, no one of which alone shall be controlling:

- (a) Customary fee in the community for similar services rendered by privately retained counsel to a nonindigent client.
- (b) The time and labor required to be spent by the attorney.
- (c) The difficulty of the defense.
- (d) The novelty or uncertainty of the law upon which the decision depended.
- (e) The degree of professional ability, skill, and experience called for and exercised in the performance of the services.

Prop 66 specifies no guidelines for the county compensation of appointed habeas corpus counsel. Assuming the counties adopt the current California Supreme Court payment guidelines for flat-rate habeas corpus representation, the counties would have to pay \$250,000 for legal services and \$50,000 for investigation and expert services up to filing the habeas corpus petition. This estimate could be reduced by only 10 percent due to reimbursement from the Department of Finance.

County	Nbr. Of County Habeas Corpus Petitioners	County cost estimate	County	Nbr. Of County Habeas Corpus Petitioners	County cost estimate	County	Nbr. Of County Habeas Corpus Petitioners	County cost estimate
Alameda	15	\$ 4,500,000.00	Madera	1	\$ 300,000.00	San Mateo	1	\$ 300,000.00
Colusa	2	\$ 600,000.00	Marin	1	\$ 300,000.00	Santa Barbara	2	\$ 600,000.00
Contra Costa	9	\$ 2,700,000.00	Monterey	3	\$ 900,000.00	Santa Clara	7	\$ 2,100,000.00
El Dorado	2	\$ 600,000.00	Orange	37	\$ 11,100,000.00	Shasta	3	\$ 900,000.00
Fresno	2	\$ 600,000.00	Riverside	65	\$ 19,500,000.00	Solano	1	\$ 300,000.00
Imperial	3	\$ 900,000.00	Sacramento	9	\$ 2,700,000.00	Sonoma	1	\$ 300,000.00
Kern	9	\$ 2,700,000.00	San Bernardino	27	\$ 8,100,000.00	Stanislaus	1	\$ 300,000.00
Kings	5	\$ 1,500,000.00	San Diego	17	\$ 5,100,000.00	Tulare	5	\$ 1,500,000.00
Lake	1	\$ 300,000.00	San Joaquin	4	\$ 1,200,000.00	Ventura	9	\$ 2,700,000.00
Los Angeles	109	\$ 32,700,000.00	San Luis Obispo	2	\$ 600,000.00	Yolo	2	\$ 600,000.00

Estimated total expense per county to file habeas corpus petitions for county Death Row inmates.

Looking at the expenses detailed in the chart above that Prop 66 will impose on the counties in its effort to “shorten” the time for case review, it is difficult to see how the initiative will save the taxpayers millions of dollars going forward. In Riverside County, not only will these capital habeas cases consume 107% of the county’s judicial resources, the county must also come up with nearly \$20 million to appoint counsel and pay for investigations into all of the cases currently on track to be filed in the superior courts. Additional new death sentences imposed will increase the costs to the counties.

Under Prop 66, payment for post-filing hearings and additional briefing, if requested by the superior court, is likely to be paid at the current rate of \$145 per hour. Prop 66 would also revise Penal Code section 1509.1(a) to authorize either party to appeal the decision of the superior court to the court of appeal. Filing the notice of appeal, request for a certificate of appealability, and preparation of the appellate briefs will take months of additional habeas corpus counsel time and cost. Attorney fees for

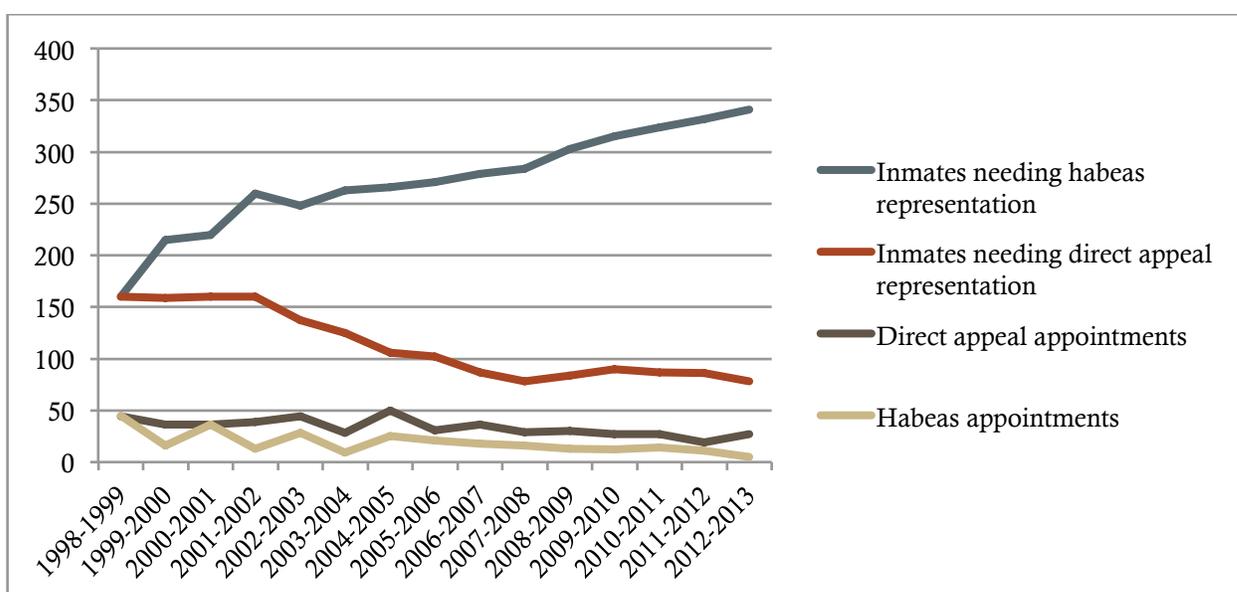
(f) The professional character, qualification, and standing of the attorney.

§ 987.6. Reimbursement by state of costs of assigned counsel

(a) From any state moneys made available to it for such purpose, the Department of Finance shall, pursuant to this section, pay to the counties an amount not to exceed 10 percent of the amounts actually expended by the counties in providing counsel in accordance with the law whether by public defender, assigned counsel, or both, for persons charged with violations of state criminal law.

perfecting the appeal are also currently paid at \$145 per hour plus expenses. A notice of appeal must be filed within 30 days. Prop 66 also amends section 1509.1(c) to require that appeals of capital habeas corpus petitions “shall have priority over all other matters and be decided as expeditiously as possible,” but again, there are no guidelines indicating what “priority over all other matters” means, nor is there any mechanism for enforcing the requirement that appeals be decided “as expeditiously as possible.”

Prop 66 Fails to Account For The Fact That There Are Not Enough Qualified Attorneys to Handle State Habeas Cases. Because the legislature has failed adequately to fund the current death penalty system, including funding for the training and compensation of habeas counsel, the California Supreme Court has long had difficulty finding sufficient numbers of attorneys willing to take on appointments as capital habeas corpus counsel. The Habeas Corpus Resource center provided the following graph documenting the post-conviction status of death row inmates through 2013.



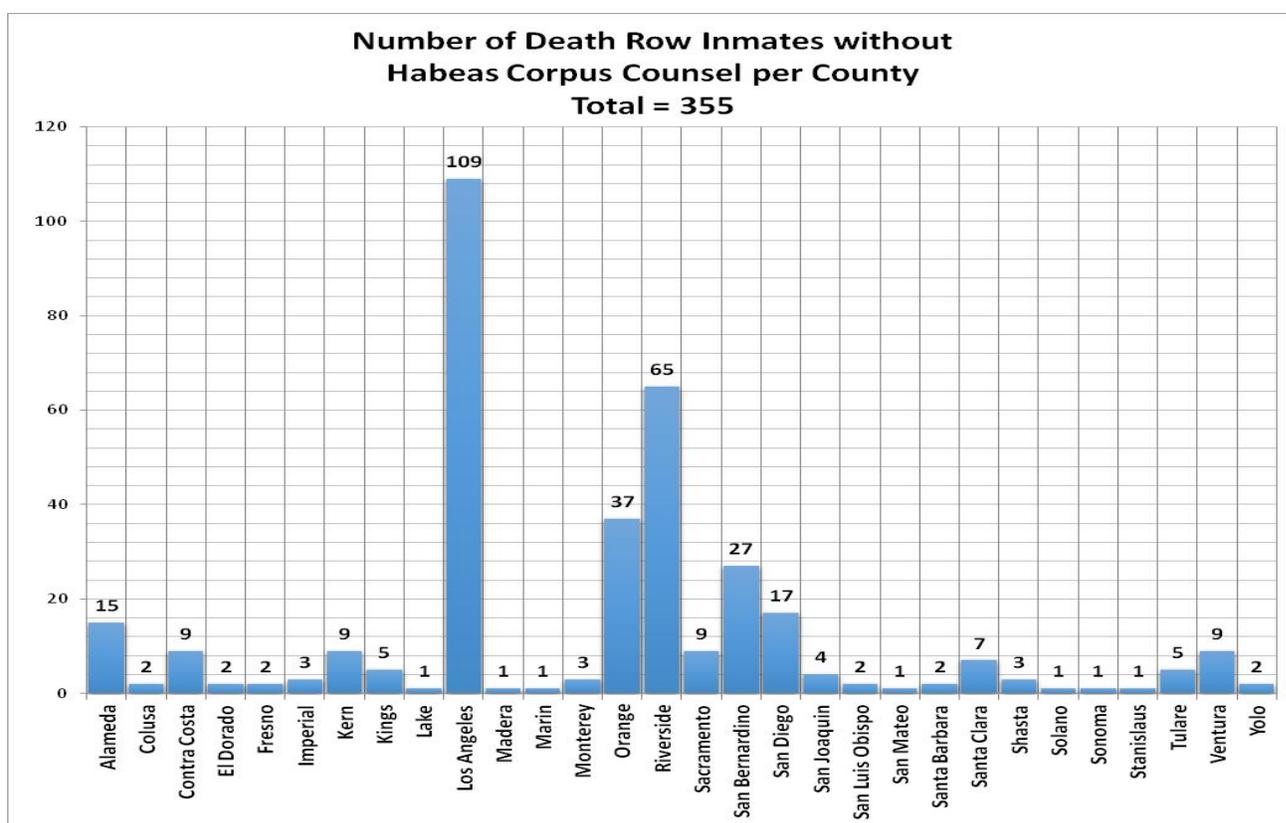
The 2008 report from the Commission on the Fair Administration of Justice unanimously found that delays in the appointment of counsel to handle capital cases were attributable to failing to provide sufficient funding to expand state agency counsel—Habeas Corpus Resource Center and Office of the State Public Defender—or to fully compensate private attorneys in a manner that allows them to provide representation that complies with their ethical obligations to their clients.²⁴²

On average, inmates wait 12 years *after* sentencing for habeas corpus counsel to be appointed. More than 100 inmates have been waiting over ten years for appointment of a habeas corpus attorney. The number of cases without habeas corpus counsel increases yearly because appointments do not keep pace with the number of new judgments of death and the need to replace private habeas corpus counsel who cannot continue representation. Between 2003 and 2013, of the 192 cases in which habeas corpus

²⁴² Final Report at 116-17, 134-37, available at <http://www.ccfaj.org/>.

petitions were filed, 40 lost their initially appointed private counsel and required replacement counsel – a replacement rate of 21 percent.²⁴³ **There simply are not enough attorneys willing to take on these death penalty cases.**

Prop 66 proposes to cure this problem by requiring superior courts to appoint habeas corpus attorneys from a panel of attorneys, who will have to accept the appointments except in cases of a conflict. But superior courts do not maintain panels of appellate attorneys. Superior courts also do not have staff experienced with evaluating qualifications and experience of attorney applicants. In fact, most jurisdictions have *very few* qualified and experienced capital habeas corpus attorneys. The learning curve in some jurisdictions will be steep and costly. Development of the necessary infrastructure will be expensive. Some county “panels” like Los Angeles and Riverside will be overwhelmed by the need for capital habeas counsel.



Death Row Inmates by County without appointed Habeas Corpus Counsel. Source: Habeas Corpus Resource Center, Oct. 31, 2015.

²⁴³ From HCRC Response to Legislative Analyst’s Office Questions About Proposed Death-Penalty Procedure Initiative, Jan. 7, 2014.

Both the HCRC and the Supreme Court have struggled to recruit and train new habeas corpus attorneys but their efforts have had limited success. The State has been unwilling or unable to pay attorneys a sufficient amount of money for competent performance and has severely restricted funds for investigation²⁴⁴ and expert services.²⁴⁵ Prop 66 would have the voters believe that the initiative will somehow magically fix this problem by shifting the burden from the California Supreme Court to the already under-staffed superior courts.

The Supreme Court financial benchmarks already fall far short of the actual costs necessary to adequately perform the work ethically required in habeas corpus cases. That is one of the main reasons attorneys refused to take appointments in capital cases—they will lose before they even start because they are not provided with the funding needed to carry out an adequate investigation. The Commission for the Fair Administration of Justice Final Report notes that in a successful habeas petition in *In Re Lucas*, 33 Cal.4th 682 (2004), the law firm of Cooley Godward LLP provided 8,000 hours of pro bono attorney time, 7,000 hours of paralegal time, and litigation expenses of \$328,000.²⁴⁶ Other estimates of cost for an adequate investigation range between \$250,000 to \$300,000.²⁴⁷

This financial situation creates a conflict of interest for any conscientious attorney – is it ethical for an attorney limit the amount of work done on a case to fit within the allowable billable hours? With the current state of funding, any effort to recruit experienced, qualified private counsel for habeas corpus representation is doomed to fail. For this reason too, Prop 66 will not achieve its stated goal of speeding up death penalty case reviews.

The California Constitution Authorizes The Judicial Council—Not The Voters—to Determine The Required Qualifications For Competent Counsel In Death Penalty Appeals. Prop 66 will amend Penal Code section 1239.1 to direct the California Supreme Court to reduce the constitutional and procedural protections to which the Court has determined indigent capital defendants are entitled. The rules in the California Rules of Court, including Rule 8.605—which sets for the required qualifications of competent counsel in death penalty appeals and habeas corpus proceedings—are adopted by the Judicial Council of California under the authority of article VI, section 6, of the Constitution of the State of California and are not subject to revision by voter initiatives. This feature of Prop 66 violates the separation of powers because it places in the hands of

²⁴⁴ \$50,000 is the cap for investigation services. Capital habeas corpus investigation relies on the services of mitigation specialists who are trained and experienced in mental health, intellectual and developmental disabilities, neighborhood and cultural influences, and trauma. Mitigation specialists are experts at identifying individuals who can provide insight into a client’s background, life history, family and social dynamics. Mitigation specialist pay is limited to \$125 per hour. The \$50,000 provides for only 10 weeks of mitigation investigation services, which is generally not enough time to perform an adequate investigation.

²⁴⁵ Payment for expert services is capped at \$300 per hour. Prosecution experts are often paid \$600 - \$700 per hour. The pool of actual experts who will work for \$300 is limited.

²⁴⁶ Final Report at 135 n.71, available at <http://www.ccfaj.org/>.

²⁴⁷ *Executing the Will of the Voters*, 44 Loy. L.A. L. Rev. at S621 n.624.

voters, rather than the judiciary, the determination as to what constitutional and procedural protections should be provided to indigent capital defendants.

Similarly, the proposed amendments to Section 68665 of the Government Code violate the separation of powers by permitting voters to direct the California Supreme Court to eliminate the standards requiring that counsel appointed to represent capital defendants have “defense experience.” This provision not only undermines the constitutional and procedural protections to which the Court has determined indigent capital defendants are entitled, it patently violates fundamental state and federal constitutional principles regarding the right to counsel that are the bedrock of the criminal justice system. The provision is also internally inconsistent where it directs the Judicial Council of the California Supreme Court to determine and “adopt the mandatory competency standards for the appointment of counsel in death penalty direct appeals and habeas corpus proceedings” and it simultaneously tells the Judicial Council that “[e]xperience requirements shall not be limited to defense experience.”

California courts have understood the state Constitution as providing greater protections for certain rights than the federal constitution and are not bound to interpret the rights of indigent defendants in California as limited to those provided under chapter 154 of title 28 of the United States Code, which governs capital case procedures. As the OAG explained in *Jones v. Davis*, while “California could reduce ... delays by relaxing its requirements for the qualifications of appointed counsel[,] [a]ny such reduction ... could be in tension with the interests of indigent defendants in obtaining experienced counsel who will vigorously represent them, or of society in ensuring that the defendants’ convictions and death sentences are reviewed through an effective adversarial process.”²⁴⁸

Prop 66’s requirement that experienced appellate counsel accept appointments in capital cases as a condition of maintaining their position on the Court of Appeal’s panel of appellate attorneys will neither save money nor quicken the pace of capital appeals. There is a widespread unwillingness of panel attorneys to take on capital cases. The research shows that the vast majority of panel attorneys “who are qualified for appointment to the most serious non-capital appeals and who meet the qualifications for capital appeals,” have indicated that they would resign from the panel entirely before they would be forced or coerced into taking an appointment in a capital case.

The state must spend significant additional funds to train new attorneys who will replace qualified appellate and post-conviction attorneys affected by this mandate of Prop 66. Rather than mandating appointments in capital cases, California will have to increase the funds it will pay counsel to take appointments in capital appeals, California must increase funding to attract attorneys in sufficient numbers to decrease the current delay in the appellate process.²⁴⁹

²⁴⁸ *Jones v. Davis*, Case No. 14-56373, AOB at 50.

²⁴⁹ See Judge Arthur L. Alarcón, *Remedies for Death Row Deadlock*, 80 Cal. L. Rev. 697, 734-36 (2007).

Failure to Comply With A Briefing Deadline Does Not Irreparably Injure A Non-Party to a Criminal Appeal. Prop 66 will amend Penal Code section 190.6 (e) to confer jurisdictional standing upon a non-party, i.e., victim, to seek writ relief to challenge a party's failure to comply with a *statutory* briefing deadline, as opposed to a court order, where no jurisdictional standing otherwise lies. This provision of Prop 66 is illusory and unenforceable. Writ petitions are heard as a matter of discretion and are governed by equitable principles. Appellate courts grant writ relief only when a petitioner (1) has no other plain, speedy and adequate remedy in the ordinary course of law, and (2) will suffer irreparable injury if such relief is not granted.

Article 1, section 28 (c)(1) of the California Constitution does not confer standing upon a victim or non-party to compel the California Supreme Court to expedite any capital appeal where, in the Court's judgment, more time is needed to provide appellate review that complies with the due process guarantees of the United States and California constitutions. Nor does Article 1, section 28 (c)(1) provide any authority or provision entitling certain victims to be given priority over other victims to have their individual appellate cases resolved. For these reasons as well, Prop 66 will not speed up review of capital cases in the courts. This provision merely adds yet another layer of litigation into the mix and does nothing to ensure that review of cases will be hastened.

Prop 66's Provision Stripping the California Supreme Court of Original Jurisdiction to Hear Capital Habeas Cases Cannot Be Effectuated Without a Constitutional Amendment. Prop 66 also would amend Penal Code Section 1509 to require that all capital petitions for a writ of habeas corpus be filed in the superior court that imposed the sentence, unless good cause is shown for the petition to be heard by another court. The proposed amendment to requires a constitutional revision.

Article VI section 10 of the California Constitution provides that *all three courts*—the Supreme Court, courts of appeal, and superior courts, and their judges—have original jurisdiction in habeas corpus proceedings. This proposed change to the law would require a revision to the California Constitution to strip other constitutionally mandated courts of their authority to exercise original jurisdiction in habeas proceedings. Because under current law all petitioners in capital cases must first file their petitions in the California Supreme Court to exhaust their claims before they can proceed to federal court, this aspect of the proposed initiative will also add an additional layer of review, extending the duration of litigation and adding considerably to the costs of administering the system under the proponent's initiative.

As already noted, if the law were changed to require trial courts rather than the California Supreme Court to hear post-conviction petitions in capital cases, the state would have to dedicate significant additional funding to provide the trial courts with the resources and additional staff needed to review capital habeas petitions. These cases present complex issues and the pleadings are typically hundreds of pages in length. Courts must prepare detailed rulings addressing the numerous claims raised and moving these proceedings to the superior courts would not only add to the caseloads of already-overburdened trial courts, but would also add to the costs involved in implementing the

changes this initiative requires. The proponent of Prop 66 offers no data or estimates regarding these costs, which clearly undermine or wholly negate any promised savings. Like virtually every aspect of proponent’s initiative, this provision will probably substantially increase the state’s fiscal burden.

Similarly, the proposed addition of Penal Code section 3604.1(c), which would strip the Court of Appeal and California Supreme Courts of their original jurisdiction to hear challenges to the constitutionality of the state’s methods of execution, cannot be accomplished without first amending section 10 of Article VI of the California Constitution.

Prop 66 Offers No Justification for Exempting Lethal Injection Protocols from the Public Debate and other Provisions of the Administrative Procedures Act. Prop 66 will amend Penal Code section 3604.1(a) to exempt the regulations for methods and procedures used in execution from the Administrative Procedures Act. However, the Court—not the CDCR—has a fundamental duty to seriously consider the constitutional issues raised by lethal injection protocols.²⁵⁰ Eighth Amendment precedent prohibits “the unnecessary and wanton infliction of pain,”²⁵¹ and procedures that create an “unnecessary risk” that such pain will be inflicted.²⁵² There is no way for the judiciary to address Eighth Amendment issues when the execution protocol is exempt from scrutiny.

Prop 66’s attempt to expedite the death penalty process at the expense of constitutional considerations and to remove from the public discourse those matters that are uniquely the people’s business will likely be subjected to legal challenges. Exempting the procedures, methods and regulations governing state sanctioned executions will not reduce or eliminate delays in executing death-sentenced inmates, but, on the contrary, is guaranteed to result in additional litigation, increasing the cost to taxpayers.

4. There Is A Critical Disconnect Between What Prop 66 Promises and What it Can Legally Achieve, Both in Terms of Savings and Expediting the Process

The exorbitant cost of the death penalty in California over the last forty years is by now well established. California voters have been repeatedly led down the garden path by tough-on-crime promises that tougher death penalty laws will save the state money and will keep the public safer.

As with the many propositions that have come before it, Prop 66 has failed no link between the numerous and scattered changes it would make to the law and any potential “savings” that could realistically flow from those changes. Prop 66 has not shown how it will “save” the state millions of dollars because it *cannot*. As with so many similar initiatives that have come before it, the problem appears to be that proponents of death penalty initiatives claim that the system can somehow be fixed

²⁵⁰ *Morales v. Tilton*, *supra*, 974.

²⁵¹ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion).

²⁵² *Cooper v. Rimmer*, 379 F.3d 1029, 1033 (9th Cir. 2004).

and that by speeding up executions and killing inmates faster, rather than having to pay to house them for lengthy prison terms—the state actually *will* save money. The facts and the experience in California over the last forty years conclusively prove the contrary.

The LAO has been complicit in this deception of the voters. Most recently, in its January 23, 2014 letter to the Attorney General regarding #13-0055, the prior “speed up the death penalty” initiative which did not make it onto the ballot, and in its December 9, 2015 letter to the Attorney General regarding Prop 66, the LAO once again repeated its earlier assessment—a steady drumbeat throughout the LAO’s death penalty fiscal impact statements—that “to the extent the measure resulted in additional executions that reduced the number of condemned inmates, the state would also experience additional savings.”²⁵³ This is not an evidence-based estimate but is instead an imprecise and purely speculative statement that suggests to voters that the state can carry out executions in a number great enough and at a rate fast enough to constitute a significant savings to the state. That notion, however, is simply contrary to the facts.

The number of executions the state must carry out to realize any significant “savings” over the coming years cannot legally be accomplished based on the number of inmates on death row who are—by any realistic assessment—still decades away from exhausting their appeals. Any resumption of executions in California is—at the earliest —years away and more likely decades away because the lethal injection litigation over the newly proposed protocols has not even made its way through the state and federal courts. Meanwhile, California is *adding* to its death row every year (14 inmates in 2015, 14 inmates in 2014, and 25 inmates in 2013), so its capital litigation costs will only continue to increase, not decrease, for years to come.

Even if Prop 66 passed and each and every one of its proposed amendments to law was implemented unchallenged, the number of executions the state can legally carry out over the next five years will not be high enough to constitute any significant savings to the state. Instead, the state will spend another \$1 billion on the state’s failed system. The state probably cannot carry out enough executions even over the next ten years for the state to realize any meaningful savings. Another \$2 billion will have gone down the drain.

Conclusion

Voters must understand what is at stake in this election. The death penalty in California is a failed system that now costs the state roughly \$1 billion every five years.²⁵⁴ That figure is bound to increase rapidly as the state continues to send people to death row, despite common knowledge that the state has sentenced 1,000 people to death by execution, but executed only 13. The death penalty has

²⁵³ See, e.g., [https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report\(15-0096\)_0.pdf](https://oag.ca.gov/system/files/initiatives/pdfs/fiscal-impact-estimate-report(15-0096)_0.pdf).

²⁵⁴ The LAO estimates that the death penalty costs \$150 million to operate but credible studies place the cost conservatively at closer to \$200 million per year. See e.g., Final Report at 114 (\$137.7 million as of 2008), available at <http://www.ccfaj.org/>; *Executing the Will of the Voters?*, 44 Loy. L.A. L. Rev. at S110 (\$184.2 million per year as of 2011).

achieved none of its stated goals. The public is not safer. It has not provided justice for those who have been traumatized and victimized by the crimes suffered by family members.

The proponents of both Prop 62 and Prop 66 agree that California's death penalty system is dysfunctional, exorbitantly expensive, and failing to achieve its purpose. Prop 62 responds to this failed system by replacing it entirely, adapting the existing regime of life imprisonment without parole to cover all persons who are convicted of murder with special circumstances.

Prop 66 responds to this failure with a sweeping array of convoluted proposed "fixes." Our detailed analysis reveals that most of these changes will actually make the death penalty system worse, and will result in its problems negatively impacting the rest of the legal system in California. As shown above:

1. Prop 66 will cost—not save—taxpayers tens of millions of dollars a year.
2. By avoiding the required constitutional changes, Prop 66's proposed "fixes" will add new layers of review, adding extra delays and costs.
3. Prop 66's key features are unworkable, unconstitutional, and will not speed up appellate review or executions.
4. There is no legal justification for exempting lethal injection protocols from existing safeguards and public oversight, and this proposal is guaranteed to become mired in additional litigation.
5. There is a critical disconnect between what Prop 66 promises and what it can legally achieve, both in terms of savings and expediting the process.

In summary, the death penalty system has become so dysfunctional that the fixes proposed in Prop 66 will make the system slower and more costly, with less reliable outcomes. The only realistic "fix" for California's failed death penalty system is to end it and replace it with LWOP as the state's ultimate punishment. Regardless of moral views on the death penalty, it is now glaringly obvious California's system cannot be repaired. The voters of California deserve effective responsible governance. The death penalty does not promote public safety and is a waste of time and money.²⁵⁵

²⁵⁵ The opinions expressed in this Report are the authors' own and do not necessarily represent the views of Loyola Law School or Loyola Marymount University.