

# PEPPERDINE UNIVERSITY

School of Law

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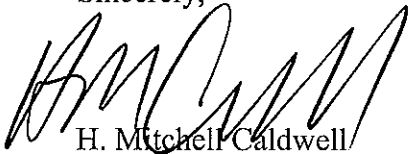
November 8, 2007

Re: Death Penalty Study

Dear Professor Uelmen:

We enclose herewith our final report of our study of how the various district attorneys in the counties of California structure and administer the exercise of discretion to prosecute a homicide as a death penalty case. Please do not hesitate to contact any of us if you have any questions or need additional information.

Sincerely,



H. Mitchell Caldwell  
Professor of Law



Carol A. Chase  
Professor of Law



Christine Chambers Goodman  
Associate Professor of Law

**Death Penalty Survey Report (11/7/07)**

In August 2006, Professors Harry Caldwell, Carol Chase and Chris Chambers Goodman undertook to study the process by which the various district attorneys offices in California make the decision to file capital charges. This study was undertaken on behalf of the California Commission for the Fair Administration of Justice.

After completing preliminary research we prepared a survey, which we sent to the District Attorneys in each of California's 58 counties. This report summarizes our efforts and their results and includes as attachments copies of our survey as well as each response (or documentation reflecting verbal responses).

**THE SURVEY**

Our survey sought two types of information. In Part I we sought information concerning the process by which each office determines whether to file a case as a capital case. In Part II we sought statistical information concerning capital cases and potential capital cases. Our questions in Part II were intended to gather information designed to reveal whether certain types of special circumstance cases are more likely than others to be filed as capital cases, and whether certain characteristics of defendants, victims or the crimes alleged were more likely to result in a capital charge. We also sought information concerning the outcomes of those cases. A copy of our survey is attached as Exhibit A.

Several former and current state prosecutors provided input and comments on our initial drafts of the survey, and we revised the draft survey to incorporate their feedback. Upon completion of our survey, we mailed a copy of the survey with a cover letter (attached as Exhibit B) to the office of each District Attorney on January 30, 2007, requesting a response by February 23, 2007. Initially we received very few responses, and after having research assistants follow up with telephone calls, we re-sent the survey on April 4, 2007, to the offices that had not responded, with a fuller explanation of our purpose in the cover letter (attached as Exhibit C). Through the spring of 2007 and into the summer our research assistants again followed up with each office from which we had not received a response. Additional responses were received, but by September 2007, eight months after our initial request, fewer than half of the counties had responded. In early September 2007, we (Caldwell, Chase & Goodman) personally placed telephone calls to each nonresponding office. On September 11, 2007, we followed up our telephone calls with a faxed letter requesting a response, no later than October 1, 2007 tailored to whether we have spoken to a person or received any return call, or a refusal to respond (attached as Exhibit D). We now believe that we have exhausted our efforts to obtain responses and are unlikely to receive additional responses. If we do receive additional responses, we will update our report to the Commission.

## THE RESULTS

As of the date of this report we have received responses from almost two-thirds of the counties in California. Twenty counties never responded. Of those counties that responded, fourteen counties expressly declined to participate. We had received information from Ventura County District Attorney Totten in January 2007 that some offices (including his) would not respond due to concerns that responding to this survey may negatively impact ongoing, yet unspecified, federal litigation. It is our belief that some offices acted in concert in deciding to refuse participation. Indeed, several offices which declined to participate used identical or nearly identical language (“With all due respect, I must decline to answer the questions in Part I of your survey. However, I can assure you that my decision to file a capital charge is based on my sound discretion, as vested pursuant to Government Code section 26500.”), suggesting some agreement among the offices as to how to respond to the survey. Copies of the responses declining to participate in the survey, including documentation of oral responses, are attached as Exhibit E. Five offices responded by indicating that they had not filed any capital cases during the time period covered by the survey (1/1/97 through 12/31/07) and were either silent as to whether they had a procedure in place to determine whether to file death penalty cases or stated that they had no such procedure in place. Copies of these responses are attached as Exhibit F. Four offices sent summary responses in letters or an email, which addressed some of the questions contained in our survey, but failed to answer many of the questions in the survey. Copies of these responses are attached as Exhibit G. Finally, fourteen offices responded to the survey, either by returning the completed survey to our office at Pepperdine University School of Law or by sending letters or emails that addressed most or all of the questions on the survey. One District Attorney answered portions of the survey by telephone; those answers were recorded onto a survey form. Copies of these responses, as well as a memorandum summarizing these responses, are attached as Exhibit H.

## SUMMARY OF RESULTS

### Non responding district attorneys offices

The following twenty district attorneys offices did not submit any response to the survey:

Alpine  
Del Norte  
Fresno  
Kern  
Marin  
Mariposa  
Merced  
Monterey  
Orange  
Riverside

San Benito  
San Diego  
San Francisco  
San Joaquin  
San Luis Obispo  
Santa Cruz  
Sierra  
Sutter  
Trinity  
Yuba

**Counties responding by indicating they decline to participate (Exh. E)**

The following fourteen counties stated that they would not be participating in the survey:

Alameda (by telephone)  
Contra Costa (by telephone)  
El Dorado (by telephone)  
Lassen (by voicemail)  
Madera (by email)  
Napa  
Placer  
Santa Barbara  
Solano  
Sonoma (by email)  
Stanislaus  
Tulare (by email)  
Ventura  
Yolo (by telephone)

**Counties responding by indicating they have not had capital cases (Exh. F)**

Five counties had no capital cases during the relevant time period and did not provide substantial detail on their process:

Amador (silent as to process)  
Glenn (silent as to process)  
Modoc ("We have no protocol in place at this time.")  
Mono (no policy in place for dealing with death penalty cases)  
Plumas (no written policies regarding the death penalty procedures)

Three additional counties (Mendocino, Nevada, and Tuolumne) indicated that they had had no capital cases in the relevant time period, but did provide more detailed responses, which are included with the responding counties listed below

**Counties submitting brief summary responses (Exh. G)**

Four counties sent brief summaries in one-page letters or emails responding to our survey:

1. Colusa County indicated that it had one capital case during the time period requested, and followed the list of qualifying factors set for in the penal code. (See Attachment "G1").
2. Humboldt County limited its response to cover the period from 2003 to the present, corresponding to the tenure of the current District Attorney. The response indicated that no death penalty charges had been filed during that time. The response further indicated that it is known that the District Attorney is personally opposed to the death penalty, but that the office evaluate all appropriate cases using a system permitting all Deputy District Attorneys to weigh in. The office has a presumption that unless every reviewing deputy believes the facts warrant the death penalty, the office will not so file. Further the District Attorney makes the ultimate decision, although he does carefully weigh the opinions and evaluations of the deputies. (See Attachment "G2").
3. Sacramento County indicated that it has a written policy, which is "internal to the DA's office," and that it does consider information the defense produces. (See Attachment "G3").
4. Siskiyou County limited its response to cover the period from April 2005 to the present, corresponding to the tenure of the current District Attorney. The response indicated that no death penalty charges had been filed during that time. The response further indicated that the office used a committee approach to review a two-defendant case for the death penalty during the reporting period "based upon written guidelines," with the final decision resting with the District Attorney. The response indicated that the office does not maintain the statistical information sought in Part II of the survey. The written guidelines were not provided. (See Attachment "G4").

**Counties responding more fully to the survey (Exh. H)**

Fifteen counties either sent in the surveys (or significant portions thereof) with their responses indicated thereon or send letters or emails that responded to the particular questions on the surveys. Those counties are as follows:

- Butte (survey)
- Calaveras (survey)
- Imperial (survey)
- Inyo (survey)
- Kings (survey)
- Lake (partial responses made by telephone to Professor Goodman, who recorded them)
- Los Angeles (detailed letter)
- Mendocino (partial survey)

Nevada (survey)  
San Bernardino (two emails, one as to process, one as to statistics)  
San Mateo (survey)  
Santa Clara (survey)  
Shasta (survey)  
Tehama (partial survey)  
Tuolumne (survey)

Summary information as to the responses to Part I and Part II is provided separately below. (The responses from each county are attached as Exhibit "H").

***Significant Results as to Process***

Most of the responding offices (10) use a panel or a committee to review whether to seek the death penalty in a special circumstances homicide. In the larger counties and some smaller counties, the panels are typically appointed by the District Attorney using criteria such as seniority, job title, management or supervisory authority. Some offices have a Special Circumstances or Serious Offender Unit. The counties following this approach are Kings, Los Angeles, Mendocino, Nevada, San Bernardino, San Mateo, Santa Clara and Shasta. San Mateo includes a representative from law enforcement on its review panel. Some smaller counties include all prosecutors in the review panel. These are Calaveras and Humboldt (all felony DDAs). Other counties indicated that the review is conducted by the elected District Attorney, including Butte, Imperial (though their response also states that the District Attorney may override that decision), Inyo and Lake. Most of the counties that use review panels use the panels to make a recommendation to the District Attorney, who makes the final decision. These include Nevada, San Mateo, Santa Clara, Shasta, Tuolumne. One county, Los Angeles, makes the recommendation to the Special Circumstances Committee. Of the counties that responded to the question whether the personal views of the members of the committee concerning the death penalty is considered in selecting the committee, none indicated that this is considered, but one (Kings) stated "different views," which suggests that the committee includes people with different views on the death penalty.

The review for the death penalty is "typically" triggered by a request by the filing attorney (Calaveras, Santa Clara) or the mere filing of a case with special circumstances (Mendocino, Imperial, Kings, Nevada, San Mateo, Tuolumne). However in some cases, the trigger occurs when the District Attorney himself makes an initial determination (Butte, Shasta, Inyo). There is no consensus as to the stage in the proceeding that the decision to file a death penalty case is "typically" made. In most counties the ultimate decision usually occurs after the post-preliminary hearing information is filed (Inyo, San Mateo, Shasta). However a noticeable minority of counties make the decision prior to the preliminary hearing (Calaveras, Nevada, Santa Clara).

Most of the responding offices indicated that they do not have written guidelines. These counties include Calaveras, Imperial, Kings, Los Angeles, Santa Clara, San Mateo and Tuolumne. The counties that acknowledged that they have written guidelines are

Inyo (indicating "minimum guidelines"), Lake (in connection with its response it refers to "Penal Code Sections and DA discretion"), Nevada, Shasta and Siskiyou. Three counties (Mendocino, Shasta and San Mateo) indicated that they were willing to provide us with their written guidelines, in response to the survey's request, but to date we have received the written guidelines from Mendocino and Shasta, which are included with their survey responses in Exhibit H.

Finally, the offices differed as to their use of information from the defense in their decision to seek the death penalty. Several indicated that they consider information "informally" if the defense wishes to present information. (Butte, Calaveras, Imperial, Kings and Tuolumne). Others indicated that they "formally" invite input from the defense, either by a personal presentation or by written submission (Los Angeles, Santa Clara, San Mateo and Shasta). Two counties (San Bernardino and Lake), indicated that they do not solicit information from the defense, and two counties (Inyo and Nevada) indicated that they do not consider information from the defense. The remaining county (Mendocino) did not disclose its policies concerning consideration of information from the defense in determining which cases to file as capital cases. San Bernardino County noted that it also seeks input from the victim's family.

#### *Significant Responses as to Death Penalty Statistics*

Although we had hoped to gather statistical information concerning death penalty cases that would shed some light on the decision making process, unfortunately the information we received has been too minimal and incomplete to form the basis for any statistical analysis. In part this is because of the relatively small group of offices that has provided information, and the incomplete nature of much of the information provided. Some counties indicated that they simply do not have the statistics available (Los Angeles, San Mateo). A few had no death penalty cases (Butte, Calaveras, Mendocino, Nevada and Tuolumne). The most populous responding counties with the greatest number of death penalty cases (San Bernardino and Los Angeles) do not maintain statistical information concerning particular characteristics or special circumstances that result in a capital case, or the age or race of the defendants or the race of the victims. Where this information was provided by other counties (Imperial, Inyo, Lake, Nevada, Santa Clara and Shasta), the number of death penalty cases was so small that it would be irresponsible to use this data as the basis for drawing any general conclusions.

Similarly, our requests for information concerning how significant a role in the decision making process is played by the particular listed factors (i.e. defendant's prior criminal history, evidence of absence of remorse) in question 6 of Part II did not yield any helpful results, as the responses showed little consensus. Some offices indicated that the significance of those factors varied with the circumstances of the particular case, while others stated that they could not quantify the factors. There are several factors that an appreciable minority of responding offices indicated do not play a significant role in determining whether to seek the death penalty, and not surprisingly those factors include "budgetary concerns"(4), gender (6), socio-economic status (6), and the defendant's willingness to plead guilty (4). A number of other factors were rated "significant" or

“very significant” by at least six counties, and those factors included defendant’s mental health (6), prior criminal history (7), absence of remorse (6), remorse (6), victim family wishes (6), strength of prosecution evidence (6), and likelihood that jury will impose death (6).

## CONCLUDING REMARKS

There are any number of issues and questions that may have prompted this study regarding California’s death penalty. Perhaps central is whether the death penalty is applied in a consistent or uniform manner statewide, and towards the end so many questions emerge. For instance, do local politics make a difference? Is the death penalty more likely to be sought if a murder occurs in northern San Diego County rather than two miles north in Southern Orange County? Given the disproportionate number of Latinos and African-Americans on California’s death row<sup>1</sup> is race a factor in filing? Are factors that might be particularly significant in less populated rural counties less significant in more populated urban counties? Do particular qualifying special circumstances prove more significant in one county than another? And perhaps ultimately, can such information even be garnered from the efforts we have undertaken in this study? Unfortunately the answer to the last question, to a significant degree, seems to be no.

Of all the decisions that a government can make, the decision to seek to end the life of another human being must be the most important and sobering. These decisions should be made only after careful consideration of specified factors after a clearly defined process designed to ensure fairness and to avoid arbitrary results. As the ultimate decision for each county rests with an elected official, the District Attorney, one would hope that the District Attorney would value transparency in his/her decisionmaking process, both to ensure that these important decisions are being made as evenhandedly as possible and to give the electorate the opportunity to voice its approval or disapproval of the process by which the District Attorney makes these decisions. Unfortunately our experience has revealed a wariness about disclosing information concerning the death penalty decisionmaking process on the part of many district attorneys offices. While some offices--including the office representing the most populous county (Los Angeles), have been very forthcoming--a record of 14 relatively complete responses out of 58 counties paints a distressing picture of the willingness of those who tinker with the machinery of the death penalty to expose their decision-making process to the electorate.

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<sup>1</sup> Of the 667 people currently on death row in the State of California, 35.38% are African-American, and 20.39% are Latino. See, e.g. Cal. Dept. of Corrections and Rehabilitation, Division of Adult Operations, Death Row Tracking System, Condemned Inmate Summary list (09/07/2007).