

CALIFORNIA

Capital Clemency Information Memorandum

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Introduction

Clemency in capital cases serves as a “fail-safe” in our criminal justice system, by acting to prevent unjust executions and to ensure that there is meaningful due process and review at every stage of a capital case. Prior to the execution of a death-sentenced prisoner, a clemency petition asks a governor, board of pardons and paroles, or both, to review the case and grant either a *reprieve* (a delay of execution for a set or undetermined period of time); a *pardon* (effectively ‘undoing’ the initial conviction); or a *commutation* of sentence (for example, reducing a sentence of death to a sentence of life in prison). In the capital clemency context, death row petitioners typically seek either a *reprieve* or a *commutation*.

Because the clemency process almost always takes place outside the courtroom and years after a person was initially convicted and sentenced, a death row prisoner may seek executive commutation for a wide range of reasons that may not have been raised or adjudicated in earlier legal proceedings. In seeking clemency, therefore, a petitioner is not restricted by the same rules and requirements that govern an appeal in court. As a result, petitions for capital clemency allow for—and indeed, require—additional investigation into the prisoner’s case and a nuanced understanding of the state-specific issues that can be relevant to the decision maker(s).

While clemency has long been recognized as an essential component of our criminal justice system, access to clemency is not explicitly guaranteed by the federal Constitution or otherwise governed by traditional due process requirements. States, therefore, have wide latitude in defining the procedures that govern their capital clemency processes. As a result, these processes, the quality of capital clemency representation, and the receptivity of decision makers vary widely nationwide.

The following information was assembled to give stakeholders in the capital clemency process some of the information most relevant to understanding clemency in California. Some of the information contained within this memorandum does not relate directly to California’s capital clemency process, but nevertheless provides important context and background for thinking about clemency in the state. Given capital clemency’s unique nature as a virtually unrestricted appeal to an executive branch decision maker, it is vital that practitioners seeking clemency on behalf of a death row prisoner have a full understanding of the target state’s historical, political, and legal landscape—or, at the very least, consider those factors as they approach the clemency process.

While the information contained within this memorandum is **not intended to serve as the basis for a capital clemency petition or campaign and is not designed to encapsulate all the diverse issues to consider in capital clemency**, we hope that it will provide a valuable starting point for all stakeholders interested in this important issue.

State Capital Clemency Information

I. Basics of the State Clemency Process

In many jurisdictions, the capital clemency process is opaque, with few national or state-specific resources available on the topic. As a result, extensive research has been conducted to prepare these memoranda—including lengthy interviews with local practitioners, calls to governors’ offices and parole boards, as well as online research—to help clarify the process for practitioners and others seeking information. Nevertheless, certain areas of practice, such as when to file a petition, and how a petition is likely to receive a response from the decision maker, are not governed by clearly established law or policy. As a result, any gaps noted within these documents reflect a lack of available information or clear answers. Additionally, it is important to remember that the capital clemency process often differs from non-capital clemency processes, and that much of the publicly available information regarding clemency pertains only to non-death-penalty cases.

a. The Power Defined

The California Constitution provides that “[s]ubject to application procedures provided by statute, the Governor, on conditions the Governor deems proper, may grant a reprieve, pardon, and commutation, after sentence, except in the case of impeachment.”¹ However, in the case of twice-convicted felons, the governor requires the approval of the state’s Supreme Court in order to grant a pardon or commutation.²

b. The Decision Maker(s)

The governor of California has the sole authority to grant commutations in capital cases, although he or she may consult with the Board of Parole Hearings (“BPH”) in coming to a decision. The BPH commenced its operation on July 1, 2005, replacing the Board of Prison Terms.³ One of the BPH’s present duties is to “investigate and report on all applications for reprieves, pardons, and commutation of sentence.”⁴

The governor appoints 14 commissioners to the BPH, subject to the state Senate’s confirmation.⁵ Commissioners are appointed to staggered three-year terms, and are eligible for reappointment.⁶ California law also requires that “their appointment by the Governor and confirmation by the Senate shall reflect as nearly as possible a cross section of the racial, sexual, economic, and geographic features of the population of the state.”⁷ The current commissioners for adult matters feature nine men and five women.⁸ (Additional characteristics relating to the diversity of the BPH are not available online). The governor *shall* designate a chair of the board periodically; while he or she *may* appoint an executive officer of the board, subject to Senate confirmation, who holds office at the pleasure of the governor.⁹

¹ Cal. Const. art. V, § 8(a).

² *Id.*

³ Cal. Penal Code § 5075(a).

⁴ Cal. Penal Code § 5075.1(g).

⁵ Cal. Penal Code § 5075(b).

⁶ *Id.*

⁷ *Id.*

⁸ *Board of Parole Hearings Commissioners*, California Department of Corrections and Rehabilitation, <http://www.cdcr.ca.gov/BOPH/commissioners.html> (last visited March 28, 2017).

⁹ Cal. Penal Code § 5075(c).

The BPH is required to investigate and report on all applications referred by the governor and to examine and consider all transcripts of judicial proceedings, affidavits, or other submitted documents.¹⁰ It has the power to employ assistants, take testimony, examine witnesses under oath, and do “any and all things necessary to make a full and complete investigation.”¹¹ Members of the BPH are authorized to administer oaths.¹² An investigation is typically conducted by the BPH investigation unit, not the commissioners themselves.¹³ Note that for twice-convicted felons, the BPH is required to transmit its recommendation in writing to the governor, whereas recommendations given to the governor by the BPH stemming from other applications do not need to be in writing.¹⁴

Each BPH commissioner is a full-time employee and receives an annual salary provided for by Chapter 6 of Part 1 of Division 3 of Title 2 of the Government Code.¹⁵ A member of the BPH can be removed for misconduct, incompetency or neglect of duty after a full hearing by the Board of Corrections.¹⁶

c. When to Bring a Petition

Though California’s clemency procedures are codified in state law, the procedures are not heavily regulated or widely understood. According to a comprehensive review of California’s clemency procedures published in the Berkeley Journal of Criminal Law in 2009, the clemency review process typically begins after all appeals have been exhausted and the trial court judge sets a date for the execution.¹⁷ After a date is set, a death row prisoner and his or her attorneys may submit a clemency application and petition to the governor. However, regardless of whether a clemency application is filed in a particular case, the BPH investigation unit constructs an investigative report in two phases: an initial investigation after the direct appeal of the death sentence is affirmed, and a second report as the judicial processes come to a close.¹⁸

The first phase of investigation is done with a checklist, in order to ensure that all background information relating to mental health, evidence, juror statements, and other relevant information is collected close in time to the imposition of the death sentence.¹⁹ The second phase begins with the Attorney General informing the BPH and the Governor’s Office that judicial proceedings in a capital case are coming to a close, and clemency review is now imminent.²⁰ At this point, witnesses are contacted again, BPH investigators collect information from the victim’s family, the petitioner’s family, correctional staff, and anyone else who can provide information relevant to a clemency proceeding.²¹ The BPH then submits a report to the Governor’s Office on the merits of the clemency application, which is generally completed around 30 days prior to the execution date.²²

¹⁰ Cal. Penal Code § 4812.

¹¹ *Id.*

¹² *Id.*

¹³ Mary-Beth Moylan and Linda E. Carter, *Clemency in California Capital Cases*, 14 Berkeley J. of Crim. L. 37, 55 (2009), <http://scholarship.law.berkeley.edu/cgi/viewcontent>.

¹⁴ Cal. Penal Code § 4813.

¹⁵ Cal. Penal Code § 5076.

¹⁶ Cal. Penal Code § 5081.

¹⁷ Mary-Beth Moylan and Linda E. Carter, *supra* note 13 at 53.

¹⁸ *Id.* at 54.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 53-55.

Only applications that have either 1) received a favorable recommendation from the BPH, or 2) been specially referred by the governor despite the BPH's own failure to recommend a review for clemency, are forwarded to the Supreme Court of California.²³ In these cases, all documents from the petitioner and from the BPH investigation (which can include materials both in support of and in opposition to the application) are forwarded to the Clerk of the Supreme Court of California for consideration.²⁴ No known commutation has been granted in any of the applications for clemency decided since 1994.²⁵

d. How to Bring a Petition

For petitioners, the first step is to complete an application for clemency and a petition, both of which are to be submitted to the Governor's Office.²⁶ California guarantees that executive clemency counsel is appointed for each indigent capital appellant, whether through state habeas appointment counsel or federal habeas appointment counsel.²⁷ (This appointment of counsel is typically conducted through the state court system, rather than through the federal courts, where petitioners in other states more frequently receive clemency counsel). The application asks for the petitioner's name, date of birth, social security number, prior convictions, a brief description of the circumstances of the crime(s) for which he or she is requesting a pardon or commutation, an explanation of why he or she is requesting a pardon or commutation, and a brief statement of why he or she should be granted a pardon or commutation.²⁸ The petitioner must then mail the application to the district attorney in the jurisdiction of conviction and sentence for his or her signature, before it is submitted to the governor.²⁹

e. Hearing Practice

The governor exercises discretion as to which petitions are set for a hearing.³⁰ If the governor determines a clemency petition should be referred to the BPH for a public hearing and confidential recommendation, the BPH gives notice to all interested parties and conducts a hearing "in a timely manner."³¹ Victims and their loved ones have a right to participate in the clemency hearing.³² Specifically, victims' family members are permitted to give statements at the BPH hearing and the district attorney's office is likely to present victim impact statements as part of their response opposing clemency.³³ Additionally, governors are frequently contacted directly by interested persons during pending clemency petitions, including victim's families, special interest groups, jurors, corrections officers, among others.

²³ Cal. Penal Code § 4850.

²⁴ Cal. Penal Code § 4851.

²⁵ See Mary-Beth Moylan and Linda E. Carter, *supra* note 13, at 58.

²⁶ *Id.* at 57-58.

²⁷ *Internal Operating Practices and Procedures of the California Supreme Court* (Jan. 1, 2007), at 13, <http://www.courts.ca.gov/documents/iopp07.pdf>.

²⁸ *Application for Executive Clemency*, Governor of the State of California, (Aug. 1, 2013), https://www.gov.ca.gov/docs/Application_for_Executive_Clemency.pdf.

²⁹ *Id.*

³⁰ See Mary-Beth Moylan and Linda E. Carter, *supra* note 13 at 55.

³¹ *Id.*

³² *A Victim's Guide to the Capital Case Process*, Office of Victims' Services California Attorney General's Office, <http://oag.ca.gov/sites/all/files/agweb/pdfs/publications/deathpen.pdf> (last visited March 28, 2017).

³³ See Mary-Beth Moylan and Linda E. Carter, *supra* note 13 at 69.

f. Responding to a Petition

Recent California governors such as Governors Davis and Schwarzenegger have publicly announced the BPH's recommendations for denying clemency in particular cases that they considered.³⁴ However, in earlier cases, governors did not state the content of their Boards' recommendations when they issued clemency decision.³⁵ While governors are allowed to reveal this information, it is also permissible to keep the BPH's recommendations—as well as the governor's own reasons for denying a commutation—confidential.³⁶

II. State Political and Judicial Information

a. Current Clemency Decision Maker(s)

Governor

Democrat **Edmund G. “Jerry” Brown Jr.** is the current governor of California and the current executive decision maker regarding clemency decisions. Governor Brown received his Bachelor's degree from the University of California, Berkeley in 1961 before earning his J.D. at Yale Law School in 1964.³⁷

Born and raised in San Francisco,³⁸ Governor Brown was introduced to politics at a young age. His father, Edmund G. “Pat” Brown Sr., dedicated nearly 25 years of his life to public service, and served as governor of California from 1959 to 1967.³⁹ Pat Brown referred to himself as a “big government man,” and was known for building highways, aqueducts and universities during his tenure.⁴⁰

Governor Brown's political career began after law school when he was elected Trustee for the Los Angeles Community College District in 1969.⁴¹ He then went on to serve as California's secretary of state in 1970 before serving his first two terms as governor in 1974 and 1978.⁴² With the nickname “Governor Moonbeam,”⁴³ he “established the first agricultural labor relations law in the country, started the California Conservation Corp and promoted renewable energy.”⁴⁴ During his second term as governor in 1977, Brown

³⁴ See generally Mary-Beth Moylan and Linda E. Carter, *supra* note 13.

³⁵ *Id.*

³⁶ *Id.* at 69

³⁷ *Jerry Brown Biography*, Office of Governor Edmund G. Brown Jr., https://www.gov.ca.gov/m_about.php (last visited Mar. 27, 2017).

³⁸ *Id.*

³⁹ Robert Reinhold, *Edmund G. Brown Is Dead at 90; He Led California in Boom Years*, N.Y. Times, (Feb. 18, 1996), <http://www.nytimes.com/1996/02/18/us/edmund-g-brown-is-dead-at-90-he-led-california-in-boom-years.html?pagewanted=all>. Notably, Edmund G. Brown, Sr. granted an unusually large percentage of capital petitions. He wrote about clemency decisions in his book, which gives an inside look into how the clemency process works. Edmund G. Brown and Ian Parberry, *Public Justice, Private Mercy: A Governor's Education on Death Row* (1989).

⁴⁰ Maura Dolan, *Older and wiser, Brown proudly embraces his father's legacy*, L.A. Times, (Oct. 26, 2010), <http://articles.latimes.com/2010/oct/26/local/la-me-jerry-brown-20101026>.

⁴¹ *Jerry Brown Biography*, *supra* note 37.

⁴² *Id.*

⁴³ Jesse McKinley, *This Time, Jerry Brown wants to be a Lawman*, N.Y. Times, (June 5, 2006), <http://www.nytimes.com/2006/06/05/us/05brown.html>.

⁴⁴ *Governor Edmund G. Brown, Jr.*, Nat'l Governor's Ass'n, <http://www.nga.org/cms/home/governors/current-governors/col2-content/main-content-list/edmund-gerald-brown.html> (last visited Sept. 2, 2016).

tried to block the legislature's bill to reinstate the death penalty in California, but his veto was overridden.⁴⁵ After leaving the governor's office, Brown unsuccessfully ran for Senate in 1982.⁴⁶

Governor Brown left politics for a few years after his Senate defeat, and spent his time traveling, working with Mother Teresa, and learning Spanish.⁴⁷ Then, in 1998, he was elected Mayor of Oakland. As mayor, Brown's critics claimed he moved away from his liberal philosophical roots, citing a move toward "hard-nosed big-city politics."⁴⁸ Governor Brown was also faulted for the dramatic increase in crime in Oakland shortly before he left office.⁴⁹

In 2006, Brown ran for state attorney general.⁵⁰ While campaigning, he said that, as attorney general, he would have no problems carrying out the law, "whether it is capital punishment, bars on same-sex marriage or collective bargaining or anything else."⁵¹ As Attorney General, he once remarked that "there are no innocent inmates on California's death row."⁵² In 2008, Brown drew negative attention when he reversed his position on same-sex marriage and asked the Supreme Court of California to reverse Proposition 8, which defined marriage as only between a man and a woman.⁵³

Jerry Brown was elected to a third gubernatorial term in 2010, defeating former eBay CEO Meg Whitman.⁵⁴ While campaigning, Brown stated that he would "rather have a society where we didn't have to use death as a punishment," but since it remains law in California, "we've got to make it work."⁵⁵ During his third term, California came out of a budget deficit and had a surplus.⁵⁶ When elected to a historic fourth term in 2014, Brown vowed to use the next four years to "make the government do what it's supposed to do."⁵⁷ In 2016, Brown signed six gun-control bills that places restrictions on semiautomatic rifles and requires background

⁴⁵ Steven Harmon, *Death penalty threatens to once again embroil Brown*, Mercury News, (July 16, 2011), http://www.mercurynews.com/bay-area-news/ci_18491769.

⁴⁶ Jim Newton, *Gov. Jerry Brown: The Long Struggle for the Good Cause*, Table Talk, UCLA Blueprint, (2016), <http://blueprint.ucla.edu/feature/gov-jerry-brown-the-long-struggle-for-the-good-cause/>.

⁴⁷ *Id.*

⁴⁸ Zusha Elinson, *As Mayor, Brown Remade Oakland's Downtown and Himself*, N.Y. Times, (Sept. 2, 2010), <http://www.nytimes.com/2010/09/03/us/politics/03bcbrown.html>.

⁴⁹ Jesse McKinley, *supra* note 43.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Debra J. Saunders, *A Penalty Without Penalty – and to Jerry Brown, It's Working*, Creators, (Mar. 8, 2012), <https://www.creators.com/read/debra-saunders/03/12/a-penalty-without-penalty-and-to-jerry-brown-it-s-working>.

⁵³ Justin Ewers, *California Attorney General Jerry Brown asks Court to Overturn Prop 8*, U.S. News & World Report, (Dec. 22, 2008), <http://www.usnews.com/news/articles/2008/12/22/california-attorney-general-jerry-brown-asks-court-to-overturn-prop-8>. The Prop 8 amendment was eventually overturned by a federal district court. Same-sex marriage came to California when the U.S. Supreme Court held in 2013 that the refusal of Governor Brown and other state officials to defend the amendment left no one with standing to challenge the district court's decision. See, e.g., Dylan Matthews, *The Supreme Court ended Proposition 8. Here's what that means*, Washington Post, (June 26, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/06/26/the-supreme-court-ended-proposition-8-heres-what-that-means/>

⁵⁴ Laura Mandaro, *Jerry Brown wins fourth term as California governor*, USA Today, (Nov. 5, 2014), <http://www.usatoday.com/story/news/nation-now/2014/11/05/jerry-brown-california-governor/18520473/>.

⁵⁵ Debra J. Saunders, *supra* note 52.

⁵⁶ David Siders, *Gov. Jerry Brown wins historic fourth term*, Sacramento Bee, (Nov. 4, 2014), <http://www.sacbee.com/news/politics-government/election/article3568891.html>.

⁵⁷ *Id.*

checks for ammunition purchases.⁵⁸ The National Rifle Association criticized Brown for exploiting the terrorist attacks in San Bernardino for political gain, calling the legislation “draconian.”⁵⁹

Board of Parole Hearings

The current Executive Officer of the BPH is **Jennifer Shaffer**, who was appointed by **Governor Brown** on June 10, 2011.⁶⁰ She acts as the administrative head of the BPH, and is responsible for managing its daily operations and implementing policies.⁶¹ The position of chairperson is vacant.⁶²

b. Legislative Structure and Political Make-Up

The California State Legislature is a bicameral body consisting of the lower house (the California State Assembly), containing 80 members, and the upper house (the California State Senate) containing 40 members.⁶³ The lower house is currently made up of 25 Republicans and 55 Democrats, while the upper house consists of 13 Republicans and 27 Democrats.⁶⁴

c. Judicial Review of State Clemency

In 1951, the Supreme Court of California found in *People v. Odle* that courts do not generally have the power to reduce an appellant’s death sentence to a sentence of life in prison.⁶⁵ “[T]he court can reduce the punishment in lieu of ordering a new trial, when the only error relates to the punishment imposed.”⁶⁶ However, it found no indication that the judiciary has the power to reverse a judgment if there has been no error in the proceedings. “To construe the [power] otherwise would give the court clemency powers similar to those vested in the Governor...and raise serious constitutional questions relating to the separation of powers.”⁶⁷ Again in *People v. Hines*, the court found no error relating to the imposition of a death sentence and therefore declined to reduce the punishment.⁶⁸

The Third District Court of Appeals of California in *Way v. Superior Court* agreed that clemency power rests exclusively with the governor, based on records from California’s Constitutional Convention in 1879.⁶⁹ The court pointed to the fact that a proposed amendment was defeated at the Convention that would have given the state legislature concurrent clemency power as evidence that the governor’s power is and remains exclusive.⁷⁰

⁵⁸ Patrick McGreevy, *In move to ‘enhance public safety,’ Gov. Jerry Brown signs gun-control proposals into law*, L.A. Times, (July 1, 2016), <http://www.latimes.com/politics/la-pol-ca-brown-guns-20160701-snap-story.html>.

⁵⁹ *Id.*

⁶⁰ *Board of Parole Hearings Executive Officer*, California Department of Corrections and Rehabilitation, http://www.cdcr.ca.gov/BOPH/executive_officer.html (last visited Mar. 27, 2017).

⁶¹ *Id.*

⁶² *Board of Parole Hearings Chairperson*, California Department of Corrections and Rehabilitations, <http://www.cdcr.ca.gov/BOPH/chairperson.html> (last visited Mar. 27, 2017).

⁶³ Cal. Const. art. IV.

⁶⁴ *Members*, California State Assembly, <http://assembly.ca.gov/assemblymembers> (last visited Mar. 27, 2017);

Senators, California State Senate, <http://senate.ca.gov/senators> (last visited Mar. 27, 2017).

⁶⁵ *People v. Odle*, 37 Cal.2d 52, 57 (1951).

⁶⁶ *Id.*

⁶⁷ *Id.* at 58.

⁶⁸ *People v. Hines*, 15 Cal.4th 997, 1079-80 (1997).

⁶⁹ *Way v. Superior Court*, 74 Cal.App.3d 165, 175 (1977).

⁷⁰ *Id.*

III. Supplemental State Information

*In thinking about clemency, it is vital to remember that this stage of the death penalty process takes place outside of a courtroom, and is typically directed at a non-legal (or at the very least, non-judicial) audience. Depending on where the petitioner has been convicted and sentenced, a clemency petition will be considered either by the governor, a board of pardons and paroles, or both. Regardless of the individual or entity responsible for the ultimate clemency decision, **politics and public opinion will almost always come into play as this critical decision is made.** For governors, clemency decisions are often perceived (rightly or wrongly) as political ‘hot potatoes’ that can be used against them if the public is not supportive. Even in states where clemency authority rests solely with a board, members are almost always appointed by the governor, and, therefore, also frequently feel constrained by the inherently political nature of their roles. As such, it is crucial to remember that local politics, history, demographics, culture, and ethos are always at play when a plea for clemency is being considered. In recognition of the fact that a truly compelling clemency petition cannot be brought without first considering how the issues raised will play out in that particular jurisdiction, the remainder of this memorandum is dedicated to providing some generalized information to better understand the culture and politics in the state where clemency is being sought.*

a. State-wide Demographics

i. General Population

The U.S. Census Bureau estimated California’s 2015 population at 39,144,818.⁷¹ As of July 1, 2015, California’s racial make-up was as follows:

Ethnicity	California, total population ⁷²
White (not Hispanic or Latino)	38.0%
Black	6.5%
Hispanic/Latino	38.8%
Asian	14.7%
Other	2%

ii. Political Breakdown

As of May 2016, 72.3% of eligible adults were registered voters in California, totaling 17.9 million people.⁷³ 44.8% are registered as Democrats as of 2016, which is up from 2012, when 43.7% of registered voters were Democrats.⁷⁴ The share of Republicans is down from 29.4% in 2011 to 27.3% in 2016.⁷⁵ The percentage of declared Independents (including those that “decline to state” or have “no party preference”) has increased to 23.3% in 2016 from 20.9% in 2012.⁷⁶ The Public Policy Institute of California’s survey

⁷¹ *Quickfacts: California*, U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/06_00 (last visited Mar. 29, 2017).

⁷² *Id.*

⁷³ *California Voter and Party Profiles*, Public Policy Institute of California, (Sept. 2016), http://www.ppic.org/main/publication_show.asp?i=526.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

results indicated that among those considered most likely to vote, 45% are Democrats, 31% are Republicans, and 20% are independents.⁷⁷

iii. Religious Make-Up⁷⁸

Christians make up a majority of California’s population, with 63% of citizens identifying themselves as such. More specifically, 32% of Californians identify as Protestant, while 28% identify as Catholic, with all other Christian denominations constituting less than 1% of California’s population. 9% identify as members of non-Christian faiths, including Judaism, Buddhism, Hinduism, and other religions. 27% of Californians identify themselves as unaffiliated or religion “none.”

iv. Income/Socioeconomic Breakdown

The following table lists California’s socioeconomic statistics in comparison to national averages:⁷⁹

	California	United States
Per capita income (in 2015 dollars)	\$30,318	\$28,930
Median household income 2011-2015	\$61,818	\$53,889
Persons in poverty	15.3%	13.5%
Language other than English spoken at home	43.9%	21.0%
High school graduate or higher (ages 25+)	81.8%	86.7%
Bachelor’s degree or higher (ages 25+)	31.4%	29.8%

In spring 2016, Governor Brown signed legislation raising California’s mandatory minimum wage to \$15 an hour by 2022.⁸⁰ Brown, who has been characterized as a fiscal moderate and has previously expressed reservations about a wage increase, signed the legislation amid growing concern about income inequality in California and the national thrust of the labor-backed “Fight for 15” campaign.⁸¹ Governor Brown compromised with lawmakers by including a provision that allows the governor to postpone a wage increase in the event of an economic downturn.⁸²

Research indicates that income inequality in California is severe. California is home to more individuals with net worths of at least \$30 million than anywhere else in the country, but the state also exhibits the

⁷⁷ *Id.*

⁷⁸ All of the statistics in this section are from *Adults in California*, Pew Research Center, <http://www.pewforum.org/religious-landscape-study/state/california/> (last visited Mar. 27, 2017).

⁷⁹ *Quickfacts: California*, supra note 71.

⁸⁰ David Siders, *Jerry Brown signs \$15 minimum wage in California*, Sacramento Bee, (Apr. 4, 2016) <http://www.sacbee.com/news/politics-government/capitol-alert/article69842317.html>.

⁸¹ *Id.*

⁸² *Id.*

highest poverty rate in the nation when cost of living is taken into account.⁸³ Between 1979 and 2012, California's "Top One Percent" nearly doubled their incomes, while incomes for the other 99 percent fell by 6.3 percent.⁸⁴ One frequently cited reason for the astronomical growth in wealth has been the technology boom.⁸⁵ Since 2005, California tech companies added at least 23 billionaires to the list of richest Americans, while Twitter alone created 1,600 millionaires overnight when it went public.⁸⁶

While income inequality in California is stark across the board, it is particularly acute when looked at by race. The average net worth of African Americans is just 14 percent that of whites in California; for Latinos, that number is just 15 percent that of whites.⁸⁷ In addition, studies reveal that a lack of retirement savings renders African Americans and Latinos over the age of 65 more than two and a half times as likely to live in poverty as whites.⁸⁸ Education rates do not account for this disparity, as people of color with a bachelor's degree or higher in California still earn five dollars less per hour than their non-Hispanic white counterparts.⁸⁹ Trends in homeownership also underscore the economic inequality.⁹⁰ 64% of white households are owner-occupied, as compared to only 34% of African-American households and 44% of Latino households. In addition, studies show that California has ten of the 20 least affordable rental markets in the country.⁹¹

b. Criminal Justice

i. Overall Prison Population

Total Prison Population as of March 2015: 112,300.⁹²

California's prison population has been on the decline for the last ten years, since its peak of 163,000 in 2006.⁹³

⁸³ Manuel Pastor and Dan Braun, *The California Chasm: A Look At Income Inequality In The Golden State*, Huffington Post, (Feb. 12, 2015), http://www.huffingtonpost.com/2015/02/12/california-income-inequality_n_6673042.html.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *California's Changing Prison Population*, Public Policy Institute of California, (Apr. 2015), http://www.ppic.org/main/publication_show.asp?i=702.

⁹³ *Id.*

Prison Population breakdown by type of crime committed:

Type of Crime Committed	Percentage of Prison Population ⁹⁴
Drug Crimes	8.4%
Property Crimes	13.5%
Crimes Against Persons (specifics noted in the following rows)	71%
-- Assault	20.2%
-- Murder	17.9%
-- Robbery	15.6%

The following table shows the breakdown of California’s prison population and death row population by ethnicity, as compared to its overall population:

Ethnicity	Total population (as of July 1, 2015) ⁹⁵	Prison population (as of December 31, 2013) ⁹⁶	Death row population (as of July, 2016) ⁹⁷
White (not Hispanic or Latino)	38.0%	22.2%	33.7%
Black	6.5%	28.9%	36.1%
Hispanic/Latino	38.8%	41.1%	24.5%
Asian	14.4%	0.8%	Asian death row prisoners are included in “other” category.
Other	2%	7%	5%

⁹⁴ *Id.*

⁹⁵ *Quickfacts: California*, supra note 71.

⁹⁶ Jay Atkinson *et al*, *Prison Census Data*, California Department of Corrections and Rehabilitation, (May 21, 2014), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENSUSd1312.pdf

⁹⁷ *Death Row Tracking System, Condemned Inmate Summary List*, California Department of Corrections and Rehabilitation Division of Adult Operations, (May 12, 2016), http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateSummary.pdf.

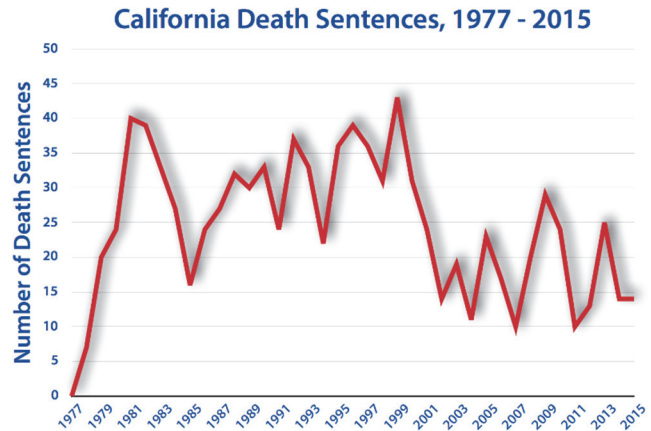
ii. Death Row Population and Demographics

- Total Prisoners on Death Row: 747⁹⁸
- Men on Death Row: 726⁹⁹
- Women on Death Row: 21¹⁰⁰

iii. Executions (Past and Pending)¹⁰¹

Total Number of Executions since 1976: 13

- Most Recent Execution: January 17, 2006¹⁰²
- Number of Executions Scheduled for 2017: 0
- Stays Issued in 2015 and 2016: 0



iv. Exonerations/Innocence¹⁰³

The following represent a handful of the high-profile cases in which individuals sentenced to death in California had their sentences overturned, were acquitted on retrial, had the charges against them dropped, or have otherwise maintained their innocence.

Paul Imbler was found guilty and sentenced to death for the 1961 murder of a store owner after the owner's wife picked Imbler out of a photo lineup.¹⁰⁴ A witness, Alfred Costello, also told police he chased Imbler after the attack and recovered Imbler's coat and weapon. Additionally, a fingerprint expert testified that Ingler's print matched one found at the crime scene.¹⁰⁵ After trial, independent investigators discovered that Costello was mentally ill and also an ex-convict who had been running an illegal gambling operation out of the victim's store.¹⁰⁶ The investigators learned that Costello's testimony was coerced by the prosecutor.¹⁰⁷ Additionally, the fingerprint expert's testimony was discovered to be false.¹⁰⁸ A federal district court

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *California*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/california-1> (last visited Sept. 8, 2016).

¹⁰² *Capital Punishment: Inmates Executed, 1978 to Present*, California Department of Corrections & Rehabilitation, http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html (last visited Mar. 27, 2017).

¹⁰³ For inclusion in this section, an individual must have been convicted, sentenced to death, and subsequently either been acquitted of all charges related to the crime that placed them on death row, had all charges related to the crime that placed them on death row dismissed by the prosecution, or been granted a complete pardon based on evidence of innocence. This characterization mirrors the language used by national entities tracking death row exonerations, such as the National Registry of Exoneration and the Death Penalty Information Center. See *Glossary*, The National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> (last visited Dec. 19, 2016); *Innocence: List of those freed from death row*, Death Penalty Information Center, <http://deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Dec. 19, 2016).

¹⁰⁴ *California*, *supra* note 101.

¹⁰⁵ *Paul Kern Imbler*, Wrongly Convicted Database Record, Forejustice.org, <http://forejustice.org/db/Imbler--Paul-Kern-.html> (last visited Mar. 27, 2017).

¹⁰⁶ *California*, *supra* note 101.

¹⁰⁷ Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, Pace Law Faculty Publications, (Jan. 13, 2010), <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1635&context=lawfaculty>).

¹⁰⁸ *Paul Kern Imbler*, *supra* note 105.

overtaken Imbler's death sentence in 1971, finding eight instances of prosecutorial misconduct during trial.¹⁰⁹

Ernest (Shujaa) Graham was convicted of murder in 1976 and subsequently acquitted in 1981.¹¹⁰ In November 1973, he and a co-defendant were charged with killing a corrections officer.¹¹¹ After an initial mistrial, Graham was retried and sentenced to death in 1976.¹¹² The Supreme Court of California reversed the conviction because prosecutors improperly used their peremptory challenges to exclude black prospective jurors.¹¹³ Graham's third trial ended in a hung jury, and he was later found not guilty in his fourth trial.¹¹⁴

Troy Lee Jones was convicted and sentenced to death in 1982 for the murder of his girlfriend.¹¹⁵ In June, 1996, the Supreme Court of California granted Jones a new trial due to ineffective assistance of counsel.¹¹⁶ The Court found that Jones' defense attorney failed to conduct an adequate pretrial investigation, speak with possible witnesses, obtain a relevant police report, or seek pretrial investigative funds.¹¹⁷ Moreover, Jones' attorney elicited damaging testimony against his own client.¹¹⁸ In November 1996, after Jones spent 14 years on death row, the prosecution announced that it was dropping all charges and would not seek to retry the case.¹¹⁹

Oscar Lee Morris was convicted in 1983 of killing a man in a Long Beach bathhouse and sentenced to death.¹²⁰ In 1988, his death sentence was vacated by the Supreme Court of California.¹²¹ Although the court did not overturn his conviction, it later ordered an evidentiary hearing when the state's chief witness against Morris issued a deathbed recantation. This recantation resulted in the ordering of a new trial.¹²² Prosecutors decided not to retry the case, and Morris was freed in 2000.¹²³

Kenneth Clair, who had been on death row for nearly 30 years, received a grant of federal habeas corpus in 2016 and will likely be resentenced to life in prison.¹²⁴ In March 2016, the U.S. Court of Appeals for the Ninth Circuit overturned Clair's death sentence and sealed the records.¹²⁵ According to documents obtained by the *Orange County Register*, Clair will serve a sentence of life because of errors made by his attorney

¹⁰⁹ Bennett L. Gershman, *supra* note 107.

¹¹⁰ See *Innocence Cases*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last visited Mar. 27, 2017) (The details on the individual cases can be found by clicking on the link for "Descriptions of Innocence Cases.").

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* See also, *Oscar Morris*, The National Registry of Exonerations, (June 2012), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3493>.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Tony Saavedra, *Santa Ana killer Kenneth Clair is spared death row – but not because of online petition*, Orange Co. Register, (Jan. 8, 2016), <http://www.ocregister.com/articles/clair-699237-court-evidence.html>.

¹²⁵ *Id.*

during trial.¹²⁶ The appellate court found that Clair's attorney failed to present evidence that would have swayed the jury towards compassion, namely that he was repeatedly raped behind bars as a teenager during his previous prison stint for purse snatching.¹²⁷ Although he is no longer on death row, the refusal to exonerate Clair triggered protests on social media as some people are concerned by his continued imprisonment for a case filled with contradictory evidence, some of which points to actual innocence.¹²⁸

c. Public Opinion Polling

A Field Poll released in January 2016, found that 47% of California voters favored replacing the death penalty with life in prison without the possibility of parole, up from 40% in 2014.¹²⁹ However, 48% of voters told the pollsters they would support proposals to accelerate the state's notoriously slow system of resolving death penalty appeals.¹³⁰ In 2012, 53% of voters voted against Proposition 34, a ballot measure to repeal the death penalty as the maximum punishment for those found guilty of murder.¹³¹

Then, most recently, in November 2016, 53.15% of California voters rejected Proposition 62 to repeal the death penalty and replace the maximum punishment for murder with life in prison without the possibility of parole, and with and passed Proposition 66, which was designed to shorten the length of time for capital appeals and make significant other death penalty procedures and laws, passed with 51.13% of the vote.¹³²

IV. Additional Information for Consideration in Clemency

a. Past Capital Clemency Decisions

i. Grants

It has been 50 years since a governor last commuted a death sentence in California. In 1967, Governor Ronald Reagan commuted **Calvin Thomas's** sentence from death to life imprisonment, after it was discovered that Thomas, who was convicted of murdering a three-year-old boy, had organic brain damage that was not discovered until after his trial.¹³³

Another commutation of note is that of **William Lindley**, who was sentenced to death in 1943 for the murder of a 13-year-old girl.¹³⁴ Both a witness and the victim, before she died, claimed that the attacker was redheaded.¹³⁵ Lindley, a local farmer, also had red hair. Further, a jailhouse informant claimed that Lindley

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Howard Mintz, *Poll: California death penalty is toss-up for voters*, The Mercury News, (Jan. 14, 2016), http://www.mercurynews.com/crime-courts/ci_29389450/field-poll-california-death-penalty-is-toss-up.

¹³⁰ *Id.*

¹³¹ Howard Mintz and Matt O'Brien, *Proposition 34: Death penalty repeal fails*, The Mercury News, (Nov. 6, 2012), http://www.mercurynews.com/ci_21943752/california-proposition-34-voters-decide-whether-keep-states.

¹³² *California Proposition 62, Repeal of the Death Penalty (2016)*, Ballotpedia, [https://ballotpedia.org/California_Death_Penalty_Repeal_Proposition_62_\(2016\)](https://ballotpedia.org/California_Death_Penalty_Repeal_Proposition_62_(2016)) (last visited Mar. 27, 2017);

California Proposition 66, Death Penalty Procedures (2016), Ballotpedia, [https://ballotpedia.org/California_Proposition_66_Death_Penalty_Procedures_\(2016\)](https://ballotpedia.org/California_Proposition_66_Death_Penalty_Procedures_(2016)) (last visited March 27, 2017).

¹³³ Harriet Chiang, *No Clemency If History Is a Precedent/ Experts say Davis is unlikely to spare Babbitt*, S.F. Chron. (Apr. 26, 1999), <http://www.sfgate.com/news/article/No-Clemency-If-History-Is-a-Precedent-Experts-2934446.php>.

¹³⁴ *California*, *supra* note 101.

¹³⁵ *Id.*

had confessed to the crime.¹³⁶ However, a new attorney investigating the case after Lindley was sentenced discovered that the witness was colorblind, and therefore would have been unable to accurately determine the attacker's hair color.¹³⁷ He also learned that there had been another redheaded farmer in the area, with mysterious scratches on his face, who had repeatedly confessed to the murder.¹³⁸ In 1946, Lindley, who was also illiterate and mentally ill, came within hours of being executed three different times before being given temporary reprieves.¹³⁹ Finally, Governor Earl Warren commuted his sentence to life imprisonment in 1947.¹⁴⁰

ii. Denials (where newsworthy or controversial)

Clarence Ray Allen

Clarence Ray Allen was executed on January 17, 2006—California's most recent execution.¹⁴¹ He was convicted of arranging a triple homicide from prison, where he was serving a life sentence for a prior murder.¹⁴² One of the victims had testified against Allen in a previous trial.¹⁴³ As a result, a California jury sentenced him to death.¹⁴⁴ Allen's attorneys submitted a petition requesting clemency, arguing that executing a 76-year-old prisoner who was diabetic, legally blind, and nearly deaf was unconstitutional.¹⁴⁵ Allen's lawyers also claimed that he was no longer a threat to society, but his request was denied by then-Governor Arnold Schwarzenegger, who made his decision without hearing oral arguments on clemency from either side.¹⁴⁶

Schwarzenegger reasoned that "[Allen's] conduct did not result from youth or inexperience, but instead resulted from the hardened and calculating decisions of a mature man."¹⁴⁷ Schwarzenegger also factored the nature of Allen's crimes and the jury's previous decision into his conclusion. "Allen's crimes are the most dangerous sort because they attack the justice system itself. The passage of time does not excuse Allen from the jury's punishment."¹⁴⁸

Stanley "Tookie" Williams

Stanley "Tookie" Williams was executed on December 13, 2005, almost 25 years after he was sentenced.¹⁴⁹ His petition for clemency was denied by Governor Schwarzenegger the day before his scheduled

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Capital Punishment: Inmates Executed, 1978 to Present*, *supra* note 102.

¹⁴² Jim Doyle, *Double life of a Death Row killer/Charismatic multiple murderer Clarence Ray Allen, 75, didn't turn really bad until his 40s*, S.F. Chron, (Jan. 12, 2006), <http://www.sfgate.com/news/article/Double-life-of-a-Death-Row-killer-Charismatic-2506688.php>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Suzanne Herel, *Governor denies clemency for Allen*, S.F. Chron, (Jan. 13, 2006), <http://www.sfgate.com/news/article/Governor-denies-clemency-for-Allen-2506258.php>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Henry Weinstein, *Schwarzenegger denies clemency for elderly murderer*, Seattle Times, (Jan. 13, 2006), <http://www.seattletimes.com/nation-world/schwarzenegger-denies-clemency-for-elderly-murderer/>.

¹⁴⁹ *Capital Punishment: Inmates Executed, 1978 to Present*, *supra* note 102.

execution.¹⁵⁰ Schwarzenegger also denied Williams' request for a stay based on an assertion of innocence.¹⁵¹ Williams, the former leader of the Crips gang, was convicted for the deaths of four people in Los Angeles during an "avalanche" of gang violence in the city.¹⁵² Williams maintained his innocence throughout his trial and appeals, but based his request for clemency on his behavior and rehabilitation in prison.¹⁵³ While on death row, Williams wrote nine children's books aimed to steer boys away from gangs and prison.¹⁵⁴ Williams also maintained a website where gang members could reach out for guidance, and published a monthly newsletter for kids.¹⁵⁵

Williams was nominated for the Nobel Peace Prize three times, and in denying his appeal, the U.S. Court of Appeals for the Ninth Circuit noted that Williams was a good candidate for clemency due to his efforts to thwart gang violence.¹⁵⁶ Yet, in his lengthy statement released regarding denial of clemency, Schwarzenegger criticized Williams' books, citing to continued gang violence as a sign of weakness in Williams' efforts.¹⁵⁷ Schwarzenegger also did not address details of the mitigating and aggravating facts in Williams' clemency request, differing from the usual practices of previous governors.¹⁵⁸ Instead, the governor focused on letters from law enforcement officials that he received urging denial of clemency, and further criticized Williams for maintaining his innocence.¹⁵⁹ Numerous prominent figures voiced support for clemency, including South African Bishop Desmond Tutu and hip-hop artist Snoop Dogg.¹⁶⁰ However, "political strategists on both sides of the death penalty debate said...[Schwarzenegger] took the politically safe road by denying clemency..."¹⁶¹ At the time, the governor was facing a bid for reelection, and some argued Schwarzenegger was more interested in appealing to swing voters.¹⁶²

No California governor has granted clemency to a death row prisoner since 1967.¹⁶³

b. Relevant State Death Penalty (Non-Clemency) Opinions

Jones v. Chappell; Jones v. Davis

In 2014, California's death penalty received significant attention when a U.S. District Court held that California's post-conviction review process violates the Eighth Amendment because it has become so "inordinately and unnecessarily delayed that only an arbitrarily selected few of those sentenced to death

¹⁵⁰ Sarah Kershaw, *Governor Rejects Clemency for Inmate on Death Row*, N.Y. Times, (Dec. 13, 2005), http://www.nytimes.com/2005/12/13/us/governor-rejects-clemency-for-inmate-on-death-row.html?_r=0.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Evelyn Nieves, *Schwarzenegger Clemency Denial Called Politically Safe*, Washington Post, (Dec. 14, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/13/AR2005121300026.html>.

¹⁵⁴ Kimberley Sevcik, *Has Stanley Williams left the Gang?*, N.Y. Times, (Aug. 10, 2003), <http://www.nytimes.com/2003/08/10/magazine/has-stanley-williams-left-the-gang.html?pagewanted=all>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Evelyn Nieves, *supra* note 153.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Jenifer Warren and Maura Dolan, *Tookie Williams is Executed*, L.A. Times, (Dec. 13, 2005), <http://www.latimes.com/local/la-me-execution13dec13-story.html>.

¹⁶¹ Evelyn Nieves, *supra* note 153.

¹⁶² *Id.*

¹⁶³ *Clemency*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/clemency> (last visited Mar. 27, 2017).

are executed.”¹⁶⁴ The order noted that since 1978, when the current death penalty system was adopted, over 900 people have been sentenced to death, while only 13 have been executed.¹⁶⁵ In California, the length of time between sentence and execution are particularly long –averaging more than 25 years, as compared to around ten or eleven years in other jurisdictions.¹⁶⁶ Therefore, petitioner Ernest Jones argued, when a prisoner like him is sentenced to death in California they do not receive a death sentence, but rather a sentence of “life in prison, with the remote possibility of death.”¹⁶⁷ The decision also noted the fact that the few executions that do take place are so sparing to be arbitrary.¹⁶⁸

The District Court agreed that, for all practical purposes, a death sentence in California is really a life sentence with a remote possibility of death—which it held is a sentence no rational legislature or jury could ever impose.¹⁶⁹ Judge Carney wrote:

[Inmates’] selection for execution will not depend on whether their crime was one of passion or premeditation, on whether they killed one person or ten, or on any other proxy for the relative penological value that will be achieved by executing that inmate over any other. Nor will it even depend on the perhaps neutral criterion of executing inmates in the order in which they arrived on Death Row. Rather it will depend upon a factor largely outside an inmate’s control, and wholly divorced from the penological purposes the State sought to achieve by sentencing him to death in the first instance: how quickly the inmate proceeds through the State’s dysfunctional post-conviction review process.¹⁷⁰

The U.S. District Court concluded that the death penalty as carried out in California is deprived of any legitimate deterrent or retributive effect and thus violates the Eighth Amendment.¹⁷¹

The next year, the U.S. Court of Appeals for the Ninth Circuit overturned the District Court opinion in (newly captioned) *Jones v. Davis*, but did not assess the substantive validity of prisoner Jones’s claims.¹⁷² Instead, the court stated that because the petitioner asked the court to apply a novel constitutional rule, it must deny the claim as barred by U.S. Supreme Court precedent.¹⁷³ The Ninth Circuit stated that “the purpose of federal habeas corpus is to ensure that the state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine.”¹⁷⁴

¹⁶⁴ *Jones v. Chappell*, 31 F. Supp. 3d 1050, 1067 (C.D. Cal. 2014).

¹⁶⁵ *Id.* at 1053.

¹⁶⁶ *Id.* at 1066-67.

¹⁶⁷ *Id.* at 1053.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1062.

¹⁷¹ *Id.* at 1063, 1067.

¹⁷² *Jones v. Davis*, 806 F.3d 538, 553 (9th Cir. 2015).

¹⁷³ *Id.* at 541-43.

¹⁷⁴ *Id.* at 553 (internal citations omitted).

c. Divisive/Important Political Issues in the State

Death Penalty Debate— 2016 Propositions

As discussed briefly above, two opposing ballot initiatives went head-to-head in November 2016 relating to the death penalty in California. The “Death Penalty Reform and Savings Act of 2016” (Proposition 66) was designed to, among other things, curtail the appeals process and bypass public review of execution protocol; while “The Justice That Works Act of 2016” (Proposition 62) was to repeal the death penalty, including for those currently on death row.¹⁷⁵ Proposition 66 passed by only 51% of the vote and Proposition 62 failed.¹⁷⁶

If implemented, Proposition 66 will change a variety of procedures governing state court appeals and petitions challenging death penalty convictions and sentences in California.¹⁷⁷ Initial petitions will be sent to the superior court and successive petitions will be limited.¹⁷⁸ It will also put time limits on state court death penalty review.¹⁷⁹ In an effort to address the delays associated with appointing counsel, Proposition 66 will require appointed attorneys who take noncapital appeals to accept death penalty appeals.¹⁸⁰ Additionally, it will exempt execution procedures from notice-and-comment rulemaking under the California Administrative Procedure Act.¹⁸¹ A legal challenge to Proposition 66 was filed the day after the election, but the case has not yet been argued or decided by the Supreme Court of California.¹⁸²

Prison Overcrowding

In the past ten years, California has faced severe prison overcrowding. In 2009, a panel of federal judges ordered the California prison system to reduce its prisoner population by nearly 27%.¹⁸³ Proposition 47 passed in 2014, aimed at reducing certain criminal penalties in an effort to reduce prison populations, and resulted in the release of nearly 3,000 prisoners by early 2015.¹⁸⁴ Although the state has a law requiring a minimum sentence of 25 years to life for three-time repeat offenders with multiple prior serious or violent felony convictions,¹⁸⁵ the vote in favor of Proposition 47 showed the voters’ willingness to put an end to California’s “tough-on-crime era,”¹⁸⁶ and move farther away from the “three-strike” law passed twenty years

¹⁷⁵ *Recent Legislative Activity*, Death Penalty Information Center, <http://www.deathpenaltyinfo.org/recent-legislative-activity> (last visited Mar. 27, 2017).

¹⁷⁶ *Narrow Victory for California Prop 66*, ABC30, (Nov. 23, 2016), <http://abc30.com/politics/narrow-victory-for-california-prop-66/1622165/>.

¹⁷⁷ *California Proposition 66, Death Penalty Procedures (2016)*, *supra* note 132.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Tracey Kaplan, *Prop. 62: Challenge already filed to measure that would speed executions*, Mercury News, (Nov. 9, 2016), <http://www.mercurynews.com/2016/11/09/challenge-already-filed-to-measure-that-would-speed-executions/>.

¹⁸³ Solomon Moore, *California Prisons Must Cut Inmate Population*, N.Y. Times, (Aug. 4, 2009), <http://www.nytimes.com/2009/08/05/us/05calif.html>.

¹⁸⁴ Lydia O’Connor, *Landmark California Law has Released Nearly 3,000 Inmates*, Huffington Post, (Mar. 6, 2015), http://www.huffingtonpost.com/2015/03/06/california-prop-47-releases_n_6819242.html.

¹⁸⁵ *A Primer: Three Strikes – The Impact After More Than a Decade*, Legislative Analyst’s Office, (Oct. 2005), http://www.lao.ca.gov/2005/3_Strikes/3_strikes_102005.htm.

¹⁸⁶ Max Ehrenfreund, *California is about to learn that “tough on crime” is tough to undo*, Wash. Post, (Nov. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/11/06/wonkbook-california-is-about-to-learn-that-tough-on-crime-is-tough-to-undo/>.

ago.¹⁸⁷ Proposition 57 passed in the November 2016 general election, making certain classes of non-violent offenders eligible for parole sooner and reversing a law approved in 2000 by voters that sent more juvenile defendants to adult courtrooms, aiming to further reduce the prison population overtime.¹⁸⁸

California's prison overcrowding was deemed to be so severe in 2011 that the U.S. Supreme Court ruled in *Brown v. Plata* that it violated the Eighth Amendment's ban on cruel and usual punishment and ordered the California to reduce its prison population by more than 30,000 prisoners.¹⁸⁹ The opinion described a prison system that fails to deliver minimal care to prisoners with serious medical and mental health problems, thus leading to needless suffering and death.¹⁹⁰ The order would reduce California's prison population to 110,000—still 137.5% of the system's capacity.¹⁹¹ The Court emphasized that California could take other measures beside solely releasing prisoners early—the state could also construct new prisons, transfer prisoners out of state and use some of the county facilities.¹⁹² Justice Kennedy's majority opinion in *Brown v. Plata* was joined by the Court's more liberal members: Justices Ruth Bader Ginsburg, Stephen G. Breyer, Sonia Sotomayor and Elena Kagan.¹⁹³ The late Justice Scalia's dissent termed the majority opinion as an example of the Court overstepping its constitutional authority and institutional expertise in issuing "structural injunctions" in "institutional-reform litigation," rather than addressing legal violations one by one.¹⁹⁴

OC "Snitch Scandal"

In 2014, Deputy Public Defender Scott Sanders filed a 506-page motion in a death penalty case alleging that the Orange County District Attorney's office had been keeping a secret jailhouse snitch network and that County prosecutors had used evidence from this network to bolster convictions in a number of cases, including evidence that was sometimes improperly obtained.¹⁹⁵ Sanders also accused prosecutors of sometimes selectively presenting damning evidence in court and withholding information that could have been beneficial to the defense in violation of a defendant's right to due process. In March 2015, Judge Thomas M. Goethals recused the entire office of District Attorney Tony Rackauckas from a murder case "because of repeated government cheating."¹⁹⁶ Eventually, it was determined that local prosecutors had worked with the Mexican mafia to find a rogue informant and news organization MSNBC to violate a

¹⁸⁷ Niraj Chokshi, *California voters seem ready to put an end to the state's 'tough on crime' era*, Wash. Post, (Oct. 31, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/10/31/california-voters-seem-ready-to-end-the-states-tough-on-crime-era/>.

¹⁸⁸ John Myers, *Proposition 57, Gov. Jerry Brown's push to loosen prison parole rules, is approved by voters*, L.A. Times, (Nov. 8, 2016), <http://www.latimes.com/nation/politics/trailguide/la-na-election-day-2016-proposition-57-gov-jerry-brown-prison-1478452055-htm1story.html>.

¹⁸⁹ *Brown v. Plata*, 563 U.S. 493 (2011); see also Adam Liptak, *Justices, 5-4, Tell California to Cut Prisoner Population*, N.Y. Times, (May 23, 2011), http://www.nytimes.com/2011/05/24/us/24scotus.html?_r=0.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Matt Ferner, *Embattled Orange County Prosecutor Linked to Jailhouse Snitch Scandal is Resigning and Leaving California*, Huffington Post, (Sept. 9, 2015), http://www.huffingtonpost.com/entry/orange-county-erik-petersen-jailhouse-informants_us_55ef6388e4b03784e277096d.

¹⁹⁶ Radley Balko, *The jaw-dropping police/prosecutor scandal in Orange County, Calif.*, Wash. Post, (July 13, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/07/13/the-jaw-dropping-police-prosecutor-scandal-in-orange-county-calif/?tid=a_inl&utm_term=.a4d179859bda. See also *People v. Dekraai*, 5 Cal.App.5th 1110 (2016) (affirming the order on appeal).

suspect's constitutional rights by using a show's production to elicit incriminating statements from a defendant.¹⁹⁷ As of July 2015, these issues have impacted at least three dozen cases.¹⁹⁸

d. Other Relevant Legal, Historical, or Social Issues

One point of interest to note in considering California's capital punishment landscape generally, is that the U.S. Court of Appeals for the Ninth Circuit has frequently been overturned by the U.S. Supreme Court in granting federal habeas relief.¹⁹⁹ Due to the strict provisions governing federal habeas corpus review imposed by the Anti-Terrorism and Effective Death Penalty Act (AEDPA), federal judges are often procedurally unable to grant relief, even where they find such relief is warranted based on the facts of a particular case. The Ninth Circuit has sometimes sought to issue relief despite the AEDPA restrictions, and these opinions have been rebuked and overturned by the U.S. Supreme Court for failing to limit the federal habeas review to the narrow circumstances in which relief can be warranted under AEDPA.²⁰⁰

¹⁹⁷ Balko, *supra* note 196.

¹⁹⁸ *Id.*

¹⁹⁹ See Lincoln Caplan, *The Destruction of Defendants' Rights*, *The New Yorker* (June 21, 2015), <http://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights>.

²⁰⁰ See Maura Dolan, *Clashing courts: Law restricts judges' ability to intervene in state criminal cases*, *L.A. Times* (Sept. 5, 2015), <http://www.latimes.com/local/crime/la-me-courts-clash-20150906-story.html>.