With new tactics, death penalty foes pursue initiative to abolish it

By L.J. Williamson

Rather than emphasizing emotions or ethics, the "Yes on 62" campaign to abolish the death penalty is stressing dollars and sense.

Subtitled "Replace the costly, failed death penalty system," Proposition 62 supporters are emphasizing the cost-ineffectiveness of capital punishment after a nearly identical measure, 2012's Proposition 34 — which touted an end to the possibility of wrongful executions — failed at the ballot box by a slim margin.

"Tactically, the Prop. 34 campaign heavily relied on the innocence message," said Allison Martin, Prop. 62's campaign spokesperson. "The Yes on Prop. 62 campaign is also advancing a commonsense taxpayer cost and effective justice message that connects especially well with undecided swing voters."

Prop. 62 backers hope the shift in focus to cost savings will boost their chances on Tuesday, especially since California has not had an execution since 2006.

To opponents of the measure questions of finance and procedure aren't the central issues with the death penalty, said Sacramento County District Attorney Anne Marie Schubert.

"These crimes are so egregious, you cannot have a healthy debate without talking about the facts of the cases," she said. "How do you call up a family member of a murder victim that we made this promise to and tell them it's all going to be taken away?"

Prop. 62 is pitted against Proposition 66, which seeks to expedite executions by limiting appeals to five years, assigning counsel to condemned convicts on a speedier basis, and expanding the number of counsel, among other provisions.

If voters pass both Prop. 62 and Prop. 66, the one with the most votes will prevail, said Sam Mahood, press secretary for Secretary of State Alex Padilla.

Prop. 62 opponents said most estimates of capital punishment's costs fail to take into account factors such as inmate health care costs and a disputed theory they call "the plea bargain effect."
Michael Rushford, president of the Criminal Justice Legal Foundation, which supports capital punishment, said in those counties with a death penalty, nearly four times as many defendants choose to plead guilty to avoid a death sentence than in counties which do not.

"In counties that didn’t have it, they had [the] expense of trial and all the appeals," Rushford said. "That savings has never been factored into discussion of which measure saves more money."

Napa County District Attorney Gary A. Lieberstein agreed that defendants would have little incentive to plead guilty when the maximum punishment is life without parole, and death penalty repeal would mean more trials.

Lieberstein cited the example of a defendant who, rather than facing the death penalty, pled guilty and agreed to life without parole, waiving all appeals or rights to request clemency.

"Had [the defendant] not offered this plea agreement, his case absolutely would have gone to trial as, under no circumstances, would our office have allowed him to plead to a sentence that would have offered him a chance to be released at any time during his life," Lieberstein said.

A leader in the death penalty reform movement who opposes Prop. 62, San Bernardino County District Attorney Michael A. Ramos said he does not use the death penalty as a tool to get a plea bargain.

Ramos said he’s been in situations "where they say, 'If you don’t give me death, I’ll tell you where the victims are buried.' So the family at least has the opportunity for a dignified burial. Without the death penalty, we would never have that opportunity."

UCLA School of Law Professor Sherod Thaxton argues "the plea bargain effect" theory is based on an implausible assumption that district attorneys mention the possibility of a death sentence in all first-degree murder cases.

And Paula M. Mitchell, professor at Loyola Law School and one of Prop. 62’s authors, said there is no data supporting the notion that guilty pleas have dropped where the death penalty has been taken off the table.

A 2015 study by the Indiana Legislative Services Agency found that a death penalty case resolved by guilty plea still cost more than twice that of a life without parole case tried through a jury.

An earlier study by the Judicial Conference of the United States found the average cost of representation in federal death penalty cases that resulted in plea bargains was more than three times higher than that of cases in non-capital cases.

While she opposes Prop. 62, Schubert, the Sacramento County DA, said the day-to-day impact for prosecutors would be minimal. The crimes that qualify for a life sentence wouldn’t change, nor would charging decisions be impacted.

Schubert said she would still expect defendants to file appeals and habeas corpus petitions. The primary changes would be in the penalty phase, and the appointment of additional counsel that is standard for death penalty cases would no longer take place.
The state of New Jersey repealed the death penalty in December 2007, and one year later, Hudson County Prosecutor Edward DeFazio, who served on the state’s Death Penalty Study Commission, said the repeal had no impact on the way his office prosecuted murder cases, nor had it been an impediment to dispositions.

Now a New Jersey state judge, DeFazio said he stands by his 2008 remarks today. "Both as the county prosecutor and a superior court judge, I have not seen a significant change in the plea negotiation process when it comes to murder cases."

Political fallout from the repeal of the death penalty in New Jersey was minimal, DeFazio said, and the plea bargain effect was not borne out by his experience.

"On the face of it, you would think that could be the case, but you have defendants who realize the imposition of the death penalty is not a reality," he said, as New Jersey had the same decades-long delays around executions California has now.

"If you're worried about plea bargain leverage, you have life without parole. That gets you leverage," DeFazio said. "You can have a sentence between a 30-year minimum and 50 years, and 85 percent served without parole eligibility. There's certainly some dispositional options on a murder plea."

"The position of the Prosecutor's Association was that the vast majority of the death penalty was a sham — a cruel hoax when it came to dealing with victims' families," DeFazio said. "Therefore, why should we be engaged in this sham? And that's what's now happening in California, only to the tune of many more people on death row," he added.

But Schubert worried that if voters abolish capital punishment, the forces behind Prop. 62 would be emboldened against their next target: life without parole.

"There's this trend in California we all recognize of lower accountability for crimes," Schubert said. "I think that's a concern."

In every first degree murder in which the death penalty is not an option, the case goes to the state appellate courts, which have 111 justices, Mitchell at Loyola said, and those cases typically resolve in three years or less.

By contrast, death penalty cases go straight to the state Supreme Court, on a slow and deliberate track handled by only seven justices, which contributes to lengthy delays that often stretch to 30 years.

That lack of intermediate review, said UC Irvine School of Law Dean Erwin Chemerinsky contributes to the backlog, as intermediate review is important in narrowing down issues in a case.

If the death penalty is eliminated, all cases will go through the usual progression to appellate courts, reducing the workload of the state Supreme Court, Chemerinsky said.

"I do think there's persuasive evidence that eliminating the death penalty would save a lot of money," Chemerinsky said, "and I take the legislative analyst's office figure as the best figure there is — if one wants to focus on costs."
"But," Chemerinsky added, "I don't think the most important issue is the cost."

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