

GUEST COLUMN

Petitioners and AG Bonta ask California Supreme Court to review constitutionality of death penalty

The California Supreme Court could either grant review and appoint a special master, as suggested by the AG, or deny review without prejudice to the filing of a writ petition before a trial court. The Court could also follow the example of the Washington Supreme Court, which held the death penalty unconstitutional bases on a similar challenge in 2018.

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California's death penalty has long been criticized, including recently by prominent public officials, as racially discriminatory in its administration. In early April, a coalition of petitioners filed *Office of the State Public Defender v. Bonta*, No. S284-496, a case asking the California Supreme Court to exercise its original jurisdiction and to enjoin the State's death penalty. Petitioners claim that the death penalty violates the California Constitution's equal protection guarantee, citing a wealth of studies over many decades indicating that death sentences are disproportionately linked to the race of defendants and victims.

Instead of opposing review, California Attorney General Rob Bonta recognized that the petition presented a question of the "greatest public importance" and asked the Court to grant review and appoint a special master to resolve the constitutionality of the State's death



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penalty based on a developed record. Two county district attorneys, from Riverside and San Bernardino, separately opposed the petition, urging the Court to deny review.

If the Court takes the case, it could soon resolve an important question that has remained open

for decades: whether petitioners can prove that the death penalty violates the California Constitution's equal protection guarantee based on widespread statistical evidence of racially disparate impact, but absent proof of discriminatory intent or purpose on the part of state actors.

Statistics show lasting disparities in the application of the death penalty

Over many years and across the State, peer- and independently reviewed studies have demonstrated consistent and widespread racial disparities in the imposition of the

death penalty in California. One study cited in the petition found—even after controlling for race-neutral factors—that for a period of over two decades, Black defendants were up to 8.7 times more likely, and Latino defendants up to 6.2 times more likely, to receive death sentences as compared to white defendants. And although Black or African American people make up just 6.5% of California’s population, they comprise 35% of the State’s death row. In Orange County, for instance, 89% of defendants sentenced to death between 2010 and 2015 were people of color. And from 2012 to 2019 in Los Angeles County, 100% of the death sentences imposed were on defendants of color.

The death penalty is also more frequently imposed in cases involving white victims. The same 20-year study mentioned above found that—again, after controlling for crime-specific differences and aggravating circumstances—cases involving white victims were up to 8.8 times more likely to result in the death penalty as compared to cases with victims of color. Other studies have found that cases involving Black victims are nearly 60% less likely, and cases involving Hispanic victims 67% less likely, to result in death sentences as compared to those involving white victims. Cases involving both a defendant of color and a white victim are the most likely to result in the death penalty—one study found that such cases involving Latino defendants are up to 8 times more likely to result in a death sentence. Still another study found that prosecutors were 58% less likely to seek the death penalty in cases involving both a Black defendant and Black victim as compared to those with a white victim.

Several features of California’s death penalty suggest these ob-

served disparities are no accident. The near-total overlap between first-degree murder and special-circumstances murder in California, for instance, means that in practically every first-degree murder case, whether death is sought will turn purely on an exercise of prosecutorial discretion. And racial disparities in juror identification and selection also create opportunities for racial bias to taint the consideration of the death penalty.

Given these long-observed trends, high-profile public officials have called for an examination of the death penalty’s constitutionality. In 2020, Governor Newsom filed an amicus brief in *People v. McDaniel*, No. S171393, stating that California’s death penalty “is now, and always has been, infected by racism.” Attorney General Bonta, too, has acknowledged the death penalty system’s “disparate impact based on race.” And several of California’s district attorneys have sought to address the problem. Los Angeles County DA George Gascón issued a directive in late 2020 prohibiting county district attorneys from seeking the death penalty, citing concerns of racial disparities in its imposition. And just last month, Santa Clara County DA Jeff Rosen petitioned to resentencing fifteen defendants on death row, likewise citing the “racially biased” nature of the penalty.

Abroad coalition of petitioners seek California Supreme Court review

In early April, the Office of the State Public Defender, LatinoJustice PRLDEF, Witness to Innocence, the Ella Baker Center for Human Rights, and civil-rights litigator and advocate Eva Paterson filed a petition for writ of mandate directly in the California Supreme Court. Petitioners ask the Court to grant review, without any prior lower-court pro-

ceedings, in an exercise of its original jurisdiction—something the Court typically employs in cases presenting issues of “extraordinary public interest” that “should be resolved promptly.”

Petitioners claim that the State’s death penalty, as administered, violates the California Constitution’s equal protection provision. In support, they cite a variety of statistics demonstrating widespread racial disparities in the imposition of the death penalty. Petitioners note that, in its fractured 1987 decision in *McCleskey v. Kemp*, the U.S. Supreme Court rejected a similar challenge under the federal Equal Protection Clause. But they contend that California’s equal protection guarantee, unlike its federal analogue, “does not require proof of invidious intent” and instead can be violated “when application of a statutory scheme disproportionately harms a protected classification” in its effect. Petitioners urge the Court to reaffirm that the California Constitution’s provision is broader than its federal counterpart and to hold that the State’s current death penalty system violates that provision.

The AG agrees to review, but two county DAs disagree and seek to intervene

Attorney General Bonta answered the petition. Although he acknowledged that his office “routinely opposes petitions for original writ relief,” he characterized this petition as presenting “a matter of the greatest public importance.” As a result, Bonta asked the Court to grant review and appoint a special master or referee to oversee development of a detailed record, evaluate the studies cited by petitioners, and resolve any factual disputes so that the Court could determine the constitutionality of the death penalty. Bonta noted that the Washing-

ton Supreme Court had employed a similar procedure in 2018’s *State v. Gregory*, when it considered the constitutionality of Washington’s death penalty and ultimately held it was unconstitutional because it was imposed in a racially discriminatory manner.

Some public officials have opposed review. Two county district attorneys filed oppositions to the petition: Michael Hestrin, DA of Riverside County, and Jason Anderson, DA of San Bernardino County. The DAs assert that they are real parties in interest to the writ petition and should be able to oppose review as representatives of the People of California who prosecute death penalty cases and litigate habeas petitions relating to death sentences. In their reply, the petitioners challenged the appropriateness of the DAs’ attempted intervention, noting that Attorney General Bonta “serves as the state’s chief law officer” and will represent the interests of the People.

The petition remains pending before the Court. Time will tell whether the Court will greenlight any form of review and, if so, whether it will elect to proceed using a special master or some other mechanism (for instance, by denying the petition without prejudice to the filing of a writ petition before a trial court). But the question of the death penalty’s constitutionality and consistency with equal protection guarantees will no doubt continue to garner significant legal and public attention.

Douglas Fuchs, Eric Vandevelde, Matt Aidan Getz, Lindsay Laird, and Jesse Schupack, all lawyers at *Gibson, Dunn & Crutcher LLP*, represented the Prosecutors Alliance of California, which filed a letter as *amici curiae* in support of review.