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Problems with Newsom's Moratorium

By David A. Carrillo and David A. Kaiser

Governor Gavin Newsom's moratorium on executions was hailed in many circles for halting a death penalty process in California that is widely criticized as a costly failure. Even death penalty proponents acknowledge that the process is stalemated. The governor makes three arguments for his order: the state will save money, he has discretionary power over executions, and this is the voters' will. None of these is accurate.

Just before Gov. Jerry Brown's term ended last year the *New York Times* ran an opinion editorial by six former governors who urged Brown to (as they did) commute all 740 California death row prisoners' sentences. At first glance that sounds like the right call. A death sentence in California already amounts to life without possibility of parole. The last time a capital inmate was executed was in 2006, and only 13 inmates have been executed since California's Legislature reinstated capital punishment in 1977. Executions are so rare in this state that a former California Chief Justice once observed that the leading cause of death on death row is old age.

Capital punishment is very expensive, although experts disagree on the exact numbers. In 2008, a commission appointed by the Legislature concluded the state would save around \$126 million a year if the death sentences were converted to lifetime incarceration. That's money the state could spend on improving its citizens' lives. And capital inmates would remain condemned to lifetime incarceration.

Yet Brown declined to issue a blanket pardon of death row. He knew something those former governors did not: California's governor does have commutation and pardon powers, but they are limited. Under California constitution Article V, section 8(a) a governor may only grant a pardon or a commutation to a person twice convicted of a felony with the California Supreme Court's approval. This may be one reason Gov. Newsom chose the executive order route. Because most inmates on California's death row have been convicted of more than one felony, changing their sentences would require agreement from the California Supreme Court — which last year blocked several of Gov. Brown's clemency requests. So while it's true that the governor has some discretionary power over ex-

ecutions, those powers do not apply here.

The moratorium is unlikely to save the state any money. There will be no savings because Proposition 66 requires the courts to proceed with death cases, and every pending capital appeal remains a live action because the death sentences are untouched. The judicial branch must continue processing death penalty cases, assigning capital counsel, and reviewing capital appeals even if the governor has effectively frozen the system at the execution end. The county courts will continue to bear the expense of holding death penalty trials, and the California Supreme Court — bound by Proposition 66 — must continue to expedite hearing capital appeals.

The California Supreme Court is unlikely to rule that it can stop processing death penalty cases, because Article VI, section 11(a) of the state constitution requires it to hear all appeals from death judgments. And those death row inmates have federal constitutional rights to have their appeals addressed. Unless the death penalty law itself is repealed, or all the existing death judgments somehow vacated, the judicial branch must continue to assign capital counsel and hear capital appeals. The moratorium does nothing to halt that expensive process.

Rather than upholding the voters' will, this order defeats it. The electorate has spoken on capital punishment several times in the past decade, upholding it each time and most recently (with Proposition 66 in 2016) demanding that executions be accelerated. Those ballot results are a far better gauge of voter will on this specific issue than the governor's general mandate. The governor is charged with enforcing the law, and the law requires imposing capital punishment.

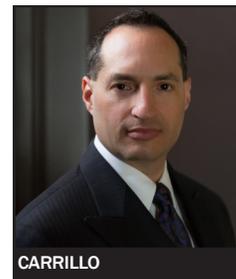
This order has some separation of powers problems. The governor is asserting his authority as the head of the state executive branch to order that the state executive will not enforce the death penalty. This does not necessarily bar California Attorney General Xavier Becerra from defending death judgments. And local prosecutors can continue to seek and obtain such judgments in their counties. The moratorium does nothing to stop the freight train moving down the track, it simply places a barrier at the finish line, inviting a pileup.

A California Supreme Court with an eye to a possible future repeal of the death penalty might

impose its own moratorium by placing its capital docket on hold. This would be difficult to justify, because Proposition 66 greatly limited judicial branch discretion in this area. That act requires that “the sentence in all capital cases should be imposed expeditiously” — which the California Supreme Court interpreted “as an exhortation to the parties and the courts to handle cases as expeditiously as is consistent with the fair and principled administration of justice.” This at least bars the judicial branch from mothballing its capital cases.

Finally, the order raises troubling issues about circumventing California's democratic process. The governor could seek judicial approval to commute all death sentences, or seek electorate approval to abolish capital punishment retroactively. But the governor cannot unilaterally do those things. With its direct democracy powers the California electorate can make policy decisions. The electorate did so in 2016: rejecting a proposal to convert all capital sentences to life without parole, and instead approving a proposal to expedite executions. One can view that as an unwise policy choice, and one can also have moral qualms about capital punishment. But one elected to “see that the law is faithfully executed” has little power to overrule the electorate's policy choice. The California Supreme Court once invalidated a San Francisco mayor's order to ignore a law, relying on the people's interest in public officials executing their official duties within prescribed limits. Regardless whether the executive is on the right side of history, a higher principle applies: our public officials have broad powers, but they are bound by the law. This moratorium is a first step, but it cannot be a permanent solution.

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