February 15, 2008

California Commission on the Fair Administration of Justice
Attn: John Van de Kamp, Chair
900 Lafayette Street, Suite 608
Santa Clara, California 95050

Re: Charging Practices of CA DA’s in Death Penalty Cases, Survey Responses

Dear Mr. Van De Kamp:

The ACLU of Northern California thanks you for the continuing opportunity to provide input to the California Commission on the Fair Administration of Justice. In this letter, we report on the results of a survey regarding the practices of California District Attorneys in deciding whether to pursue a sentence of death. We hope this research assists the Commission in identifying reforms needed to ensure that California’s death penalty is administered in a just, fair and accurate manner.

I. Summary of Findings and Recommendations

As described in detail below, our survey solicited information from defense attorneys about the District Attorney’s procedures for charging special circumstances and deciding whether to pursue death.1 We received responses from all of the most active death penalty counties in California. Our analysis of this data leads to four primary findings:

1) There is great variation in the practices for charging special circumstances and few, if any, checks in place;

2) The individuals who decide whether to pursue death may not reflect the diversity or views of the community;

3) There is great variation in when the decision to seek death is made; and

4) There is significant variation in the involvement of the defense in the process.

This survey was completed with great assistance from the following law students at UC Davis School of Law: Tanya Beserra, Aaron Palley and Jessica Ollendorff.
Based on these findings, there is reason for concern that current District Attorney practices are over-taxing the criminal justice system in two ways. First, current District Attorney practices require the court and the defense to waste resources preparing cases for potential death penalty trials that will not or should not proceed as death penalty trials. By widely charging cases with special circumstances and failing to give timely notice to the defense that the case will not proceed as a death penalty case, the prosecution forces the defense and the court to expend considerable resources on cases that ultimately do not go to trial as death cases. Likewise, by failing to consider the input of the defense, the District Attorneys are likely seek the death penalty in more cases than if they had considered information from the defense. Because the defense is in a unique position to provide information about mitigation, if there is no mechanism to consult the defense, this information will not be considered before trial and more cases will proceed as death penalty trials than necessary.

Second, current District Attorney practices may result in the prosecution seeking death in more cases than the community supports. The results of our survey indicate that those individuals within most District Attorney offices who decide whether to pursue the death penalty do not reflect the racial and ethnic diversity of the State of California. Further, District Attorneys rarely consult members of the community in deciding whether to seek death. Nor can jury verdicts of death be taken as community endorsement of the District Attorney’s decision because those who oppose the death penalty are removed from service, including a disproportionate number of people of color and women. As a result, some District Attorneys may be pursuing death in far more cases than the community would support. This is of particular concern in California because the California Constitution requires that the views of the community be represented in the decision to impose a death sentence.

Further, these disparate practices appear to be related to the geographical disparities in use of the death penalty that exists among the various counties in the state. At the first Commission hearing, Professor Radelet presented evidence documenting these geographic disparities. The Commission has since issued a question asking if geographic disparities are “a problem” and what potential remedies exist. The survey results, combined with the great disparities of resources in defense counsel, support the conclusion that geographic disparities in death sentences are caused, in part, by the wide variety of procedures and standards in place in California counties. To answer the Commission’s question, this is “a problem”: it is unfair and unjust if variation in local procedures and disparities in access to resources result in far more death sentences in some areas of the state than others.

To address these concerns, we recommend the following reforms:

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2 Haney, Craig, “‘Modern’ Death Qualification,” Law and Human Behavior, Vol. 18, No. 6 1994
1) District Attorneys should adopt review procedures to screen homicide cases prior to charging special circumstances and to limit those charges to the most egregious cases;

2) The Rules of Court should be changed to require the District Attorney to give notice of his or her decision whether to pursue death within 120 days of filing the information or indictment and procedures should be implemented to identify cases that definitely will not be pursued as death as early as possible;

3) District Attorneys should adopt written policies that require consultation with the defense attorney before deciding whether to pursue death, including an opportunity for the defense to submit any materials it wishes and for defense attorneys to address review committees;

4) District Attorney review committees should be racially diverse and the committee should consult with representatives of the community including those who do not necessarily support the death penalty; and

5) The Attorney General should ultimately review all local decisions to seek death, to ensure statewide consistency and fairness of the process.

These recommendations and findings are discussed in detail below.

II. Survey Methodology

During the fall of 2007, we conducted a survey of defense attorneys regarding the death penalty charging practices of District Attorneys in their county. Attached as Exhibit A, the survey form was a simple, two page document seeking basic information about how the local District Attorney decides whether to charge special circumstances and whether to pursue a sentence of death. The survey was sent to the Chief Public Defender, Alternate Defender, and head of the appointments panel for each county.

We received a total of 17 responses, covering 17 different counties. All of these responses came from the Chief Public Defender or a deputy public defender with two exceptions. Because San Mateo has no public defender, the response was provided by the head of the appointments panel. In the case of Riverside County, we received no response from the county public defender’s office despite repeated attempts. We thus requested and received a survey response from an attorney in private practice who regularly handles death penalty cases in the county.

Two of the 17 responses came from counties that have effectively abandoned the death penalty in favor of sentencing people to die in prison (San Francisco and Mendocino). The remaining 15 responses come from active death penalty counties. After the initial request was sent, our follow up focused on securing responses from the counties that most frequently pursue death sentences. The counties for which we secured responses...
include the ten counties that have returned the highest number of death sentences since reinstatement, as well as the ten counties that have returned the highest number of death sentences since 2000. Thus, although 15 counties is a small fraction of all of California’s counties, our survey responses include all of the counties that regularly pursue the death penalty. These 15 responses are attached as Exhibit B.

Specifically, we received responses from the following active death penalty counties:

- Alameda
- Contra Costa
- Fresno
- Kern
- Los Angeles
- Orange
- Riverside
- Sacramento
- San Bernardino
- San Diego
- San Mateo
- Santa Clara
- Solano
- Tulare
- Ventura

Because these surveys were completed by defense attorneys rather than the District Attorney’s Office, they cannot be considered conclusive evidence of the practices of these offices. Nevertheless, if the local District Attorney has an established practice regarding death penalty charging, the Public Defender’s Office and defense attorneys who regularly represent defendants facing possible death sentence should be aware of that practice. Further, to the extent that even the defense community does not know what the local prosecutor’s practices are regarding death penalty charging, that lack of transparency and consistency is also relevant.

III. Detailed Findings

1. There is great variation in the practices for charging special circumstances and few, if any, checks in place.

The decision whether to charge special circumstances is critical. It is this decision that transforms a “standard” homicide case into a potential death penalty case. It is a particularly critical decision because California does not require the district attorney to affirmatively give notice of intent to seek death. In fact, the Rules of Court create a presumption that every case charged with special circumstances is a death penalty case, unless and until the district attorney declares otherwise. As a result, courts are legally obliged to follow all of the added precautions of a death penalty case in every special

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6 CA Rule of Court 8.613(b) states, “In any case in which the death penalty may be imposed:
(1) If the prosecution notifies the responsible judge that it intends to seek the death penalty, the judge must notify the presiding judge and the clerk. The clerk must promptly enter the information in the court file.
(2) If the prosecution does not give notice under (1)-and does not give notice to the contrary-the clerk must notify the responsible judge 60 days before the first date set for trial that the prosecution is presumed to seek the death penalty. The judge must notify the presiding judge, and the clerk must promptly enter the information in the court file.”
circumstance case, including the requirement for daily transcripts. Defense attorneys are ethically obliged to prepare every special circumstance case as a death penalty case unless and until the district attorney declares otherwise. While some prosecutors and even defense attorneys believe that the defense can “figure out” which cases are “really” death cases, this is not reliably true. Indeed, in one recent case in Riverside, the prosecution surprised both the court and the defense by declaring for the first time on the day of trial that it was seeking a sentence of death.

Given the critical importance of the decision to charge special circumstances—and the resource implications of this decision to the courts and the defense—it is particularly disturbing that this area elicited the greatest variety of responses in our survey. As shown in Chart 1, the majority of responses indicated that the decision to charge special circumstances is made by the deputy district attorney assigned to charging. The variation arose in the degree to which the deputy district attorney was believed to consult other individuals before making that decision.

**Chart 1**

<table>
<thead>
<tr>
<th>County</th>
<th>Decision Process</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alameda</td>
<td>Deputy DA assigned to charging—“generally, all eligible cases are charge with specials.”</td>
</tr>
<tr>
<td>Contra Costa</td>
<td>A Senior DA—“not every case that is eligible is filed that way but there are enough to make it seem almost that way.”</td>
</tr>
<tr>
<td>Fresno</td>
<td>Deputy DA assigned to charging, possibly after consulting committee and the DA—“where appears eligible usually are charged, though not always.”</td>
</tr>
<tr>
<td>Kern</td>
<td>Unknown</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>Deputy DA assigned to charging</td>
</tr>
<tr>
<td>Orange</td>
<td>Deputy DA assigned to charging for that region—the practice is to “over, rather than undercharge…. In other words, if the facts can be argued to support a special circumstance, that circumstance will be filed.”</td>
</tr>
<tr>
<td>Riverside</td>
<td>The Chief DA after consultation with committee</td>
</tr>
<tr>
<td>Sacramento</td>
<td>Deputy DA assigned to charging</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>A Senior DA</td>
</tr>
<tr>
<td>San Diego</td>
<td>Charging DA, after consulting supervising DA and assigned DA, and sometimes the Chief DA</td>
</tr>
<tr>
<td>San Mateo</td>
<td>A Senior DA</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>A Senior DA</td>
</tr>
<tr>
<td>Solano</td>
<td>The Deputy DA in charge of 187s [homicides]</td>
</tr>
<tr>
<td>Tulare</td>
<td>Deputy DA assigned to charging—“filed in nearly every case they can be.”</td>
</tr>
<tr>
<td>Ventura</td>
<td>Deputy DA assigned to charging, usually consults the felony supervisor</td>
</tr>
</tbody>
</table>


Only five responses indicated a belief that the charging district attorney consulted with supervisors, a review committee or the head District Attorney prior to the decision to charge specials. Similarly, five of 15 responses volunteered that the prosecution appeared to charge special circumstances in nearly every case possible. As to what information is considered, most responses checked all of the available options: police reports, probable cause statements, conversations with police officers and “other.” But this seemed to reflect a lack of knowledge on the part of the individuals completing the survey. Indeed, the response from Tulare County seems to aptly summarize what most defense attorneys know about the information considered before charging special circumstances: “tarot cards, who knows for certain?”

Overall, the responses indicate that there are few if any checks in place prior to charging special circumstances. Moreover, there is little if any information available regarding the level of experience the decision makers have and what, if any, discretion is used in making the decision to charge special circumstances. Given the incredible breadth of California’s death penalty statute, the implications of this finding are significant. The likely result is that many homicide cases enter the system as potential death penalty cases, requiring significant resources from the defense and the court. Because no one in the state of California tracks how many cases are charged with special circumstances, there is no reliable data on this point. In all likelihood, only a small fraction of the cases initially charged with special circumstances proceed all the way to trial as death penalty case. But county and court budgets are forced to absorb the added costs of the far larger category of potential death penalty cases in which special circumstances are initially charged.

2. The individuals who decide whether to pursue death may not reflect the diversity or views of the community.

In all but three of the 15 counties for which responses were received, the defense attorneys indicated that the District Attorney consults a “review panel or committee” prior to making a decision about whether to seek death. The three counties in which review committees apparently are not used are Kern, Sacramento and Solano. For both Sacramento and Solano Counties, the attorneys indicated that the District Attorney consults with the deputy district attorney assigned to the case and either the charging district attorney or the supervising district attorney for all homicide cases. In the case of Kern County, the Chief Public Defender indicated that the procedures were so unpredictable and changeable that he did not know who, if anyone, was consulted.

The significance of the decision of the review committee varies county to county. Only in the case of Los Angeles did the respondent indicate that the decision to pursue death was in fact made by the review committee. In all other cases, the review committee’s decision was characterized as a decision that the District Attorney could “veto” or simply a “recommendation” to the District Attorney, with the ultimate decision being made by the District Attorney himself or herself. The supervisor of the Los Angeles Public Defender’s

death penalty unit later clarified that the review committee in Los Angeles also makes a “recommendation,” and that the final decision is made by the chair of the committee, who is the supervisor of the District Attorney’s death penalty unit.

Significantly, the membership of the review committees is universally limited to members of the District Attorney’s Office. If the membership was established and known to the survey respondent, it was generally described as including senior management only. In a few cases, the review committee appeared to be more “ad hoc,” as in San Diego, where the survey respondent stated that the committee consists of “whichever [Deputy District Attorneys] who handle homicides are interested/ available to hear the trial deputies pitch for/ against the death penalty.”

Most disturbing, only two responses indicated that the review panels are racially diverse: Los Angeles and San Bernardino. As noted in the Los Angeles response, because the panel is limited to senior management in the District Attorney’s Office, the diversity of the panel depends on the diversity of the office management. California prosecutors continue to be overwhelmingly white; this problem is even more pronounced among senior and management level prosecutors. The Daily Journal just reported that, while the Los Angeles District Attorney has made strides in recruiting more diverse attorneys to the office, few attorneys of color have advanced to senior management in the office.

The lack of diversity among the members of the review committee is further exacerbated by the narrow realm of individuals consulted by the prosecutors in making their decision. With the exception of Alameda County, all responses indicated that the District Attorney consulted with the victim’s family prior to the decision to seek death. But only two counties—Tulare and San Diego—offered that the District Attorney consulted with other members of the community.

The cumulative impact of these practices is that the individuals deciding whether to seek death may not reflect the racial and ethnic diversity of the community, or the community values. Because individuals who oppose the death penalty are not permitted to serve on death penalty juries, jury decisions cannot serve as a reliable indicator of community support for individual death sentences. Moreover, because people of color and women are disproportionately excluded from jury service, this segment of the community has the least overall input on the use of the death penalty. This is particularly disturbing given the evidence of racial and ethnic disparities in California’s death penalty.

3. There is great variation in when the decision to seek death is made.

As shown in Chart 2, nine county responses indicated that the District Attorney usually makes a decision about whether to seek death at a known stage: in eight counties, after

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12 Ibid.
13 Haney, supra note 2.
14 Pierce and Radelet, supra note 4, at pp. 37-38.
the preliminary hearing and in one county (Sacramento) before. But in the other six counties, the responses of the defense attorneys indicated that the timing of the decision varies greatly and sometimes the decision is not made until the eve of trial. Indeed, although Riverside County is identified here as a county that normally decides after the preliminary hearing, as noted previously, the District Attorney recently surprised the court and defense counsel on the day set for trial with its intention to seek death.

Chart 2

<table>
<thead>
<tr>
<th>County</th>
<th>When is the decision to seek death made?</th>
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<tbody>
<tr>
<td>Alameda</td>
<td>After preliminary hearing</td>
</tr>
<tr>
<td>Contra Costa</td>
<td>After preliminary hearing</td>
</tr>
<tr>
<td>Fresno</td>
<td>Sometimes after preliminary hearing but sometimes not until trial</td>
</tr>
<tr>
<td>Kern</td>
<td>Varies</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>After preliminary hearing</td>
</tr>
<tr>
<td>Orange</td>
<td>Varies from first few weeks of case to not until trial</td>
</tr>
<tr>
<td>Riverside</td>
<td>After preliminary hearing</td>
</tr>
<tr>
<td>Sacramento</td>
<td>Before preliminary hearing</td>
</tr>
<tr>
<td>San Bernardino</td>
<td>Sometimes before preliminary hearing if high profile, but mostly after</td>
</tr>
<tr>
<td>San Diego</td>
<td>After preliminary hearing</td>
</tr>
<tr>
<td>San Mateo</td>
<td>Varies but often not until the case has reached the trial stage</td>
</tr>
<tr>
<td>Santa Clara</td>
<td>After preliminary hearing</td>
</tr>
<tr>
<td>Solano</td>
<td>Varies, most recently after preliminary hearing</td>
</tr>
<tr>
<td>Tulare</td>
<td>After preliminary hearing</td>
</tr>
<tr>
<td>Ventura</td>
<td>After preliminary hearing</td>
</tr>
</tbody>
</table>

The failure to provide the court and defense timely notice of whether death will be pursued leads to two results: 1) in many cases, the court and the defense unnecessarily expend resources in anticipation of a death penalty trial; and 2) in other cases, the defense fails to properly prepare, resulting in an unfair trial for the defendant. Specifically, the defense must expend time, attorney resources and investigative resources preparing for the penalty phase of trial in cases in which the death penalty may ultimately not be sought or worse yet, not expend the necessary recourses and be unprepared to present critical mitigating evidence at the penalty phase of the trial. Either result causes undue expense to California taxpayers and undue delay in the criminal justice system generally.

4. **There is significant variation in the involvement of the defense in the process.**

County practices are inconsistent regarding the extent to which defense counsel may share information with the prosecution before the decision about whether to seek death is made. It is encouraging that, in most counties, the defense is allowed to at least submit written materials—either a letter or a letter with supporting documentation. In seven counties, defense attorneys are also allowed to speak to the review committee or
prosecutors who will make a recommendation to the District Attorney, though in one county (Sacramento) this was described as the “actual practice” rather than a formal policy. Most disturbing, in three counties the defense attorneys indicated that they were not consulted or allowed to provide any input into the decision making at all. This includes the two most aggressive death penalty counties in California: Riverside and San Bernardino.

Chart 3

<table>
<thead>
<tr>
<th>Responses to Question 9) What participation from the defense is part of the process?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Defense is Not Regularly Consulted</strong></td>
</tr>
<tr>
<td>Kern</td>
</tr>
<tr>
<td>Riverside</td>
</tr>
<tr>
<td>San Bernardino</td>
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<tr>
<td><strong>Defense May Submit Written Materials</strong></td>
</tr>
<tr>
<td>Alameda</td>
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<tr>
<td>Contra Costa</td>
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<tr>
<td>Fresno</td>
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<tr>
<td>Los Angeles</td>
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<tr>
<td>Solano</td>
</tr>
<tr>
<td><strong>Defense May Submit Materials and Speak to Committee</strong></td>
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<tr>
<td>Orange</td>
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<tr>
<td>San Diego</td>
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<tr>
<td>San Mateo</td>
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<td>Sacramento</td>
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<tr>
<td>Santa Clara</td>
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<td>Tulare</td>
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<tr>
<td>Ventura</td>
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</tbody>
</table>

The failure to consult the defense likely causes prosecutors to take to trial death penalty cases in which substantial mitigation exists. In some of these cases, if the District Attorney had only considered the defense evidence and arguments, he or she may have been persuaded to forgo seeking death. This, again, causes the judicial system to be overtaxed, leading to court congestion and excess cost to taxpayers. Indeed, the Riverside County District Attorney’s aggressive pursuit of death sentences may be contributing significantly to the excessive court backlogs in that county.15

IV. Recommended Reforms

To address the problems identified in our analysis of the survey responses, we recommend five reforms, discussed below.

1) **District Attorneys should adopt review procedures to screen homicide cases prior to charging special circumstances and to limit those charges to the most egregious cases.**

Each time the District Attorney chooses to charge special circumstances, the defense attorneys are ethically required to treat the case as a potential death penalty case. Because no one in California tracks the number of special circumstance filings, we have no way of knowing exactly how many such cases enter the system each year. But the anecdotal evidence suggests that the number is vast. As noted, five survey respondents volunteered that the prosecution seemed to charge special circumstances whenever possible. This practice places a significant strain on defense and court resources.

The Commission should recommend that District Attorneys institute review procedures to screen homicide cases and limit special circumstance charging to the most egregious cases. Until the statute is reformed to reduce the number of special circumstance in California, such screening mechanisms are necessary to prevent overloading the judicial system, as is currently the case.

2) **The Rules of Court should be changed to require the District Attorney to give notice of his or her decision whether to pursue death within 120 days of the filing of the information or indictment and procedures should be implemented to identify cases that definitely will not be pursued as death as early as possible.**

One of the first death penalty reforms implemented in Illinois was a new rule of court requiring prosecutors to give notice of their intent to pursue the death penalty 120 days after arraignment on the indictment, and to provide notice of the aggravating factors to be relied on.16 The Governor’s Commission stated that “meaningful evaluation of whether a case is eligible for the death penalty should be completed in a timely fashion.”17 Timely notice provides the defense a fair opportunity to prepare without requiring the defense to expend resources unnecessarily on cases where the death penalty will not be sought. In Illinois, notice of intent to seek death also triggers access to state funding for the defense and the prosecution.18 New York also required notice 120 days after indictment.19 Other

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17 Ibid.
18 Ibid., supra note 16, Recommendation #31.
19 NY Criminal Procedure Law §250.40.
states with notice requirements include Arizona, Idaho, Montana, Pennsylvania, Nevada, and Washington.\textsuperscript{20}

Requiring the prosecution to give the defense notice of its decision whether to seek death is a simple and straightforward reform that will help achieve two goals. First, it provides the court and the defense with the critical information needed to allocate resources properly among cases. Second, it prevents sandbagging of the defense, ensuring that the defense team has sufficient time to prepare for a death penalty trial. To achieve these goals, the sooner notice is provided the better. As long as the case remains a possible death penalty case, the defense remains ethically obliged to treat it as such. In particular, early notice that a case will not proceed as a death penalty case allows the defense to save significant resources that would otherwise be spent on penalty phase preparation and related litigation.

But the prosecution cannot be required to make this decision too early. As noted below, the prosecution’s decision making is greatly benefited by consulting with the defense, and requires extensive information about the defendant and the circumstances of the case. Our survey results indicated that once the decision to seek death has been made, District Attorneys are willing to reconsider, but only if new evidence or information is presented. Several respondents further indicated that reconsideration is rare. District attorneys will make better decisions if they are based on as much information as possible, which requires sometime for both the prosecution and the defense to investigate the case.

Thus, the District Attorney should not be required to give notice too early, and the notice deadline should be extended when requested by the parties. A presumptive notice deadline of 120 days from arraignment on the indictment or information, that also allows for extension of the deadline on request, is a fair compromise. At the same time, procedures should be implemented in prosecutor’s offices to identify cases that definitely will not be pursued as death as early as possible and to inform the defense.

3) District Attorneys should adopt written policies that require consultation with the defense attorney before deciding whether to pursue death, including an opportunity for the defense to submit any materials it wishes and for defense attorneys to address review committees in person.

Modern death penalty statutes require individualized consideration before someone can be sentenced to death.\textsuperscript{21} Jurors must weigh aggravating and mitigating factors and must base their ultimate decision on the comparative weight of those factors. Thus, prior to deciding whether to ask a jury to impose a sentence of death, prosecutors should consider the mitigating factors and all of the available evidence. For this reason, prior to deciding whether to seek death in a federal case, the U.S. Attorney requests information from the

\textsuperscript{20} AZ Rules of Criminal Procedure 15.1(g)(1); ID Code §18-4004A, MT Standards for Competency of Counsel for Indigent Persons in Death Penalty Cases I.1.a., PA Rules of Criminal Procedure 802, NV SCR 250(4)(c); WA RCW 10.95.040.

defense and invites the defense to meet with the review committee in Washington. The Illinois Governor’s Commission recommended similar procedures be adopted in that state.

All California District Attorneys should be required to have written policies that include consultation of the defense before deciding whether to seek death. These procedures should include the opportunity for the defense to submit written materials and to meet with the review committee in person, as in the federal system. Written policies are necessary to prevent any ambiguity and to ensure that consistent procedures are applied in each and every case. Notably, survey responses from Kern, San Bernardino and Riverside Counties all indicated that the procedures used to decide whether to seek death vary from case to case even within these counties. Due process requires district attorneys to use a consistent, predictable and fair procedure for deciding whether to seek death. Written policies should be required to achieve this objective and to provide transparency.

4) District Attorney review committees should be racially diverse and should consult representatives of the community including those who do not necessarily support the death penalty.

In her recent book analyzing the role of the prosecutor in the American criminal justice system, Professor Angela J. Davis notes that “[t]he lack of transparency in prosecution offices is an overriding concern.” Prosecutors have incredible power and incredible discretion in how they use that power. The community is not just excluded from the decision making process; the decision making process is hidden from public view. This is particularly concerning given that the senior management in most District Attorney Offices continues to be overwhelmingly white while the criminal justice system continues to have a disproportionately impact on the lives of people of color.

To ensure that the decision to seek death reflects the views and values of California’s diverse community, District Attorneys should be required to ensure that their “death penalty review committees” are racially and ethnically diverse. This may require expanding the ranks of the committee beyond senior management. District Attorneys should also be required to consult community members before deciding whether to seek death. This should include a racially and ethnically diverse group of individuals, as well as individuals who have different views on the death penalty. Professor Davis recommends citizen review boards be used to provide input to and oversight of prosecution offices generally. Such review boards could also be used to provide feedback to the prosecutor about the community’s view of seeking death in individual cases.

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23 Illinois Governor’s, supra note 16, Recommendation #30.
25 Id. at pp. 184-186.
5) The Attorney General should ultimately review all local decisions to seek death, to ensure statewide consistency and fairness of the process.

Finally, centralized review by the Attorney General should be required to ensure statewide consistency in death sentencing. The Illinois Governor’s Commission recommended that a statewide review committee be created, concluding that this is the only way to ensure consistency and fairness in the administration of the death penalty across the state. The Illinois Commission stated, “[i]t is important that standards relating to the most serious penalty imposed by law be applied in a uniform and rational manner in all parts of the state in order to avoid the disparate application of the death penalty.”

California’s Attorney General has direct supervision over the District Attorneys of the state. Once a District Attorney has decided to pursue death in an individual case, the Attorney General should be empowered to review that decision and should be required to provide final authorization. Review by the Attorney General would be the most effective method of ensuring statewide consistency of practice in charging. It would also provide a centralized means on ensuring that the statewide judicial system is not overloaded. Years of experience have demonstrated that our judicial system cannot efficiently process more than 20 death penalty cases on post-conviction review. The Attorney General, with statewide perspective, is in the best position to determine how to distribute those scarce judicial resources across all of the potential death penalty cases in California.

V. Conclusion

The results of our survey of District Attorney charging practices regarding the death penalty demonstrate a lack of uniformity across the state and the need for reform. Current practices are inconsistent and in some cases simply unfair, contributing to geographic disparities in death sentences across the state. These practices are also overburdening the system, leading to congestion, delays, added expenses, and, in some cases, a shortage of defense services. Similarly, current practices fail to reflect the diverse views of the members of the California community. We urge the Commission to recommend the reforms identified here, in order to ensure that the death penalty is applied in a fair manner and one consistent with the values of all Californians.

Sincerely,

Natasha Minsker
Death Penalty Policy Director

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26 Illinois Governor’s, supra note 16, Recommendation #30.
27 Ibid.
28 Govt. Code Section 12550.
Exhibit A
## Exhibit A

**Decision Process of the District Attorney in Your County on the Death Penalty**

1. Who decides whether **special circumstances** will initially be charged, making the death penalty a possible sentence?

   - [ ] The DDA assigned to charging.
   - [ ] The District Attorney.
   - [ ] A Senior DDA.
   - [ ] A review committee.
   - [ ] Other: (please briefly describe)

2. What information is considered before charging **special circumstances**? (please check all that apply)

   - [ ] The probable cause statement.
   - [ ] The police reports.
   - [ ] Statements from police officers.
   - [ ] Other: (please briefly describe)

3. When deciding whether to seek the **death penalty**, does the DA in your county employ any of the following?

   - [ ] A Review Panel/Committee appointed by the District Attorney.
   - [ ] “Case by Case” review by the District Attorney only.
   - [ ] “Case by Case” review by Senior DDA only.
   - [ ] Other: (please briefly describe)

4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)

   - [ ] It is racially diverse.
   - [ ] It includes people outside the DA’s office.
   - [ ] It includes DA personnel only.
   - [ ] Other: (please briefly describe)

5. If you know who is on the DA review committee, please state:
6. What is the purpose of this death penalty review process? (please check all that apply)

☐ To reach a FINAL decision as to whether to seek the death penalty.

☐ To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.

☐ To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)

☐ Various members of the community.

☐ The defense attorneys.

☐ The victim’s family.

☐ Other: (please briefly describe)

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)?

9. What participation from the defense is part of the process? (please check all that apply)

☐ Defense attorney may speak to the committee/ DA/ reviewing DDA.

☐ Defense attorney may submit any materials he/she wants to the committee/ DA/ reviewing DDA.

☐ Defense attorney may submit only a letter, without attachments.

☐ The defense is not consulted at all.

☐ Other: (please briefly describe)

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)

☐ The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.

☐ The DA conducts no independent investigation into potential mitigating circumstances.

☐ The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.

☐ Once the decision to pursue the death penalty is made, it will not be reconsidered.

☐ Other: (please briefly describe)

-THANK YOU -
Exhibit B
Exhibit B
Alameda County Response
Decision Process of the District Attorney in Your County on the Death Penalty

1. Who decides whether special circumstances will initially be charged, making the death penalty a possible sentence?
   - [x] The District Attorney.
   - [ ] The DDA assigned to charging.
   - [ ] A Senior DDA.
   - [ ] A review committee.
   - [ ] Other: (please briefly describe)

2. What information is considered before charging special circumstances? (please check all that apply)
   - [ ] The probable cause statement.
   - [x] The police reports.
   - [x] Statements from police officers.
   - [ ] Other: (please briefly describe)
     Generally, all cases “eligible” for spec. circ. charging are so charged.

3. When deciding whether to seek the death penalty, does the DA in your county employ any of the following?
   - [x] A Review Panel/Committee appointed by the District Attorney.
   - [ ] “Case by Case” review by the District Attorney only.
   - [ ] “Case by Case” review by Senior DDA only.
   - [ ] Other: (please briefly describe)
     The committee meets after the preliminary hearing/holding order and makes a rec. to DA. I doubt that the committee would recommend something other than what it believes the DA already supports.

4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)
   - [ ] It is racially diverse.
   - [ ] It includes people outside the DA’s office.
   - [x] It includes DA personnel only.
   - [ ] Other: (please briefly describe)

5. If you know who is on the DA review committee, please state: Chief Asst. DA Nancy O’Malley, DA Supervisor Richard Moore, and Trial DA Angela Backers.
6. What is the purpose of this death penalty review process? (please check all that apply)

☐ To reach a FINAL decision as to whether to seek the death penalty.

☐ To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.

☐ To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)

☐ Various members of the community.

☐ The defense attorneys.

☐ The victim’s family.

☐ Other: (please briefly describe)
No affirmative consultation of which I am aware.

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)?
Post-PX

9. What participation from the defense is part of the process? (please check all that apply)

☐ Defense attorney may speak to the committee/DA/reviewing DDA.

☐ Defense attorney may submit any materials he/she wants to the committee/DA/reviewing DDA.

☐ Defense attorney may submit only a letter, without attachments.

☐ The defense is not consulted at all.

☐ Other: (please briefly describe)

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)

☐ The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.

☐ The DA conducts no independent investigation into potential mitigating circumstances.

☐ The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.

☐ Once the decision to pursue the death penalty is made, it will not be reconsidered.

☐ Other: (please briefly describe)
Contra Costa County Response

Decision Process of the District Attorney in Your County on the Death Penalty

1. Who decides whether special circumstances will initially be charged, making the death penalty a possible sentence?

☐ The DDA assigned to charging.

☐ The District Attorney.

☒ A Senior DDA.

☐ A review committee.

☐ Other: (please briefly describe)

2. What information is considered before charging special circumstances? (please check all that apply)

☐ The probable cause statement.

☐ The police reports.

☐ Statements from police officers.

☒ Other: (please briefly describe)

This is a bit obscure. Certainly statutory eligibility is a factor. Not every case that is eligible is filed… but there are enough to make it seem almost that way.

3. When deciding whether to seek the death penalty, does the DA in your county employ any of the following?

☒ A Review Panel/Committee appointed by the District Attorney.

☐ “Case by Case” review by the District Attorney only.

☐ “Case by Case” review by Senior DDA only.

☐ Other: (please briefly describe)

4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)

☐ It is racially diverse.

☐ It includes people outside the DA’s office.

☒ It includes DA personnel only.

☐ Other: (please briefly describe)
Exhibit B
Contra Costa County Response

5. If you know who is on the DA review committee, please state: Senior Deputy DA’s

6. What is the purpose of this death penalty review process? (please check all that apply)
   - [ ] To reach a FINAL decision as to whether to seek the death penalty.
   - [ ] To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.
   - [x] To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)
   - [ ] Various members of the community.
   - [x] The defense attorneys.
   - [x] The victim’s family.
   - [ ] Other: (please briefly describe)

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)?
   - Post-PX

9. What participation from the defense is part of the process? (please check all that apply)
   - [ ] Defense attorney may speak to the committee/DA/reviewing DDA.
   - [x] Defense attorney may submit any materials he/she wants to the committee/DA/reviewing DDA.
   - [ ] Defense attorney may submit only a letter, without attachments.
   - [ ] The defense is not consulted at all.
   - [ ] Other: (please briefly describe)

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)
    - [ ] The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.
    - [x] The DA conducts no independent investigation into potential mitigating circumstances.
    - [x] The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise. But, this is only what they say. I know of no case where a previous decision to seek death has been changed.
    - [ ] Once the decision to pursue the death penalty is made, it will not be reconsidered.
Exhibit B
Contra Costa County Response
☐ Other: (please briefly describe)

-THANK YOU -
Exhibit B
Fresno County Response

Decision Process of the District Attorney in Your County on the Death Penalty

1. Who decides whether special circumstances will initially be charged, making the death penalty a possible sentence?
   - X The DDA assigned to charging.
   - X The District Attorney.
   - □ A Senior DDA.
   - X A review committee.
   - □ Other: (please briefly describe) I’m not sure there is any firm protocol. My impression is that it depends on the notoriety of the case, as to whether more than the charging DA gets involved.

2. What information is considered before charging special circumstances? (please check all that apply)
   - □ The probable cause statement.
   - X The police reports.
   - □ Statements from police officers.
   - X Other: (please briefly describe) Again, I am not sure. Where a case appears eligible for special circumstance(s) to be alleged, they are usually alleged, though not always. I assume it depends upon facts of the case and the defendant.

3. When deciding whether to seek the death penalty, does the DA in your county employ any of the following?
   - X A Review Panel/Committee appointed by the District Attorney.
   - □ “Case by Case” review by the District Attorney only.
   - □ “Case by Case” review by Senior DDA only.
   - X Other: (please briefly describe) My understanding is that a committee which includes the top level management and the District Attorney discusses and reviews each case. The District Attorney makes the ultimate decision.

4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)
   - □ It is racially diverse.
   - □ It includes people outside the DA’s office.
   - X It includes DA personnel only.
   - □ Other: (please briefly describe)
Exhibit B
Fresno County Response

5. If you know who is on the DA review committee, please state:
   - The District Attorney and the Assistant DAs as well as the Chief of Homicide, possibly others.

6. What is the purpose of this death penalty review process? (please check all that apply)
   - [ ] To reach a FINAL decision as to whether to seek the death penalty.
   - [ ] To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.
   - [X] To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)
   - [ ] Various members of the community.
   - [X] The defense attorneys.
   - [X] The victim’s family.
   - [X] Other: (please briefly describe) Although defense counsel is invited to submit an argument against the death penalty, I do not believe such input has ever been given serious consideration. Also, although the victim’s family may express a desire, it is not usually determinative as to which penalty is pursued.

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)? It varies. Usually a letter is provided after the preliminary hearing and before or at the Superior Court arraignment; occasionally the decision is delayed (a delay in the decision usually results in a choice not to seek the death penalty)

9. What participation from the defense is part of the process? (please check all that apply)
   - [ ] Defense attorney may speak to the committee/DA/reviewing DDA.
   - [X] Defense attorney may submit any materials he/she wants to the committee/DA/reviewing DDA.
   - [ ] Defense attorney may submit only a letter, without attachments.
   - [ ] The defense is not consulted at all.
   - [ ] Other: (please briefly describe)

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)
    - [ ] The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.
    - [ ] The DA conducts no independent investigation into potential mitigating circumstances.
    - [ ] The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.
    - [ ] Once the decision to pursue the death penalty is made, it will not be reconsidered.
X Other: (please briefly describe) Once the decision to seek death has been formalized, it is rarely reconsidered; however, there have been exceptions to that rule.

-THANK YOU-
Exhibit B
Kern County Response

I reviewed the questions once again and quite frankly I would be guessing about whether the DA's Ofc has a review team or who make the final decisions in Kern County. I think my guesswork would have no value although I would like to help you.

I think it is very telling that all of the DAs are unwilling to state their practices and procedures. That they are so uniformly guarded tells us that they have a lot to hide. New Jersey is on the brink of doing away with the death penalty. Even Poland is leading the charge against the death penalty in today's news. How many Americans does it take to screw in a light bulb?

I think the Commission can draw some conclusion from the prosecution's unwillingness to comply and answer the questions.
1. Who decides whether special circumstances will initially be charged, making the death penalty a possible sentence?

X  The DDA assigned to charging.

☐ The District Attorney.

☐ A Senior DDA.

☐ A review committee.

☐ Other: (please briefly describe)

2. What information is considered before charging special circumstances? (please check all that apply)

X  The probable cause statement.

X  The police reports.

X  Statements from police officers.

☐ Other: (please briefly describe)

3. When deciding whether to seek the death penalty, does the DA in your county employ any of the following?

X  A Review Panel/Committee appointed by the District Attorney.

☐ “Case by Case” review by the District Attorney only.

☐ “Case by Case” review by Senior DDA only.

☐ Other: (please briefly describe)

4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)

X  It is racially diverse.

☐ It includes people outside the DA’s office.

X  It includes DA personnel only.

X  Other: (please briefly describe) The permanent members are selected by position, so diversity depends on diversity within those positions. Currently, one known African American, one of Asian descent.

5. If you know who is on the DA review committee, please state: Three Assistant D.A.’s, six Directors, one Head Deputy of Major Crimes, and two rotating trial deputies.
6. What is the purpose of this death penalty review process? (please check all that apply)

X To reach a FINAL decision as to whether to seek the death penalty.

☐ To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.

☐ To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)

☐ Various members of the community.

☐ The defense attorneys.

X The victim’s family.

X Other: (please briefly describe) In some cases experts, such as when their opinions bear on the gravity of the crime.

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8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)?

post-PX

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9. What participation from the defense is part of the process? (please check all that apply)

☐ Defense attorney may speak to the committee/DA/reviewing DDA.

X Defense attorney may submit any materials he/she wants to the committee/DA/reviewing DDA.

☐ Defense attorney may submit only a letter, without attachments.

☐ The defense is not consulted at all.

☐ Other: (please briefly describe)

---

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)

The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.

X The DA conducts no independent investigation into potential mitigating circumstances.

X The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.

☐ Once the decision to pursue the death penalty is made, it will not be reconsidered.

X Other: (please briefly describe) In a few cases, the D.A. does interview client family members in an effort to “deconstruct” mitigation.

-THANK YOU-
Exhibit B
Orange County Response

1. In Orange County, each DDA on the homicide panel is responsible for a geographical portion of the county. The deputy or senior deputy assigned to the geographical region in which a homicide has been committed is responsible for deciding how to file the homicide.

2. As far as I know, the DDA considers the police reports, statements by police officers, and any other information he might have before charging special circumstances. The practice in Orange County is to over, rather than undercharge special circumstances. In other words, if the facts can be argued to support a special circumstance, that circumstance will be filed.

3. A review panel/committee appointed by the District Attorney

4. It includes DA personnel only

5. The makeup of the review committee changes from case to case. The only constants are the District Attorney, the head of the homicide department (presently David Brent) and the trial attorney

6. To make a recommendation to the District Attorney as to whether to seek the death penalty

7. The District Attorney consults the defense attorneys prior to making a final decision about whether to pursue the death penalty. The defense is invited to make a presentation to a committee of Deputy and Senior District Attorneys who make a recommendation to the District Attorney as to whether death should be pursued. The District Attorney also consults the victim’s family, although its input is not determinative.

8. The timing of the decision whether to seek death varies from case to case. In some cases, it is decided within the first couple of weeks that a case will not be a death case. In some cases, the DA’s office doesn’t drop death until the eve of trial.

9. All of these apply, except for “the defense is not consulted at all.” The defense is invited to attend a meeting with the committee which is making the recommendation as to penalty, but it can send materials, or a letter, if it chooses not to attend. The only time that the defense is not consulted is when the DA’s Office decides not to seek death before a formal committee review of the case

10. The DA’s Office conducts no independent investigation into potential mitigating circumstances (except as it feels necessary to rebut defense claims of mitigation for trial purposes). However, the DA is always willing to reconsider its decision to pursue the death penalty if new evidence or circumstances arise, and in fact, has changed his mind in several cases with the receipt of new information.
### Decision Process of the District Attorney in Your County on the Death Penalty

1. Who decides whether special circumstances will initially be charged, making the death penalty a possible sentence?

- ☑ The District Attorney, after consultation with review committee
- ☐ The DDA assigned to charging
- ☐ A Senior DDA
- ☐ A review committee
- ☐ Other: (please briefly describe)

2. What information is considered before charging special circumstances? (please check all that apply)

- ☑ The probable cause statement
- ☑ The police reports
- ☑ Statements from police officers
- ☐ Other: (please briefly describe)
  
  **All other relevant information**

3. When deciding whether to seek the death penalty, does the DA in your county employ any of the following?

- ☑ A Review Panel/Committee appointed by the District Attorney
- ☐ “Case by Case” review by the District Attorney only
- ☐ “Case by Case” review by Senior DDA only
- ☐ Other: (please briefly describe)

4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)

- ☐ It is racially diverse
- ☐ It includes people outside the DA’s office
- ☑ It includes DA personnel only
- ☐ Other: (please briefly describe)

5. If you know who is on the DA review committee, please state:

- Upper Management
6. What is the purpose of this death penalty review process? (please check all that apply)

- To reach a FINAL decision as to whether to seek the death penalty.
- To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)

- Various members of the community.
- The defense attorneys.
- The victim's family.

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)?

Post Preliminary Hearing

9. What participation from the defense is part of the process? (please check all that apply)

- Defense attorney may speak to the committee/ DA/ reviewing DDA.
- Defense attorney may submit materials he/she wants to the committee/ DA/ reviewing DDA.
- Defense attorney may submit only a letter, without attachments.
- The defense is not consulted at all.

10. Which of the following apply to the DA's practices in your county? (please check all that apply)

- The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.
- The DA conducts no independent investigation into potential mitigating circumstances.
- The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.

-THANK YOU-
1. Who decides whether **special circumstances** will initially be charged, making the death penalty a possible sentence?

XX The DDA assigned to charging.

The DA assigned to charging is John O'Mara. He charges the specials, makes a tentative decision as to whether or not to seek death and presents to the DA, who has ultimate review and veto power.

☐ The District Attorney.

☐ A Senior DDA.

☐ A review committee.

☐ Other: (please briefly describe)

---

2. What information is considered before charging **special circumstances**? (please check all that apply)

☐ The probable cause statement.

XX The police reports.

☐ Statements from police officers.

XX Other: (please briefly describe)

The charging DA conferences with the investigating officers. Rarely are any other officers, in any capacity or level, involved in this process.

---

3. When deciding whether to seek the **death penalty**, does the DA in your county employ any of the following?

☐ A Review Panel/Committee appointed by the District Attorney.

☐ “Case by Case” review by the District Attorney only.

☐ “Case by Case” review by Senior DDA only.

XX Other: (please briefly describe)

The charging DA decides whether or not to seek death in consultation with the assigned Deputy District Attorney. This decision is then presented to the DA, who has ultimate review and veto power.

---

4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)

☐ It is racially diverse.

☐ It includes people outside the DA’s office.
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| **Exhibit B**  
Sacramento County Response |  |
| ☐ It includes DA personnel only. |  |
| **XX Other: (please briefly describe)**  
NOT APPLICABLE |  |
| ———— | ———— |
| **5.** If you know who is on the DA review committee, please state:  
NOT APPLICABLE |  |
| ———— | ———— |
| **6.** What is the purpose of this death penalty review process? (please check all that apply) |  |
| ☐ To reach a FINAL decision as to whether to seek the death penalty. |  |
| ☐ To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty. |  |
| **XX To make a recommendation to the District Attorney as to whether to seek the death penalty.** |  |
| ———— | ———— |
| **7.** Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply) |  |
| ☐ Various members of the community. |  |
| ☐ The defense attorneys. |  |
| ☐ The victim’s family.  
**XX Other: (please briefly describe)**  
While the family of the victim(s) may not always be contacted, we strongly believe the feelings of the family enter into the DA’s ultimate decision. |  |
| ———— | ———— |
| **8.** When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)?  
Almost always pre-PX |  |
| ———— | ———— |
| **9.** What participation from the defense is part of the process? (please check all that apply) |  |
| **XX Defense attorney may speak to the committee/DA/reviewing DDA.** |  |
| **XX Defense attorney may submit any materials he/she wants to the committee/DA/reviewing DDA.** |  |
| ☐ Defense attorney may submit only a letter, without attachments. |  |
| ☐ The defense is not consulted at all. |  |
| **XX Other: (please briefly describe)**  
No formal process exists. However, in practice, the Charging DA (Bureau Chief of Homicides): meets with defense counsel to discuss the case; will review any materials the defense wants to submit [we have employed a process where the information that is submitted is not shared with the DA prosecuting the case]; and, will have an exchange of information as to how the penalty phase “evidence” will impact the process and where this defendant fits in with others where death has or |  |
Exhibit B
Sacramento County Response

has not been sought.

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)

☐ The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.

XX The DA conducts no independent investigation into potential mitigating circumstances.

XX The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.

☐ Once the decision to pursue the death penalty is made, it will not be reconsidered.

XX Other: (please briefly describe)
Once the determination has been made to seek death, defense counsel is in a far more difficult position to get the DA to change their position. If new material is discovered and/or penalty phase investigation or mental status issues are present, the DA may reconsider their position. However, this is a very difficult to be in.

-THE THANK YOU -
Exhibit B
Solano County Response

Basically, their chief deputy in charge of 187’s in Solano decides whether or not to file a special circ charge pre-px (initial complaint). If HTA on it, they’ll charge it in the information.

If HTA on sp circ at PX and charged in the information, the boss DA will formally decide whether or not to seek death, although he listens much to the chief deputy in charge of 187’s and, perhaps, to his other chief deputy. He’ll also consider the opinion of the chief of police for the agency involved. However, there is no formal committee per se (unlike Alameda), but just like Alameda, the final decision is made by the boss DA.

Since they so rarely seek death, we don’t even bother with presentations most of the time b/c we know death isn’t even on the table. When it might be possible (and we know in advance from talking to the DA’s e.g., about potential settlements . . . if it’s a death case they’ll tell us and we can’t negotiate anything), we can submit a written presentation, which they will consider . . . that’s what happened the last time they were seeking death—at least pre-px, when they turned down our lwopp offer. So we fought it out at PX and gave them a lengthy written presentation, which apparently convinced them to drop death and accept our lwopp offer.

Anyway, that’s Solano County . . . at least in the present era.
### Exhibit B
San Bernardino County Response

#### Decision Process of the District Attorney in Your County on the Death Penalty

<table>
<thead>
<tr>
<th>1. Who decides whether <strong>special circumstances</strong> will initially be charged, making the death penalty a possible sentence?</th>
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<tbody>
<tr>
<td>[ ] The DDA assigned to charging.</td>
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<tr>
<td>[ ] The District Attorney.</td>
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<tr>
<td>[X] A Senior DDA.</td>
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<tr>
<td>[ ] A review committee.</td>
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<tr>
<td>[ ] Other: (please briefly describe)</td>
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<tr>
<th>2. What information is considered before charging <strong>special circumstances</strong>? (please check all that apply)</th>
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<tbody>
<tr>
<td>[ ] The probable cause statement.</td>
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<td>[X] The police reports.</td>
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<tr>
<td>[X] Statements from police officers.</td>
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<tr>
<td>[X] Other: (please briefly describe) Publicity and community reaction.</td>
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<tr>
<th>3. When deciding whether to seek the <strong>death penalty</strong>, does the DA in your county employ any of the following?</th>
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<tbody>
<tr>
<td>[X] A Review Panel/Committee appointed by the District Attorney.</td>
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<tr>
<td>[ ] “Case by Case” review by the District Attorney only.</td>
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<td>[ ] “Case by Case” review by Senior DDA only.</td>
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<td>[ ] Other: (please briefly describe)</td>
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<th>4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)</th>
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<tbody>
<tr>
<td>[X] It is racially diverse. There is one Hispanic and no Blacks.</td>
</tr>
<tr>
<td>[ ] It includes people outside the DA’s office.</td>
</tr>
<tr>
<td>[X] It includes DA personnel only.</td>
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<td>[ ] Other: (please briefly describe)</td>
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<tr>
<th>5. If you know who is on the DA review committee, please state: <strong>5 Chief Deputy District Attorneys, chaired by the</strong></th>
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</table>
**Exhibit B**

**San Bernardino County Response**

Chief of the “Career Criminal and Homicide” unit.

6. What is the purpose of this death penalty review process? (please check all that apply)

- [ ] To reach a FINAL decision as to whether to seek the death penalty.
- [x] To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.
- [ ] To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)

- [ ] Various members of the community.
- [ ] The defense attorneys.
- [x] The victim’s family.
- [ ] Other: (please briefly describe)

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)? It varies. High “profile” cases are often done before PX, but generally it is post-PX.

9. What participation from the defense is part of the process? (please check all that apply)

- [ ] Defense attorney may speak to the committee/ DA/ reviewing DDA.
- [ ] Defense attorney may submit any materials he/she wants to the committee/ DA/ reviewing DDA.
- [ ] Defense attorney may submit only a letter, without attachments.
- [x] The defense is not consulted at all.
- [x] Other: (please briefly describe) Defense attorney may have some input through the actual trial Deputy DA, but it is at the discretion of that DDA.

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)

- [ ] The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.
- [x] The DA conducts no independent investigation into potential mitigating circumstances.
- [x] The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.
- [ ] Once the decision to pursue the death penalty is made, it will not be reconsidered.
Exhibit B
San Bernardino County Response

☐ Other: (please briefly describe)

-THANK YOU-
Exhibit B
San Diego County Response
Decision Process of the District Attorney in Your County on the Death Penalty
Replies are “educated guesses” by JBH after meeting with the DA

1. Who decides whether special circumstances will initially be charged, making the death penalty a possible sentence?

☐ The DDA assigned to charging.
☐ The District Attorney.
☐ A Senior DDA.
☐ A review committee.

☐ Other: (please briefly describe): It appears that the deputy assigned to the case (who is usually called to the scene of the crime during evidence gathering), the charging deputy and the trial deputy’s supervisor/division head make the initial decision to pursue special circumstances. My impression from our meetings w/DA Dumanis is that for some high profile cases, the assistant DA or a Chief Deputy may be involved.

2. What information is considered before charging special circumstances? (please check all that apply)

☐ The probable cause statement.
☐ The police reports.
☐ Statements from police officers.

☐ Other: (please briefly describe) * Is a “PC Statement” a specific internal document of the DA? If so, I do not know about this and it was not discussed. My assumption here is that the trial deputy writes up charges from police reports — written and verbal — and her own observations and visceral response to the crime scene.

3. When deciding whether to seek the death penalty, does the DA in your county employ any of the following?

☐ A Review Panel/Committee appointed by the District Attorney.
☐ “Case by Case” review by the District Attorney only.
☐ “Case by Case” review by Senior DDA only.

☐ Other: (please briefly describe) DA Dumanis described a “committee” comprised of whichever DDA’s who handle homicides are interested/available to hear the trial deputy’s pitch for/against death. The Assistant DA Jesse Rodriguez is present but the DA is not. The committee discusses the case and makes a recommendation to the DA.

4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)

☐ It is racially diverse. Unknown / changes for each case
☐ It includes people outside the DA’s office.
☐ It includes DA personnel only.
5. If you know who is on the DA review committee, please state: It changes but the Assistant J. Rodriguez is supposed to be present. The Chief deputies – Carlos Armour, Julie Korsmeyer, Mark Pettine – are likely present at many of these meetings. Senior deputies such as Dan Lamborn, David Greenberg, Jeff Dusek and Kim Lagotta seem likely folks sought for input.

6. What is the purpose of this death penalty review process? (please check all that apply)

☐ To reach a FINAL decision as to whether to seek the death penalty.

☐ To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.

☒ To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)

☐ Various members of the community.

☒ The defense attorneys.

☒ The victim’s family.

☒ Other: (please briefly describe) I’m guessing there are times when community members/leaders get an audience with the DA re: a death decision. Defenders may be accompanied by a witness or expert that is compelling. The DA claims she (1) tells the family that “death is not easy and they may prefer LWOP”, listing the pros and cons; and (2) that the wishes of the family are not paramount in her decision. I believe the latter point to be somewhat disingenuous.

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)? Post-prelim unless there is a plea sooner.

9. What participation from the defense is part of the process? (please check all that apply)

☒ Defense attorney may speak to the committee/ DA/ reviewing DDA.

☒ Defense attorney may submit any materials he/she wants to the committee/ DA/ reviewing DDA.

☒ Defense attorney may submit only a letter, without attachments.

☐ The defense is not consulted at all.

☐ Other: (please briefly describe)

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)
Exhibit B
San Diego County Response
☐ The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.
☐ The DA conducts no independent investigation into potential mitigating circumstances.
☐ The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.
☐ Once the decision to pursue the death penalty is made, it will not be reconsidered.

☒ Other: (please briefly describe) I don't know about the depth of the DA’s investigation into mitigation. I do know they try to stifle it prior to filing the case by meeting with defendant's families to obtain damaging info. This DA will meet with defenders even after death is declared should more info be available. We’ve had mixed results with this process and the feeling is that what really helps is an LWOP plea form; however, the DA did back off death in a recent case without a plea.

-THANK YOU-
### Decision Process of the District Attorney in Your County on the Death Penalty

1. **Who decides whether special circumstances will initially be charged, making the death penalty a possible sentence?**
   - [ ] The DDA assigned to charging.
   - [ ] The District Attorney.
   - [X] A Senior DDA.
   - [ ] A review committee.
   - [ ] Other: (please briefly describe)

2. **What information is considered before charging special circumstances? (please check all that apply)**
   - [X] The probable cause statement.
   - [X] The police reports.
   - [X] Statements from police officers.
   - [ ] Other: (please briefly describe)

3. **When deciding whether to seek the death penalty, does the DA in your county employ any of the following?**
   - [X] A Review Panel/Committee appointed by the District Attorney.
   - [X] "Case by Case" review by the District Attorney only.
   - [X] "Case by Case" review by Senior DDA only.
   - [ ] Other: (please briefly describe) **THE D.A. MAKES THE FINAL DECISION HIMSELF AFTER CONSULTING HIS "REVIEW PANEL".**

4. **If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)**
   - [ ] It is racially diverse.
   - [ ] It includes people outside the DA’s office.
   - [X] It includes DA personnel only.
   - [ ] Other: (please briefly describe)

5. **If you know who is on the DA review committee, please state:**
6. What is the purpose of this death penalty review process? (please check all that apply)

- [x] To make a recommendation to the District Attorney as to whether to seek the death penalty.
- [ ] To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.
- [ ] To reach a FINAL decision as to whether to seek the death penalty.
- [ ] Other: (please briefly describe)

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)

- [x] The victim's family.
- [x] The defense attorneys.
- [ ] Various members of the community.
- [ ] Other: (please briefly describe)

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)?

**Usually late - i.e. well after the case has reached the trial court stage.**

9. What participation from the defense is part of the process? (please check all that apply)

- [x] Defense attorney may speak to the committee/ DA/ reviewing DDA.
- [x] Defense attorney may submit any materials he/she wants to the committee/ DA/ reviewing DDA.
- [ ] Defense attorney may submit only a letter, without attachments.
- [ ] The defense is not consulted at all.

- [x] Other: (please briefly describe)  **Defense attorneys are invited to make a full presentation to the review panel.**

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)

- [x] The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.
- [ ] The DA conducts no independent investigation into potential mitigating circumstances.
- [x] The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.
- [ ] Once the decision to pursue the death penalty is made, it will not be reconsidered.
- [ ] Other: (please briefly describe)

**-THANK YOU -**
### Santa Clara County Response

#### Decision Process of the District Attorney in Your County on the Death Penalty

<table>
<thead>
<tr>
<th>1. Who decides whether special circumstances will initially be charged, making the death penalty a possible sentence?</th>
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</thead>
<tbody>
<tr>
<td>☐ The DDA assigned to charging.</td>
</tr>
<tr>
<td>☐ The District Attorney.</td>
</tr>
<tr>
<td>☑ A Senior DDA.</td>
</tr>
<tr>
<td>☐ A review committee.</td>
</tr>
<tr>
<td>☐ Other: (please briefly describe)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2. What information is considered before charging special circumstances? (please check all that apply)</th>
</tr>
</thead>
<tbody>
<tr>
<td>☑ The probable cause statement.</td>
</tr>
<tr>
<td>☐ The police reports.</td>
</tr>
<tr>
<td>☐ Statements from police officers.</td>
</tr>
<tr>
<td>☐ Other: (please briefly describe)</td>
</tr>
</tbody>
</table>

- Not sure about this one. I would suspect all of the above and that they probably also consider the notoriety of the crime.

<table>
<thead>
<tr>
<th>3. When deciding whether to seek the death penalty, does the DA in your county employ any of the following?</th>
</tr>
</thead>
<tbody>
<tr>
<td>☑ A Review Panel/Committee appointed by the District Attorney.</td>
</tr>
<tr>
<td>☐ “Case by Case” review by the District Attorney only.</td>
</tr>
<tr>
<td>☐ “Case by Case” review by Senior DDA only.</td>
</tr>
<tr>
<td>☐ Other: (please briefly describe)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)</th>
</tr>
</thead>
<tbody>
<tr>
<td>☐ It is racially diverse.</td>
</tr>
<tr>
<td>☐ It includes people outside the DA’s office.</td>
</tr>
<tr>
<td>☑ It includes DA personnel only.</td>
</tr>
<tr>
<td>☐ Other: (please briefly describe)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>5. If you know who is on the DA review committee, please state:</th>
</tr>
</thead>
<tbody>
<tr>
<td>☑ Chief Assistant; Assistant in charge of homicide.</td>
</tr>
<tr>
<td>☑ The Supervising attorney for any of the following units, depending on the nature of the case: Sexual assault unit supervisor; gangs &amp; career criminals; chief of special units.</td>
</tr>
<tr>
<td>☑ Forensic mental health.</td>
</tr>
<tr>
<td>☑ One of later members selected by Chief Assistant.</td>
</tr>
</tbody>
</table>

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Exhibit B
Exhibit B
Santa Clara County Response

6. What is the purpose of this death penalty review process? (please check all that apply)

☐ To reach a FINAL decision as to whether to seek the death penalty.
☐ To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.
☒ To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)

☐ Various members of the community.
☒ The defense attorneys.
☒ The victim's family.
☐ Other: (please briefly describe)

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)?

post-PX

9. What participation from the defense is part of the process? (please check all that apply)

☒ Defense attorney may speak to the committee/DA/reviewing DDA.
☒ Defense attorney may submit any materials he/she wants to the committee/DA/reviewing DDA.
☐ Defense attorney may submit only a letter, without attachments.
☐ The defense is not consulted at all.
☐ Other: (please briefly describe)

10. Which of the following apply to the DA's practices in your county? (please check all that apply)

☒ The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.
☐ The DA conducts no independent investigation into potential mitigating circumstances.
☒ The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.
☐ Once the decision to pursue the death penalty is made, it will not be reconsidered.
☐ Other: (please briefly describe)

-THANK YOU-
1. Who decides whether **special circumstances** will initially be charged, making the death penalty a possible sentence?
   - ☑ The DDA assigned to charging.
   - ☐ The District Attorney.
   - ☐ A Senior DDA.
   - ☐ A review committee.
   - ☐ Other: (please briefly describe)
     There may be discussion with supervisory staff, I do not know for certain.

2. What information is considered before charging **special circumstances**? (please check all that apply)
   - ☑ The probable cause statement.
   - ☑ The police reports.
   - ☑ Statements from police officers.
   - ☐ Other: (please briefly describe)
     The victim’s family, tarot cards, who knows for certain? It seems that they are filled in almost every case where they could possibly be filed.

3. When deciding whether to seek the **death penalty**, does the DA in your county employ any of the following?
   - ☑ A Review Panel/Committee appointed by the District Attorney.
   - ☐ “Case by Case” review by the District Attorney only.
   - ☐ “Case by Case” review by Senior DDA only.
   - ☐ Other: (please briefly describe)

4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)
   - ☐ It is racially diverse.
   - ☐ It includes people outside the DA’s office.
   - ☑ It includes DA personnel only.
   - ☐ Other: (please briefly describe) There is usually a supervising attorney, the trial deputy, and the DA investigator at a minimum.
### Exhibit B
**Tulare County Response**

5. If you know who is on the DA review committee, please state: **The members change.**

6. What is the purpose of this death penalty review process? (please check all that apply)
   - [x] To reach a FINAL decision as to whether to seek the death penalty.
   - [x] To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.
   - [ ] To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)
   - [x] Various members of the community.
   - [x] The defense attorneys.
   - [x] The victim’s family.
   - [ ] Other: (please briefly describe)

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)?
   Post preliminary hearing, pre-arraignment on the information.

9. What participation from the defense is part of the process? (please check all that apply)
   - [x] Defense attorney may speak to the committee/DA/reviewing DDA.
   - [x] Defense attorney may submit any materials he/she wants to the committee/DA/reviewing DDA.
   - [ ] Defense attorney may submit only a letter, without attachments.
   - [ ] The defense is not consulted at all.
   - [ ] Other: (please briefly describe)

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)
    - [x] The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.
    - [ ] The DA conducts no independent investigation into potential mitigating circumstances.
    - [x] The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.
    - [ ] Once the decision to pursue the death penalty is made, it will not be reconsidered.
    - [ ] Other: (please briefly describe)
Exhibit B  
Ventura County Response  
Decision Process of the District Attorney in Your County on the Death Penalty

1. Who decides whether special circumstances will initially be charged, making the death penalty a possible sentence?
   - The DDA assigned to charging.  
   - The District Attorney.  
   - A Senior DDA.  
   - A review committee.  
   - Other: (please briefly describe)  

2. What information is considered before charging special circumstances? (please check all that apply)
   - The probable cause statement.  
   - The police reports.  
   - Statements from police officers.  
   - Other: (please briefly describe) The felony supervisor is usually consulted prior to charging any special circumstances.  

3. When deciding whether to seek the death penalty, does the DA in your county employ any of the following?
   - A Review Panel/Committee appointed by the District Attorney.  
   - "Case by Case" review by the District Attorney only.  
   - "Case by Case" review by Senior DDA only.  
   - Other: (please briefly describe) Even though a "review" committee is usually utilized in potential death penalty cases, the District Attorney makes the final decision.  

4. If the DA in your county does employ a review panel, what is its makeup? (please check all that apply)
   - It is racially diverse.  
   - It includes people outside the DA’s office.  
   - It includes DA personnel only.  
   - Other: (please briefly describe)  

5. If you know who is on the DA review committee, please state:

6. What is the purpose of this death penalty review process? (please check all that apply)

- [ ] To reach a FINAL decision as to whether to seek the death penalty.
- [x] To reach a decision, which the District Attorney may veto, as to whether to seek the death penalty.
- [ ] To make a recommendation to the District Attorney as to whether to seek the death penalty.

7. Who else does the DA consult when deciding to pursue the death penalty? (please check all that apply)

- [ ] Various members of the community.
- [ ] The defense attorneys.
- [x] The victim’s family.
- [ ] Other: (please briefly describe)

8. When is the decision to seek death made (e.g., pre-PX, post-PX, at trial setting)? That decision is usually made post PX.

9. What participation from the defense is part of the process? (please check all that apply)

- [x] Defense attorney may speak to the committee/ DA/ reviewing DDA.
- [x] Defense attorney may submit any materials he/she wants to the committee/ DA/ reviewing DDA.
- [ ] Defense attorney may submit only a letter, without attachments.
- [ ] The defense is not consulted at all.
- [ ] Other: (please briefly describe)

10. Which of the following apply to the DA’s practices in your county? (please check all that apply)

- [x] The DA conducts independent investigation into potential mitigating circumstances, such as mental illness.
- [ ] The DA conducts no independent investigation into potential mitigating circumstances.
- [x] The DA is willing to reconsider its decision to pursue the death penalty if new evidence/circumstances arise.
- [ ] Once the decision to pursue the death penalty is made, it will not be reconsidered.
- [ ] Other: (please briefly describe)