The California Attorney General's constitutional authority over criminal justice reform during the COVID-19 pandemic

Overview

The COVID-19 pandemic has transformed nearly every aspect of life in California, including our criminal justice system.[1] It also may portend economic dire straits.[2] These circumstances will compel California to make difficult choices, including in the capital case arena — which has always been "the antithesis of efficient and effective use of government time and resources."[3] The state Attorney General can mitigate some of these issues by using that office's constitutional authority to exercise leadership in criminal justice reform. This can be done by acknowledging errors in capital and other criminal cases, arguing for changes in existing law where appropriate, and settling individual cases where continuing to defend a judgment is not in the public interest.

The Attorney General has broad authority to control criminal case resolution

Article V, section 13 of the California constitution describes the Attorney General's duties. The Attorney General is the "chief law officer of the State" and has the duty "to see that the laws of the State are uniformly and adequately enforced."[4] The Attorney General represents the interest of the people in a matter of public concern.[5] This includes criminal actions, which are "prosecuted in the name of the people of the State of California."[6]

The Attorney General's constitutional and statutory duties include discrete responsibilities, which taken together, "give the Attorney General oversight not only with respect to a district attorney's actions in a particular case, but also in the training and development of policy intended for use in every criminal case."[7] The Attorney General has "direct supervision over every district attorney" in all matters

pertaining to the duties of their office.[8] And when the Attorney General assists a district attorney, he or she may "assume a paramount control and direction of the business" the two are jointly conducting."[9] The Attorney General may also go beyond assistance and take over a prosecution when he or she believes the law is not being adequately enforced.[10] This power "confers broad discretion upon the Attorney General to determine when to step in and prosecute a criminal case."[11] Finally, the Attorney General "shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity."[12] This duty, however, is not limited to matters in the Supreme Court.[13]

Conflicts with the district attorney

Those constitutional and statutory provisions give the Attorney General broad authority to control the resolution of a criminal case, both in the trial courts and in post-conviction proceedings. And as several cases have explained, when the Attorney General and a local prosecutor disagree, the Attorney General prevails. For example, in *County of Sacramento v. Central Pacific Railroad Co.*, the Supreme Court invoked the Attorney General's supervisory authority over district attorneys to allow the Attorney General to withdraw a district attorney's plea deal.[14] More recent Court of Appeal cases have taken a similar approach, allowing the Attorney General to assert its constitutional authority in criminal and habeas corpus proceedings.[15]

There is one source for limiting the Attorney General's power over a district attorney, but it is not controlling. In *People v. Brophy*, the Court of Appeal concluded that the Attorney General did not have authority to order a telephone company to discontinue service to prevent illegal betting.[16] The court observed that direct supervision by the Attorney General "does not contemplate absolute control and direction" of district attorneys; the Attorney General's role as chief law officer did not confer authority to issue the order; and the Attorney General's duty to see that laws are uniformly and adequately enforced did not provide authority where the law gave the district attorney enforcement power.[17]

The Supreme Court has never directly addressed *Brophy*'s reasoning. But others have correctly pointed out that the language is dicta and legally flawed.[18] And

Brophy involved a situation in which an Attorney General assumes a district attorney's typical duties in a manner *adverse* to a defendant. Such a situation would likely not be at issue in the type of post-conviction proceeding envisioned by this article. Overall, there is ample authority for the Attorney General to control post-conviction litigation, even if a district attorney disagrees with decisions made.

Neither constitutional nor statutory limits constrain the Attorney General's authority to settle cases

In an article on this blog, Sean McCoy and Brandon Stracener argued that the Attorney General's constitutional authority is limited. That thesis rests on two questionable assertions. They first contend that the prejudicial error rule limits the Attorney General's ability to exercise decisions about which judgments to defend. Under this rule, they reason that the office may only decline to defend a judgment when it concludes a prejudicial error has occurred, and even then Article VI, section 13 requires a court to affirm unless it finds a miscarriage of justice. They then argue the prejudicial error rule limits the Attorney General's ability to settle capital cases, because the rule requires the Attorney General to defend criminal judgments unless and until it (or a court) determines a miscarriage of justice has occurred.[19]

In fact, neither the prejudicial error rule nor the statutory "duty to defend" judgments prevent the Attorney General from settling cases — which does not require concession of error. Under Article VI, section 13, "No judgment shall be set aside, or new trial granted . . . on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or . . . of procedure, unless . . . the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." According to McCoy and Stracener, this provision limits the Attorney General's power to resolve cases to situations where that office concludes there has been a miscarriage of justice. But the actual words of the provision and its placement in the state constitution article governing the judiciary indicate that it applies only to the courts, not to the Attorney General. The circumstances attending that provision's adoption show the same.

Before the forerunner to Article VI, section 13 was added by constitutional amendment in 1911, "most trial errors were reviewed under the functional

equivalent of an automatic reversal rule."[20] Article VI, section 13 "changed the role of appellate courts by requiring review of the entire cause including the evidence and permitting reversal only after finding a miscarriage of justice."[21] The 1911 Voting Guide made it clear the object of the amendment was "to render it unnecessary for the higher courts to grant the defendant in a criminal case a new trial for unimportant errors" and avoid allowing criminals to "escape justice through technicalities."[22]

As this history demonstrates, Article VI, section 13 was intended to apply to appellate courts, not the Attorney General. Further, in *In re Clark*,the California Supreme Court ruled that Article VI, section 13, which "serves to limit the jurisdiction of the court," only applies in appeals, not in habeas corpus proceedings.[23] Thus, any assertion that Article VI, section 13 prohibits the Attorney General from resolving capital cases (the majority of which are in some form of habeas proceeding) is misplaced.

McCoy and Stracener also argue that Government Code section 12512 limits the Attorney General's ability to resolve cases. That section provides: "The Attorney General shall attend the Supreme Court and prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity." This states only the Attorney General's duty to accept cases in which the state is a party. And no reported case has addressed an argument under the statute that the Attorney General's office has abdicated its duty to defend criminal judgments. Should the Attorney General conclude that it is in the public interest to take a position that benefits a defendant-appellant or habeas petitioner, that judgment is entitled to deference.[24] Thus, section 12512 does not limit the Attorney General's settlement discretion.

The Attorney General already has shown a commitment to criminal justice reform

When the Attorney General opines that the office has the authority to resolve cases, that analysis carries great weight with the courts.[25] For example, in one case the Attorney General's office successfully moved the Ninth Circuit to summarily reverse the denial of a federal habeas petition.[26] In another, a federal court approved a

stipulation between a habeas petitioner and the Attorney General's office to dismiss a petition in exchange for a new state court judgment.[27]

Those actions reflect the Attorney General's overriding duty to serve the public interest and the interests of justice.[28] California courts have also recognized law enforcement's limited prosecutorial resources, and the continual need to choose priorities.[29] Moreover, ethical rules direct prosecutors to "consider potential negotiated dispositions or other remedies" in collateral attacks if such action serves the interests of justice.[30]

These principles may also explain the Attorney General's actions in a recent case, *Ellis v. Harrison*. In *Ellis,* the petitioner contended he was denied effective counsel because his trial attorney held racist beliefs towards him and his race.[31] Initially, the state defended the federal district court's denial of Ellis's habeas petition. The state later changed its position, waived procedural defaults, and at oral argument conceded that the conviction should be overturned.[32] Relying on that concession, the en banc court reversed the district court's denial of habeas relief.[33] No court ever found error. While *Ellis* did not directly address the Attorney General's ability to settle a case, it shows that the office may decline to defend a judgment, even absent a judicial finding of error. The decision not to defend a judgment tainted by racism (even when there are viable procedural default arguments) is consistent with a prosecutor's ethical duty to do justice, not just win. The Attorney General's forceful stance against racism may also serve a broader societal interest in fostering confidence in the criminal justice system.[34]

The Attorney General could more expansively employ its settlement discretion

The Attorney General could continue to exercise its discretion and occasionally resolve post-conviction cases — particularly those involving the appearance of explicit or implicit racial bias, or violations of immigrants' rights. There are some indications that Attorney General Xavier Becerra is more willing than his predecessor to take positions favorable to the rights of criminal defendants.[35] But there are ample opportunities to do more. Public statements and legal allegations by Becerra and his office in non-criminal matters dealing with racial and immigration

issues seem to conflict with arguments the office makes in criminal cases raising such issues. The office could apply its principles consistently and more broadly refuse to defend, or use its settlement power in connection with, criminal judgments.

For example, Attorney General Becerra has suggested that he personally had a negative experience with law enforcement and has acknowledged that racial profiling takes place.[36] And exercising peremptory challenges on the basis of race is unconstitutional.[37] Yet the Attorney General's office has argued that a juror's "negative experience with law enforcement" and belief in racial profiling are "proper race-neutral reason[s] to challenge" that juror.[38] The office could instead acknowledge that such reasons are not race neutral and join in efforts to reform this area of the law.[39]

The Attorney General could also refuse to defend racially charged closing arguments by prosecutors. In a recent lawsuit, the Attorney General alleged that President Trump had "lashed out at immigrants, branding them as 'animals' during a public White House meeting in which he aired his frustrations related to immigration."[40] But the Attorney General's office has defended prosecutors' use of similar language.[41] The office could cease to do so.

As a final example, the Attorney General's office recently declared in a press release that "California will not stand by" while the Trump administration violates "treaty obligations and federal law, which require immigration officials to promptly give asylum-seekers a fair chance to present their claims."[42] But the office has rejected defendants' attempts to claim violations of their rights of consular notification, which is protected under both California law and the Vienna Convention.[43] The office has argued that there is no individually enforceable right under the convention, and that the failure to advise a defendant of the right to consular assistance was not prejudicial.[44] It need not do so. California Supreme Court Justice Mariano-Florentino Cuéllar recently described consular notification "as foundational to the sensible treatment of their nationals abroad."[45] As with the other claims discussed above, the Attorney General could stop making the enforceability or prejudice arguments it has asserted in response to claimed Vienna Convention violations.

Law enforcement and prosecutors have little incentive to change the kind of problematic conduct described here when it is condoned or dismissed as "harmless" by the state's highest law enforcement officer — and consequently often upheld by the courts. By refusing to defend such behavior, the Attorney General's office can set an example and take meaningful steps toward reforming the criminal justice system.

Conclusion

The California constitution entrusts the Attorney General with significant authority in handling criminal cases, especially post-conviction. Neither the California constitution's harmless error provision nor Government Code section 12512 limit that office's ability to settle post-conviction cases, or to concede error in the interests of justice. Instead, the Attorney General has broad discretion to take such action. The most expensive aspects of the death penalty (trials, appeals, and habeas) are still going forward even under the executions moratorium. With no functional death penalty, and thinner resources than before the pandemic, this is a uniquely appropriate time for Attorney General Becerra's office to consider alternatives to expending resources defending death sentences that in all likelihood will not be carried out. Now, with state resources stretched thin by COVID-19, Becerra has a chance to continue charting a reform-minded course in criminal cases.

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[1] See, e.g., Jud. Council of Cal., March 23, 2020 Statewide Order by Hon. Tani G. Cantil-Sakauye (suspending and continuing all jury trials for 60 days).

[2] See, e.g., Koseff, *Coronavirus Brings an End to California's Good-Times Budget. How Bad will It Get*?, S.F. Chronicle (Mar. 23, 2020).

[3] Berman, *Might COVID-19 Ultimately Bring an End to the Death Penalty in the United States?* Sentencing Law and Policy Blog (Mar. 22, 2020).

[4] Cal. Const., art V, § 13. Parallel statutory language in Gov. Code § 12511 provides for "charge, as attorney, of all legal matters in which the State is interested" (except matters pertaining to the University of California system and other officers authorized by law to employ attorneys).

[5] *D'Amico v. Bd. of Medical Examiners* (1974) at 14.

[6] Pen. Code § 684.

[7] *Pitts v. County of Kern* (1998) at 363.

[8] Cal. Const., art V, § 13.

[9] *County of Sacramento v. Central Pacific Railroad Co*. (1882) 61 Cal. 250, 254.

[10] Cal. Const., art V, § 13. The parallel statutory provision allows for a broader exercise of authority, stating that the Attorney General can take full charge of any prosecution "where he deems it necessary." Gov. Code § 12550.

[11] *People v. Honig* (1996) at 354–55.

[12] Gov. Code § 12512.

[13] See Pen. Code § 1256 ("It shall be the duty of the district attorney to cooperate with and assist the attorney general in presenting all criminal matters on appeal"); *D'Amico*, *supra* note 5, at 15.

[14] *Central Pacific*, *supra* note 9, at 254.

[15] See*In re Stier* (2007) at 69, 73–74, 79 (on Attorney General's appeal, reversing judgment granting habeas corpus relief); *People v. Mendez* (1991) at 1776–77, 1783 (reversing denial of Attorney General's motion to vacate orders resulting from stipulation between defendant and district attorney to reduce conviction to misdemeanor and seal record).

[16] *People v. Brophy* (1942) at 29.

[17] *Id.* at 28–29.

[18] California Constitution Center, A Governor Can Probably Stop Capital Cases by Executive Order, SCOCAblog (Sept. 16, 2019); 9 Ops.Cal.Atty.Gen. 74, 78 (1947) (characterizing the discussion as "pure dicta," noting that the briefs in *Brophy* failed to bring *Central Pacific* to the court's attention, and pointing out that *Brophy* was decided before Government Code section 12550 was enacted and did not consider all the constitutional text); see also *State of Cal. ex rel. State Lands Com. v. Super. Ct.* (1995) at 71 (an opinion of the Attorney General is "entitled to considerable weight, especially when . . . the opinion is consistent with a long line of authority both before and after its issuance").

[19] This tracks the Attorney General's position in at least one case. See *McPeters v. Brown* (E.D.Cal. 2020), No. 1:95-cv-05108-DAD, Docs. 253, 255 (in 2013, after the district court ordered the Attorney General to look into settlement, a supervising deputy attorney general asserted the lack of authority to settle absent a "miscarriage of justice").

[20] *People v. Blackburn* (2015) at 1138 (conc. opn. of Liu, J., joined by Werdegar, Cuéllar, and Kruger, JJ.).

[21] *Ibid.*

[22] *Id.* at 1138–39, quoting Voter Information Guide, Special Elec. (Oct. 10, 1911), argument in favor of Sen. Const. Amend. No. 26, p. 11; accord, *People v. Cahill* (1993) at 532 (dis. opn. of Mosk, J.).

[23] *In re Clark* (1993) at 795.

[24] See *D'Amico*, *supra* note 5, at 15.

[25] *See Phyle v. Duffy* (1948) at 441 (the California Attorney General's opinion on legal question is "entitled to great weight in the absence of controlling state statutes and court decisions").

[26] See *Baca v. Adams* (2015) at 1035.

[27] See *Burke v. Wittingham* (C.D. Cal. 2001) No. 5:01-cv-00184-VAP-MLG, Doc. 20.

[28] *D'Amico*, *supra* note 5, at 15; Rules Prof. Conduct, rule 3.8, com. [1].

[29] *People v. Rivera* (1981) at 145; *Roseville Community Hospital v. State of Cal.* (1977) at 590.

[30] Am. Bar Assn., Criminal Justice Standards for the Prosecution Function, Standard 3-8.5; see also *People v. Force* (2019) at 517, fn. 3.

[31] *Ellis v. Harrison* (2018) at 1162 (*per curiam*) (*Ellis I*).

[32] *Ellis v. Harrison* (2020) at 555–56 (en banc) (*Ellis II*).

[33] *Id.* at 556.

[34] Cf. *Ramos v. Louisiana* (2020) slip op. at 13 (conc opn. of Kavanaugh, J.) (the perception of unfairness and racial bias "can undermine confidence in and respect for the criminal justice system"); Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?* (2013) 122 Yale L.J. 2336.

[35] Compare, e.g., Br. for States of New York et al. as Amici Curiae in Support of Petitioner at 9–10, *Ramos v. Louisiana* (S. Ct. Case No. 18-5924) (arguing constitutional right to unanimous jury applies to states), and *People v. Superior Court* (*Gooden*) (2019) at 274, 279 (defending constitutionality of Senate Bill 1437, which restricted liability for murder), with Bazelon, *Kamala Harris Was Not a 'Progressive Prosecutor'*, N.Y. Times (Jan. 17, 2019).

[36] See *California's Racial and Identity Profiling Advisory Board Releases First Annual Report*, Cal. Dept. of J. (Jan. 2, 2018); *Attorney General Becerra Announces Revised Proposed Regulations to Collect Data Required During Law Enforcement Stops*, Cal. Dept. of J. (Aug. 1, 2017).

[37] See, e.g., *People v. Gutierrez* (2017) at 1157.

[38] See Respondent's Answering Br. at 64, *People v. Duff* (S105097).

[39] See Assem. Bill No. 3070 (2019–20 Reg. Sess.) (mandating, inter alia, that numerous reasons – including that prospective juror expressed that he or she had negative experience with law enforcement, or belief that law enforcement officers

engage in racial profiling – are "presumptively invalid" bases for a peremptory challenge); Supreme Ct. of Cal., Statement of January 29, 2020 (creating work group to study "whether modifications or additional measures are warranted to address impermissible discrimination against cognizable groups in jury selection"); see also Wash. Rules of Court, general rule 37 (mandating similar procedures to those envisioned by Assembly Bill 3070).

[40] Complaint for Declaratory and Injunctive Relief (Aug. 16, 2019) in *State of California v. U.S. Dept. of Homeland Security* (N.D. Cal.), 2019 WL 3926611, ¶¶ 282, 294.

[41] See, e.g., Respondent's Answering Br. at 233–34, *People v. Powell* (S043520) ("comparing a vicious murderer to a dangerous animal is permissible" and "has a non-racial purpose which does not invoke any alleged stereotypes about African-Americans").

[42] Attorney General Becerra Leads Multistate Amicus Brief Challenging Trump Administration "Turnback Policy", Cal. Dept. of J. (Feb. 22, 2019).

[43] Pen. Code § 834c(a)(1); *People v. Mendoza* (2007) at 709.

[44] See, e.g., Respondent's Answering Br. at 123–28, *People v. Maciel* (S070536). The California Supreme Court has only "assumed, without deciding, that Article 36 gives foreign nationals individual, enforceable rights." *People v. Leon* (2020) 8 Cal.5th 831, 846.

[45] *Leon*, 8 Cal.5th at 856 (conc. opn. of Cuéllar, J.).