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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION

ERNEST DEWAYNE JONES, Petitioner, v. VINCENT CULLEN, Warden of California State Prison at San Quentin, Respondent.	Case No. CV-09-2158-CJC DEATH PENALTY CASE

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EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 2

EXHIBIT M
LEGISLATIVE HISTORY MATERIAL REGARDING CALIFORNIA'S DEATH PENALTY STATUTES
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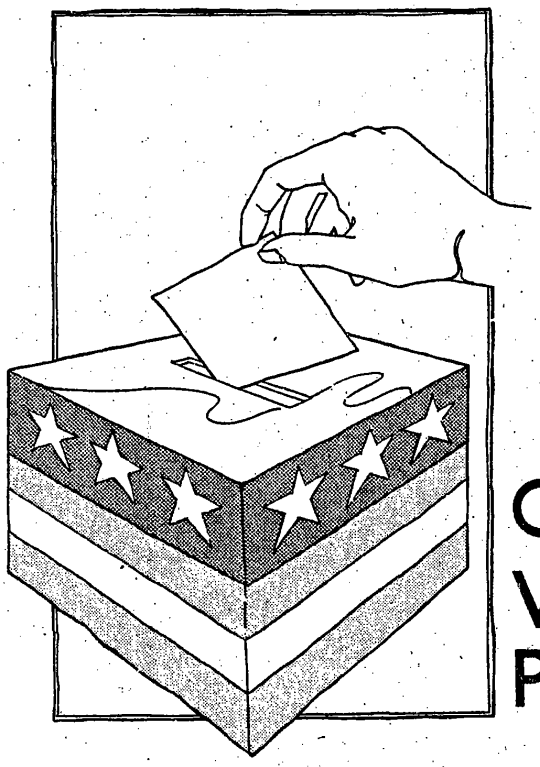

CALIFORNIA VOTERS PAMPHLET

GENERAL ELECTION NOVEMBER 7, 1978

COMPILED BY MARCH FONG EU · SECRETARY OF STATE

ANALYSES BY WILLIAM G. HAMM · LEGISLATIVE ANALYST

AVISO

Una traducción al español de este folleto del votante puede obtenerse si completa y nos envía la tarjeta con porte pagado que encontrará entre las páginas 24 y 25. Escriba su nombre y dirección en la tarjeta en LETRA DE MOLDE y regrésela a más tardar el 27 de octubre de 1978.

NOTICE

A Spanish translation of this ballot pamphlet may be obtained by completing and returning the postage-paid card which you will find between pages 24 and 25. Please PRINT your name and mailing address on the card and return it no later than October 27, 1978.

7 Murder. Penalty—Initiative Statute

Official Title and Summary Prepared by the Attorney General

MURDER. PENALTY. INITIATIVE STATUTE. Changes and expands categories of first degree murder for which penalties of death or confinement without possibility of parole may be imposed. Changes minimum sentence for first degree murder from life to 25 years to life. Increases penalty for second degree murder. Prohibits parole of convicted murderers before service of 25 or 15 year terms, subject to good-time credit. During punishment stage of cases in which death penalty is authorized: permits consideration of all felony convictions of defendant; requires court to impanel new jury if first jury is unable to reach a unanimous verdict on punishment. Financial impact: Indeterminable future increase in state costs.

Analysis by Legislative Analyst

Background:

Under existing law, a person convicted of *first degree murder* can be punished in one of three ways: (1) by death, (2) by a sentence of life in prison without the possibility of parole, or (3) by a life sentence with the possibility of parole, in which case the individual would become eligible for parole after serving seven years. A person convicted of *second degree murder* can be sentenced to 5, 6, or 7 years in prison. Up to one-third of a prison sentence may be reduced through good behavior. Thus, a person sentenced to 6 years in prison may be eligible for parole after serving 4 years.

Generally speaking, the law requires a sentence of death *or* life without the possibility of parole when an individual is convicted of first degree murder under one or more of the following special circumstances: (1) the murderer was hired to commit the murder; (2) the murder was committed with explosive devices; (3) the murder involved the killing of a specified peace officer or witness; (4) the murder was committed during the commission or attempted commission of a robbery, kidnapping, forceable rape, a lewd or lascivious act with a child, or first degree burglary; (5) the murder involved the torture of the victim; or (6) the murderer has been convicted of more than one offense of murder in the first or second degree. If any of these special circumstances is found to exist, the judge or jury must "take into account and be guided by" aggravating or mitigating factors in sentencing the convicted person to either death or life in prison without the possibility of parole. "Aggravating" factors which might warrant a death sentence include brutal treatment of the murder victim. "Mitigating" factors, which might warrant life imprisonment, include extreme mental or emotional disturbance when the murder occurred.

Proposal:

This proposition would: (1) increase the penalties for first and second degree murder, (2) expand the list of special circumstances requiring a sentence of either death or life imprisonment without the possibility of parole, and (3) revise existing law relating to mitigating or aggravating circumstances.

The measure provides that individuals convicted of first degree murder and sentenced to life imprisonment shall serve a minimum of 25 years, less whatever credit for good behavior they have earned, before they can be eligible for parole. Accordingly, anyone sentenced to life imprisonment would have to serve at least 16 years and eight months. The penalty for second degree murder would be increased to 15 years to life imprisonment. A person sentenced to 15 years would have to serve at least 10 years before becoming eligible for parole.

The proposition would also expand and modify the list of special circumstances which require either the death penalty or life without the possibility of parole. As revised by the measure, the list of special circumstances would, generally speaking, include the following: (1) murder for any financial gain; (2) murder involving concealed explosives or explosives that are mailed or delivered; (3) murder committed for purposes of preventing arrest or aiding escape from custody; (4) murder of any peace officer, federal law enforcement officer, fireman, witness, prosecutor, judge, or elected or appointed official with respect to the performance of such person's duties; (5) murder involving particularly heinous, atrocious, or cruel actions; (6) killing a victim while lying in wait; (7) murder committed during or while fleeing from the commission or attempted commission of robbery, kidnapping, specified sex crimes (including those sex crimes that now represent "special circumstances"), burglary, arson, and trainwrecking; (8) murder in which the victim is tortured or poisoned; (9) murder based on the victim's race, religion, nationality, or country of origin; or (10) the murderer has been convicted of more than one offense of murder in the first or second degree.

Also, this proposition would specifically make persons involved in the crime other than the actual murderer subject to the death penalty or life imprisonment without possibility of parole under specified circumstances.

Finally, the proposition would make the death sentence *mandatory* if the judge or jury determines that the aggravating circumstances surrounding the crime *outweigh* the mitigating circumstances. If aggravating circumstances are found *not* to outweigh mitigating circumstances, the proposition would require a life sentence without the possibility of parole. Prior to weighing the aggravating and mitigating factors, the jury

would have to be informed that life without the possibility of parole might at a later date be subject to commutation or modification, thereby allowing parole.

Fiscal Effect:

We estimate that, over time, this measure would increase the number of persons in California prisons, and thereby increase the cost to the state of operating the prison system.

The increase in the prison population would result from:

- the longer prison sentences required for first degree murder (a minimum period of imprisonment equal to 16 years, eight months, rather than seven years);
- the longer prison sentences required for second degree murder (a minimum of ten years, rather than four years); and
- an increase in the number of persons sentenced to life without the possibility of parole.

There could also be an increase in the number of executions as a result of this proposition, offsetting part of the increase in the prison population. However, the number of persons executed as a result of this measure would be significantly less than the number required to serve longer terms.

The Department of Corrections states that a small number of inmates can be added to the prison system at a cost of $2,575 per inmate per year. The additional costs resulting from this measure would not begin until 1983. This is because the longer terms would only apply to crimes committed after the proposition became effective, and it would be four years before any person served the minimum period of imprisonment required of second degree murderers under existing law.

Text of Proposed Law

This initiative measure proposes to repeal and add sections of the Penal Code; therefore, existing provisions proposed to be deleted are printed in ~~strikeout type~~ and new provisions proposed to be added are printed in *italic type* to indicate that they are new.

PROPOSED LAW

Section 1. Section 190 of the Penal Code is repealed.

~~190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years.~~

Sec. 2. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the state prison for a term of 25 years to life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 15 years to life.

The provisions of Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 of the Penal Code shall apply to reduce any minimum term of 25 or 15 years in a state prison imposed pursuant to this section, but such person shall not otherwise be released on parole prior to such time.

Sec. 3. Section 190.1 of the Penal Code is repealed.

~~190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:~~

~~(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.~~

~~(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.~~

~~(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.~~

Sec. 4. Section 190.1 is added to the Penal Code, to read:

190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The question of the defendant's guilt shall be first determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2 except for a special circumstance charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder in the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (2) of subdivision (a) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is

Continued on page 41

7 Murder. Penalty—Initiative Statute

Argument in Favor of Proposition 7

CHARLES MANSON, SIRHAN SIRHAN, THE ZODIAC KILLER, THE SKID-ROW SLASHER, THE HILLSIDE STRANGLER.

These infamous names have become far too familiar to every Californian. They represent only a small portion of the deadly plague of violent crime which terrorizes law-abiding citizens.

Since 1972, the people have been demanding a tough, effective death penalty law to protect our families from ruthless killers. But, every effort to enact such a law has been thwarted by powerful anti-death penalty politicians in the State Legislature.

In August of 1977, when the public outcry for a capital punishment law became too loud to ignore, the anti-death penalty politicians used their influence to make sure that the death penalty law passed by the State Legislature was as weak and ineffective as possible.

That is why 470,000 concerned citizens signed petitions to give you the opportunity to vote on this new, tough death penalty law.

Even if the President of the United States were assassinated in California, his killer would not receive the death penalty in some circumstances. Why? Because the Legislature's weak death penalty law does not apply. Proposition 7 would.

If Charles Manson were to order his family of drug-crazed killers to slaughter your family, Manson would not receive the death penalty. Why? Because the Legislature's death penalty law does not apply to the master mind of a murder such as Manson. Proposition 7 would.

And, if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, that criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.

Proposition 7 would also apply to the killer of a judge, a prosecutor, or a fireman. It would apply to a killer who murders a citizen in cold blood because of his race or religion or nationality. And, it would apply to all situations which are covered by our current death penalty law.

In short, your YES vote on Proposition 7 will give every Californian the protection of the nation's toughest, most effective death penalty law.

A long and distinguished list of judges and law enforcement officials have agreed that Proposition 7 will provide them with a powerful weapon of deterrence in their war on violent crime.

Your YES vote on Proposition 7 will help law enforcement officials to stop violent crime—NOW.

JOHN V. BRIGGS
Senator, State of California
35th District

DONALD H. HELLER
Attorney at Law
Former Federal Prosecutor

DUANE LOWE
President, California Sheriffs' Association
Sheriff of Sacramento County

Rebuttal to Argument in Favor of Proposition 7

The argument for Proposition 7 is strictly false advertising.

- It would not affect the Charles Manson and Sirhan Sirhan cases. They were sentenced under an old law, thrown out by the courts because it was improperly written.
- As for the "zodiac killer", "hillside strangler" and "skid-row slasher", *they were never caught.* Even the nation's "toughest" death penalty law cannot substitute for the law enforcement work necessary to apprehend suspects still on the loose.

But you already know that.

Regardless of the proponents' claim, no death penalty law—neither Proposition 7 nor the current California law—can guarantee the *automatic* execution of all convicted murderers, let alone suspects not yet apprehended.

California has a strong death penalty law. Two-thirds of the Legislature approved it in August, 1977, after months of careful drafting and persuasive lobbying by law enforcement officials and other death penalty advocates.

The present law is *not* "weak and ineffective" as claimed by Proposition 7 proponents. It applies to murder cases like the ones cited.

Whether or not you believe that a death penalty law is necessary to our system of justice, you should vote NO on Proposition 7. It is so confusing that the courts may well throw it out. Your vote on the murder penalty initiative will not be a vote on the death penalty; it will be a vote on a carelessly drafted, dangerously vague and possibly invalid statute.

Don't be fooled by false advertising. READ Proposition 7. VOTE NO.

MAXINE SINGER
President, California Probation, Parole and Correctional Association

NATHANIEL S. COLLEY
Board Member, National Association for the Advancement of Colored People

JOHN FAIRMAN BROWN
Board Member, California Church Council

Arguments printed on this page are the opinions of the authors and have not been checked for accuracy by any official agency.

Argument Against Proposition 7

DON'T BE FOOLED BY FALSE ADVERTISING. The question you are voting on is NOT whether California should have the death penalty. California ALREADY has the death penalty.

The question is NOT whether California should have a tough, effective death penalty. California ALREADY has the death penalty for more different kinds of crimes than any other State in the country.

The question you are voting on is whether to repeal California's present death-penalty law and replace it with a new one. Don't be fooled by false advertising. If somebody tried to sell you a new car, you'd compare it with your present automobile before paying a higher price for a worse machine.

Whether or not you agree with California's present law, it was written carefully by people who believed in the death penalty and wanted to see it used effectively. It was supported by law enforcement officials familiar with criminal law.

The new law proposed by Proposition 7 is written carelessly and creates problems instead of solving them. For example, it does not even say what happens to people charged with murder under the present law if the new one goes into effect.

As another example, it first says that "aggravating circumstances" must outweigh "mitigating circumstances" to support a death sentence. Then it says that mitigating circumstances" must outweigh "aggravating circumstances" to support a life sentence. This leaves the burden of proof unclear. As a result, court processes would become even more complicated.

Proposition 7 does allow the death penalty in more cases than present law. But what cases?

Under Proposition 7, a man or woman could be sentenced to die for lending another person a screwdriver to use in a burglary, if the other person accidentally killed someone during the burglary. Even if the man or woman was not present during the burglary, had no intention that anyone be killed or hurt, in fact urged the burglar not to take a weapon along, they could still be sentenced to die.

This is the kind of law that wastes taxpayers' money by putting counties to the expense of capital trials in many cases where the death penalty is completely inappropriate. To add to the waste, Proposition 7 requires two or more jury trials in some cases where present law requires only one.

Don't let yourself be fooled by claims that Proposition 7 will give California a more effective penalty for murder. It won't. DON'T BE FOOLED BY FALSE ADVERTISING. Vote NO on Proposition 7.

MAXINE SINGER
President, California Probation, Parole and Correctional Association

NATHANIEL S. COLLEY
Board Member, National Association for the Advancement of Colored People

JOHN PAIRMAN BROWN
Board Member, California Church Council

Rebuttal to Argument Against Proposition 7

ALRIGHT, LET'S TALK ABOUT FALSE ADVERTISING.

The opposition maintains if someone were to lend a screwdriver to his neighbor and the neighbor used it to commit a murder, the poor lender could get the death penalty, even though "he had NO INTENTION that anyone be killed."

Please turn back and read Section 6b of the Proposition 7. It says that the person must have INTENTIONALLY aided in the commission of a murder to be subject to the death penalty under this initiative.

They say that Proposition 7 doesn't specify what happens to those who have been charged with murder under the old law. Any first-year law student could have told them Proposition 7 will not be applied retroactively. Anyone arrested under an *old* law will be tried and sentenced under the *old* law.

The opposition can't understand why we included the aggravating vs. mitigating circumstances provision in Proposition 7. Well, that same first-year law student could have told them this provision is required by the U.S. Supreme Court. The old law does not meet this requirement and might be declared unconstitutional, leaving us with no death penalty at all!

If we are to turn back the rising tide of violent crime that threatens each and every one of us, we must act NOW.

This citizen's initiative will give your family the protection of the strongest, most effective death penalty law in the nation.

JOHN V. BRIGGS
Senator, State of California
35th District

DONALD H. HELLER
Attorney at Law
Former Federal Prosecutor

DUANE LOWE
President, California Sheriffs' Association
Sheriff of Sacramento County

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(g) "Fully Enclosed" means closed in by a ceiling or roof and by walls on all sides.

(h) "Health Facility" has the meaning set forth in Section 1250 of the Health and Safety Code, whether operated by a public or private entity.

(i) "Place of Employment" means any area under the control of a public or private employer which employees normally frequent during the course of employment but to which members of the public are not normally invited, including, but not limited to, work areas, employee lounges, restrooms, meeting rooms, and employee cafeterias. A private residence is not a "place of employment."

(j) "Polling Place" means the entire room, hall, garage, or other facility in which persons cast ballots in an election, but only during such time as election business is being conducted.

(k) "Private Hospital Room" means a room in a health facility containing one bed for patients of such facility.

(l) "Public Place" means any area to which the public is invited or in which the public is permitted or which serves as a place of volunteer service. A private residence is not a "public place." Without limiting the generality of the foregoing, "public place" includes:

(i) arenas, auditoriums, galleries, museums, and theaters;

(ii) business establishments dealing in goods or services to which the public is invited or in which the public is permitted;

(iii) instrumentalities of public transportation while operating within the boundaries of the State of California;

(iv) facilities or offices of physicians, dentists, and other persons licensed to practice any of the healing arts regulated under Division 2 of the Business and Professions Code;

(v) elevators in commercial, governmental, office, and residential buildings;

(vi) public restrooms;

(vii) jury rooms and juror waiting rooms;

(viii) polling places;

(ix) courtesy vehicles.

(m) "Restaurant" has the meaning set forth in Section 28522 of the Health and Safety Code except that the term "restaurant" does not include an employee cafeteria or a tavern or cocktail lounge if such tavern or cocktail lounge is a "bar" pursuant to Section 25939(a).

(n) "Retail Tobacco Store" means a retail store used primarily for the sale of smoking products and smoking accessories and in which the sale of other products is incidental. "Retail tobacco store" does not include a tobacco department of a retail store commonly known as a department store.

(o) "Rock Concert" means a live musical performance commonly known as a rock concert and at which the musicians use sound amplifiers.

(p) "Semi-Private Hospital Room" means a room in a health facility containing two beds for patients of such facility.

(q) "Smoking" means and includes the carrying or holding of a lighted cigarette, cigar, pipe, or any other lighted smoking equipment used for the practice commonly known as smoking, or the intentional inhalation or exhalation of smoke from any such lighted smoking equipment."

SECTION 2: Severability

If any provision of Chapter 10.7 of the Health and Safety Code or the application thereof to any person or circumstance is held invalid, any such invalidity shall not affect other provisions or applications of said Chapter which can be given effect without the invalid provision or application, and to this end, the provisions of said Chapter are severable.

SECTION 3: Effective Date

Chapter 10.7 of the Health and Safety Code becomes effective 90 days after approval by the electorate.

TEXT OF PROPOSITION 6—*Continued from page 29*

truth of the charges upon which a finding of probable cause was based and whether such charges, if found to be true, render the employee unfit for service. This hearing shall be held in private session in accordance with Govt. Code § 54957, unless the employee requests a public hearing. The governing board's decision as to whether the employee is unfit for service shall be made within thirty (30) working days after the conclusion of this hearing. A decision that the employee is unfit for service shall be determined by not less than a simple majority vote of the entire board. The written decision shall include findings of fact and conclusions of law.

(f) Factors to be considered by the board in evaluating the charges of public homosexual activity or public homosexual conduct in question and in determining unfitness for service shall include, but not be limited to: (1) the likelihood that the activity or conduct may adversely affect students or other employees; (2) the proximity or remoteness in time or location of the conduct to the employee's responsibilities; (3) the extenuating or aggravating circumstances which, in the judgment of the board, must be examined in weighing the evidence; and (4) whether the conduct included acts, words or deeds, of a continuing or comprehensive nature which would tend to encourage, promote, or dispose schoolchildren toward private or public homosexual activity or private or public homosexual conduct.

(g) If, by a preponderance of the evidence, the employee is found to have engaged in public homosexual activity or public homosexual conduct which renders the employee unfit for service, the employee shall be dismissed from employment. The decision of the governing board shall be subject to judicial review.

SECTION 4. Severability Clause

If any provision of this enactment or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or application of this enactment which can be given effect without the invalid provision of application, and to this end the provisions of this enactment are severable.

TEXT OF PROPOSITION 7—*Continued from page 33*

found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Section 190.3 and 190.4.

Sec. 5. Section 190.2 of the Penal Code is repealed.

~~190.2. The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:~~

~~(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim;~~

~~(b) The defendant, with the intent to cause death, physi-~~

~~cally aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;~~

~~(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:~~

~~(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.~~

~~(2) The murder was willful, deliberate, and premeditated, the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.~~

~~(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:~~

~~(i) Robbery in violation of Section 211;~~

~~(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.~~

~~(iii) Rape by force or violence in violation of subdivision (2) of Section 261, or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;~~

~~(iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;~~

~~(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.~~

~~(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.~~

~~(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.~~

~~(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.~~

Sec. 6. Section 190.2 is added to the Penal Code, to read:

190.2. (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:

(1) The murder was intentional and carried out for financial gain.

(2) The defendant was previously convicted of murder in the first degree or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed murder in the first or second degree.

(3) The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.

(4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place, area, dwelling, building or structure, and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed or delivered and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.

(7) The victim was a peace officer as defined in Section 830.1, 830.2, 830.3, 830.31, 830.35, 830.36, 830.4, 830.5, 830.5a, 830.6, 830.10, 830.11 or 830.12, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties; or the victim was a peace officer as defined in the above enumerated sections of the Penal Code, or a former peace officer under any of such sections, and was intentionally killed in retaliation for the performance of his official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a federal law enforcement officer or agent, engaged in the performance of his duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his official duties.

(9) The victim was a fireman as defined in Section 245.1, who while engaged in the course of the performance of his duties was intentionally killed, and such defendant knew or reasonably should have known that such victim was a fireman engaged in the performance of his duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission or the crime to which he was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his testimony in any criminal proceeding.

(11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this state or any other state, or a federal prosecutor's office and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(12) The victim was a judge or former judge of any court of record in the local, state or federal system in the State of California or in any other state of the United States and the murder was carried out in retaliation for or to prevent the performance of the victim's official duties.

(13) The victim was an elected or appointed official or former official of the Federal Government, a local or State government of California, or of any local or state government of any other state in the United States and the killing was

intentionally carried out in retaliation for or to prevent the performance of the victim's official duties.

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim while lying in wait.

(16) The victim was intentionally killed because of his race, color, religion, nationality or country of origin.

(17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:

(i) Robbery in violation of Section 211.

(ii) Kidnapping in violation of Sections 207 and 209.

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.

(vi) Oral copulation in violation of Section 285a.

(vii) Burglary in the first or second degree in violation of Section 460.

(viii) Arson in violation of Section 447.

(ix) Train wrecking in violation of Section 219.

(18) The murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration.

(19) The defendant intentionally killed the victim by the administration of poison.

(b) Every person whether or not the actual killer found guilty of intentionally aiding, abetting, counseling, commanding, inducing, soliciting, requesting, or assisting any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole, in any case in which one or more of the special circumstances enumerated in paragraphs (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

The penalty shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5.

Sec. 7. Section 190.3 of the Penal Code is repealed.

~~190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.~~

~~However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.~~

~~However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and was acquitted. The restriction on the use of this evidence is intended to apply only to proceedings conducted pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in other proceedings.~~

~~Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.~~

~~In determining the penalty the trier of fact shall take into account any of the following factors if relevant:~~

~~(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.~~

~~(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.~~

~~(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.~~

~~(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.~~

~~(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.~~

~~(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.~~

~~(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects of intoxication.~~

~~(h) The age of the defendant at the time of the crime.~~

~~(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.~~

~~(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.~~

~~After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.~~

Sec. 8. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or confinement in state prison for a term of life without the possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions whether or not such conviction or convictions involved a crime of violence, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved

the express or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence is intended to apply only to proceedings pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in any other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

Sec. 9. Section 190.4 of the Penal Code is repealed.

~~190.4. (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivision (b) of Section 190.1.~~

~~In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.~~

~~If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.~~

~~If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.~~

~~In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose a punishment of confinement in state prison for life.~~

~~(b) If defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.~~

~~If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole.~~

~~(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.~~

~~(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact the prior phase is the same trier of fact at the subsequent phase.~~

~~(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.~~

~~The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.~~

~~The denial of the modification of a death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the peoples appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.~~

~~The proceedings provided for in this subdivision are in addition to any other proceedings on a defendant's application for a new trial.~~

Sec. 10. Section 190.4 is added to the Penal Code, to read:

190.4. (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to Subdivision (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Whenever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of a separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach an unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by an unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and in the court's discretion shall either order a new jury impaneled to try the issues the previous jury was unable to reach the unanimous verdict on, or impose a punishment of confinement in state prison for a term of 25 years.

(b) If defendant was convicted by the court sitting without a jury the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be. If such new jury is unable to reach a unanimous verdict as to what the penalty shall be, the court in its discretion shall either order a new jury or impose a punishment of confinement in state prison for a term of life without the possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subject to the death penalty, evidence presented at any prior phase of the trial, including any proceeding under a plea of not guilty by reason of insanity pursuant to Section 1026 shall be considered an any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reasons for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes. The denial of the modification of the death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the People's appeal pursuant to paragraph (6).

Sec. 11. Section 190.5 of the Penal Code is repealed.

~~190.5. (a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.~~

~~(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and~~

~~Veterans Code, or Section 37, 128, 1500, or subdivision (b) of Section 190.2 of this code, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death.~~

~~(c) For the purposes of subdivision (b), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.~~

Sec. 12. Section 190.5 is added to the Penal Code, to read:

190.5. Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of the commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

Sec. 13. If any word, phrase, clause, or sentence in any section amended or added by this initiative, or any section or provision of this initiative, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this initiative, or any other section, provisions or application of this initiative, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this initiative are declared to be severable.

Sec. 14. If any word, phrase, clause, or sentence in any section amended or added by this initiative or any section or provision of this initiative, or application thereof to any person or circumstance is held invalid, and a result thereof, a defendant who has been sentenced to death under the provisions of this initiative will instead be sentenced to life imprisonment, such life imprisonment shall be without the possibility of parole.

If any word, phrase, clause, or sentence in any section amended or added by this initiative or any section or provision of this initiative, or application thereof to any person or circumstance is held invalid, and a result thereof, a defendant who has been sentenced to confinement in the state prison for life without the possibility of parole under the provisions of this initiative shall instead be sentenced to a term of 25 years to life in a state prison.

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE
BILL McVITTIE, Chairman

State Capitol - Room 3151
445-3268

BILL ANALYSIS

Staff Member PJJ

Ways & Means NO

Rev. & Tax NO

Urgency YES

BILL: Senate Bill 2054 (as amended 5/6/80)

AUTHOR: Briggs

Hearing Date: ~~June 16, 1980~~ June 23, 1980

SUBJECT: Death Penalty: Special Election

BACKGROUND:

In 1978 the death penalty statute set forth in Sections 190, et seq., of the Penal Code were adopted by initiative and vote at the November election. Since the statute was adopted by initiative, any amendments, even technical ones, must also be made by a vote of the people.

SB 2054 would make the following changes in the death penalty statute:

1. Under current law, a person shall be sentenced to death or life without the possibility of parole if the murder was committed while the defendant was engaged in or was an accomplice in the commission of or attempted commission or, or the immediate flight after, committing or attempting to commit arson in violation of Penal Code Section 447.

   SB 2054 would change the reference to Section 447a.

2. Under current law, a person convicted of first degree murder shall serve a term of 25 years to life. If special circumstances are found to be true, the sentence shall be death or life without the possibility of parole. Under current law, if a second jury hangs on the issue of special circumstances, the penalty shall be 25 years.

   SB 2054 changes the penalty to 25 years to life if the second jury hangs on the special circumstance issue.

3. SB 2054 makes other technical changes to address drafting errors in the initiative.

   SB 2054 would additionally call for a special election on November 4, 1980 to be consolidated with the general election on this measure.

COMMENTS:

1. a. The initiative establishing the current law provided that one of the special circumstances that may be alleged to invoke the death penalty is a murder committed while the defendant was committing or attempting to commit arson in violation of Section 447 of the Penal Code. Unfortunately, Section 447 was repealed in 1929. Proponents indicate they meant to refer to Section 447a of the Penal Code. SB 2054 strikes the reference to 447 and instead refers to 447a.

b. Section 447a of the Penal Code was repealed last year and a comprehensive arson statute enacted (450, et seq., of the Penal Code). To what section or conduct do the proponents intend to refer since section 447a has been repealed? Will this reference to a repealed section generate litigation to determine the conduct covered when the initiative was enacted?

2. a. Does the problem that the proponents seek to address in this bill indicate the need to permit the Legislature to make changes without the cost and time involved in a special election?

b. One of the special circumstances which may invoke the death penalty is the murder of a peace officer as specified by reference to sections of the Penal Code. All of those sections may be changed under legislation pending this year. How will those changes be integrated into the death penalty statute? By special election?

3. SENATE VOTES: Judiciary -- 6 Ayes; 1 No
Floor -- 29 Ayes; 1 No

SOURCE: Attorney General

SUPPORT: Unknown

OPPOSITION: Unknown

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE
BILL McVITTIE, Chairman

6/16
PJJ

State Capitol - Room 3151
445-3268

BILL ANALYSIS WORK SHEET

BILL #: SB 2054 AUTHOR: Briggs

1. Origin of the bill:

   (a) What is the source of the bill? (What person, organization or governmental entity, if any, requested introduction?

   SENATOR BRIGGS

   (b) Has a similar bill been before either this session or a previous session of the Legislature? If so, please identify the session, bill number and disposition of the bill.

   NO

   (c) Has there been an interim committee report on the bill? If so, please identify the report.

   NO

   (d) Please attach copies of letters of support or opposition from any group, organization or governmental agency who has contacted you either in support or opposition to the bill. (Committee analyses will only reflect those letters received.)

   SEE FILE

2. Problem or deficiency in the present law which the bill seeks to remedy:

   COPY FROM SENATE ANALYST

3. Please attach copies of any background material in explanation of the bill, or state where such material is available for reference by committee staff.

   NONE

4. Hearing:

   (a) Approximate amount of time necessary for hearing: 15 MINUTES

   (b) Names of witnesses to testify at hearing: NONE

SENATE COMMITTEE ON JUDICIARY 1979-80 REGULAR SESSION

SB 2054 (Briggs)
As introduced
Penal Code
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DEATH PENALTY
-NONSUBSTANTIVE CHANGES-

HISTORY

Source: Attorney General

Prior Legislation: None

Support: Unknown

Opposition: No Known

KEY ISSUE

SHOULD VARIOUS NONSUBSTANTIVE CHANGES BE MADE IN THE DEATH PENALTY STATUTE?

PURPOSE

Existing law includes a death penalty statute which was enacted by initiative.

This bill would change a cross-reference to the law of arson to conform to current law, would correct several typographical errors, and would make other nonsubstantive changes.

The bill would provide for a special election to enact its provisions, that election to be consolidated with the general election on November 4, 1980.

The purpose of the bill is to clean up the death penalty initiative.

(More)

COMMENT

1. Changes made by the bill

The bill would make the following changes in Sections 190, 190.1, 190.2, 190.3, and 190.4 of the Penal Code:

(a) On page 1, line 13, the phrase "of the Penal Code" is deleted as surplusage.

(b) On page 2, lines 35 and 36, "Section" is replaced by "Sections."

(c) On page 3, line 40, the phrase "of the Penal Code" is deleted as surplusage.

(d) On page 5, lines 31 and 32, the reference to the definition of "arson" is changed from Section 447 to subdivision (a) or (b) of Section 451. This would conform Section 190.2 to the changes made by SB 116 (Roberti) enacted last year.

(e) On page 6, line 20, "Sections" is replaced by "Section."

(f) On page 9, lines 2 and 3, "Subdivision" is replaced by "subdivision."

(g) On page 10, line 6, the words "to life" are added after "25 years," thus conforming the statement of the penalty for first degree murder without special circumstances in Section 190.4 to the penalty as provided in Section 190.

(h) On page 11, line 4, "Subdivision 7 of Section 11" is replaced by "subdivision 7 of Section 1181."

(More)

12
20
75
34

(i) On page 11, line 16, the word "Clerk's" is deleted from the phrase "Clerk's minutes."

(j) On page 11, line 21 and 22, the words "of Section 1238" are added to the phrase "paragraph (6)," thus making the appropriate reference to appeals by the People.

2. Need for special election

Since the present death penalty statute was adopted by initiative, any amendments, even ones as insignificant as these, must be put on the ballot for a statewide vote. The costs involved in adding such amendments to the ballot, in printing the text and arguments pro and con in the ballot pamphlets, and in tabulating the votes, are substantial.

The death penalty statute makes numerous cross-references to other sections of the Penal Code, sections which could be changed at any time. For example, one of the special circumstances for which the death penalty may be awarded is the killing of a peace officer as defined in specified subdivisions of section 830 of the Penal Code. The subdivisions would be renumbered by SB 1447 (Presley), which has passed the Senate and is presently before the Assembly Criminal Justice Committee. If that bill passes, it would require new amendments to the death penalty statute, and thus another special election.

SHOULD NOT THIS BILL PROVIDE THAT THE DEATH PENALTY STATUTE COULD BE AMENDED BY A TWO-THIRDS VOTE OF THE LEGISLATURE, THUS PERMITTING NECESSARY TECHNICAL CHANGES TO BE MADE WITHOUT CALLING A SPECIAL STATEWIDE ELECTION?

****

ACLU

AMERICAN CIVIL LIBERTIES UNION
CALIFORNIA LEGISLATIVE OFFICE
1311 "Eye" Street - Suite 102
Sacramento, California 95814
Telephone (916) 442-1036

June 13, 1980

Honorable John Briggs
State Capitol, Room 2062
Sacramento, California

Re: SB 2054, As Amended

Dear Senator Briggs:

This is to inform you that the American Civil Liberties Union is opposed to your SB 2054 which is scheduled for hearing in the Assembly Criminal Justice Committee on June 16, 1980.

SB 2054 would make several changes in the current Death Penalty Statute which was enacted as a result of your initiative in 1978. Specifically, the bill would change a section making the death penalty applicable to cases in which death results from an act of arson and would change the penalty for first degree murder from 25 years to 25 years to life.

We are opposed to this measure because we feel that the amendments relating to arson will make that provision of the death penalty clearly unconstitutional in that it will require a jury to find "special circumstances" and permit a jury to impose the death penalty any time a death results during the commission of the crime of arson. We feel that your proposed amendments will be particularly susceptible to Constitutional attack in that the definition of arson which you seek to include encompasses any malicious and intentional burning, even of an outhouse.

In addition, we note the irony of your bill requesting the Legislature to make changes in the initiative which you sponsored in order to avoid the legislative process. Undoubtably, many of the errors which your initiative contains would not have occurred if you had not sought to ignore this process.

For these reasons, we will urge the Committee to vote "no" on Senate Bill 2054.

Sincerely,

James R. Tucker
Legislative Advocate

Brent A. Barnhart
Legislative Advocate

JRT:sb

ACLU of Northern California • Brent Barnhart, Legislative Advocate
Drucilla S. Ramey, Chairperson • Dorothy M. Ehrlich, Executive Director
814 Mission Street, Suite 301 • San Francisco 94103 • (415) 777-4860

ACLU of Southern California • James Tucker, Legislative Advocate
Joyce S. Fiske, Chairperson • Ramona Ripston, Executive Director
633 South Shatto Place • Los Angeles 90005 • (213) 487-1720

The Rose Bird Court

Chief Justice Rose Bird, Justice Cruz Reynoso, Justice Joseph Grodin and Justice Stanley Mosk are four of the most liberal judges ever to serve on the California Supreme Court. Bird, Reynoso and Grodin were appointed to the Court by Jerry Brown. Mosk is a holdover appointment from Jerry's father, Pat Brown. These four super-liberal judges will face the voters in an election next year.

The People say YES to the death penalty. The Rose Bird Court says NO.

The people have voted twice on initiatives to reinstate the death penalty. Both times more than ⅔ of the voters said YES. The State Legislature has passed laws to reinstate the death penalty, yet not one murderer has been executed in California in more than twenty years. The Rose Bird Court has reversed 30 of 33 death penalty cases. Rose Bird has failed to uphold the death penalty in every single case.

The People say YES to tough anti-crime laws. The Rose Bird Court says NO.

The people said yes to the Victims' Bill of Rights, an initiative to give California the toughest anti-crime laws in the nation. Rose Bird voted to undermine key provisions of this important initiative.

The People say YES to Proposition 13. The Rose Bird Court says NO.

Rose Bird voted to rule Proposition 13 unconstitutional right after it was adopted by an overwhelming vote of the people. Since then, all of the key protections against tax increases contained in Proposition 13 have been attacked by the Rose Bird Court.

Now it's your turn to say NO . . . to the Rose Bird Court.

The Rose Bird Court has been soft on crime and tough on the taxpayer. If they are re-elected next year, their philosophy will control our highest court until 1998. If they are defeated, Governor George Deukmejian could appoint all four replacements. That would be bad news for criminals and good news for taxpayers.

☐ **Yes,** I want a Supreme Court that is tough on criminals, not taxpayers. I will join the campaign to defeat Rose Bird, Cruz Reynoso, Joseph Grodin and Stanley Mosk.

☐ **You may** use my name as an official endorser of Californians to Defeat Rose Bird.

☐ **I will** make a contribution to Californians to Defeat Rose Bird of:

☐ $10 ☐ $15

☐ $25 ☐ $50

☐ other $ _____

_____
Name

_____
Address

_____
City/State/Zip

_____
Signature

Please make your check payable to: CDRB (or Californians to Defeat Rose Bird) and mail it to 19762 MacArthur Blvd., #208, Irvine, CA 92715

Say NO
to higher taxes and more crime

Shall the members of the Supreme Court be reconfirmed?

	YES	NO
Rose Bird Chief Justice		X
Cruz Reynoso Associate Justice		X
Joseph Grodin Associate Justice		X
Stanley Mosk Associate Justice		X

Vote NO
on the Rose Bird Court.

Californians to Defeat Rose Bird
19762 MacArthur Blvd., Irvine, CA 92714
Treasurer, Blanche Kelly.

Rose Bird

vs.

the People of California

Californians to Defeat Rose Bird

Dear Concerned Citizen:

A child born in the United States today faces one chance in 133 of being murdered, according to the United States Bureau of Justice Statistics.

But for a convicted murderer in California, the chances for survival may be far better.

Because Rose Bird and the anti-death penalty majority of the California Supreme Court are determined to prevent any convicted killer from paying the ultimate price for his crime.

The California Supreme Court has reversed 53 of 56 death penalty cases they have heard since 1978.

And Chief Justice Rose Bird has voted against the enforcement of the death penalty in every single case.

They began 1986 by reversing eleven death penalty cases on New Year's Eve, clearly demonstrating that they plan to reverse more capital cases this year than ever before!

We have enclosed case histories of three actual death penalty cases which were reversed by the California Supreme Court.

Please read these cases carefully. Then, based on your own good judgement and common sense, tell us if you think the Rose Bird Court made the RIGHT or WRONG decisions.

Since 1967 when the California death penalty was last enforced, 40,000 innocent Californians have been murdered.

But not one murderer has been executed!

According to California's Attorney General, recent decisions by the Rose Bird Court could result in new trials for up to 180 convicted killers.

All of these killers have been found guilty and sentenced by judges and juries. They include William Bonnin, the infamous "Freeway Killer," sentenced to death for the sex-torture murder of 10 young men and boys.

Some of these cases are so old that key witnesses may have died or have forgotten important facts. It will be nearly impossible to gain convictions in all of these cases if they are

(over please)

2330 Butano Drive, Sacramento, CA 95825
Californians to Defeat Rose Bird 2330 Butano Drive, Sacramento, CA 95825 Blanche Kelly, Treasurer

retried.

You know what that means.

Convicted killers could be walking free in our neighborhoods! Not only will justice be denied but the cost of retrying those convicted killers has been estimated by prosecuting attorneys to cost California taxpayers hundreds of millions of dollars.

There is only one way to put an end to this insanity once and for all.

We must defeat Rose Bird, Joseph Grodin, Cruz Reynoso, and Stanley Mosk when they go before the voters for reconfirmation next year.

Bird, Grodin, and Reynoso were each appointed to the Court by Governor Jerry Brown. Mosk is a hold over appointment from Jerry's father, Pat Brown.

Bird was appointed Chief Justice by Jerry Brown in spite of the fact that she had no previous experience as a judge.

One of her first acts as Chief Justice was to attempt to declare Proposition 13 unconstitutional!

There are no appointees of Ronald Reagan on the High Court. Only two, Justices Lucas and Panelli, were appointed by Governor Deukmejian.

The result will be a consistent 5-2 vote against the people, against the clear intent of our laws, and against the best interests of honest citizens.

If Rose Bird and her three "Brown cronies" could be defeated next year, an unbiased majority could be appointed to the Court which would enforce the death penalty and protect Proposition 13.

But this will not be an easy task. Don't forget:

NO SUPREME COURT JUSTICE IN THE HISTORY OF CALIFORNIA HAS EVER BEEN DEFEATED AT THE POLLS.

Californians to Defeat Rose Bird (CDRB) has already started organizing the statewide citizen's campaign we will need to accomplish our necessary and historic mission.

Here is what we have accomplished since the beginning of this year:

CDRB has built a grass-roots citizen's organization of

(next page, please)

over 80,000 Californians dedicated to the defeat of the Rose Bird Court. Your organization covers every corner of the state and it is growing every day!

CDRB has been joined by more than 350 district attorneys, police chiefs, sheriffs and elected officials who serve as co-chairmen of this campaign.

CDRB has mailed campaign literature to more than three million Californian voters exposing the irresponsible record of the Rose Bird Court.

But now we must do more because Rose Bird and her liberal Brown-appointed cohorts are determined to maintain their power.

Rose Bird has hired Jane Fonda's and Tom Hayden's professional political advisors to produce advertising for her campaign.

Her campaign advertising team is headed by a man who went to North Viet Nam in 1972, while our young men were being tortured and killed in Communist prison cages. And now while serving as Rose Bird's paid campaign consultant, he's also planning an advertising campaign to help the Communist government of Nicaragua.

The Hayden-Fonda campaign team has boasted that they will spend millions of dollars on slick television ads to keep Rose Bird on the Court.

We have a long, tough, and important campaign ahead of us and we need your help to win.

So get out a pen and do two things right now.

✓ 1. Fill out your "Citizen's Review" and return it immediately. We will release the results to the press and let them know how millions of Californians feel about the reversals of important death penalty cases by the Rose Bird Court.

✓ 2. Join Californians to Defeat Rose Bird by investing $15, $25, $50, $100 or more in the campaign to defeat Bird, Grodin, Reynoso, and Mosk today.

Your investment will be put to work immediately to counter the Rose Bird propaganda being circulated by her Hayden-Fonda political organization.

Before you decide how much to invest in this vitally important citizen's campaign, consider this...

If Rose Bird is confirmed, it will be for a full 12-year

(please see other side)

term ending in 1998! And she's young enough that we could expect Ms. Bird as Chief Justice throughout that time.

You can see how important it is that we organize now and go all out to win. We must get hundreds of thousands of Californians to agree to help.

Do you want a State Supreme Court that will be dominated by the extremist left-wing philosophy of Jerry Brown, Tom Hayden and Jane Fonda--or one which will fairly uphold the laws which have been passed by the people of California?

How much is it worth to you to have a State Supreme Court that will not destroy Proposition 13?

How much is it worth to you to have a State Supreme Court that will protect our families from vicious killers by enforcing our death penalty law?

We think it's worth at least $15. We hope that you believe that it's worth even more--$25, $50 or even $100.

But whether you send $25, $15, $100 or more it will help us prevent the irresponsible, radical judges of the Rose Bird Court from controlling our States' highest court until 1998.

So, please return your Citizen's Review of Death Penalty Cases together with your largest possible investment in Californians to Defeat Rose Bird, today.

We are anxiously awaiting your reply.

Most Sincerely Yours,

Howard Jarvis
Co-Chairman

Senator Ed Davis
Former Los Angeles Police Chief
Co-Chairman

Paul Gann
Co-Chairman

State Representative Ross Johnson
Co-Chairman

P.S. Rose Bird, Joseph Grodin, Cruz Reynoso, and Stanley Mosk impact your life more than anyone else in the state today--including the Governor. Help us stop them from holding power to the year 1998 by completing your Citizen's Review of Death Penalty Cases and returning it with your contribution of $25, $50 or more today in the enclosed postage-free envelope.

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Total Through September 15, 1985

State Senators	2
State Assembly	22
County Supervisors	31
City Council	21
District Attorneys	17
Sheriffs	22
Mayors	67
Police Chiefs	179

CO-CHAIRMEN OF CALIFORNIANS TO DEFEAT ROSE BIRD
(These names were released previously – This is a partial list.)

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Assemblyman Ross Johnson

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Ferndale
Ben Nielsen
Fountain Valley
Charles H. Pappageorge
Yuba
Arlin Pischke
Lakeport
E. Daniel Remy
Burbank
Roger Rogers
Bishop
C.D. Simpson
Tracy
Jean Siriani
Stanton
Ronald Westmyer
Bradbury

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Steven Godden
Winters
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Norman G. Hansen
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Garden Grove
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San Diego

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(Titles for identification purposes only.)

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Bear Valley
Richard H. Lockwood
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Manteca
Charles Thayer
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Rose Bird **NO** ✖
Chief Justice
California Supreme Court

Press Director:
Janet Byers (714) 553-8099

Californians to Defeat Rose Bird
19762 MacArthur Blvd., Irvine, CA 92714

Citizen's Review of Death Penalty Cases Overturned by the California Supreme Court

CERTIFIED TO:

Diana Weir
7 Nace Ave.
Piedmont, CA 94611

DOCUMENT NUMBER: 94611WEIR007D B0219

IMPORTANT INSTRUCTIONS

Please read carefully, and sign to validate this document

This document contains actual case histories of three of the 53 important death penalty cases which have been overturned by the Rose Bird Court. The factual descriptions and comments of each case, are based on information furnished by the California District Attorney's Association.

Please read each case carefully, then indicate with an (X) in the space provided whether you believe the decision of the Rose Bird Court was right or wrong. You may add your own comments in the space provided or send additional comments on a separate sheet of paper.

Only the tabulated results will be released to the press. Your name will remain confidential.

Thank you for your participation. Please turn the page and complete your Citizen's Review.

PLEASE SIGN HERE
TO VALIDATE Mrs Diana Weir

Please turn to next page now. . . .

the diary; and therefore, it should not have been introduced into evidence.

Your Verdict: Was the Rose Bird Court: ☐ RIGHT ☐ WRONG

Your Comments:

SPECIAL QUESTIONS

This section is to be completed only by Supporters of Californians to Defeat Rose Bird.

A. Do you believe Rose Bird, Joseph Grodin, Cruz Reynoso and Stanley Mosk, the Supreme Court majority appointed by Jerry and Pat Brown, should be re-elected?
☐ Yes ☐ No ☐ Undecided

B. Would you help in the campaign to defeat the Brown appointed Rose Bird Court which if successful would permit the Governor to appoint their replacements?
☐ Yes ☐ No

C. Will you invest now to begin this statewide campaign, and help us fight the Hayden-Fonda political machine which is raising millions of dollars to keep Rose Bird in office? ☐ Yes ☐ No

D. What is your maximum investment?
☐ **$25** ☐ **$15** ☐ **$50** ☐ **$100** ☐ **Other $** _____ (please fill in)

Please make your check payable to:
C.D.R.B. (or Californians to Defeat Rose Bird), 2330 Butano Drive, Sacramento, CA 95825

94611WEIR007D B0219
Diana Weir
7 Nace Ave.
Piedmont, CA 94611

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Californians to Defeat Rose Bird 2330 Butano Drive, Sacramento, CA 95825 Blanche Kelly, Treasurer

COURT REPORT

Californians to Defeat Rose Bird
and Justices Joseph Grodin, Cruz Reynoso and Stanley Mosk

19762 MacArthur Blvd., Irvine, CA 92715 · (714) 553-8099

Executive Committee: Senator Ed Davis, Paul Gann, Howard Jarvis and Assemblyman Ross Johnson

Editor: Janet Byers · Volume 1, No. 3 · Fall, 1985

CDRB RADIO DOCUMENTARIES ON THE AIR

JUSTICE DENIED, a series of radio documentaries on the Rose Bird Court, sponsored by Californians to Defeat Rose Bird (CDRB), airs on 16 radio stations throughout the state, premiering the week of November 4.

Projected as a year-long media campaign, JUSTICE DENIED features interviews with a variety of people who, from personal and professional involvement with the Bird Court and its decisions, wish to speak out.

Stu Mollrich, campaign manager of CDRB said he believes it is the first time in California political history that a year-long, regularly scheduled program like JUSTICE DENIED has ever been devoted to a single issue or candidate. "This is too important an issue to decide merely on the basis of a 30-second commercial," Mollrich said. "These programs will promote debate on the issues and give knowledgeable people a forum for expressing their opinions."

First guest is Robert Philibosian, former district

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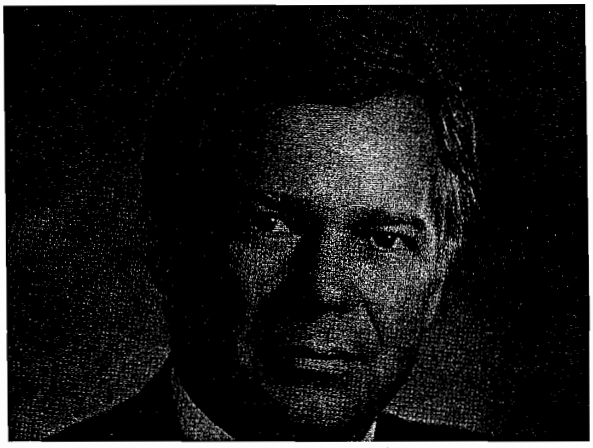
ROBERT PHILIBOSIAN
Former District Attorney, Los Angeles
"The liberal justices have ignored the will of the people as expressed directly in the initiative process and by the legislature."



HON. MICHAEL BRADBURY
District Attorney, Ventura County
"The majority of the Bird Court will not allow anyone in California to be executed regardless how perfect the trial."

GOVERNOR NAMES PANELLI TO HIGH COURT

All six nominees praised

Disapproving accusations that he would "pack the court" with right-wing, ultra-conservatives, Governor George Deukmejian's selection of Edward Panelli, a Bay area judge highly regarded by both liberals and conservatives, is termed a "shoo-in" for the seat vacated by the retirement of Associate Supreme Court Justice Otto Kaus.

Among his original slate of possible Supreme Court appointees were six strong candidates, including Panelli, giving us a preview of the kind of court we could have if Rose Bird, Joseph Grodin, Cruz Reynoso and Stanley Mosk are voted out of office next year.

Representing a geographical and political cross-sec-

Continued on Page 2

FRANKLY SPEAKING

PRESIDENT REAGAN, speaking to a group of U.S. attorneys said, "I want judges of the highest intellectual standing who harbor the deepest regard for the Constitution and its traditions—one of which is judicial restraint." Reagan added that the nation's founders "never intended, for example, that the courts pre-empt legislative prerogatives or become vehicles for political action, or social experimentation, or for coercing the populace into adopting anyone's personal view of Utopia."

TWO DEMOCRATS with clout announce their opposition to Bird, Reynoso and Grodin. They are State Senator Robert Presley of Riverside and Assemblyman Norm Waters of Placerville.

GOVERNOR GEORGE DEUKMEJIAN said to a Sacramento reporter who asked him about capital punishment, "You pay a fine if you get a traffic ticket. You are sentenced to a couple of years in prison if you commit an assault. And when someone takes the life of another, that person is, in effect, going to forfeit their life."

MARY NICHOLS, campaign manager for Tom Bradley, and a well-known Los Angeles attorney was quoted in the *Los Angeles Times* as saying, "All of a sudden it's gotten respectable to get up and say I'm voting against Rose Bird." Nichols was at one time secretary for environmental affairs for former Governor Jerry Brown.

BILL WARDLOW, a Democrat activist and advisor to District Attorney Ira Reiner, accused Rose Bird of putting her political and social views above the law when interviewed by a Los Angeles newspaper reporter. "She has created an air of hostility to the judiciary that could be terribly damaging to the court system of this state," he said.

SACRAMENTO UNION in a June editorial takes the court to task over the reversal of the Theodore Frank and Harold Memro death sentences and the overturning of Memro's guilt conviction. "Is it any wonder that the public has lost faith in its Supreme Court?" the Union asks.

WILLIE BROWN, State Assembly Speaker has indicated he would be willing to sacrifice his own political career if it would mean "***that*** court remaining okay and in good shape." "***That*** court," of course, is the Rose Bird Court, without which "we will go back to the dark ages," Brown adds.

LT. GOVERNOR LEO T. McCARTHY, quoted in the San Bernardino Sun, says he has changed his mind about the death penalty after voting against it since 1977. In issuing his own reversal, some have branded him as a "born again" death penalty proponent. McCarthy says he changed his mind after weighing the overwhelming impact of serial murders on victims and survivors against the punishment received by the offenders. He quoted *the average sentence for first-degree murder as 10 to 13 years.*

MARTIN SMITH, political editor for the *Sacramento Bee,* in a major California publication writes, "...only one person can save the court from being dragged deeply into the 1986 political mire. That person is Chief Justice Rose Bird. She can do this by changing her mind and not seeking confirmation to a new 12-year term."

DAN WALTERS in his syndicated column out of Sacramento writes, "...Bird has indicated that she would be willing to die at stake rather than retire from the field of ideological and political battle—a syndrome one Democrat calls the 'Joan of Arc' syndrome." In conclusion he says that there are strong indications she will fight to the finish, "no matter how many bodies litter the political landscape."

ANDREA NEAL, who writes on the U.S. Supreme Court for UPI states, "Support for the death penalty (throughout the country) is at a record high." Seventy-two percent of Americans favor killing killers, according to a 1985 Gallop Poll. Neal, quoting from still another source says a woman in Oregon has made a study that shows *64 percent of willful murderers commit a new crime within four years of release from prison.* ♦

Continued from Page 1

tion, the five state appeal court justices and one federal court judge received the highest praise from all segments of the state's legal community. Even prominent lawyers who have taken leading roles in Rose Bird's campaign have commended the Governor's selection.

In alphabetical order they are:

Justice John Arguelles . .	*2nd District Court of Appeal, Los Angeles*
Justice Hollis Best	*5th District Court of Appeal, Fresno*
Justice Marcus Kaufman.	*4th District Court of Appeal, San Bernardino*
Justice Edward Panelli . .	*presiding justice, 6th District Court of Appeal, San Jose*
Judge Pamela Ann Rymer	*U.S. District Court, Central District L.A.*
Justice James Scott	*1st District Court of Appeal, San Francisco*

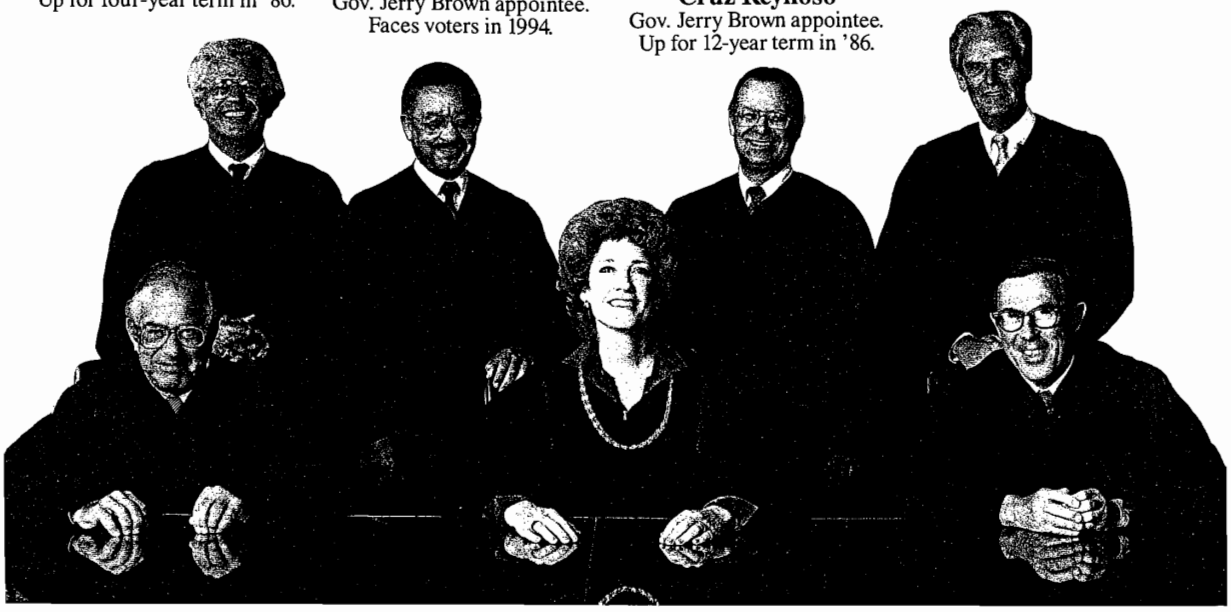
Panelli, who has served 13 years on the bench, is seen as a moderate, but never an ideologue. Alden Danner, who chaired the Judicial Nominations Evaluation Commission, said Panelli received the highest rating possible, "exceptionally well-qualified." ♦

Joseph R. Grodin
Gov. Jerry Brown appointee.
Up for four-year term in '86.

Allen E. Broussard
Gov. Jerry Brown appointee.
Faces voters in 1994.

Cruz Reynoso
Gov. Jerry Brown appointee.
Up for 12-year term in '86.

Malcolm M. Lucas
Gov. Deukmejian appointee.
Up for eight-year term in '86.



Stanley Mosk
Gov. Pat Brown appointee.
Up for 12-year term in '86.

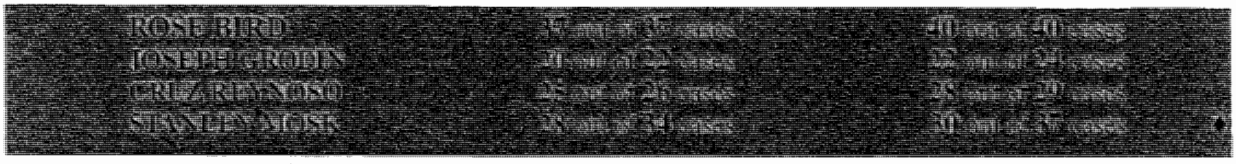
Rose Bird
Gov. Jerry Brown appointee.
Up for 12-year term in '86.

Otto Kaus
Gov. Jerry Brown appointee.
Retired effective Oct., 1986.
His replacement on '86 ballot.

DEATH SENTENCES REVERSED

The Rose Bird Court, as of mid-October, had reversed 37 out of 40 death penalty sentences, two cases having been heard and reversed twice. Some of these were unanimous decisions, not because all of the justices wished to see the murderers receive a lesser sentence, but because all were bound by previous rulings of the Bird Court which became law and made such a vote mandatory.

(Number of cases heard by each justice varies according to length of time on bench.)



CDRB—80,000 Members Strong

And Still Growing!

California voters are taking a strong stand on how they feel about Rose Bird. With election time still a year away, the number of "undecideds" is decreasing and the number who say they will not vote for Bird is growing. Certainly, the more than two million pieces of mail sent out by CDRB since February of this year has helped influence their decision.

In February of this year, 35 percent of those questioned in a Field Poll said they hadn't made up their minds. By August that group had shrunk to 15 percent and voters opposed Bird's bid for a 12-year term by 47-38 percent.

Public support for the other justices was also on the downswing, but with a heavy undecided block, proving

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attorney for Los Angeles who shares his thoughts on the Bird Court, which he feels "infringes on the constitutional powers of the people to make the law . . . a court that engages in legislation by lawsuit."

The Honorable Michael Bradbury, District Attorney for Ventura County, is interviewed for the second program. He talks about the Amy Sue Seitz case and the fact that her killer, convicted child molester and murderer, Theodore Francis Frank, is being tried a second time for his monstrous crime, due to a Bird Court reversal on his original death penalty sentence. "It (the second trial) may be a fruitless act and a tremendous waste of the taxpayers' money unless we can defeat Rose Bird, Joseph Grodin, Cruz Reynoso and Stanley Mosk in the November 1986 elections," Bradbury said.

Future JUSTICE DENIED programs will include an interview with a woman juror who, along with 11 other citizens, just sentenced a vicious killer to death, fearful that the sentence would be overturned by the Bird Court; a police chief who tells how the decisions of the Rose Bird Court have hampered his department's effectiveness,; Howard Jarvis, tax crusader, on what the Bird Court has done to Proposition 13 and a senior deputy district attorney who worked with Rose Bird when she was a public defender.

In discussing his reasons for appearing on JUSTICE DENIED, Bradbury said, "With the help of such programs, the people of California are coming to understand that they have an unqualified right to vote for or against justices of their Supreme Court. For the first time in California's history, our citizens will understand the issues in what is unquestionably the most important election of the 1980s.

"It is significant that JUSTICE DENIED commentators include both liberals and conservatives. But, they have one thing in common: a grave concern over a court that has consistently stepped beyond its legitimate role in a Democracy," Bradbury concluded.

Speaking for JUSTICE DENIED on behalf of the executive committee of Californians to Defeat Rose Bird, Senator Ed Davis, former Los Angeles Chief of Police and the originator and founder of Neighborhood Watch, says, "We can't guarantee that all listeners could pass the state bar exam, but we do think they are qualified to pass on who should be on the State Supreme Court. The more information we can pass along to help everyone make an educated decision, the better."

Joel Fox, the producer of JUSTICE DENIED pointed out that "now, Bird, Grodin, Reynoso and Mosk have a year in which to come up with a reply. They won't have the excuse of being left with no time to prepare their side of the case because of a last-minute media blitz." Fox has also advised that transcripts of each program will be made available to the public, upon request. ♦

Continued from Page 3

there is still a lot of work to be done to get voters to examine the records of Grodin, Reynoso and Mosk.

We can't afford to be smug. The Rose Bird War Chest is reported at $452,875. With that kind of money in the bank, Bird can and will wage quite a battle as election day nears. ♦

"JUSTICE DENIED" RADIO SCHEDULE

Californians to Defeat Rose Bird 19762 MacArthur Blvd., Irvine, CA 92715, Treasurer, Blanche Kelly.

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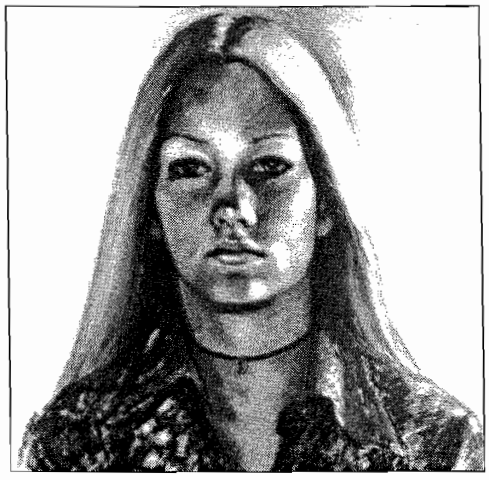
Karen Diane Green won't be celebrating Christmas this year.



But the man who murdered her will.

His name is Charles Green. His 17 year old wife, Karen, separated from him and went into hiding, fearing for her life.

On October 11, 1977, Charles Green tracked Karen down. He abducted Karen and drove her to a remote wooded area. Then he sexually assaulted her at gun point and killed her with a shotgun blast to the face.

Charles Green was convicted of the monstrous crime and sentenced to death.

On April 24, 1980, Chief Justice Rose Bird, Justice Stanley Mosk and two other members of the California Supreme Court overturned Green's death sentence on technicalities. He is now eligible for parole.

Now there are four Supreme Court Justices who consistently refuse to enforce California's death penalty law.

They are Rose Bird, Joseph Grodin, Cruz Reynoso and Stanley Mosk. These justices must face the voters in next year's election.

Together they are largely responsible for overturning 39 of 42 death sentences which they have decided. And Rose Bird has voted against the death penalty in every single case.

When Karen's family sit down for Christmas dinner, there will be an empty chair at the table.

An empty chair will exist for the families of hundreds of other murder victims throughout California.

Think about them for a moment when you sit down with your family to enjoy a holiday feast.

And, think about the brutal killers who live to celebrate another Christmas because the Rose Bird Court has allowed them to escape their just punishment.

Then, make a New Year's resolution. Bring justice back to California in 1986 by voting NO on Rose Bird, Joseph Grodin, Cruz Reynoso, and Stanley Mosk.

Rose Bird
Chief Justice
California Supreme Court

NO
✖

Californians to Defeat Rose Bird,
Joseph Grodin, Cruz Reynoso, Stanley Mosk
19762 MacArthur Blvd., Irvine, CA 92715

Californians to Defeat Rose Bird 19762 MacArthur Blvd., Irvine, CA 92715, Treasurer, Blanche Kelly.

CALIFORNIA LEGISLATURE

SENATE COMMITTEE ON JUDICIARY
SENATOR BILL LOCKYER, CHAIRMAN

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
ASSEMBLYMAN JOHN BURTON, CHAIRMAN

Joint Hearing on

CRIME VICTIMS JUSTICE REFORM ACT
Proposition 115 on the June 1990 Ballot

December 11, 1989
State Bar Board Room
San Francisco, California

186-J

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman

ASSEMBLY PUBLIC SAFETY COMMITTEE
John Burton, Chairman

HEARING ON THE CRIME VICTIMS JUSTICE REFORM ACT

Proposition 115 on the June 1990 Ballot

December 11, 1989
State Bar Board Room
San Francisco, California

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PART 1

Hearing Transcript

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman

ASSEMBLY PUBLIC SAFETY COMMITTEE
John Burton, Chairman

HEARING ON THE CRIME VICTIMS JUSTICE REFORM ACT

Proposition 115 on the
June 1990 Ballot

December 11, 1989
State Bar Board Room
San Francisco, California

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CHAIRMAN BILL LOCKYER Our purpose, as current law requires, is to have policy committees who poll the appropriate jurisdictions, hear testimony on initiatives proposed for the June '90 ballot In this instance, we haven't heard the final word about qualifying, but the sponsors, at least, were quite confident about their ability to obtain sufficient signatures to qualify for the June ballot and so we'll probably begin the public discussion, at least as far as legislative committees are concerned, early and take a careful look at the proposals From the Senate Judiciary Committee, we have our Majority Leader and former Chairman, Barry Keene and Senator Milton Marks, whose district we're in, our Caucus Chair Also Senator Quentin Kopp, of course, is present as one of the proponents of the measure

This is a joint discussion with the Assembly Public Safety Committee and, of course, chaired by Assemblyman John Burton, who is here, and Tom McClintock is also with us John, did you want to say anything or we'll just get going and ask Dean Uelman to comment and perhaps I might mention, we started it this way because of the Dean's schedule It may be a little bit topsy turvy, but we will catch up quickly with the vigorous advocate of the initiative right after Mr Uelman's testimony

DEAN GERALD F UELMAN Thank you I appreciate your willingness to accommodate my schedule We're swearing in a new crop of lawyers back in Santa Clara at four o'clock so I have to get back for that

I happen to believe that the criminal justice system is badly in need of reform And I think increasing public frustration with long delays and spiraling costs creates a very receptive climate for dramatic change And at first blush, the Crime Victims Justice Reform Act Initiative might seem responsive to these concerns But I believe that closer scrutiny of this measure will reveal that the proposal is ill-considered, is poorly drafted and is fraught with hidden costs and the prospects of making this situation worse, rather than better

What I'd like to do in these remarks is focus on Section 3 of the initiative which amends Section 24 of the California Constitution That appears at Page 3 of the draft of the initiative which has been supplied

I think it's important to note some very significant differences between the approach taken by this initiative and the approach taken by Prop 8, the initiative that was enacted in 1982 Prop 8 left the substantive rights of defendants, as defined by our state Constitution and interpreted by our courts, basically intact All that had changed was the remedy for their violation Proposition 8 merely precluded the suppression of evidence So the California prohibition of unreasonable searches and seizures still prohibits searches that the federal Constitution permits It's just that those prohibitions won t be enforced by exclusionary rules

What this new initiative does is redefine the rights themselves -- providing that

criminal defendants have no greater rights than under the U S Constitution And this is going to raise some very difficult questions of interpretation because many of the rights defined by the Constitution have greatest application in the investigatory phase before one has become a criminal defendant Presumably, greater rights under the California Constitution are still available to those who are not yet criminal defendants When one has been subjected to a search, to police interrogation or to an identification procedure before being arrested, are his substantive rights defined by his status at the time the violation takes place or at the time he objects to the violation after criminal charges have been filed?

The initiative doesn't tell us It speaks only in terms of the rights of criminal defendants, oblivious of the fact that many of the most important rights in our state Constitution protect suspects who are not yet defendants Frankly, I think the limitation of the no greater rights provision to criminal defendants raises significant questions under the equal protection clause of the federal Constitution Is it rational to treat someone's rights to due process of law, for example, differently from other citizens simply because the state has accused one of a crime?

One aspect of the protection of due process, for example, is the prohibition against vague language If the California Supreme Court found that a statute was unconstitutionally vague under the California Constitution, is one precluded from raising that objection after criminal charges are brought, even though he would be free to assert this claim in a suit for injunctive relief?

I think one of the most serious ambiguities under the 1990 Initiative is whether it affects the right to jury trial The right to jury trial under the California Constitution is much broader than under the federal Constitution We guarantee the right in all misdemeanor cases, while the federal right is limited to cases where more than six months imprisonment is at stake We require twelve jurors and we require unanimous verdicts, while the federal Constitution does not

Now while the first clause of Section 3 of the 1990 Initiative leaves out the right to jury trials, the next sentence of the initiative provides "this Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States " That sentence is breathtaking in its sweep Note that it doesn't say the above-enumerated rights It says, this Constitution' and that means that no part of the Constitution, including the right to jury trial, can be construed to afford greater rights than the federal Constitution Now if the right to jury trial under the California Constitution cannot be construed to afford any greater right than the federal Constitution, California citizens may be giving up more than they realize, including the much broader protection against the use of racially motivated preemptory challenges to exclude ethnic groups

from serving on juries and the absolute guarantee of unanimity in jury verdicts

Ironically, by leaving out the right for the jury trial in the first clause, the drafters seem to suggest that their intent is to leave the right to a jury trial unaffected But the breadth of the language they employ in the second clause, leaves room for no exceptions The entire Constitution must be construed to confer no greater rights than the federal Constitution

If this draft were submitted to me by a law student, I'd return it for a rewrite with a grade of D- For it to be presented to the voters of California to be enacted as an amendment to the Constitution with this kind of ambiguity inherent, is an insult to their intelligence

Unfortunately, the concept of interpreting our state constitutional guarantees more broadly than the parallel provisions of the federal Constitution is being presented to the public by the promoters of this initiative as a liberal excess of the Bird Court era that we can well do without

I believe in giving credit where credit is due The chief promoter of separate and independent guarantees of rights in state constitutions was not Rose Bird or Stanley Mosk, but none other than Thomas Jefferson After having served as President of the United States, Jefferson concluded that "the true bearers of our liberty in this country are our State governments and the wisest conservative power ever contrived by man is that of which our revolution and present government found us possessed Seventeen distinct states can never be so fascinated by the arts of one man as to submit voluntarily to his usurpation "

In other words, Jefferson found that the greatest protection to our lives will be in the state constitutional protection of rights that may wax and wane as the protections of the federal Constitution are interpreted The Federalist ideal with, as Justice Louis Brandeis put it, 50 different laboratories of democracy, can hardly be described as a liberal or activist phenomenon In fact, as former Chief Justice Warren Burger aptly put it quite recently, "It is vital that the states continue to serve as Brandeis put it, as the laboratories of democracy Indeed, most of the original thirteen states had their own bills of rights before 1791 " Chief Justice Burger continued, "Those powers of government affecting perhaps the most intimate and personal aspects of an individual's life, such as family, health, moral and criminal matters, are the province of the states and subject to regulation under state law Principles of Federalism permit state courts to apply and develop state constitutional doctrine independent of, but consistent with the federal Constitution The framers' decision in 1787 to leave this independent power and responsibility to the states is a significant part of our Constitution "

And our present Chief Justice, William Rehnquist, concurred in addressing a

conference of all of the Chief Justices of the State Supreme Courts last year He noted, "Our court has neither the authority nor the inclination to oppose efforts to construe state constitutional provisions more liberally than their federal counterparts are construed The movement is a classic example of Justice Brandeis praise for the federal system as making possible experimentation in 50 different state laboratories to see what the proper solution to a question is And in the past ten years, the Supreme Courts of nearly every state have rendered 600 decisions construing their state constitutions independently of parallel federal provisions "

I've included a map in my statement which charts the decisions rendered by the state courts up to 1986 And it graphically attests to the national diversity of this trend Enactment of this Initiative would simply announce that after 140 years of membership, California is simply opting out of its role as one of the 50 laboratories of Federalism Ironically, many of the cases in which the California Supreme Court interpreted our state Constitution to give criminal defendants more broad protection than the federal Constitution, have served as models for other states and ultimately, even persuaded the United States Supreme Court

Most recently, for example, the U S Supreme Court, inspired by the 1978 California Supreme Court decision in People vs Wheeler, imposed limitations on the use of preemptory challenges to exclude blacks from sitting on juries Unfortunately, the U S Supreme Court decision in Batson vs Kentucky falls short of the protections recognized in Wheeler Wheeler is one of the decisions which will be abrogated by this new initiative

I can only address one of the 30 sections contained in the initiative Many others present similar ambiguities and contradictions Some are thoughtful and worthwhile proposals that will improve the quality of justice in California Unfortunately, the initiative process precludes any picking and choosing and prevents any editing or correcting of drafting flaws Even corrective action by the Legislature is prohibited unless a two-thirds vote can be mustered

While concern for the victims of crime is commendable, I fear that the enactment of this initiative will turn us all into victims, who have simply given up the protection of our own state Constitution, and the 200 years of historical struggle which it represents While the real cost of this initiative is yet to be assessed, the greatest price it exacts is our independence as a state Thank you I'd be glad to respond to any questions

CHAIRMAN LOCKYER Dean, could you tell us some part of the initiative that you would most strongly favor and that you think would be a useful change in the law?

DEAN UELMAN Yes, I think there are some -- some positive reforms that I would have no difficulty supporting the provisions For example, with respect to

continuances of cases where one of the joint parties shows a reason to delay the trial, the initiative would allow the entire trial to be continued without necessarily granting a severance I think there are other proposals that are worthy of consideration There is, for example, right now, an experiment in place to give judges a more active role in the voir dire selection of jurors And I think that experiment will provide information that we can use to reform the law

Unfortunately, the initiative process may well be the worst way to go about reforming the law because it doesn't allow for that kind of experimentation and it doesn't allow for considered debate and amendment of the proposals that are being put forth

SENATOR MILTON MARKS In what way does the proposition change the death penalty provisions in California law?

DEAN UELMAN It makes a number of changes in defining the special circumstances under which the death penalty can be utilized I think we should carefully think about that Right now the more serious issues presented by the death penalty for us are the burdens that result from overuse And to simply expand the categories in which the death penalty can be used, I don't think it really addresses the underlying problems that we have in administering the death penalty today

CHAIRMAN LOCKYER Members, Mr Burton?

ASSEMBLYMAN JOHN BURTON Would you comment on the -- the elimination -- or what this would do to the California specific privacy amendment and how that would affect a woman's right to choice?

DEAN UELMAN Yes, I think Mr Riordan is going to address that more directly, but by totally eliminating any more expansive interpretation of the right to privacy than is conferred by the U S Supreme Court under the federal Constitution, simply puts California at the mercy of the current majority of the U S Supreme Court If the Roe case is over-ruled and the issue of the right to choice is simply dumped back in the lap of the states, what protects that right to choice in California is the specific guarantee of the right to privacy under the California Constitution And the fact that the limitation of the initiative applies to criminal defendants, does nothing because essentially it is the criminal law that we rely on to enforce the criminalization of abortion in California So I think that the risk is very real that the enactment of this initiative could jeopardize the constitutional protection under our state Constitution for the right to choice

CHAIRMAN LOCKYER It could

DEAN UELMAN It would I don't think there's any question but that it would

ASSEMBLYMAN BURTON Well, if -- okay, then what does that presume? That the federal court eventually is more sweeping in its elimination of a privacy

DEAN UELMAN: Yes

ASSEMBLYMAN BURTON and then that there be prosecutions brought or new statutes enacted in California

DEAN UELMAN: Actually, the statute s already in place

ASSEMBLYMAN BURTON: So an action brought under that current law?

DEAN UELMAN: Exactly It's part of the California Penal Code now and if Roe vs Wade is over-ruled, prosecutions under that provision could be an issue

ASSEMBLYMAN BURTON Except the Beilenson Therapeutic Abortion Act would, I guess, eliminate a certain percentage of that as I read that law

DEAN UELMAN: I think Mr Riordan will -- will be able to address that more directly

ASSEMBLYMAN BURTON Okay, great

CHAIRMAN LOCKYER Other members? Okay, thank you very much

DEAN UELMAN Thank you

CHAIRMAN LOCKYER Senator Kopp

SENATOR QUENTIN KOPP Thank you, Mr Chairman Can you hear me?

CHAIRMAN LOCKYER Oh, yeah (laughter)

SENATOR KOPP I am tempted to pick up with Mr Burton's question and also pick off at the fallacious and spurious argument about what this does with respect to the right to choose an abortion, but I'll save it for later

CHAIRMAN LOCKYER Thank you

SENATOR KOPP because I want to make a couple of introductory remarks first and I want to try to direct those introductory remarks to the Dean's overall comments of the relationship of this initiative to the federal constitutional provisions that apply

First of all, I identify myself for the record, Mr Chairman and Members of the Joint Committee, as a lawyer duly admitted to practice before the courts of this state and the federal courts, including the U S District Court for this district and the Eastern District as well and the U S Court of Appeals for the Ninth Circuit and the United States Supreme Court and as a lawyer who's practiced since 1955 in San Francisco and elsewhere around the state I identify myself also as a member of the Senate sirce December first, 1986

Finally, I advise the Committee that although my practice was not particularly specific in regard to criminal cases, all the criminal actions in which I represented a party were limited to representing those accused of crimes -- to representing criminal defendants, in both the state courts and in the federal courts I don t try and I didn t try one of those cases every month or even every year, but I'll tell you I tried enough of them to know that if I had the choice of defending a client who was guilty of

a crime, believe me I'd rather defend that client in the state court than the federal court

And let me remind all of us that even though lawyers love to have wins and victories -- the "W's" rather than the "L's", as far as society is concerned, it s a not a game among lawyers and it's not a game as between adversarial lawyers and a judge who presides over a trial by jury It is a search for truth and a process which is supposed to serve the public -- the public interest And the very basic reason that human beings form governments, is to protect persons, and then, secondarily, property, and then for all the multitude of other activities But that's the reason we have governments So that if you want to debate -- or the Dean or anybody else wants to debate, not my interest as a lawyer defending people accused of crimes and who may be guilty of those crimes, but the interests of all of the people whom we represent -- I say to you that the federal system is in the public interest to a far larger degree than the state system

Now,

ASSEMBLYMAN BURTON Senator Kopp?

SENATOR KOPP Yeah

ASSEMBLYMAN BURTON I mean isn't it really the truth now that if it was the Warren Court making the decisions on the Constitution as they saw it with Black and Douglas and if Rutledge was alive and Murphy was alive and we had the Deukmejian Supreme Court here now, we wouldn't be talking "we don't want the state system, we want the federal system " What it is, is that the proponents of this initiative -- and that's their right -- they want the most narrowly constructed system of constitutional rights which benefit all of us Because if you don't have any protections, they can kick in everybody s door and hope they find a crime somewhere So I really don't know if the relevance is the greatness of the state or the greatness of the federal system What it is, is who happens to have, quote, "the bleeding heart" -- the majority that's expanding upon the basic constitutional rights of the people as somebody sees it

SENATOR KOPP I'm responding to what I heard the Dean's comments to be

ASSEMBLYMAN BURTON I was going to say that to him, too, and

SENATOR KOPP All right But I'll expand to state that you are partially right because there are some of these provisions which relate to judicial interpretation But other provisions are statutory Other provisions are in the federal rules and criminal procedure

ASSEMBLYMAN BURTON We ain't talking about that We're talking about the Constitution and we're talking about interpretation and I don't know too much except the privacy one, which you'll get to, and whether or not there's specific, you know, what trial by jury means And, again, I guess that -- we're really talking about court

interpretation because I think our state's Bill of Rights was really patterned after the feds and that and I think really, that if we had a conservative interpretation of our Constitution for the last 20 years and nobody ever heard of Rose Bird, we wouldn t be dealing necessarily, you know, with this So I think it's more in the court s interpretations of constitutional rights and that the conservatives see it too liberal, the liberals might see it as too conservative Because I don t know the difference, except that, you know, the express right to privacy under the Cory Amendment and maybe some nuances, so

SENATOR KOPP: Well, again, I don't think it'd be profitable to argue with you about that

ASSEMBLYMAN BURTON Well, that's what

SENATOR KOPP That's why I say firstly because now let me go through the initiative

CHAIRMAN LOCKYER If I could call on Senator Keene

SENATOR BARRY KEENE Just one more conceptual question before you get into the detail Let's presume that your conclusion is accurate that public protection is best afforded by the presumably narrower interpretations of the federal Constitution Wouldn't the more honest thing to do be to present the public with an initiative that repeals those provisions and strikes them from the California Constitution?

SENATOR KOPP: Not necessarily

SENATOR KEENE Isn't that what we're doing?

SENATOR KOPP: With respect to some of these provisions, there may well be that kind of a repeal process that's part of it

ASSEMBLYMAN BURTON Well, it is, but also

SENATOR KOPP. But we're also reversing some judicial decisions

SENATOR KEENE Well, but the effect is

SENATOR KOPP Within the present language of the California Constitution

SENATOR KEENE But the effect is to provide for federal constitutional provisions and to read the state status to be superfluous And if that's the case, why don't we just say that and tell the public we're repealing the Bill of Rights of the California Constitution and you can rely now on the federal Constitution

SENATOR KOPP: Well, we're not

SENATOR KEENE It doesn't market as well

SENATOR KOPP No, it doesn't

SENATOR KEENE But that's what we're doing

ASSEMBLYMAN BURTON That's exactly what you're doing

SENATOR KOPP Well, we're not repealing the Bill

ASSEMBLYMAN BURTON That's exactly what it does, Senator It says that what you

have over here doesn't matter It's what you have over here supersedes it And, you know, nothing wrong with that But that s what it does What you're saying is the book here doesn't matter, that this is the book we'll go by But you aren t doing that You re just putting this subsection in and saying nothing in here means anything See Subsection A over there

SENATOR KOPP That's an oversimplification

ASSEMBLYMAN BURTON Not too much of an oversimplification

SENATOR KOPP Oversimplification

ASSEMBLYMAN BURTON Well, you tell me why it doesn't do that, then What does

SENATOR KOPP Because of the enumerated provisions in the Bill of Rights

ASSEMBLYMAN BURTON What are my rights? Which ones are you keeping that are not in the federal Constitution? In other words, the purpose of this is to limit the court's ability to address issues under our state Constitution that they have addressed heretofore, which make people unhappy and that's why we're here, and to do it under this book over here

SENATOR KOPP Some

ASSEMBLYMAN BURTON Well, what else is it called? What rights remain?

SENATOR KOPP There's -- there's other provisions

ASSEMBLYMAN BURTON Give me some

SENATOR KOPP that aren't touched Well, give me your Constitution and I'll

ASSEMBLYMAN BURTON Well, you're the guy -- you're the proponent of this

SENATOR KOPP Well, I'm going to tell you what this provides And I can tell you that it provides for a reversal of a number of judicial decisions, but not a complete elimination of existing language It provides for an alteration of some language and provides, as indicated, that the federal constitutional rights shall be the prevailing rights

ASSEMBLYMAN BURTON So you're eliminating state court decisions and putting them in the federal court decisions

SENATOR KOPP To the extent that those federal court decisions fit the language of this initiative, yes Or to the extent that the state court decisions were inconsistent with the federal constitutional principles

ASSEMBLYMAN BURTON Now how would you decide that the court's decision was inconsistent if it dealt with search and seizure?

ASSEMBLYMAN BURTON That it's inconsistent

SENATOR KOPP You utilize the decisions of the United States Supreme Court

ASSEMBLYMAN BURTON So what you re saying is not what is in the Constitution because the words are the same It's what this court said versus what that court said

SENATOR KOPP Together with those provisions that are adapted from the federal

rules of criminal procedure

ASSEMBLYMAN BURTON: Are we adopting the federal rules of criminal procedure?

SENATOR KOPP Not in their entirety

ASSEMBLYMAN BURTON Are we adopting federal rules of criminal procedure?

SENATOR KOPP Some of the rules

ASSEMBLYMAN BURTON Which ones -- which ones are we adopting?

SENATOR KOPP: I mean, do you want to let me go through this?

ASSEMBLYMAN BURTON Well, I'd say if you can't answer the question, do it anyway you want

SENATOR KOPP All right I will answer the question, but I'll do it seriatim Let's start with number one, which is the elimination of the post-indictment preliminary hearing A 1978 decision -- People vs Hawkins -- created a right for a defendant who is indicted by a grand jury to a post-indictment preliminary hearing So this reverses that decision and it conforms California law, not only with the federal system, but also the system used in 47 other states Secondly

ASSEMBLYMAN BURTON You mean after indictment that s it You move right into the trial phase?

SENATOR KOPP Correct Correct

ASSEMBLYMAN BURTON And does the initiative specifically repeal that decision by name somewhere in here?

SENATOR KOPP Not by name, but by

ASSEMBLYMAN BURTON Okay

SENATOR KOPP But by language it establishes that procedural alteration

ASSEMBLYMAN BURTON That's because -- because that's Oh it doesn't matter Grand jury hearings are all very fair We know that

SENATOR KOPP Number two In California the rules of evidence that generally apply at trial, apply to preliminary hearings, which means that witnesses, victims come to court to testify twice, same information In the federal system, under Rule 5 1 of the Federal Rules of Criminal Procedure and in 36 other states, a police officer is allowed to testify as to what victims and witnesses have told the police officer during the course of the investigation

ASSEMBLYMAN BURTON Is that hearsay?

SENATOR KOPP Huh?

ASSEMBLYMAN BURTON Hearsay?

SENATOR KOPP Yeah

ASSEMBLYMAN BURTON So this allows

SENATOR KOPP To that extent And the idea and the concept is that it is a probable cause hearing and not a trial

Thirdly, requires that any public defender or private counsel appointed to a case be ready to proceed with the preliminary hearing or trial within the time provisions prescribed in the Penal Code This is manifestly aimed at delays which result, not only in unnecessary jail crowding, denial of the right of speedy trial for defendants, denial of the right to a speedy trial as far as the rights of victims are concerned, and the losses of cases because witnesses become unavailable

Attorneys would be given a reasonable length of time to prepare cases Failure to be ready when promised can result in sanctions, including removal from the case with the appointment of alternative counsel and the provision exists also for lengthier time allotments to be set by the court as needed in cases that involve multiple defendants or cases that have complicated evidentiary issues

Fourthly, judges

CHAIRMAN LOCKYER Senator, perhaps on that point, we can pause for purposes of some further comment My concern is that 60 days from the time of the arraignment, trial must begin, absent some showing of good cause, and it raises the question of whether 60 days is the right amount of time Whether burdening your private or typically public lawyers -- public defenders -- you would have an adequate opportunity to prepare and whether there's some impairment of effective counsel that might result Or, another possibility is ripple effects on civil matters that could get postponed in order to make sure that courtrooms are available for the criminal proceedings which tend to be flooding the state courts right now You have to think of it as it would affect a busy lawyer When you have multiple cases kind of moving along and if some -- if an arraignment hits you on one, do you think you could, as a general rule, adequately prepare in two months for -- for a major trial with one client when you have several other clients

SENATOR KOPP Well, you shouldn't -- you shouldn't be taking on the case, you know? And there's

CHAIRMAN LOCKYER Public defenders mainly don't have any choice And they have to take the case

SENATOR KOPP There's certainly no paucity of lawyers and as a matter of fact the provision that's relevant indicates that a lawyer is barred from taking the case if the lawyer cannot be assured of proceeding to trial

CHAIRMAN LOCKYER So you think just as a general matter, that's an unrealistic

SENATOR KOPP Well, here's what happens in the system Lawyers take on too many cases They're not in one court because they re in another court

CHAIRMAN LOCKYER Yeah, it really is just a squeeze on county budgets then, I suppose, to the extent that they're -- maybe they have too many cases It means they should have more lawyers or fewer cases where they would have to accept the indigent

clients

SENATOR KOPP More appointed counsel

CHAIRMAN LOCKYER Yes, well, you can do it that way Either way you burden the county budget, I guess

SENATOR KOPP: Well, you may -- you may burden it in that sense, but you save money in the other sense You save money with respect to overcrowded jails or excessive pretrial attention

ASSEMBLYMAN BURTON If they are guilty, they're gonna end up in jail

SENATOR KOPP: Not in the county jail

ASSEMBLYMAN BURTON What if it's on county time? Does this make everything non-felony subject to a state prison state prison term?

SENATOR KOPP Obviously, some will be given misdemeanor sentences It will be in county jail Others who are found guilty will be given state prison time But if you're talking about just the narrow point of a county budget, you can save more money than it costs in appointed counsel or extra deputy public defenders

CHAIRMAN LOCKYER Well, okay, as long as these people are eligible for bail we re talking about, I guess We don't revoke the right to bail?

SENATOR KOPP No, we don't revoke bail or the right to bail

ASSEMBLYMAN TOM MC CLINTOCK Then, Senator, the question basically is whether we would delay civil cases in order to dispose of the criminal cases and get those people off the streets if they're guilty, or vice versa Keep them off the streets and move the civil cases Is that it?

SENATOR KOPP That's a part of the conundrum Right now, civil cases take a secondary role to the criminal cases Let's face the fact that in many Superior Courts, you can t get a civil case to trial because the criminal cases have priority and precedence So there s nothing novel

ASSEMBLYMAN MC CLINTOCK This would affect those criminal cases stature, would it not?

SENATOR KOPP Well, of course it would But there's nothing novel about the fact that you re expediting the criminal cases (laughter)

Next item is the voir dire examination by judge

CHAIRMAN LOCKYER Senator Keene?

SENATOR BARRY KEENE Well, it doesn't relate to that specifically

CHAIRMAN LOCKYER Well, go ahead

SENATOR KEENE But since you were interrupted, it might be a good time to ask you this question If the purpose -- because it seems to me the procedure you're going through now was to wipe clean the slate of all of these liberal opinions that have been issued in California Why does this have perspective application? Why should it apply

to the future as well as the past? I mean you could do that quite easily also with a much more restrictive approach and say, "Well, all of these cases are to be given no effect greater than the federal Constitution allows "

SENATOR KOPP Most criminal statutes and provisions apply perspectively

SENATOR KEENE Well, you

SENATOR KOPP Are you suggesting to apply these retroactively? Would ?

SENATOR KEENE No, what I'm suggesting is that you are -- are justifying a number of the provisions here on grounds that they remedy wrongs that have been committed by the courts in the form of liberal decisions that have allowed greater rights to criminal defendants than the federal Constitution allows And I say, well, if you make the case -- if you make that case, that that s good in the interest of public protection Why do you have to tie the hands of future California courts, the California Legislature in the future, the executive branch of California government in the future and say that nothing may be accomplished in this direction than is greater than what the federal government allows? Why don t we just wipe out the cases of the past?

SENATOR KOPP Well, basically because the initiative evolves from unsuccessful efforts to secure enactment of many of these provisions

SENATOR KEENE Well, but you've got a very conservative California Supreme Court now We don't even trust them, I guess

SENATOR KOPP I guess not I guess people, including victims -- and you'll hear from a victim of heinous crimes -- have lost so much confidence, Senator Keene, in the criminal judicial system in California

SENATOR KEENE You raise one other issue and it was spotlighted by Dean Uelman The sentence that says "this Constitution shall not be construed by the courts to afford greater rights to the criminal defendant ' It doesn't say what those rights are or what kind of rights For example, if someone is accused of a crime, do their rights to free speech or assembly or religion automatically get restricted to what the federal government allows and not what the California Constitution in the cases under it allows, and if so, why isn't that too blunt a provision?

SENATOR KOPP I'm going to defer the answer to that question to District Attorney Danner from Santa Cruz County who is here to testify on that particular section

SENATOR KEENE Okay, thank you

SENATOR KOPP Let me talk again about voir dire Voir dire will be conducted by judges with supplemental questions by attorneys upon the showing of good cause and this is no different than the federal system of jury selection in criminal trials In addition, it will require a finding of good cause to examine separately each perspective juror in a capital case In addition

ASSEMBLYMAN BURTON Finding of good cause? Is that defined?

SENATOR KOPP Defined in the case law adnauseam

ASSEMBLYMAN BURTON You wouldn't have time If you don't like what that judge is doing, you go and try to get a writ somewhere and tell him to let you ask the guy a question

SENATOR KOPP: That's the federal system

ASSEMBLYMAN BURTON So have you answered my questions yet?

SENATOR KOPP: Yeah There's good cause definitions in federal reports

ASSEMBLYMAN BURTON: And so if you don't

SENATOR KOPP It's based upon the federal system

ASSEMBLYMAN BURTON If you don't like the system

SENATOR KOPP That system's been in effect for ten years

ASSEMBLYMAN BURTON Do you find that there's nothing wrong with the federal system?

SENATOR KOPP Now I don't think there is anything wrong with that as far as the public interest is concerned

ASSEMBLYMAN BURTON Well, I'm asking you a question

SENATOR KOPP You and I

ASSEMBLYMAN BURTON Hey, I'm asking -- you're a witness I'm asking a question, Senator, how it works if I don't like a ruling that I haven't shown good cause, does the person, if they feel strongly enough, stop it and go some where up a little higher to get a higher court to tell this trial judge to allow it?

SENATOR KOPP Yes Yes

ASSEMBLYMAN BURTON You could do that Okay That's good enough It seemed to be burdensome

SENATOR KOPP Voir dire questions will be an aid of the exercise of the challenge for cause In addition, it provides for reciprocal discovery As you know, I am sure, right now the prosecution discloses everything in its possession The defendant has no obligation to produce or disclose anything in return District Attorney Danner, again, can testify as to what that results in as a matter of practice

Incidentally, these rules are almost identical with the same rules which have been in force in Oregon since 1973 allowing prosecutors to know the names and addresses of witnesses who are going to be called It does not require the defendant, however, to state whether he or she will testify And also to give the D A copies of any written statements and physical and scientific evidence

It also allows the joinder of separate but similar criminal actions, in contravention of People vs Smallwood which was decided in 1986, and mandates a second, independent defense be admissible evidence in the proof of the first or separate trials

may be required

CHAIRMAN LOCKYER What s an example of that, Senator? If you have one

SENATOR KOPP No, I don t have one

CHAIRMAN LOCKYER Okay

SENATOR KOPP Multiple defendants who participate in one crime will be able to be charged and tried together in one case unless it appears to the court that it will be impossible for all the defendants to be available and prepared within a reasonable period of time

ASSEMBLYMAN BURTON Well, isn't the unfairness of trying everybody together is that somebody -- everybody gets tarred with the same brush? I mean enabling them to get tried together sounds like we're doing them a favor If I was, let's say, an innocent bystander and really had a minimal amount of culpability in something, I wouldn't want to be tried with the heavies I mean, isn't that the purpose of separate trials is, so that I can put my thing out on the merits and not get hung up with the heinous stuff that these other two defendants did?

SENATOR KOPP That's the argument

ASSEMBLYMAN BURTON Well, is that ?

SENATOR KOPP That's the argument, but

ASSEMBLYMAN BURTON You see the logic to that?

SENATOR KOPP Yeah, the logic of that is that it presupposes that a jury won't consider independently the evidence against Defendant B as compared to Defendant A

ASSEMBLYMAN BURTON Do you assume guilt?

SENATOR KOPP I don t make that assumption

ASSEMBLYMAN BURTON In other words, you

SENATOR KOPP They're both innocent when they walk in that courtroom

ASSEMBLYMAN BURTON We're doing the best to make sure they re guilty whether they're guilty or not when they walk out, I guess or something

SENATOR KOPP Well, we're not doing the best to make sure that they're both guilty, but we re trying to provide a administration of a case that takes into consideration the needs of society and not simply somebody who's accused of a crime and says, I m not willing to stand trial with Defendant A "

ASSEMBLYMAN BURTON Do you automatically, when you're arrested, cease being a part of society? Is that in here?

SENATOR KOPP I think that is a facetious question, Mr Burton

ASSEMBLYMAN BURTON Yes, it is a

SENATOR KOPP Because you know -- because you know that there -- have been thousands and thousands of trials of two or more defendants in which one defendant is found guilty and the other defendant is not found guilty

ASSEMBLYMAN BURTON Well, I guess the basic -- the basic difference, Senator, is that -- and I understand one of the needs you're talking about But I just think you should get a fair shot at your trial if it's you standing trial You know, it s just like legislative hearings where you have all this stuff coming at you and you can't remember whose amendment was what and I just think that -- that maybe for whatever administrative clear-cut stuff there was, I think there's a danger that somebody could get tarred -- tarred with the other evidence

SENATOR KOPP Well, there's no

ASSEMBLYMAN BURTON No guarantees either way

SENATOR KOPP There's no guarantees either way and there's no guarantee of a separate trial every time you want to ask for a separate trial for your client

SENATOR MARKS May I ask a question?

SENATOR KOPP: Go ahead

SENATOR MARKS The U.S Supreme Court upheld the Georgia sodomy laws applied to homosexuals -- no federal right to privacy Could that be the standard for privacy in California and will that be in this proposition?

SENATOR KOPP I don't know the answer to that, Senator

SENATOR MARKS: Well, that's a federal law that's contrary to California law California

SENATOR KOPP I'll tell you what Give me the case to read that you're referring to that you have up there and I'll tell you, I'll go back to the office this afternoon and I ll read it and I'll call you on the phone tomorrow

SENATOR MARKS Bowers vs Hardwick, 106 Supreme Court, 2841

SENATOR KOPP Have you read the case?

SENATOR MARKS Yes, I have

SENATOR KOPP Well, what's it hold?

SENATOR MARKS That we can refuse to overturn a criminal statute prohibiting consenting adults from engaging in certain sexual conduct in the privacy of their home

SENATOR KOPP Have you read People vs Belous?

SENATOR MARKS No, I haven't

SENATOR KOPP All right Well, People vs Belous which I ll talk about in a little while, is a 1969 California Supreme Court, which recognizes the right to privacy in California without any constitutional provisions

CHAIRMAN LOCKYER But that -- wouldn't that be eliminated?

ASSEMBLYMAN BURTON That's a liberty case That's got nothing to do with this

SENATOR KOPP It s not a liberty case Privacy

CHAIRMAN LOCKYER Wouldn't that be limited by the effect of the proposition?

SENATOR MARKS The proposition says that California law -- California decisions

that are contrary to those of federal law, shall not be upheld

SENATOR KOPP I think it's a bogus argument There was a right to privacy found in California cases before the Constitution ever

ASSEMBLYMAN BURTON Well, what were the facts of that case, Senator? I want to read that one

SENATOR KOPP Be happy to

CHAIRMAN LOCKYER But those

SENATOR KOPP 71, Cal 2d, 954 at Page 963, et seq

ASSEMBLYMAN BURTON But that -- I asked you what the case was about I didn't mean a cite I don't want to do your research for you

SENATOR KOPP I'm going to smile, Mr Burton, because I've known you so long and I know what

ASSEMBLYMAN BURTON And you know what a research guy I am

SENATOR KOPP Curious sense of humor you have It's the abortion case that is often discussed in the context of this initiative

SENATOR MARKS I would like it if you could give me an answer because I don't believe that under the statute that you're talking about that if the federal law is contrary to that of the California law -- California decision, that the federal law must prevail And therefore there would have an equal effect upon a Californian's right to privacy

SENATOR KOPP Well, what's the relevance? You're talking about another use -- talking about a statute in another state?

SENATOR MARKS Talking about a federal decision on another state s statute

SENATOR KOPP Yeah

SENATOR MARKS The federal decision is different than that of California decision Therefore, under your proposition, the federal decision would prevail

SENATOR KOPP I didn't know it was I don't think so

SENATOR MARKS Well, maybe you can tell us

SENATOR KOPP Yeah

All right, another provision adds the crime of torture to the Penal Code punishable by life in prison There are three additional sections which clarify and add death penalty provisions, including special circumstances relating to murder in the course of kidnapping, train wrecking, sodomy, oral copulation, rape by instrument

Also a provision that provides for life imprisonment for 16 to 18 year olds convicted of murder in special circumstances And a prohibition that prevents a judge from dismissing or striking special circumstances that have been admitted or found by a jury, which overturns a 1981 Supreme Court case, and prohibits the judge from dismissing any special circumstances after there's been a finding by the jury

CHAIRMAN LOCKYER On the torture deal, it's -- it allows life without possibility of parole for torture? Or mandates it, or what?

SENATOR KOPP It allows it

CHAIRMAN LOCKYER Pardon?

SENATOR KOPP: I think it allows it

ASSEMBLYMAN BURTON If it's going to be in the Constitution, we want to be sure

CHAIRMAN LOCKYER: It reinvigorates the heinous crime

ASSEMBLYMAN BURTON All crimes are heinous

SENATOR KOPP It's a statutory Let me just add one other thing about this spurious argument that somehow this abolishes the right to choose an abortion in California Again, let us remind ourselves that even before the 1972 Constitutional Amendment was adopted, which includes the word privacy, the Supreme Court in People vs Belous had held unconstitutional pertinent provisions of Section 274 of the old Penal Code section prohibiting or restricting abortions And the Belous case was supplemented four years later by People vs Barksdale

SENATOR KEENE The problem

SENATOR KOPP And I want to add one other thing

SENATOR KEENE Wait, before you get off of that one -- before you get off of that one If you would take a look at your conclusion because I know you will want to change your opinion on this initiative if you find your conclusions to be wrong

SENATOR KOPP Uh-huh

SENATOR KEENE If you will look at the pre-existing right to privacy, before the Constitutional Amendment was adopted In the Belous case, I think you'll find that it was found in another constitutional provision such as due process and equal protection, which are the very things that are being constricted by the proposed initiative

So if that's correct, and Senator Marks is quite correct that the U S Supreme Court will not support the privacy of consenting adults in private, but will allow any statute to limit those things regardless of what the California Constitution may say about privacy -- that pre-existing right to privacy was founded in due process which is specifically mentioned here and with equal protection I don't know if you want to continue to defend this initiative

SENATOR KOPP Here s what it says Let's quote it to you "That such right is not enumerated in either the United States or California Constitutions It is no impediment to the existence of the right "

SENATOR KEENE It's in -- it's in the penumbra of those other constitutional protections that are now being eliminated by this initiative

SENATOR KOPP No it isn't

SENATOR KEENE Oh, yeah Yeah

ASSEMBLYMAN BURTON Well, do you -- do you mean to say, Let s leave the Cory Amendment out Let's leave the Beilenson Bill out Let's leave this language in " And the Court specifically overrules Roe vs Wade and says there is no right You do not believe that then our State Supreme Court is going to be bound by that? You leave out the Cory Amendment, okay?

SENATOR KOPP Uh-huh

ASSEMBLYMAN BURTON Which, you know, we can argue on this point You leave out the Beilenson Bill -- the Therapeutic Abortion Act So what people have relied on for choice is the Belous case The Supreme Court comes down 7-2, overturns Wade, makes the law of the land, you know, that there is no innate right to privacy for women in this area Do you believe that the California Supreme Court could still use Belous to allow women that right to choice?

SENATOR KOPP Yeah, because, again, as has been pointed out, you're talking with this initiative about criminal procedure

ASSEMBLYMAN BURTON That s what the law is Abortion was a crime Abortion was a crime And Wade was the Attorney General of the state of Texas It was a criminal act It wasn't like now where, you know, no funds shall be used except for -- a prohibition of funds It was a crime 274 of the Penal Code I believe you said it was So I mean, as I understand it, the law is still on the books of the State of California So I mean it is in fact, Senator, a crime, and I mean I don t think they could use that -- I don t know if they could use that to deal or not deal with, you know, Medicaid financing and all that stuff, but you get down to the basic issue that it is -- that abortion is a crime in -- there's a statute in the Penal Code that says it s a crime and only because of Roe vs Wade is it not a crime and then you can throw in, I guess,

SENATOR KOPP I disagree with that

ASSEMBLYMAN BURTON You disagree with what?

SENATOR KOPP I disagree with that analysis The -- those statutes that you re talking about are now invalid

ASSEMBLYMAN BURTON Because of Roe vs Wade

SENATOR KOPP And they can't be revived by an initiative or any other constitutional amendment

ASSEMBLYMAN BURTON Our statute has never been ruled invalid Penal Code Section 274 has never been ruled unconstitutional

SENATOR KOPP Our statute was ruled invalid

ASSEMBLYMAN BURTON In which case -- which court case?

SENATOR KOPP In the Belous case

ASSEMBLYMAN BURTON That -- not -- not the whole abortion statute wasn't ruled

out No It's a specific circumstance with a specific fact And the point I mean, you know, you feel comfortable with what you're doing, that's all right But I think in this one it's -- and I wouldn't say, Quentin, that you're a hundred percent wrong I'm saying, there's a very great possibility that that -- that that could be the outcome And I mean, I -- I see I differ with my friend Senator Keene I don t think that would have you change your mind in a minute You've got the political courage to be for this bill

SENATOR KOPP Well, you've got the political courage to be against this initiative

ASSEMBLYMAN BURTON Well, certainly Certainly

SENATOR KOPP So everybody has political courage

ASSEMBLYMAN BURTON And I think it takes more courage to be for it

SENATOR KOPP Now -- now that we've gotten that off the table -- to do what you re suggesting would take -- would take this initiative or another act of the Legislature because those statutes have been invalidated

ASSEMBLYMAN BURTON I don't -- you may be right I don't think so

SENATOR KOPP That's my analysis Thank you, Mr Chairman

CHAIRMAN LOCKYER Thank you

SENATOR KOPP Members of the Committee

MS MARJORIE LAIRD CARTER Mr Chairman, honorable committee members and distinguished guests, I'm Marjorie Laird Carter and I am President of California Women Lawyers California Women Lawyers is a statewide organization which represents women attorneys, as well as those who share our goals We represent over 30 affiliates which are local groups throughout the state, as well as our individual members And we are concerned about issues which affect all women in the state of California -- not just attorneys -- and we are committed to all issues affecting a woman's right to choice

I'm addressing you this afternoon in opposition to the Crime Victims Justice Reform Act Specifically, I will be speaking against certain wording in the initiative which could affect the reproductive rights of California women, which you've just been discussing Those words are "to privacy "

The concern that the initiative's inclusion of the phrase "right to privacy" may affect a woman's freedom to make decisions regarding reproduction is not a mere political ploy It is clear that there is a danger that if passed, this initiative could reopen the door that once characterized most abortions in the state as a crime and branded most women and health providers who were involved in those abortions as criminals

This belief is not held only by California women lawyers and the many pro-choice organizations One dozen of this state's most respected constitutional law scholars

have independently analyzed the initiative and they have concluded that it could virtually affect the right to choose in this state Those scholars assert that if the right to privacy in criminal cases is repealed by this initiative and if Roe vs Wade is overturned or eroded, the way would be paved for a host of unintentional consequences, including the criminalization of abortion

The professors conclude their analysis as follows "No one can say with certainty what future courts will do, but no one familiar with constitutional law can deny that this language could put reproductive freedom at risk in California "

Proponents of the initiative consistently deny even the possibility that a woman's right to choose could be affected and they argue that the initiative applies only to criminal defendants First they say that the measure applies only to criminal procedural rights and not to abortion, which is a civil right However, constitutional law professors have said that that misses the point It's the fact that this is a civil right that keeps it from being illegal Under current law, you can use privacy as a defense But if Roe is overturned, the initiative's enactment could eliminate that explicit privacy act of the defense in any criminal prosecution Today it is the 1972 California Constitutional Privacy Amendment which most firmly protects California abortion rights and this right must not be taken away

Historically, abortions and other acts that were related to reproductive rights were considered criminal The illegality of those acts in the coat hanger and the back alley days was changed only through the application of the Inalienable Right to Privacy Amendment to the California Constitution The California Supreme Court used the Inalienable Right to Privacy to find those anti-abortion laws unconstitutional Those laws were enacted in 1872

California Penal Code Sections 274 and 275 make criminal, both with respect to the patient and to the doctor, except in those situations that were set forth in the -- excuse me -- the Therapeutic Abortion Act and those exceptions were for medical criteria for approved abortions That portion of the act was held to be impermissible, although vague, in People vs Barksdale In Barksdale the Court did not nullify those code sections which to date have still not been repealed They were held to be unenforceable

CHAIRMAN LOCKYER What do you mean, because of the vagueness?

MS CARTER Because of the vagueness -- that case did not nullify them So they were unenforceable because they were vague

CHAIRMAN LOCKYER Isn't that the same result? I don't

MS CARTER Well, it was a result at that time, but

CHAIRMAN LOCKYER Well, I don't

MS CARTER it didn't take them off the books

CHAIRMAN LOCKYER Oh, okay

MS CARTER: So there still on the books

CHAIRMAN LOCKYER I'm not sure I understand the distinction between nullify and

MS CARTER: It didn't repeal them

CHAIRMAN LOCKYER and impermissibly vague I mean a subsequent court might say they aren't unduly vague

MS CARTER Right

CHAIRMAN LOCKYER And thereby revive the original penal statute

MS CARTER: California state courts recognized the right to privacy relative to abortion decisions before the 1972 Amendment was added to the Constitution They held in the 1969 decision of People v Belous that the 19th century state law was struck down except when it was necessary to save the mother's life That case relied partly on the U S Supreme Court 1965 ruling in Griswold vs Connecticut, and they found that the fundamental right of a woman to choose whether or not to bear children follows from the Supreme Court and from the state court's repeated acknowledgment of a right to privacy or liberty in matters related to marriage, family and sex Then in 1972, the California voters added the express right of privacy to a person's inalienable rights under Article I, Section 1 of the California Constitution

The case then that followed in 1981 was the Committee to Defend Reproductive Rights vs Myers and in that case, the California Supreme Court ruled that under Article I, Section 1 of the California Constitution, all women in the state, rich or poor, possessed a fundamental constitutional right to choose whether or not to bear a child That right was first recognized in People vs Belous

This happened four years before Roe vs Wade acknowledged that there was in existence a comparable constitutional right under the federal Constitution In Myers the Court analyzed the importance of the right of privacy to a woman s equality in society And the Court found that for a woman, the constitutional right of choice is essential for her ability to retain personal control over her body If the right to privacy means anything, it s the right for the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decis_on whether to bear or beget a child This right of personal choice is central to a woman s control, not only of her own body, but also to her control of her social role and her personal destiny

Now federally there is no specific constitutional right to privacy But this right has been defined through the decisions of the Supreme Court under the penumbra of rights granted by Article IX of the United States Constitution The federal right to privacy relative to reproductive rights was created in 1973 by Roe vs Wade But that federal right is much narrower than the right that was added to the California -- by

the California voters in 1972

If Roe is overturned or further limited, California women then will solely depend upon the California Constitution to protect their reproductive rights A new amendment to the California Constitution which addresses the right to privacy, no matter how slight, is a concern of Californians And those concerns must be cautioned to be particularly wary of any amendment which could weaken a woman's reproductive freedom In his, the second opinion in Webster, United States Supreme Court Justice Harry Blackman undoubtedly spoke for most woman -- women when he said, "I fear for the future I fear for the liberty and equality of the millions of women who have lived and come of age in the year since Roe was decided "

For those of us who remember the days before Roe and the days before the California amendment, we know the danger if the right to make decisions about our own reproductive destiny is taken away from us And we have all much to fear if that happens

The relative part of the initiative reads, "In criminal cases, the right of a defendant to privacy shall be construed by the courts of the state in a manner consistent with the Constitution of the United States This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States "

The initiative ostensively was created to shorten the time lapse between arrest and the trial of a criminal defendant And the California District Attorneys Association, the creator of the initiative, apparently believe that speeding up the pretrial phase of criminal proceedings will reduce crime in our society Without conceding the accuracy of that assumption and without commenting on the wisdom of the methods that they suggest for implanting their plan, the single issue being argued by the organized women's community is that the inclusion of the right to privacy in that initiative potentially threatens women's procreative choice and therefore must be opposed

The initiative severely limits the rights of defendants and it accelerates the pretrial and trial proceedings by affording criminal defendants only those rights which exist under the U S Constitution By federalizing these rights, many independent protections, including the right to privacy which exists under the California Constitution, are eliminated

Now the authors of the initiative have told us that they did not intend that the inclusion of the phrase "to privacy" would affect reproductive freedoms In fact, they may not have even addressed that issue of abortion in their consideration And partly that may have been due to the fact that at this point, abortion is no longer a crime and that women and medical personnel are no longer considered criminals, at least as long as we have the protection of the privacy provisions of the California Constitution But it's not the intent which is critical It's the possible result

with which we are concerned

The proponents rely upon Steven Barnett who is a constitutional law professor at Boalt, who says that "if the initiative passes and the Courts are left in any doubt as to the language or the context, then the ballot statements, I suppose, would settle the issue " But there are experts in the field of initiative legislation who are not that optimistic They feel that the Court is not bound to take the ballot arguments if the language is clear, and in this case, in the initiative, the language is clear

It's possible that we could see a ruling even restricting privacy rights relative to abortion that says that that was not the intent However we're not going beyond the plain meaning of the initiative The intent may be considered when analyzing a bill But in as much as the initiative is not a legislative bill, then the proponents' intentions are virtually irrelevant

The initiative says that "criminal defendants shall have no greater right to privacy under the California Constitution than they enjoy under the U S Constitution " The California Constitution, like many state constitutions, has always provided protections that differ from those guaranteed by the U S Constitution There are many areas as delegated by the federal Constitution for which states have exclusive control States are best able to address the situations presented by the unique problems of their own residents

If the initiative is enacted and if the United States Supreme Court overturns or restricts Roe, therefore weakening the right to privacy, the effect could be that the 1972 Privacy Amendment, as the constitutional protection for women who want abortions, would be eliminated, thus opening the door for prosecutions under the existing or under future statutes Anti-choice legislators would be encouraged to rally for such a bill And the obvious fear is that one day such a law just might pass And just as real as that concern is the fear that at least one zealous prosecutor will attempt to enforce the old California Penal Code sections which once criminalized abortion Litigation is already under way in other states which enforce such antiquated laws

The distress that many others felt at the erosion of Roe vs Wade by the Webster decision was less severe for those of us in California because we knew that we had the privacy protection of the California Constitution Webster may have expanded the states' rights to make laws regulating reproductive freedoms, but those laws would have to be interpreted according to that state's constitution and California had already clearly established that a woman's reproductive freedom is protected by the California Constitutional right to privacy

Then, suddenly we learn that what appears to be through a slight of hand, an initiative has been introduced that includes two words "to privacy," which really could jeopardize that right We do not need to be affected by a change or a reversal

in Roe

The constitutional right to abortion was established by the 1969 Belous decision That opinion and Barksdale which followed, have sustained the claim of criminal defendants who were prosecuted for abortion that they had a right of choice under the California Constitution And the 1972 Amendment to the Constitution expressly guarantees the right to privacy for Californians But this is only true if the California state constitutional privacy provisions are left untouched

And what happens if it's changed By its expressed terms, the initiative amends the California Constitution to eliminate state constitutional rights for criminal defendants, including that of privacy, which are not also guaranteed under the United States Constitution Webster gives the states the right to make certain regulations regarding abortions And this may be expanded further if Roe is eroded

The result, then, under the initiative would be that if a woman or her doctor were prosecuted for an abortion, they could defend themselves only by raising whatever federal constitutional rights they possess Prior cases based on a Californian's right to privacy would no longer provide independent state law protection for those abortion defendants The initiative's passage, having wiped out the present state constitutional protections, California women choosing to abort pregnancies would be vulnerable to prosecution the day after Roe was overturned

Were the state privacy provisions to die at the same time as Roe, then women and their doctors would be no safer from criminal prosecutions in California than they would be in any other part of the country A woman's reproductive freedom has been protected through her right to privacy The establishment of this right has been a long, hard fought battle, slowly evolving over a period of time It is intolerable to the women of California that this right could be taken away by the phrasing of an initiative that otherwise has nothing to do with abortion or reproductive rights

When we accomplish something, we like to feel some closure -- some sense of completeness And it's overwhelming to realize that our accomplishments may be only temporary, subject to the change upon the whim of others or the unthinking insertion of two words -- "to privacy -- to an initiative We don t want to keep reinventing the wheel We want to be free to address other concerns and find solutions to other problems

Repeatedly, the majority of Californians have indicated their strong desire regarding reproductive rights and that they remain private Further that those rights should be protected If Roe is overruled and if this initiative is passed, California women will no longer enjoy that protection This is not an issue of supporting one candidate for governor over another And it's not yelling smoke when there's no fire It's a concern that a basic, hard-won right may be taken away, however unintentionally

If there is a belief that there should be a change to California's current laws affecting reproductive decisions, then initiatives and bills should be introduced and drafted directly addressing those concerns This issue is too important to have back alley methods used to establish the laws affecting it Even though proponents say that the bill will not affect abortion rights, they refuse to remove the phrase "to privacy" or any limiting words that would eliminate the possibility that abortion would be criminalized

No one can predict with certainty how courts will interpret the words There have been courts who have tortured what appear to be the plain meaning of a statute to arrive at a preferred result While those propounding this initiative may conclude that the interpretation limiting women's reproductive rights is both unintended and unlikely -- unlikely things do happen.

California women do not want to go back to the days when abortion was a crime Back to the coat hanger days, back alleys and trips across the border We will vocally, vigorously protect our reproductive rights and our rights to privacy Since there is a chance -- even if it's slight -- that the initiative could affect our right, we have no alternative but to oppose the initiative as it's presented

CHAIRMAN LOCKYER Okay, thank you, Ms Carter Anyone have questions or comments? One question

ASSEMBLYMAN MC CLINTOCK Which organization do you represent?

MS CARTER California Women Lawyers

ASSEMBLYMAN MC CLINTOCK Did that organization take a stand in the confirmation of Rose Bird and the other justices in 1986?

MS CARTER: The stand that we took at that time was preservation of the judiciary

ASSEMBLYMAN MC CLINTOCK So you -- you supported the Rose Bird majority on the court The point I m trying to get at is that we're listening to these arguments and everyone who seemed to support the Bird Court and the unprecedented criminal defenses that it issued, has seized on this abortion issue Those who opposed the Bird Court and its unprecedented criminal protections say that's simply not the case and the only unaligned group that I'm aware of that has taken a stand on this is Leg Counsel and they seem generally to disagree with the position taken

How do you address those who look at this language and cynically wonder if this issue is simply being used as a red herring to defeat a measure which would write out of the law a broad range of decisions that Rose Bird and her court issued in procedural protections for criminal defendants that are unprecedented anywhere else in the country and anywhere else in our history?

MS CARTER Well I suppose there are many who would make the argument that you did and would be able to align the feelings of people at this point with how they voted on

the Rose Bird matter Our group didn't

ASSEMBLYMAN MC CLINTOCK The correlation on both sides seems to be dramatic.

CHAIRMAN LOCKYER Let me -- let me interrupt to give you an example I opposed the reconfirmation of Rose Bird, but I'm very concerned about this language and its impact on the right to choice So there's one example and now I'm not Leg Counsel, but my own view is Leg Counsel -- they're going to tell you whatever you tell them to tell you (laughter) But there s an example, at least, of someone who doesn't fall into one group or the other, although I think you're largely correct, that's a way of saying people are consistent with their philosophy, except for a few like me (laughter)

MS CARTER And we have many members who would most likely support the initiative but for this language And also members who did not support the confirmation of Rose Bird But I would say at this point, we are united in our concern about the language And it really has nothing to do with where we stood on any other issue

CHAIRMAN LOCKYER Okay, thank you very much I guess Ms Campbell is our next speaker Thank you for joining us

MS W COLLENE CAMPBELL Good afternoon My name is Collene Campbell Mr Chairman and Members of the Committee, today you have and will hear a great deal about the rights of criminals However, you seldom have the opportunity to hear first-hand the victims regarding victims' rights or rather the lack of such rights because crime victims are too devastated to act, react or tell their story Prior to the trial of the criminal by the court, the victim is admonished to be silent Therefore during the years of delays in trials, there is no voice from the crime victim Following those years of court appearances, the victims are just trying to survive I'm here to tell you the system does not work It's great to argue your point, but the results to the victim is real

Hopefully you will listen to this testimony with an open mind and it will be useful and help you better evaluate the additional, unnecessary anguish suffered everyday by thousands of victims like myself -- witnesses and even jurors in the California courts

It is extremely difficult for me to testify before you because my pain is impossible to disguise However, I know it is very important to citizens of California that I am able in a very few minutes to help you understand the urgency of the Crime Victims Justice Reform Act And I realize that only the victims themselves can help educate the public It is the only way the truth will be known

Our criminal justice system has made a mockery of man's law And also God's law Citizens become victims because of the criminal However, they stay victims because of our deplorable legal system It is unrealistical (sic) to expect victimized families to endure the system in years of torture in the courts It is not economical or reasonable The taxpayers are paying the bill to continue this brutal punishment to

the unfortunate victims of crime

There are many of us who would not be victims of crime if we had the same rights as criminals Terrible crimes are committed each day by criminals awaiting trial Trials that are hung up on technicalities and procedures It is common knowledge that the goal of most defense attorneys is to delay court proceedings as long as possible, making it much tougher for the prosecutor to obtain a conviction The saddest part of this scenario is the devastating effect on the victims during the long delays This causes divorces, suicides, drug addiction and virtually everything you can imagine

I am really proud to represent the courageous crime victims and in that capacity I would like to be strong enough to convince you of what is really happening in the world of the criminal justice system That is what is going on and happening to good, honest, hard-working citizens who have had the misfortune of becoming a victim of crime

The crime victim is a human It does not matter the color of their skin, their religious affiliation or whether they are Democrats or Republicans The fact is the terrible tragedy has happened in their lives and the pain is multiplied dramatically by our current justice system A person's mind which has been impacted by a terrible and continued tragedy can never return to normal

I have had nearly eight very long years They've been tough years And an unsolicited education in our criminal justice system I could never be normal Nor would it be appropriate for me to be normal I know too much about injustice and unfairness and pain of being a victim in our society today I can't just turn my back and walk away

I would like to make life a little better for those of you who have yet not had the misfortune of suffering the horrible experience of having a violent crime committed to your family But someday you might. You talk about choice Believe me, we haven t had choice

If I may, I would like to share with you a little bit of my own experience You see, I'm not guessing about this I've been there and I'm trying darn hard to live through it But my son, my brother, and my sister-in-law have all been murdered Scotty, my only son, was strangled and thrown from an airplane into the Pacific Ocean We never found our son s body We could not even have a funeral because there has been no end In just my son's case alone, we have been in court constantly The case at this very moment, as I'm speaking to you, is before its 15th different judge, some several times It has been nearly eight years and we continue to stay in the system That means we have endured eight holidays

Mickey, my brother, the Mickey Thompson, was my only sibling A wonderful man and he wouldn't be talking while somebody's trying to make a point Trudy, his wife, was

my sister-in-law and best friend Mickey and Trudy were shot down assassination-style in the driveway of their home on their way to work Three members of my family are dead, murdered by men who should have been in jail

Our judicial system is badly lacking It is soft on crime and permits defense attorneys to manipulate the intent of our law at the expense of victims and taxpayers And I m not talking about a little expense I'm talking about a lot of expense and many lives wasted

Resulting from my son's death, two men were convicted of first degree murder However, the Appellate Court released one of the killers The court that had nothing to do with his guilt or innocence It's simply a technicality

We are at this very moment back in trial and in all probability the man will be reconvicted However, the cost is too great, both to us the family and to the taxpayers Today is the first time that I have ever missed one minute in the courtroom in eight years I thought it was important that I come and tell you what it's really about

The fact that really rankles me the most is the man who killed Scotty was out on bail for killing another man at the time he killed Scott He is out on bail again He paid a big price for bail to buy his freedom, but he has court-appointed private attorneys for which the taxpayers are still footing the bill That's nearly eight years of a very high cost

CHAIRMAN LOCKYER Mrs Campbell is there anything in the -- well, let me ask you What was the grounds for the trial court -- or the Appellate Court's reversal of the first case? You mentioned it was a technicality

MRS CAMPBELL It was a mass confession Confession of entirely how he killed my son

CHAIRMAN LOCKYER The defendant, you mean?

MRS CAMPBELL The defendant's confession on tape and they said it may have been coerced and he may have feared for his life even though he was at work with the telephone ringing and people coming in and out of the office and him walking in and out of the office and so forth

CHAIRMAN LOCKYER That's, in your mind, what you would deem a technicality

MRS CAMPBELL You bet your life

CHAIRMAN LOCKYER Okay

ASSEMBLYMAN MC CLINTOCK Just to follow up on that point, Mrs Campbell, I don't understand Was this a complete confession on a tape?

MRS CAMPBELL Complete confession It was recorded by undercover officers

ASSEMBLYMAN MC CLINTOCK He confessed to the beginning to end of the crime

MRS CAMPBELL That s right

ASSEMBLYMAN MC CLINTOCK And it s not being used in court

MRS CAMPBELL It s not being used in court

ASSEMBLYMAN MC CLINTOCK Thank you

CHAIRMAN LOCKYER With respect to the bail issue or the crime committed by the defendant, is there anything in the initiative that addresses those matters?

MRS CAMPBELL No, I wish there were, Sir One week ago today I was again back on the witness stand in a trial of the man who murdered Scott The prosecutor said, "Mrs Campbell, let me take you back to 1982 "

CHAIRMAN LOCKYER Pardon me, but what county is this in?

MRS CAMPBELL Orange County

CHAIRMAN LOCKYER Okay

MRS CAMPBELL And that is exactly what happened. I went back to 1982 with all the hurt, the pain, and the emotions. It is like being at a funeral everyday for years and years That kind of punishment should not be allowed to happen even to a mad dog, let alone to grieving parents But in California, it's happening many times everyday We pay -- we pay police officers millions to arrest criminals and institutionalize offenders The taxpayers dollars are spent by the millions to defend these same criminals in an illogical fashion In California, all stops are pulled to free these members to put them back on the streets with our families In other words, give them another chance to kill and most of them do

I constantly hear that we cannot afford jails We can't afford police officers But we can spend millions on absurd trials and delays. It does not take a genius to figure out how to help turn crime around and from where the dollar should come.

Just two weeks ago in Orange County they completed the Randy Craft murder trial where in excess of $8 million was spent on defense That would go a long way in building jails But worst of all, like all trials, it left a trail of devastated victims who will never recover

In the United States the average felony case is tried within six months of the criminal s arrest In California it takes more than two years Nothing is more crushing to the victim's spirits than to see a case delayed again and again and again Victims have a right to justice, too And justice delayed is indeed justice denied

Hopefully in memorial to our victims there is hope for a better future and today informed Californians understand there is definitely something wrong and lacking with the expensive so-called justice in our state This knowledge, coupled with the opportunity provided by the Crime Victims Justice Reform Act, will improve justice in California, saving lives and millions of taxpayers dollars Citizens are now aware and many are angry and willing to take action because they have been fooled or uninformed long enough The rights of innocent crime victims have been ignored by the

Legislator -- Legislature, excuse me -- and courts for too long And this reform will help restore the much needed balance of justice Not only have the victims been cheated of a fair trial, but the taxpayers are literally being robbed of their hard-earned dollars which are being wasted on ridiculous court delays

Like war, there must be sacrifices to gain peace However, for crime victims the price of peace and justice during the last decade has been great Many of us have suffered our devastating loss because of a weak California justice system. Harassment of witnesses, including victim witnesses, is a characteristic for California's criminal justice system Witnesses are forced to return again and again to unnecessary, seemingly never-ending preliminary hearings Victims of traumatic violence, including sexual assault, are forced to testify on multiple occasions against their assailants Defense attorneys commonly use delay tactics to force witnesses to return to court over and over again In gang rape, the views of the criminal justice system by defense lawyers often forces the victim to give identical testimony over and over

Finally, consider the abuse of jury selection California's jury selection system has been so offensive, that each year thousands of prospective jurors go to almost any length to avoid jury service Jurors are endlessly bombarded with insulting, intrusive, irrelevant and repetitive questions by lawyers bent on propaganda in favor of their clients, rather than choosing a fair juror Questions like "what magazine do you read?" or "what bumper stickers do you have on your car?" are common It is now commonplace for jury selection in a death penalty case to take six months to a year It often takes three or four days to choose a jury for a drunk driving case, all at taxpayers' expense

The Crime Victims Justice Reform Act will not solve all the problems of California's criminal justice system, but it will improve things substantially for victims, witnesses and jurors It is time to acknowledge that in California, victims, not just criminal defendants and defense attorneys, have rights too The families of crime victims no longer want to bury their opportunity for justice along with their murdered loved ones And we are counting on the people of the great state of California to help us All law enforcement support this reform act

I thank you for your attention There's two more things that I would like to say Number one is please feel free to ask me questions I have had eight years of an education in the judicial system I'm certainly not an attorney, but there's not many of the things in this initiative that I can t speak to and tell you how it really works out there

The other thing is, you were asking about consolidation of cases Let me give you an example My son was strangled by two men They started the conspiracy on the ground, took him up in an airplane, threw him out of the plane and ended the conspiracy

at the same time But under current law, those two men could not be tried together One is in prison with life imprisonment without the possibility of parole and it appears that it's a very big possibility that the second man -- the one that planned it and I think is the most responsible, may walk out this week

The other situation I'd like to call to your attention is my brother and my sister who was murdered There was two of them There's possibly four men involved and under current law, even though it was a conspired killing, under current law it is conceivable that they could ask for and receive eight separate trials in that case Those are the kinds of things we want to eliminate

May I answer any questions of the panel?

CHAIRMAN LOCKYER Assemblyman McClintock?

ASSEMBLYMAN MC CLINTOCK Mrs Campbell, with respect to the confessed murder of your son, you had said that he was -- at the time that he murdered your son -- admits to murdering your son -- he was out on bail for killing another person?

MRS CAMPBELL That's correct

ASSEMBLYMAN MC CLINTOCK He then admitted to killing your son That admission cannot be used in court What has happened to him since then?

MRS CAMPBELL He served two years before the District Court of Appeals overturned it He was let out about fourteen months ago He's back out on the streets again He has committed other crimes since he has been out He is free to go and come as he pleases out of the court right now and as he is in trial, and the jury will never really know what happened in that case because we have lost so much evidence

ASSEMBLYMAN MC CLINTOCK You say he's at large right now

MRS CAMPBELL That's correct

ASSEMBLYMAN MC CLINTOCK I wouldn't say at large, but free

MRS CAMPBELL Free He's free As free as you and I are

ASSEMBLYMAN MC CLINTOCK And conceivably any of us here maybe in this building today might encounter him on the street

MRS CAMPBELL: That's true. In fact we took our grandchildren water-skiing for the first time over Labor Day -- first time in a long time

ASSEMBLYMAN MC CLINTOCK And you said that

MRS CAMPBELL And he was water-skiing on the Colorado River

ASSEMBLYMAN MC CLINTOCK And you say that since he s been released he s been involved in additional crimes

MRS CAMPBELL Yes

SENATOR KEENE Has he been charged with any crimes for which he s been involved ?

MRS CAMPBELL He has a couple of felony indictments waiting But of course, that would be way, way down the line However they are in Arizona

ASSEMBLYMAN MC CLINTOCK And he's still free despite those other felonies?

MRS CAMPBELL That s correct And there was a motion made to take him back into custody, but the way the California law reads, couldn't do it

SENATOR KEENE The way the California law reads it wouldn't go I read exactly the opposite, that California law permits denial of bail for crimes of violence where there is a danger to the public

MRS CAMPBELL But you know he's out on -- the bail money is not because he's a danger It only assures he comes back to court

SENATOR KEENE Yeah, but there is in the law, though, protection for the public The bail can be revoked on the basis of this constituting a danger

MRS CAMPBELL Well, I wish you were the judge hearing it because we have had several judges hearing it -- we went through seven bail hearings at one time after he bit his mother's finger off And the judges disagree with you, apparently

SENATOR KEENE When they ruled on the refusal to use the confession, what was the ground -- the ostensible ground of the Appellate Court in throwing the confession out?

MRS CAMPBELL They said he might have feared for his life, but unfortunately, the Appellate Court did not listen to the tape recording where it showed that there were people coming in and he was walking out and he was talking on the phone in conversations in his own office There was one statement on there they were in doubt about

SENATOR KEENE But why -- why would they come to the conclusion that he feared for his life? What circumstances ?

MRS CAMPBELL Because one of the officers said that we have to find out what happened Of course, they were undercover

SENATOR KEENE Yeah

MRS CAMPBELL We have to find out what happened or there's going to be broken knee caps And that was enough, even though he had many people around him, that they threw it out I can't give you logic to these things because there's no logic to me -- to me, even But I'm trying to give you the reasons that they gave us

SENATOR KEENE No, but -- but your conclusion that there is illogic in that situation -- I'm trying to find out why a court would do something like that

MRS CAMPBELL We tried awfully hard, too, Sir

SENATOR KEENE But if one of the police officers threatened to, or violently threatened to, break knee caps, that might raise some doubts about the reliability of the confession

MRS CAMPBELL That's what they felt

CHAIRMAN LOCKYER Well, it might under federal law The initiative might not change that particular result

MRS CAMPBELL: But I know you're here today to talk about the initiative

CHAIRMAN LOCKYER Yeah

MRS CAMPBELL and that doesn't apply directly to it I -- I just wanted to give you an idea I'm with hundreds and hundreds of victims My scenario is different, but the results are all the same with all of us It's very painful for us to be here And another friend of mine will be here today to tell you her experiences, too

CHAIRMAN LOCKYER Okay It's helpful to have

MRS CAMPBELL Well, I really -- I really appreciate you trying to have an open mind because I know you haven't heard what it's really like on the front lines And I could bring you hundreds of people and I appreciate you trying to listen because it -- it's not a political issue as it seems to come down to, which makes me so mad I could rip people's heads off This is -- this is -- this is the world I am a native Californian I came from a law enforcement family But this is where it is now There's nothing left of us out here

CHAIRMAN LOCKYER Mrs Campbell, I don't know if it's any reassurance at all, but to the extent that at least this office holder hears comments in terms of knowing what s real and what's just an abstraction, I hear comments from people who are frustrated with our criminal justice system far more than some theoretical abstraction to the contrary, so I don't know how -- what the experience of other policy-makers is, but you can -- I'd at least like you to know that there are lots of people saying or expressing similar concerns to

MRS CAMPBELL Well, that makes me feel a little bit better It s rather lonesome out here and we can't do anymore You know, you -- at any page, you can add 50 people, edit it and they'll all come up with a different answer We had over 50 attorneys trying to draft this We had every District Attorney in the state of California saying this does not affect the abortion issue We can't do any better than that We re always going to have somebody that wants to shoot it down for some other reason This is the best we can do

CHAIRMAN LOCKYER Well, they could have drafted it better, but they didn't

MRS CAMPBELL Well, you know, all of us can do better in life, but it will be an improvement over what we have

CHAIRMAN LOCKYER I have to be a majoritarian and I believe that majority rule is a function of equality And so whenever someone tells me, "Oh, it takes two-thirds vote or five-sixths vote or three-fourths vote to change things, whether they re adopted by the Legislature or the people, my basic core principles are offended because I -- it seems to me what you're saying more than anything else is we, crime victims and families, want at least some guarantee of equality with people accused of crimes But

what you suggest is creating a body of law and rules that perpetuate inequalities and let minorities rule And I just think that's unfair

MRS CAMPBELL Well, I'm glad you have that opinion, but I would like to straighten you out on one thing We're not just talking about crime victims Whatever you do here today isn t going to help me one bit

CHAIRMAN LOCKYER I understand that

MRS CAMPBELL We re trying to help the people -- the innocent people that are yet to come And, again, I would -- I had no idea -- I thought this was a hearing where people were hear to listen and they weren't set in iron And I m disappointed I'm sorry I left my son's murder trial to come to people that were already set in iron I thought I was here to help give information

CHAIRMAN LOCKYER Well

MRS CAMPBELL And I thank you and if you have any further questions I

CHAIRMAN LOCKYER Assemblyman Burton, do you have a couple?

MRS CAMPBELL Sure

ASSEMBLYMAN BURTON One is a comment My family has suffered criminal violence certainly not to the extent that yours has and you certainly have my sympathy for that I was wondering -- the person who is out on bail for murder who then murdered your son What was the first murder charge?

MRS CAMPBELL It wasn't murder It was a -- it was a killing during a drug situation He got -- it was a -- he was out on bail at that time waiting to go to trial

ASSEMBLYMAN BURTON For a?

MRS CAMPBELL He ended up with a manslaughter on that one

ASSEMBLYMAN BURTON Well, but he was charged with ?

MRS CAMPBELL He was drunk and intoxicated I mean, drunk and on drugs

ASSEMBLYMAN BURTON So he

MRS CAMPBELL He killed that man and was out on bail at that time waiting for a delayed trial

ASSEMBLYMAN BURTON Vehicular manslaughter or killing?

MRS CAMPBELL Yes

ASSEMBLYMAN BURTON So, drunk driving or under the influence of drugs and ran over somebody?

MRS CAMPBELL Right

ASSEMBLYMAN BURTON I just want to comment -- I know you won't go along with it, but part of the things that we're talking about -- if one -- a law enforcement person gets a statement from somebody by threatening to break their knee caps

MRS CAMPBELL That wasn't exactly correct

ASSEMBLYMAN BURTON Well, that's how I heard it How, in other words, do undercover people talking to this guy who was at work threaten to break his knee caps?

MRS CAMPBELL Yeah, you know, I don't want to waste people's time

ASSEMBLYMAN BURTON Well, I don't understand because it is mentioned as a technicality if in fact a law enforcement person threatens somebody with physical violence if they don't say what they want to hear, it's more than a technicality

MRS CAMPBELL That wasn't it He was

ASSEMBLYMAN BURTON Would you mind telling me what was said?

MRS CAMPBELL It was over about the 45 or 50-minute conversation and the two undercover people who were representing themselves as being drug dealers and Mafia, you know, not something in society During this conversation the man laughed and said, "I have to go back to my boss and tell him or there's going to be broken knee caps " Now we didn t -- he didn't say I'm going to break your knee caps It was a statement with knee caps And it could be interpreted, I suppose, both ways

ASSEMBLYMAN BURTON Well, and they were -- the two people were undercover cops who were

MRS CAMPBELL No, one of them was a narcotics snitch actually, working for the DEA

ASSEMBLYMAN BURTON One cop and one snitch?

MRS CAMPBELL Yeah, and one -- the other was a police officer The police officer was the one who made the mistake, by the way

ASSEMBLYMAN BURTON And they went in and were taping, I guess, were going to try to get this guy on a drug thing and during that period he said

MRS CAMPBELL They were taping trying to get him to tell what happened to my son

ASSEMBLYMAN BURTON All right, so it was -- it was aimed at that and it was state narcotics?

MRS CAMPBELL No

ASSEMBLYMAN BURTON Was it a state narcotics agent?

MRS CAMPBELL One was federal

ASSEMBLYMAN BURTON Pardon me?

MRS CAMPBELL One was federal The other was an Anaheim police officer

ASSEMBLYMAN BURTON And one was a snitch?

MRS CAMPBELL Well, the snitch was working for the federal government or the informant would be kinder term for us to use

ASSEMBLYMAN BURTON Okay

MRS CAMPBELL The informant was working for the DEA The Anaheim police officer, of course, was

ASSEMBLYMAN BURTON Was working on the -- was working on that case

MRS CAMPBELL On the Anaheim case Yeah

ASSEMBLYMAN BURTON And the informant went with him and then they got in this conversation and taped it and it was because of the possibility that it might have been coerced, because of the knee cap conversation, that the confession was excluded

MRS CAMPBELL That's what

ASSEMBLYMAN BURTON Okay Thank you

MRS CAMPBELL Any other questions?

CHAIRMAN LOCKYER Thank you very much

MRS CAMPBELL Thank you, Gentlemen

CHAIRMAN LOCKYER Mr Riordan?

MR DENNIS RIORDAN Thank you, Gentlemen I think we -- we've just heard an expression of the pain of a crime victim and I think we all agree that public officials have an obligation to hear that statement and to attempt as best as they can to rectify the problems described Delay in the criminal justice system is certainly one of them But we also have an obligation to look at a measure being proposed and figure out -- does it deal with the problems that were just articulated? Does it create any others?

Let me give you an example Mrs Campbell mentioned suppression of a confession on the ground that it is coerced One thing we know is that this initiative will not in any way affect that problem and the reason is that the State of California has already adopted a federal standard in this area Suppression of confessions on the grounds of -- of Miranda or on the grounds of coercion is controlled only by federal law So we know that this initiative will not address that at all Hopefully the problem has been fully addressed because California law is in line with federal law

And we all have to agree that no matter how much pain crime victims have been through, we would advise them not to contribute to the Jim Baker fund to fight crime and help crime victims We have to ask ourselves does this initiative truly address their problem and I think there's a consensus that crime in this state and the crime problem will be not alleviated one bit by outlawing abortion In fact, we'll create a new group of criminals who are decent human beings The men, women, the doctors in this state -- the women who need to have abortions So if this initiative affects abortion, it disserves the interest of crime victims

And let me explain how it does because I think there's been some misinformation on this and I think it can be done very simply There were two Supreme Court decisions that started to provide women with abortion in this state They've been cited here People vs Belous, People vs Barksdale Remember those It is absolutely true -- they happened to be criminal cases and they started to recognize a right to an abortion under the California Constitution Neither of those decisions did anything to change the rule that clinical abortions are crimes They left that portion of California --

the Beilenson statute -- unaffected After those decisions, you could still be sent to jail -- a woman or a doctor -- for a clinical abortion

Now as you probably know, probably 95 percent of all the abortions in this state are clinical abortions, which means that if clinical abortions are outlawed today, 95 percent of the women, 95 percent of the doctors involved in those abortions are criminals and could be sent to jail Belous and Barksdale did not affect that

Then along comes Roe vs Wade -- we have a federal right to an abortion This is the key misunderstanding And I talked to Senator Kopp outside And this is what frightens me because he admitted his ignorance on this point He said, "But all those criminal statutes were struck by Roe vs Wade They don't spring into life if you eliminate the state constitutional provision on privacy " He is wrong

The Legislature repassed Sections 274 and 276 in 1976 making it a crime to have a clinical abortion Under the current statutes of this state, which have never been invalidated by any state or federal court, a doctor or a woman who has a clinical abortion commits a crime in California. The reason they have never been declared unconstitutional is it has been recognized that because of Roe vs Wade and the state constitutional provision, these statutes, were they ever pursued, would result in their being invalidated

ASSEMBLYMAN BURTON Can I ask a question?

MR RIORDAN Yeah

ASSEMBLYMAN BURTON What is a criminal abortion?

MR RIORDAN A criminal abortion

ASSEMBLYMAN BURTON Would it be any abortion other than under the Beilenson characteristics?

MR RIORDAN Exactly In 1976 California again passed a new statute saying any abortion that isn't allowed by Beilenson is a crime and those include clinical abortions

CHAIRMAN LOCKYER Pardon me, but is anyone present -- that's recent enough that I'm wondering how I voted (laughter) Does anyone present know who was the author of that bill?

MR RIORDAN I don't I don't

CHAIRMAN LOCKYER Staff, will you let us know sometime?

MR RIORDAN But the reason I mention this

CHAIRMAN LOCKYER I'm sure it wasn't intentional

MR RIORDAN is that I started to do an article for the L A Times and the San Francisco Reporter on this provision and I said we may have a problem because if you eliminate the state constitutional provision, maybe they can use manslaughter to prosecute women Of course, they can't use abortion because there are no anti-abortion

statutes since Roe and my researcher came back and said, "No, there are abortion statutes and they postdate Roe " So these statutes are like the statutes in Webster When they passed them in Missouri, everybody said "unconstitutional " Two federal courts declared them unconstitutional They got to the U S Supreme Court What did we find out? They were perfectly constitutional If you had a court test today, it looks like 274 to 276 would be declared unconstitutional If Roe goes this term and the future of Roe is as shaky as that of the Berlin wall, and if this initiative passes, there is no impediment to applying 274 and 276 and no one can tell me that there aren't prosecutors throughout the state who want to apply this No one can tell me that One of the two major parties believes in criminalization of abortion So there are plenty of office holders who are waiting to apply this statute

So the argument Quentin Kopp made was that Belous and Barksdale created the '72 privacy provision So what? We've got an initiative that takes out of the constitution all due process, equal protection and privacy provisions That eliminates the unarticulated ones in Belous and then the articulated ones in 1972 I don't want to be the lawyer that goes into court representing a doctor charged with an abortion or a woman and says she has the right to privacy And they say criminal defendants don't have it I say, "Oh, that's the articulated right to privacy It's not the inarticulated right to privacy of Belous," and a judge says, "Show me in this initiative where it doesn't say privacy is dead " And I have to admit that it does

Somebody says to me what about the -- the voters' handbook? We'll put a thing in there that says that it doesn't really apply to abortion All right I'm a criminal defense lawyer I'm in court I say, "Your Honor, abortion prosecution under 274, 276 -- I raise my client's constitutional right to privacy It's given up in Roe vs Wade on a federal level, but she has her California constitutional right "

"But I'm reading the new California Constitution, Mr Riordan, and it says that -- is your client a criminal defendant?"

"Yes, she is She's been indicted for abortion "

"Says right here she has no privacy rights "

I say, "Judge, you know where it says she has no privacy rights? That really means she has no privacy rights except in abortion cases "

"Well, I'm reading the Constitution here and it says that no criminal defendant has any privacy rights It doesn't say no criminal defendant except women and abortion "

"Well, they -- but they put a handbook initiative in there and they said they clarified it that way "

"Well, Mr Riordan, three million people voted for that It isn't the guy who drafted it who was the proponent It's the three million people who voted for it and I have to assume that when they said no privacy, they meant no privacy "

I don't want to make that argument I'll make it I ll make it, sure, I'll make it I'll make it as forcibly as I do I ought to lose that argument if I try and make it If I get a judge who s sympathetic to abortion, maybe he'll bend over backwards, tear the law apart and do what they used to accuse Rose Bird of -- voting his or her predilections But a judge will say, "Mr Riordan, I'm sympathetic I don't want to send this woman to prison But she doesn't have any privacy rights "

That s what we're looking at and that's why this isn't phoney It isn't a red herring Anyone who cares about the right to privacy and a woman s constitutional right to abortion has to be terrified by this And I say to you, if you're not concerned about that, read it out of the statute Take out the two words "to privacy " Why hasn't that happened? The proponents say, "We know why it hasn't " Because it would mean they'd have to pull the initiative off and give back all of the money that's been raised to support the initiative and they'd have to start the signature process again and they wouldn t have it on the ballot in an election year And I accept that they really don't -- a lot of them really don't want to affect abortion I m just saying we can't take the constitutional right to abortion and play games with it in an election year

It is a real problem and when I go to Quentin Kopp, who defends it, and say, "When you passed those statutes in '76 you said, 'No, no, there have been no new abortion statutes since '67 '" I say, "Senator, I appreciate the mistake I didn't know about it either " And I haven't talked to one person and I will bet that I'm talking to some legislators that didn t know that there's been a new abortion provision passed since Roe vs Wade and I don't know.

ASSEMBLYMAN BURTON This applies to those two guys We weren't there (laughter)

MR RIORDAN Let me talk about one other thing, though, in terms of big constitutional issues All right Let's have a separate debate on whether voir dire works or it doesn't work But let me ask you this Let's put on the initiative in the state of California a provision that says under the California Constitution no black person, no woman, no Asian-American shall enjoy equal protection of the laws in a criminal case What would happen to that? This is the most diverse state in the union In the year 2000 or thereafter, they tell us the largest ethnic group in northern California will be Asian-Americans The largest in the south will be Hispanics

CHAIRMAN LOCKYER Excuse me, what does that have to do with anything?

MR RIORDAN Because this initiative eliminates the equal protection clause in criminal cases

CHAIRMAN LOCKYER Well, as independent state grounds

MR RIORDAN That's right That's right And what that means is

CHAIRMAN LOCKYER It s still very vital under federal

MR RIORDAN That's right Tell all the Hispanics, tell all the Asian-Americans two things You have two eyes The federal Constitution and the state one that protect you Consider them eyes against discrimination Don't mind if we poke out one Don't mind if we eliminate the anti-discrimination principle from our state Constitution It's all going to be taken into consideration in Washington by the federal Supreme Court which is headed by a man who in 1954 wrote the memo that said Brown vs Board of Education should be decided the other way William Rehnquist said "separate but equal" was constitutional in his memo to Justice Jackson I don't know many black people I don't know many Asian-Americans who believe that as long as Rehnquist is protecting us from discrimination, with that racist provision in his house clause, we'll rest assured

ASSEMBLYMAN BURTON Well, let me give -- let me give you this with -- I don't know anybody going back whenever it was that -- not that it made it right, but when they bought a house, I think, there weren't 17 houses in the country that didn't have

MR RIORDAN I take that one back

ASSEMBLYMAN BURTON Okay

MR RIORDAN Let's forget that

ASSEMBLYMAN BURTON Okay

MR RIORDAN Let's take that one back

ASSEMBLYMAN BURTON I'll do that in 1960

MR RIORDAN But let's take that

ASSEMBLYMAN BURTON But let me ask you a couple of questions First of all, I think that for the first time -- and I think it's with the information that there are two statutes, post-Roe/Wade, sitting on the books that somebody has really made the case that this will affect the -- will affect a woman's right to abortion And the Attorney General who has stated that -- he has not stated it as clearly as you have and backed it up with -- with citations of the two statutes and I would commend to his staff that he ought to be aware of that as opposed to just saying, "Well, it eliminates privacy and that eliminates the Cory amendment and therefore," but I think clearly you have made that case

Answer me this one What case in California -- because I know that this -- I think I know that the Supreme Court -- federal -- sustained it -- a conviction against a challenge that blacks were systematically excluded from a jury down in Georgia -- some deep south place, I guess All right, where in California has there ever been a case reversed on that ground?

MR RIORDAN Well, that -- that's the whole line of Wheeler cases, where we led the nation We said you can t use preemptories in a racist manner to eliminate blacks

ASSEMBLYMAN BURTON: All right, so we have -- I mean, so we do have a line of cases doing that

MR RIORDAN Well, we do and I -- and I think it's clear that Battson followed California s lead and it s an argument for the -- the whole notion of federalism and independent state grounds I will say this, however. The California standard on use of racist preemptories is -- is different than the federal one In the federal one, the prosecutor has to say, "I'm going to bump blacks and here it goes, one, two, three, four, five, six, seven, eight, nine, ten " In California if he makes a pattern of that after the second or third bump, he has to explain that on the record So we -- we continue to have a broader provision that -- that would be lost

ASSEMBLYMAN BURTON Under the federal Constitution, the U S Attorney would have -- I guess it'd be an unconstitutionally impaneled jury or something -- illegal jury I mean the guy's got to say, "I'm throwing all the blacks or all the this' or all

MR RIORDAN Essentially,

ASSEMBLYMAN BURTON That's unfair

MR RIORDAN Right

ASSEMBLYMAN BURTON I don't care who stands up and says that

MR RIORDAN It s been an articulated standard up until now He has to actually articulate the strategy which used to be legal until -- until first, California, and then the Supreme Court made it illegal

ASSEMBLYMAN BURTON I mean how long ago was it legal for a lawyer -- for a prosecutor to stand up in the south and say, "I'm getting all the blacks off the jury?"

MR RIORDAN Until about three years ago

ASSEMBLYMAN BURTON It was legal for them to stand up and say that?

MR RIORDAN Yeah, it was Under Swain it was legal until Battson and Battson, I may be wrong, was '85 So until three or four years ago, the only state where the admission of a racist-use of preemptories was unconstitutional was in California Now, fortunately, that's the law of the land, although we say it

ASSEMBLYMAN BURTON Huh?

MR RIORDAN If you say it, it's the law of the land No, that's right And in California you have to

ASSEMBLYMAN BURTON But wasn't it your federal court case, I thought, that they overruled the appeal because it wasn't said It was just a pattern, but they couldn't prove that the pattern was the pattern or something?

MR RIORDAN Well, honestly .

ASSEMBLYMAN BURTON It just seems to me like it's also -- it adds the possibility of being a real as opposed to a, you know, threat

MR RIORDAN And the federal courts have not gone as far as California in that

regard And I would defend that as an example of why we need the federalist principle of having larger independent state grounds And it's a reason and I'll be accused alarmist on this But I'll make the point and then I'll finish it This is a state where, as recently as 1919 there were statutes that were passed saying no Japanese person can own farmland in California under penalty of criminal sanction This is the city that gave it laws to say no Chinese person can own a laundry or else they go to jail Now we don't have that here We have our own problems, but this is certainly a state with a history of tolerance and equality, but that has grown really only since we've declared equal protection to be a good thing This initiative says equal protection is a bad thing as far as the state Constitution is concerned

SENATOR KEENE What difference is there currently in equal protection?

MR RIORDAN Well, -- well, no, let me be clear on this Federal and state equal protection law probably right now, in the criminal context, are pretty evenly balanced

SENATOR KEENE So you're saying there might be some occasion for evolution of a state doctrine separately

MR RIORDAN No, no, what I'm saying is this There is only equal protection in the criminal context -- isn't like it is in the civil context where it protects housing and such There's only one thing it protects Racist or sexist prosecutions Prosecutions directed either explicitly or when you prove it, implicitly, at blacks or women or new Asian refugees, so forth and so on And the question is, if we eliminate that, at least as long -- at least for the moment -- that -- is it still protected against that on the federal level? That's true But why would any prosecutor -- why did they do this? Why is the equal protection clause in this initiative? The only thing it does is -- is prohibit racist prosecutions My question to them would be, if it's unthinkable that we never go back to that, why not leave the equal protection clause in the California Constitution?

SENATOR KEENE The next witness will be asked that question

MR RIORDAN But I would be delighted to answer some questions on a few of the other criminal law provisions The one thing I wanted to do -- there are three articles in the Reporter, in the Los Angeles Times and in the Sacramento Bee that run down the analysis of abortion and I think the one thing you'll find that is constantly absent when people talk about this, I have Diane Feinstein's memo from her legislative advisor on why she needn't worry about this and it's says, "Don't worry because the initiative doesn't mention abortion and it can't spring into life and criminalize abortion

SENATOR KEENE Who's her legislative advisor?

MR RIORDAN Well, it's a George Whitecart, who wrote an opinion on -- on the effect of this statute

SENATOR KEENE He is one of the people in

MR RIORDAN I assume that he's someone that she called on in terms of the campaign to advise her on this issue The gaping hole in the thing is that it doesn t mention that there are presently criminal statutes which have never been invalidated by anything

ASSEMBLYMAN BURTON You're the first guy to mention it all year

MR RIORDAN Well, I'll confess to you, I didn't know it when I started it

ASSEMBLYMAN BURTON Well, somebody was smart enough to tell you and you're smart enough to tell us (laughter)

MR RIORDAN And -- and I think it makes absolutely all the difference in the world and to the argument that a judge will try and read the legislative -- the handbook and so forth -- the answer to that is no judge is going to do that if he doesn t like abortion anyway And probably no judge is going to do that if he's a true judicial craftsman and feels that he shouldn't torture language in order to fit his principles

And if we want to make it a situation where no judge, whatever he thinks, could ever interpret this to apply to a woman's right to an abortion, take out the two words "to privacy" or put in two words -- "to privacy" and on from there That doesn t eliminate the problem with the equal protection clause and this is a problem with the Van de Kamp as well as the Wilson version

I don t think I am going to spend the next six months telling every minority person and every woman in this state, this has a pro-discrimination provision in it This has an anti-antidiscrimination provision It eliminates the equal protection clause and no person who is concerned about civil rights can help but ask, why was it in there, if you're not going to revive that kind of insidious agenda or race discrimination The prosecutors don't get anything out of eliminating the equal protection clause from the state Constitution that s worth getting

ASSEMBLYMAN BURTON Well, it s my opinion that if they really just wanted to do whatever it is they wanted to do, they could have shortened the time if they wanted to put in time constraints They could have put in the capital punishment things, whatever the hell they wanted it to be I guess they could, which I think is going to be more trouble than it s worth, allow hearsay in prelims because then at the trial the woman says, 'No, I didn't tell the cop that I told him this, and then the guy walks But basically, it could have been done in a cleaner, straightforward manner and it's my cynical suggestion that some of the people drafting it out of the fifty, may well have known exactly what they were putting in They figured that the groundswell of support for punishing the criminal and protecting the victim -- the victim's family and future victims -- would be so strong -- that they would, like Quentin, say, "don't worry about

that Don't worry about that Don't worry about that "

And that is the problem with the whole initiative process is that we sit here and a bill will go through four committees in the Legislature and sometime in that fourth committee, which would be the fiscal committee of the other house, someone will spot something in the bill that nobody thought was in the bill, wanted to be in the bill, or thought should be in the bill and it's amended and taken care of And that's a small thing And that's why I've always had trouble with anybody's initiatives because they just are not carefully and thoughtfully drafted because we do all this crap politically, but it's done -- most of them are done with a political idea in mind as against a legislative idea and I think that's what happened here

MR RIORDAN I would never accuse any specific person of even dreaming

ASSEMBLYMAN BURTON Well, this happens We do it in ours I mean, the so-called liberal side of the amendments You know, you find out that, you know, if you scratch your ear you've polluted the atmosphere with wax and you get fined (laughter)

MR RIORDAN The question that I would put to anyone that was a prosecutor is, isn t it true that if you didn't put the equal protection clause in here, it wouldn't have any effect whatsoever on the speed of trials, which is ostensibly your objective, and is it really worth the non-benefit -- non-benefit because we assume you're not interested in racist prosecutions -- isn't it really worth it to pull it out and therefore leave the minorities and this remarkably diverse racial state in a sense of confidence that nobody is trying to erode the anti-discrimination provisions

ASSEMBLYMAN BURTON Well, the answer will be in hindsight

MR RIORDAN One more thing because you had an important concession from Quentin Kopp, okay, which is this If this initiative runs on the ballot and everybody says it's free, why not? If it runs on the ballot and it says this initiative will cost ten, twenty, fifty million dollars, people are going to start saying, "All right, now let me take a good look at it Does this really make sense?"

Quentin Kopp conceded that you are going to need -- and Jeff Brown can tell you about this We are talking about a cost of millions and millions and millions of dollars to institute the counsel provisions and the continuance His thing was, "Oh, get more public defenders, get more appointed-counsel " He's absolutely right The numbers will be dramatic And so when we talk about the wisdom of this, let's talk about whether that money which will go to defense attorneys to increase their numbers, is worth the cost

CHAIRMAN LOCKYER Question

SENATOR KEENE I take it that consenting adults in private would not be affected by the loss of privacy because there is a statute on the books that denies state intrusion into those situations

MR RIORDAN: Yes I -- he

SENATOR KEENE: It's not the same as

MR RIORDAN: No, that's right What we would be saying is -- we would be saying this to the citizens of California You know if you are a homosexual, if you engage in acts in privacy, whatever else, you can be prosecuted for those acts in California without having constitutional remedies You don t have a federal one and we just eliminated the state one There isn't a statute, so it would take legislative action, but for that matter, if it were done on the county level under a county provision, you would lose any challenge to something like that under -- under the privacy clause It does take a criminal action Because one of the ironies of this -- in an abortion, if they talk about a civil right, they're correct After this passes, the County of San Francisco tries to shut down an abortion clinic -- brings a civil injunction suit Doctor gets up and says, "Privacy. California Constitution "

Judge says, "You're absolutely right You're protected You lose the civil suit ' The next day they go back and they say, "Doctor, you've just been indicted for running an abortion clinic Well, sorry doctor, that's a criminal case You have no right to privacy "

SENATOR KEENE Let me give you another hypothetical You've got a situation where you ve got a patient in a permanently persistent vegetative state and the family says that, "From all we ve ever been able to tell and from what she's told us directly, or he s told us directly, he would have wanted the plugs to be pulled in this situation " The plug is pulled and a prosecution occurs Is that affected by the loss of the right to privacy here?

MR RIORDAN Well, as you know, that case is more or less before the Supreme Court right now -- whether it is a federal right to privacy If the decision is that there is no federal right to privacy, this would mean that if a prosecution is brought, no one can say, "But in California we recognize things differently " In fact, even if the California Constitution explicitly is interpreted to have that right, you would only have it in a civil context if someone brings a tort suit against you If they bring a criminal case, you're in jail There's no right to privacy.

SENATOR KEENE So that case is the terminally ill equivalent of Roe vs. Wade

MR RIORDAN Or of Hardwick, you know, sexual activity between consenting adults

SENATOR KEENE Right

MR RIORDAN It's -- it's the case where if the decision goes one way in the Supreme Court, there will be an area of privacy which California can't enjoy in criminal prosecution, which it could in a civil context, because he doesn t enjoy it on a federal level

CHAIRMAN LOCKYER Tom?

ASSEMBLYMAN MC CLINTOCK Just to pass along the information The -- we wondered about the re-enactment of Penal Code 274

MR RIORDAN Yeah, I have a series of these articles

CHAIRMAN LOCKYER Why don't you give it to the sergeant right there Thank you very much, Mr Riordan

MR RIORDAN Thank you

ASSEMBLYMAN MC CLINTOCK The bill that changed the indeterminate to determinate sentencing is what re-enacted the abortion law

CHAIRMAN LOCKYER Is that when it occurred?

ASSEMBLYMAN MC CLINTOCK Yeah That was when it occurred

MR RIORDAN Thank you

CHAIRMAN LOCKYER Thank you Okay, Art Danner?

MR ARTHUR DANNER III Mr Chairman, Senators, Assemblymen, Ladies and Gentlemen, thank you for the opportunity to come before you today to discuss portions of the Crime Victims Reform Act of 1989 As we sit here today, almost one million signatures have been gathered in support of placing the reform measure on the June 1990 ballot It's anticipated that the measure will officially qualify shortly in the Secretary of State's Office The measure has been endorsed by virtually

ASSEMBLYMAN BURTON Excuse me, Sir I wonder -- I have to -- to go shortly and I wondered if it wouldn't disturb you, could you address yourself to the two points that -- that Mr Riordan raised One, about the statutes and the other dealing with abortion and then dealing with the -- if you -- if you're able to, and if you're not, you know, it doesn't matter And also to the equal protection questions

MR DANNER Sure My reading

CHAIRMAN LOCKYER Okay

MR DANNER My reading of the initiative -- but let me first attempt to deal with the equal protection question Okay, my reading of the initiative is that it speaks to procedural rights And in terms of -- the question of equal protection -- it doesn't mean to abrogate equal protection rights that are now guaranteed by the federal Constitution and would stand, obviously

In terms of answering his question, for instance, let me try to give you an example of where the initiative, by bringing into line California law with federal law, would make a difference The Hawkins decision concerning grand jury post-indictment hearings was grounded in -- much in the equal protection argument -- that independent state grounds have extended the equal protection argument In that particular instance, the assimilation of -- of state law to federal law, I think, would make it unnecessary -- that decision unnecessary In other words, what I'm saying, would abrogate it And, of course, that's one of the objectives of the initiative

So I guess what I'm saying in essence is is that if you have a civil right that s been guaranteed under equal protection grounds in the state of California, that I don t believe that this initiative will speak to that -- will make a difference with regard to that I think that's fundamental also to understanding the issue that's been raised concerning the right to choice here in terms of the abortion issue that's been interjected into the initiative because, at least in my judgment, it s going to be extremely difficult the way I see it, for us to otherwise criminalize what has been made a civil constitutional right in the state of California

ASSEMBLYMAN BURTON How -- how is it made a civil constitutional right by the passage of a constitutional amendment?

MR DANNER: It's -- it's been recognized -- what I'm talking about -- I don't -- I don t think it will be -- that it is -- that it will be interpreted in any way by any court in this state and what we have already decided by case law in terms of Belous and it's going to be then criminalized by the passage of this. .

ASSEMBLYMAN BURTON Would you not decide

MR DANNER: Can I finish? by the passage of this initiative And what I mean by that is in its entirety Looking to what the language says literally and what arguments, in terms of ballot -- ballot measure are made and what interpretations given by the courts.

ASSEMBLYMAN BURTON Well, ballot arguments mean nothing as far as court interpretation and constitutional amendments Valid arguments are worth what anybody, you know, you should see some of the ones we have in this town (laughter) I mean, there's just the courts have ruled you can almost say anything But, too, were not Belous and Barksdale decided under the California Constitution?

MR DANNER I believe they were, yes

ASSEMBLYMAN BURTON Okay, so we are throwing out that in moving into the federal Constitution where the court has said in Webster that "there is no absolute right to privacy," okay? Now if they go farther, which, you know, they could go and in effect overturn all of Roe vs Wade and throw it back to the states, we are sitting with a statute in our Penal Code that would make some abortions -- abortions that do not go through the steps of the Beilenson Therapeutic Act -- a crime Now I would submit that you as a D A , if you didn't punish someone who, I guess, went to a walk-in clinic for abortion, that a right to life constituency in Santa Cruz -- I mean, you would be in some real trouble because it's a law on the books

MR DANNER In Santa Cruz

ASSEMBLYMAN BURTON Santa Cruz

MR DANNER Not Santa Cruz We don't have too many right to lifers in Santa Cruz (laughter)

ASSEMBLYMAN BURTON Well, you might have two of them But you would be sitting there So I don't think it's -- I think -- in other words, up until I knew of the statute that would end, I kind of thought that that -- that the argument made by privacy, yeah, there was a theory there, but with the laws sitting on the books, I think it s a real thing that there will be a law that calls a certain act a crime I believe the guy in Kern County would be licking his chops, you know (laughs) It'd -- because either one may believe or two that it s a crime and I don t think we can kind of sweep it aside and say it really doesn't matter because we didn't mean for it to matter Because I think I would bet and I don't know that among the drafters, I don't know how many of them are aware of what was in the Indeterminate Sentencing Bill that created this thing

MR DANNER Yeah I -- I don't know and certainly I don't think we're talking about sweeping it aside We're talking about what a court has to look at when it interprets an initiative And, while I accept, certainly, your statements about that ballot arguments are many times rejected, I think that the law's clear that it must be considered certainly interpreting the meaning of what an initiative means

I think the other -- the other problem you have here is that, I think you're missing one thing and that is that I mean, I'm a D A in terms of -- faced with prosecuting And I -- I just want you to think with me for a moment that -- all right, let's assume Roe vs Wade gets repealed There is not anything now that convinces me in any way, even with what you're telling us concerning the statutes on the books because of Belous and Barksdale that I ought to or should or would prosecute under those particular sections And I don't think there is any provision there that would force that result

ASSEMBLYMAN BURTON I think

MR DANNER in terms of a logical

ASSEMBLYMAN BURTON I think that the danger in this is, I think it, again, it s one of the things that I kind of fault with the -- with initiatives -- 58 different D A s, God knows how many different judges and I think that -- I mean I just think that Mr Riordan made a very strong point and really made a very strong case for which, otherwise to me, was conceptual and now I view it as a real situation It may or may not determine the passage of this thing at all because, you know, you've got pro-choice versus murders and, you know, how are people going to vote? But I just think it was a very unfortunate piece of draftsmanship and this -- and I'll be honest, I don't know if I d be for this thing, you know, anyway, but it -- it s unfortunate

CHAIRMAN LOCKYER Tom, you want to jump in?

MR DANNER Let me just -- if I could comment I don't think that's any different than what we have any other day Certainly in Santa Cruz or any other place that's

very protective and jealous of the constitutional rights that we have, we get cases each and every day that test in a real situation what the constitutional validity of the law is And so your case scenario that you put out there is one that certainly, I suspect, will and can apply in this instance But I don't believe it s any different than in many other areas where we get these test cases each and every day

And my further point is that I cannot see, at least at this point, unless somebody can point that out to me, and maybe Professor or Mr Riordan can do otherwise, that -- that we're going to criminalize something that otherwise has been made constitutional in terms of the Belous decision, given a right -- a constitutional right

ASSEMBLYMAN BURTON: But we're wiping out .

MR DANNER We're not wiping that out. So we can -- I guess we can go back to

ASSEMBLYMAN BURTON No, no, no all you have to do is -- a clear reading says, "Blah, blah, blah, blah, blah, blah privacy " No more under the state than is allowed under the feds and the feds are telling us, there ain't no privacy Now to me

MR DANNER That doesn't mean we've criminalized it

ASSEMBLYMAN BURTON What?

MR DANNER: That doesn't mean we've criminalized it That

ASSEMBLYMAN BURTON: It's already No, there's two laws on the books that make it a crime

MR DANNER No My point is that that's not -- not the case That was my scenario that I told you As a prosecutor I am not going to prosecute when I have a decision on the books that says -- that says, basically, that this is a

ASSEMBLYMAN BURTON Then you're not going to like this initiative

MR DANNER I'm going to follow what I think the law tells me to do and that instance and where it's unclear, I sure am not going to charge somebody with a crime

ASSEMBLYMAN MC CLINTOCK Mr Danner?

MR DANNER Yes

ASSEMBLYMAN MC CLINTOCK Mr Chairman, obviously this is a central point in the debate and Mr Riordan raised the rhetorical question Why not simply take out the reference "to privacy?" My question to you is, if that were done, what other effect might that have on the thrust of the initiative with respect to criminal procedures?

MR DANNER Well, we're -- the reason that that language is in there, and I think this responds to the other question, has to do with the expansion of the independent state grounds in areas such as search and seizure And the reason why that language is in there is to speak to that kind of expansion of the rights for criminals versus the rights of the rest -- that the rest of us have

ASSEMBLYMAN MC CLINTOCK Criminal procedure speaking to the Bird Court decisions that involved the ability to seize evidence -- I believe in one case it was a bloody

shoe or something that was found in the trunk of the murder suspect I forget the details of that case But that's what you're basically trying to address If the words to privacy we're excised from this initiative, am I to understand then that the reforms aimed at search and seizure would -- would disappear and would still be guided by the Supreme Court decisions on search and seizure?

MR DANNER Well, it would certainly leave free to the courts to expand along the lines of independent state grounds in that area and apply decisional law except -- except where the -- the United States Supreme Court has spoken otherwise But it would -- it would otherwise allow them to expand in that area So the -- the answer is yes That's what we were concerned about

ASSEMBLYMAN MC CLINTOCK Criminal procedure and anything else

MR DANNER Yes

ASSEMBLYMAN MC CLINTOCK Anything else?

MR DANNER Yes That's one example The other example I used was, for instance, that it would allow the kind of decision that was made in Hawkins to be made, you know, once again And the initiative would basically prevent that -- it would not allow for that to happen

CHAIRMAN LOCKYER Senator Keene?

SENATOR KEENE Yeah I appreciate the point of view that you have because I think you're trying to do the right thing and not have this have any broader application than is intended by those of you, and I don't know whether you were actually a core part of it, who helped draft the thing But I think it's a lot of wishful thinking and I'll give you my arguments and maybe you can respond to them

In the first place, the courts will feel free to go beyond the meaning of the language where it's clear that the words will bear other meanings -- where they permit some ambiguity This language permits no ambiguity

In the second place, where the courts will go is -- they certainly will not give great weight to ballot arguments which are written after the fact and are the opinion of a few people when you're talking about an initiative that is direct democracy and not the initiative of a few people The sponsors of the initiative are not the few people who put it on the ballot The sponsors of the initiative and the -- the people that are pushing the initiative are, in fact, the People of California That's the whole notion of initiative So the opinions of a few people in a ballot argument written after the fact -- after all this action has been taken to put it on the ballot and all of these signatures have been secured and all the rest -- is certainly not going to carry great weight even if the court is willing to look to outside pieces of information on the grounds that the words will possibly bear that meaning, which I don t think they will

The third point that you make was that even if you get a situation where the U S Supreme Court acts and repeals Roe and this passes, that you as a prosecutor, I presume -- you think that other prosecutors will think likewise -- will not -- will not prosecute because of the Barksdale and the Belous cases But those cases fall just as surely as Hawkins falls And for the very same reasons that Hawkins falls Hawkins is knocked out because of the provisions in here -- they're being adopted in the initiative process and, likewise, Barksdale and Belous fall So I don't think that there is the semblance of a rational argument for your conclusion -- a legal argument for your conclusion Let me put it that way I think you ought to do the right thing And I think your intent was not to include abortion in this. But I -- I'm afraid there is no other conclusion to be reached

MR. DANNER. Okay, let me try to respond to those points

SENATOR KEENE: Please

MR DANNER And, they were well put The first point you make is the language permits no ambiguity That's right We think that that's correct And we think for that very reason, that a court will not interpret this and apply this in a way that you think it will conclude Because it talks about in criminal cases and it talks in specific language as to procedural rights Okay? And we think that that is clear and unambiguous That we're -- we're not going to

CHAIRMAN LOCKYER I -- I can't -- every time I hear someone say it applies to procedural matters I keep rereading the section and I'll be darned if I can find anything that's

MR DANNER Well, maybe -- maybe I can find that for you here in a second, but if I can just stay with my train of thought while I've got it

CHAIRMAN LOCKYER: Okay Go ahead

MR DANNER All right The second thing with regard to ballot arguments This -- the ballot arguments are going to be drafted by those individuals who participated in the drafting of the document I mean their purposes are going to be stated And I mean there is legal precedent for the court to consider that Now as to what weight they give it, obviously, that's within the ambit of the court But it seems to me that in this particular instance, given the arguments that will be made in the ballot measure that this was not intended in any way, nor was it -- nor does it speak to the right of choice -- those arguments will have significant weight, I believe And I think that they will be in essence a convincing part of the situation here

Finally, I don't think you can equate the Hawkins situation with Belous One s a criminal case and one is a, basically, a civil case if you will, in the sense that what we re talking about was a constitutional right in a civil context Not a -- an equal protection argument in the criminal arena that we're talking about So I -- I don t

accept your argument that it's -- that they're of the same quilt, if you will All right? Now, I

SENATOR KEENE It's a distinction, but what's the difference?

MR DANNER Well, I think the difference is great because I come back to my point is that I cannot see how, in the final analysis, the court will abrogate what has been found under Belous to be a constitutional right And I don t think that this initiative does anything whatsoever to that argument And further, I don t see that we, in any way, immediately criminalize that right by anything that happens under this initiative

Now, I want -- I want to say that I

SENATOR KEENE I must say I don't understand that

MR DANNER Yeah, well, let me -- let me just indicate A number of things have have to happen here which I think, as far as I'm concerned, and I think the overwhelming number of D A s -- I think virtually every -- all of them agree -- that are remote Certainly the overturning of Roe vs Wade is a -- a probability, given what's happened You know, we don't argue that It may not happen Many people think it will The observers think it will And it looks to be going that way

SENATOR KEENE The government attorney said he wanted to overturn Griswold, too

MR DANNER Yeah And -- but I -- I think, you know, that's first of all That s the first thing that needs to happen The second thing here is is that then there must be some indication that this particular initiative applies now to a situation to make criminal anyone who has received an abortion

CHAIRMAN LOCKYER Well, could you pause there just for a minute? I'm not trying to distract you The initiative won't make it criminal in and of itself It is criminal under existing statutes but for the application of the right to privacy

MR DANNER I don't think so

CHAIRMAN LOCKYER It is eliminated by this

MR DANNER I don't think so I don't think those statutes will withstand the scrutiny I don't believe, at least based on the reading of the law that I did, that whatever form they're in, that they could pass the old constitutional muster at this particular point

CHAIRMAN LOCKYER This is a vagueness challenge

MR DANNER Yes Yeah

CHAIRMAN LOCKYER Although -- all right, let me just insert something

MR DANNER Surely

CHAIRMAN LOCKYER It somewhat takes out of context the opinion in Barksdale But it makes me get nervous when I read the court saying -- and this is subsequent to Belous -- "We concluded that the Penal Code Section 274 is valid in its entirety " Now

that makes me worry about the potential challenge to that statute, you know, if it s re-enacted as part of our later statutes, about the likelihood of the court striking it down Now, if every District Attorney were like you, I -- I would rest easy And just think there wouldn't be a prosecution brought But of course, -- well, that's probably why we write the law because we don't know who the D A will be or the judge, or whatever may be

MR DANNER: But I hope -- well, let me -- let me just say that out of Belous the court found, quote, "The fundamental right of a woman to choose whether or not to bear children follows from a right to privacy or liberty" -- or liberty -- "in matters related to marriage, family and sex " All right? Now, if we're making arguments here which we are that we're talking about are going to be taken into account by the court, there is an additional right stated there in terms of liberty that doesn't even deal with right to privacy So there is an additional argument that can be made, I think, and I think successfully, even if you want to set aside all the other arguments that we're talking about All right

CHAIRMAN LOCKYER We probably have maybe beat this issue to death today, but if there's anything else you wanted to get to

MR DANNER Well, I just .

CHAIRMAN LOCKYER The abortion and privacy issue

MR DANNER. Well, yes, I did I did I wanted to emphasize and as a person who supports the right to choose, personally and in terms of the way I look at the law Of course, I have to do that regardless of my, you know, personal views And that's why I think it's important for you to know that and I know in speaking and conversing with virtually all of the District Attorneys, there's not one, I think, that would see it differently in terms of whether, at this point, the state of the law, even after Roe v Wade is overturned It would prosecute under the state of the law then in existence

SENATOR KEENE I wonder if they'd answer that if we asked them that question? Or if they would say if Roe v. Wade were reversed and someone urged prosecution, under this statute what would you do? Is that too hypothetical for them to respond?

MR DANNER No, I'd say -- that's why I'm confident as to what they'd say I think that under the circumstances, I -- my view of it is is that you would, I think, have virtual unanimity in terms of response in view of the state of the law if Roe vs Wade were just reversed, you know, what would they do?

SENATOR KEENE What if they have a vote in election time that says we're not enforcing the law?

MR DANNER Well, then the debate begins certainly in earnest But that happens all the time And for those of us who have opponents -- they raise all kinds of issues each and every time And I think then, obviously, the debate will be joined But in

that particular instance, I still think that given what they have, and that would be my answer, that you could not and would not prosecute

SENATOR KEENE All right

MR DANNER Let me just -- I have a number of other comments to make We ve talked about the different issues I can -- let me just make a couple of points here since we re moving along in terms of time and Iglehart has told me if he misses the 49er game because of me, we're in deep trouble

CHAIRMAN LOCKYER It won't be because of you

MR DANNER All right (laughter) Now, I just want to What time does it start? I want to mess up his schedule (laughter)

Anyway, I want to make two points about the -- the other portions and provisions of this initiative overall One, that in drafting these, I think one of the things that we looked at is the responsibility of those of us who work in the system to look within the system when we re talking about doing something about the system And you know, if we pass all kinds of legislation dealing, well, as you know, with sentencing and other things of that nature -- but I think we have a real responsibility as we look to a system which seems to be ever increasing in terms of cases, in terms of resources that we give it -- that we really look inside it to see what kinds of reforms we can make to make it work in a better way Hence the procedural aspects of this initiative and one of its real thrusts to make a difference in how things are handled in the courts on an everyday basis And the provisions that you see in this initiative are born out of that -- are inspired by that And are meant to be an answer to some of those plaguing questions

The very -- the very people who support the system we have -- the public -- I think has the right to demand that And I think they're not any less entitled to us reviewing those -- those things that we do each and every day to make them better And so it's one of the -- the thrusts behind the provision

CHAIRMAN LOCKYER Would you comment in that respect on the argument we ll hear, I guess, shortly, that there are public costs that are rather substantial compelled by the various -- the procedural changes

MR DANNER I haven't heard those arguments in their detail yet, but it is my view, shared by virtually, as I've indicated, all D A s, that this initiative, if passed, will mean substantial savings to the system, both in terms of real dollars, we think, and resources that are otherwise always there at the present time I mean if you take, for instance, take for an example, preliminary hearings All right? And as we know already, this initiative would affect those drastically in the sense that we could utilize hearsay information That doesn't mean we always would do that or in each and every instance we would follow that, but it would allow us to do that and

that's, of course, analogous again to the federal law, which basically says there must be some probable cause determination for an individual to be held and due process that s required in the federal Constitution

But just looking at the number of preliminary hearings handled -- and I think you can imagine how many that must be I mean, it's thousands and we did some, I think, basic studies that were based on Judicial Council statistics which showed that the average preliminary hearing lasted for approximately half an hour or more Our estimate in terms of the length of preliminary hearings here would indicate that they would last, on the average again, you know, half that time In terms of the cost figures we have, and I have them if you'd like to at one time, we'd be glad to submit those We think that's going to result in a savings of over a hundred million dollars to the system each and every year Just that fact alone So there's an example, I think, of what we're talking about when we're talking about procedural reform It's going to affect the way of doing business in each and every one of the courts that we all practice in

So, in terms of responding to their arguments, I haven't heard those yet I'd be glad to listen to those

CHAIRMAN LOCKYER Maybe we can have some letters exchanged

MR DANNER That might be -- certainly, a real good idea

CHAIRMAN LOCKYER I guess somebody -- what Leg Analysts? -- or someone has the obligation of figuring out those cost figures for the ballot, so, if not here, I suppose the argument will have to go on there in order to provide the information to the public

MR DANNER I would also add that the other -- the other provisions of the initiative that do the -- we think do the same thing have to do with the abrogation of Hawkins and the use of the grand jury I think many of you are familiar with preliminary hearings in murder cases that last significant amounts of time, which would otherwise, under the indictment process, not require the use of Municipal Court resources and attorney time on each side and, of course, bring the case to the Superior Court in a much faster way

With rare exceptions, I think I can state that the -- in those category of cases, and I'm speaking about murder cases and other serious cases those -- of those sort that are usually asked to be indicted, that in virtually each and every one of those cases, the case is held to answer and the case does proceed to Superior Court, which -- that means that we're talking about faster process And of course this initiative does not in any way touch or abrogate the right to attack an indictment in terms of its sufficiency once it is -- it does come to the Superior Court.

CHAIRMAN LOCKYER What kind of cases or what felony cases would you personally

think you could submit to a grand jury if this were the law?

MR DANNER As I recall, some of the figures that when the Hawkins case was decided, as I recall, I think indicated that approximately three percent of cases at that point, I think, statewide, were being sent to the grand jury And I would think that it was either, you know, approximately that many in my county or even less and it should be clear that prosecutors, as certainly as well as defense attorneys are concerned in certain kinds of cases about testing the sufficiency of the evidence and I assume would do so even with the provisions of this initiative But on the other side, for those instances where the case unfortunately becomes an arena for deposition practice almost, it would save us immense time and I think, of course, a lot of resources by proceeding by grand jury

CHAIRMAN LOCKYER So what -- what would those be in terms of the crimes involved?

MR DANNER The kinds of crimes? What I have submitted have been in the past murder cases, special circumstances murder cases and other types of murder cases At times child abuse cases where the victim in that situation, having to proceed to preliminary hearing within ten -- ten days is not otherwise able to because they're traumatized

CHAIRMAN LOCKYER And these are the ones that would go to the grand jury?

MR DANNER Yes, those -- these are the ones that I would send Cases where there is a witness that otherwise is fearful for his or her safety at the initial outset of the proceedings, such as in gang-related cases There's also some white collar crime cases that I have submitted in terms of the complexity and because of the length of time it otherwise would take to go through preliminary hearing. So those are the types of cases that I would and I think other prosecutors would submit, as well

CHAIRMAN LOCKYER Senator?

SENATOR KEENE Yeah Why don't we just repeal these California constitutional provisions and say that we're repealing the California Bill of Rights because that Bill of Rights would not allow the provision of lesser rights than the federal Constitution -- only the greater rights And since this says we no longer allow the California Constitution Bill of Rights to provide greater rights, it has no purpose or meaning Why don't we just repeal it and tell the people what we're doing?

MR DANNER Well, it just -- it goes back, I think, to our argument that we were -- our discussion we were having before There may be the application of California civil rights in that -- in this civil arena rather than in a criminal case Our objective here was not to affect the entire arena of California constitutional law Only that which brings us to a different conclusion in the criminal arena than the federal law When somebody asks you out there, well, let's see The result in this case was this Now, I

SENATOR KEENE How do you

MR DANNER: Yeah, how do you feel about that? And we say, "Well, we don t feel very good about it," and, " Well, I don't understand that because it seems like here" and then they read us some federal law and they say, "Yeah, you're right, under the federal law, that wouldn't be the result "

SENATOR KEENE Wait a minute, let me understand that But then, why didn't we say that the California Bill of Rights shall be inapplicable in criminal cases?

MR DANNER Well, I guess if we had you there with us drafting, then you would have suggested that I

CHAIRMAN LOCKYER He would have argued against it politically

MR. DANNER: He would have (laughter) And what if your opponent would have said, "Did you do that, Senator?" (laughter) "Did you suggest that language?" And -- but -- no, the wording here, in terms of choice, I assume we can look at it always from a Monday quarterback position, but I mean, I -- I think that the intent, the purpose and the various goals are set out fairly clearly

All right Let me just -- I had just a couple of other things to make a point on Oh, the other point I started -- I said I had two points The other point I want to make is that I remember in terms of Proposition 8, the Victims' Bill of Rights, that those critics and opponents said that that provision would in fact clog the courts, cost huge amounts of money, be a problem and in fact, it has not done so In fact, in my view and I think, in the view of prosecutors, it has done the opposite It has moved up the time at which, in many kinds of cases, we have to consider what we're going to do in terms of dispositions It has made a real difference in the system It was one, I think, step in the minds of certainly prosecutors as far as bringing the system into some type of balance This is a second step in that direction I'm not suggesting there's a third, but I'm saying that at least at this point, that's the way we see many provisions in this particular initiative

It - it does do certain things in the substantive law and it creates a new crime of torture, as you know, and I think the question was asked, "Well, what is the penalty for that?' It's a life term -- not life without possibility of parole, but the initiative says it's a life term, so that's the answer to that

CHAIRMAN LOCKYER That's not -- that's not a new special circumstances?

MR DANNER: No, no It's a life term And so somebody had asked that question, I think Maybe it was Burton -- yes, Assemblyman Burton

Let me see if there are other things that I can answer Are there any other questions I might answer? Okay, then let me just say that

CHAIRMAN LOCKYER Thank you very much

MR DANNER I covered, I think, most of it and maybe I can conclude by (pause) --

by saying thank you (laughter) Thank you very much for your questions and I'll listen with some interest to the arguments of those here that want to make the cost arguments because we re certainly very interested in that since it's the thrust -- one of the thrusts of the initiative Thank you very much

CHAIRMAN LOCKYER Thank you Mr Iglehart? I have about three, four, I guess, witnesses We are kind of running out of time, but maybe if I urge people to just kind of not repeat some prior argument for purposes of emphasis or whatever, but to just tell us anything new that you might want to add to the discussion

MR RICHARD B IGLEHART Okay, thank you Mr Chairmen and Members I am Richard Iglehart with the Attorney General's Office I just -- I don't have any formal remarks I just plan to scrap all I had I will simply respond to a couple of points that have been brought up so far

As to Senator Keene's remark, "Why don't we just scrap the California Bill of Rights?" I think

SENATOR KEENE No, why don't we admit that that's what we're doing?

MR IGLEHART Okay, because we're not Because we're not And I think what you'll see is this California had an experiment for a while -- an independent state grounds And it -- and it -- it developed for a while and it probably -- it may -- some people argue it got out of hand But in any case, for a period of time in California, the -- the California Supreme Court and the California Court of Appeals decided certain constitutional issues their own way And they were often in different areas Sometimes they came back Sometimes the California Supreme Court brought them back And sometimes the U S Supreme Court does it, for example, Trombetta I suggest to you what will happen is there will be some level of consistency in the interpretation of constitutional principles that are based on U S Constitutional principles There will be some level of consistency in those areas where the U S Supreme Court has spoken But in the areas where they haven't, and those are the vast creases of the zone, is where the U S Supreme Court hasn't Then on the basis of the same wording of the California Bill of Rights, the California courts will be free to still go their own way where there is no contrary decision by the U S Supreme Court

When, then, the U S Supreme Court then decides the issue, if they do, or perhaps that specific case goes up and they decided, and if that is decided in a more restrictive way, then I agree that we're bound to that But until that happens, I think that there will still be a flourishing of decisions because there are many more cases and there are many more courts that we're talking about here There will be a flourishing of decisions in areas that haven't been spoken to by the U S Supreme Court When -- when the U S Supreme Court does speak to that particular issue, then I would say thereafter, California courts would need to take heed of that if this were to

pass and to interpret, thereafter, California law pursuant to that And that doesn t offend me

CHAIRMAN LOCKYER Please, go to the next point

MR IGLEHART: Well, this was brought up several times with Senator Keene

CHAIRMAN LOCKYER Yes Yes

MR IGLEHART: And I think it's a -- when -- I commend you for exploring this issue I think you've done a very good job I'd like to see -- there's a bunch of other areas in this initiative that are very important I'd like to see this healthy discussion go on as to them I -- you -- I'll stop there if you want to ask me questions

CHAIRMAN LOCKYER We're bringing it into clarity because you made your point We understand it

MR IGLEHART: Yeah Okay I'll stop there

What time does this game start? (laughter) I don't -- I was -- I was kidding Art (laughter) You already know this Most of these bills have been before you many times The Attorney General has supported most of these bills as they've been before you So this is not new

CHAIRMAN LOCKYER Yes Okay Thank you Mike Lawrence

MR MICHAEL LAWRENCE I'm going to dispense with my written remarks as well

CHAIRMAN LOCKYER Thank you

MR LAWRENCE I've already submitted them to both committees The ACLU does welcome this opportunity to speak on the initiative and in particular, I thank Senator Lockyer for putting me in the first wave of speakers

CHAIRMAN LOCKYER You're not at the end of the day

MR LAWRENCE The ACLU opposes the initiative on many grounds and I think that the fate of the initiative is going to be decided on the privacy ground And I'm not going to repeat the comments of the speakers today But let me emphasize that I think that is the ground that is most troublesome in the initiative

The other reason the ACLU opposes the initiative is that it severely curtails the rights of defendants to a fair trial and to the right to present their defense in the name of crime control, when indeed there will be no crime control to be gained because of the initiative

The ACLU also opposes the initiative because it expands the scope of the death penalty once again without having any penalogical discussion of whether or not that is necessary

And finally, the ACLU opposes this initiative because it imposes arbitrary and very restrictive punishments without consideration as to whether or not they're needed And I m referring specifically to the fact that children, 16 and 17 years old, will receive

life without the possibility of parole or without consideration of the unusual circumstances in their case

Crime is a serious problem in California and it's one that our leaders should pay utmost attention to However, this initiative does nothing to control the crime problem or to assist victims of crime And I say that with, I think, several various reasons why this is true And I came to the initiative process and to this initiative in particular, trying to be somewhat objective But we're working for the ACLU We re always

CHAIRMAN LOCKYER Not objective

MR LAWRENCE We're never objective (laughter) But in all honesty, I think if the fair labeling laws of the Federal Trade Commission apply to initiatives, fraud prosecution might be contemplated Because it neither does what it's intended to do nor what the label says that it does

Crime victims are supposed to be somewhat helped by a speedier process And yet no one has given very much consideration to what s going to actually occur if the initiative passes I think what is very important, besides the very substance of the

CHAIRMAN LOCKYER Now wait a minute now You don't disagree that speed of process would be a value to victims?

MR LAWRENCE Oh, I think actually it would I think a speedier trial

CHAIRMAN LOCKYER But you disagree with that idea

ASSEMBLYMAN MC CLINTOCK I would just suggest to him that those victims have spent many, many years of agony considering that very point, come to a very different conclusion than you have

MR LAWRENCE Oh, I agree I agree that there are many crime victims who are still feeling frustration about the circumstances of their -- of their loss And I am one of them I don't think that there are very few people in this room who haven't suffered some loss through crime But to think that we are going to eliminate that pain through an initiative process that is as chaotic and as haphazard as this one is, ignores the very real world in which we live in

CHAIRMAN LOCKYER I'm just making sure -- you don't disagree with that goal, but don't think it's achieved here

MR LAWRENCE I think actually the reverse is achieved

CHAIRMAN LOCKYER Okay

MR LAWRENCE The fact that we will eliminate preliminary hearings might initially save some time and money if we look at it only in the abstract But if we look at what the purpose of preliminary hearings are, and that is to quickly assess whether or not the State has proved a case based on probable cause, the time savings is not so clear

I mean why go into a courtroom -- I am looking at whether or not -- if I'm going into a trial, I'm looking to whether or not there is some possibility of success at trial I use a preliminary hearing as one vehicle for determining that I can test the witnesses credibility, objectivity, and his ability to recount the events, in determining whether or not it's worth going to trial in this case

And as you know, 90 percent of our cases are resolved by guilty pleas in California If we eliminate the preliminary hearing process for those cases brought by indictment, or if we severely curtail the ability to determine whether a case can be made by the prosecution, defense attorneys are going to be powerless to advise their clients correctly and to whether or not they should go to trial And those 90 percent figures that we are very comfortable with now, 90 percent of the cases ending up in a guilty plea, are a real advantage We are not going to have 90 percent of the cases resolved by guilty pleas if this initiative passes

ASSEMBLYMAN MC CLINTOCK Mr Lawrence, pardon me, how many of those cases -- what percent of those cases are guilty pleas in response to a plea bargain? Where a defendant pleads to a much lesser offense than was originally charged?

MR LAWRENCE I would say probably the vast majority There's no question about it that the system couldn't survive if everybody went to trial I don't think anyone would dispute that And certainly not the prosecutors who are offering the guilty pleas and doing the plea bargains

But I think that we really need to take a close look at this problem of delay in trying to pinpoint what the causes are and determine whether or not solutions may be worse than the problems which are addressed

CHAIRMAN LOCKYER So your conviction is that speeding up preliminary hearings will just result in longer and more lengthy trials and that's the cost?

MR LAWRENCE Longer delays and more lengthy trials More trials of persons who might normally accept the guilty pleas The person who might normally accept a guilty plea because his attorney has made a valued recommendation will probably not even get that recommendation because there has been no preliminary hearing to determine the strength of the case And I'm going to reserve the question of whether or not it s going to save any money based on the plethora of attorneys out there

CHAIRMAN LOCKYER Yeah

MR LAWRENCE We currently have 40 people on death row who have already been convicted and don't have attorneys for an appeal To find the thousands of attorneys that we are going to have to need to comply with the initiative s mandates I think is going to be completely beyond our means And unless we want to raise the rate of compensation for defense attorneys, I think it might be impossible

Other than that, I don't want to take anymore time discussing specifics that I've

already discussed in the written material But I certainly will take questions

CHAIRMAN LOCKYER We're okay?

MR LAWRENCE No questions for the ACLU? Okay Thank you very much for allowing me to appear

CHAIRMAN LOCKYER Thank you very much Mr Brown

MR JEFF BROWN Thank you Members I would specifically like to address myself to the initiative's Section 987 05 which says that "the judges in assigning counsel in criminal cases and appointing counsel shall acquire representations in advance that the counsel will be ready within the time limits either for a preliminary hearing or trial "

Now what that does in effect is say, before an attorney is to be appointed in a case, he or she has to definitely agree that on a particular time on a particular date, that that attorney will be ready for trial

Now I am the head of an office that currently has at any given time anywhere between 215 to 270 cases set for trial in the felony courts And maybe double that number in the misdemeanor courts And an untold number of preliminary hearings that are set

Attorneys -- appointed attorneys, especially, and those in public defender offices, will not be able to give any definite guarantee that on a particular date that they will be able to try that case because there may be other cases that they are in the process of trying or cases that are going to be double set When appointed attorneys, particularly public defenders, set cases, they will set two or three or four cases on a given day with the idea that some may fold or if there is a problem of inconvenience that the case will be continued until the trial that they're having or the hearing that they are hearing are concluded What this initiative does is say you can't do that You have to give absolute assurances Now if those assurances are going to be given, then what you're going to have to do is you're going to have to expand your appointed counsel panels or, as in most counties, you're going to have to increase your public defender representation -- the number of attorneys representing clients in public defender offices

CHAIRMAN LOCKYER Well, how do you it if you don t even have a courtroom?

MR BROWN Well, that's it I don't know how you do it How do you do it if you don't have a judge? How do you do it

CHAIRMAN LOCKYER Well, you can say, 'Well, we have a lawyer ready," but if

MR BROWN Yeah, how do you do it if you don't have a prosecutor ready? I mean, we cannot hand off complex felony cases We can't even hand-off complex misdemeanor cases Some acquaintance with the evidence is indispensable for the People or for the defense in representing their respective client

Now, it seems to me that this is just a cockamamie thing that is not well-thought-out It's a sort of a thing that is -- obviously they didn t consult anybody in the defense bar because they weren't interested in their views But what it will do, is it will either cause a serious evasion of the law that is fixed on the statutory books because it has passed through the initiative process, or it will just create the sort of confusion that will be necessitated by this legislation

It also says that if attorneys are not ready, whatever the reason, for example they may be trying another case or some other good reason, they can be removed from the from the duty of representing the client Now that's an incredible -- that's an incredible solution What that means is that if you have paid somebody -- maybe you ve paid them everything that you own -- everything that you own -- that you, all of a sudden, because your attorney is, through no fault of his own, is trying another case, you find that your attorney is being removed and some youngster is being put in Some court stooge And that's likely to be the sort of character that will take over those cases Because no self-respecting attorney will do that

In addition to that, I mean if you're a deputy public defender and you've prepared your case diligently for 60 days and you can't get out to trial for some reason, maybe you have a preliminary hearing You're supposed to be removed and some other person is going to come in I suggest to you that that is just an untenable solution That is in violation of a person's Sixth Amendment rights and it really will cause chaos in the system

What this section will do is it will either bring one of two results It will bring confusion and evasion of the law Or in the alternative, what it will do is it will cause county offices, such as mine, to have to be expanded to accept this load In addition to this, you will see the removal of counsel from cases because they are not ready and perhaps inadequate counsel put in Because as I indicated, it is very hard to familiarize yourself with a case given the circumstances that are set down in this particular section of the initiative

Art Danner, my friend whom I have great respect for, has said that the average preliminary hearing takes a half an hour A half an hour for a case, perhaps -- a felony case of some seriousness I suggest to you that that is a bargain

Now if we start eliminating preliminary hearings as we know them today, what we're going to see is a lot of cases flowing up to the trial calendar and sitting up in the trial calendar And what you're going to see is a huge rate of dismissals Mandatory dismissals, say, like they are in the Municipal Court in the misdemeanor section where it runs anywhere between 30 and 40 percent in given offices

I suggest to you that the preliminary hearing system may need to be streamlined, but it does not have to be streamlined in this way It can be streamlined by judges

that are not going to put up with depositions And you're going to see preliminary hearings do what they're supposed to do

So the $100 million that he talks about I think is illusory because I think the cost will be probably shifted to the Superior Court

And those are my comments on it I have to pick up my kid now She's probably waiting out there on the street, but I'm not -- I'll be delighted to answer any questions

ASSEMBLYMAN MC CLINTOCK Just a very quick question

MR BROWN Sure

ASSEMBLYMAN MC CLINTOCK You mentioned the preliminary hearings take a half hour I heard Mrs Campbell cite a statistic that it takes an average of six months for criminal cases in the federal court to go to trial It takes the same case two years to go to court in California

MR BROWN Well, that's not true Not the average case Mr McClintock, let me just say one thing I do not know what the averages are I know what happens in San Francisco, which is a large city And it takes about 60 to 90 days from the point of inception to the point of final adjudication for a case to come through the system Now there are unusual cases -- there are real exceptions to that that may take some time But by in large, the average case doesn't last for very long And there's also something else that's happening

ASSEMBLYMAN MC CLINTOCK Well, what accounts for this -- this amount of time that these -- these cases are in court? Mrs Campbell's case -- eight years and this matter is still pending?

MR BROWN Well, probably because, there was what? She mentioned something like appeals

ASSEMBLYMAN MC CLINTOCK Retrials

MR BROWN By in large, when cases take that long, it's because there's been a retrial and there has been litigation in the Appellate Court I haven't seen any cases in San Francisco take eight years to try I mean, I've had death penalty cases that have taken a long time, but by in large, those are the exceptions to the rule and they usually take that long because there are intermediate appeals taken or there are -- there's long preparation that is necessitated by a very, very rare class of cases. But frankly, the system can move quickly if there is good calendar control by judges in the jurisdiction and I think San Francisco's an able example It s one of the few things here in San Francisco that we do well

CHAIRMAN LOCKYER Okay, thank you

MR BROWN Thank you very much

CHAIRMAN LOCKYER Is there anyone present who would wish to add something? Yes

MR GARY YANCEY: If I may, Gary Yancey, D A from Contra Costa County and I ll sit in for Gary Mullen who isn t here

CHAIRMAN LOCKYER Okay

MR YANCEY With Art's permission I disagree with our friend from San Francisco on the costs I might add

MR BROWN Excuse me, I have to leave because my daughter -- I don t want my daughter to become victimized by a crime (laughter)

MR YANCEY I'll keep it impersonal

MR BROWN: Thank you

MR YANCEY: The statistics that Art Danner gave you on the half-hour preliminary hearing included cases averaged in as ones that just appeared for a straight plea That is the attorneys negotiated a plea of guilty right there and went out The cases that actually go to preliminary hearing take much longer

The initiative is born out of frustration I ve been a prosecutor for 20 years as Art has and we've seen every abuse of the system come down the line If you read the actual initiative very carefully you'll see that the court, in every instance that's been complained of, has the ability to take the situation and soften it in terms of the impact on the defendant For instance, what we just heard about the appointment of the public defender and private attorneys, the language says that the court can continue the case or give the person more time to prepare it if it becomes necessary It doesn't say that it's an absolute 60-day limit on every occasion

In my opinion, the savings on the preliminary hearings alone will more than offset any staff that might be necessary if there was an increase, which I don't believe, in the trials in Superior Court The great majority of preliminary hearings are a waste of time The average burglary case goes like this the witness has to show up five, six, seven times as the victim to testify that his house was broken into, his TV was taken and he didn't know the guy sitting over here had the right to take it There is no reason that person has to miss his work, his life, or her work or life for five or six times to do that The police officer on the beat can do it

In my county in Contra Costa, the public defenders do not stipulate to the criminalist in drug cases, even though we have given them a copy of the drug report and never in the history of our county has any drug case ever been toppled by attacking a criminalist at the preliminary hearing So the criminalists drive all the way from Martinez to, for instance Richmond, twenty-some miles, to testify in the case that they stipulate to when they arrive Stall and delay tactics, something which led to this initiative

So, other than that, it's going to save money It's going to save time And overall it will really speed up the system And that's based upon actual experience

CHAIRMAN LOCKYER Thank you

MR YANCEY Any other questions?

ASSEMBLYMAN MC CLINTOCK I just wanted to

MR YANCEY Yes

ASSEMBLYMAN MC CLINTOCK track down the statistics that Mrs Campbell cited Do you have any information comparing the average case -- average time for the criminal case to get to trial here in California compared to other states or the federal system

MR YANCEY No, I don't I know that only four percent of the cases that are held to answer in preliminary hearing, though, will actually go to trial in Superior Court Extreme cases may take extreme time and sometimes make bad law and the more money that you have to pay a defense attorney or, particularly in large dope cases, or the more complex the search and seizure issues are, the more the case can be strung out

ASSEMBLYMAN MC CLINTOCK Have there been any estimates of the amount of court time that would be compressed, in effect, saved, by this initiative?

MR YANCEY Any estimates?

ASSEMBLYMAN MC CLINTOCK Yeah

MR YANCEY Well, it gives the court the tools to compress the cases that are stalled unnecessarily down to what the cases ought to be That is that the preliminary hearing should go in the time it's set and the Superior Court trials should either be resolved by plea or go to trial within 60 days or a short time thereafter if it's not a complex case

ASSEMBLYMAN MC CLINTOCK And your point in support of the contention that it will actually save money is that you're not filling all of this court time on these needless repetitive tasks

MR YANCEY Absolutely The provision that the public defender objected to on assigning the felony cases requiring a defense attorney to be ready -- that's really aimed at the defense attorneys who will stall and delay the case for years, in order to, as someone earlier said, hope that witnesses drift off, lose interest, die, become unavailable, frightened, or whatever, or just plain tired of the system

Something that hasn't been addressed The time that will be saved in picking the juries -- I have personally, before the Hovey case, picked a death penalty jury in less than a week Now it takes two or three months Well, if you got an experienced -- your highest, highest experienced lawyers in the office who you assign to the death penalty cases, if they're spending two or three months picking a jury when it could be done in less than a week, that is an enormous saving of time And -- the whole system will -- will move well ahead We'll see justice We won't see so many cases walking away because of reasons that have nothing to do with the truth or innocence and the defendant and I think that's the bottom line Thank you

CHAIRMAN LOCKYER: Thank you, Sir I think we have another witness

MS GINNY PETERSEN Good afternoon My name is Ginny Petersen and this is my husband, Christopher, and we came up from L A County and we'd like to speak to you about what we have gone through as victims through the court system

As this issue's been debated here today among you gentlemen, I truly feel that with the exception of Collene, that the point of this has been missed and that s the victim and the family and what is going -- what they are going through As everyone here leaves this afternoon, you'll be able to put this on the back burner and go about the rest of your day We will not be able to

My husband, Christopher, and I are two of four survivors of Richard Ramirez, the Night Stalker, in L A County Here in San Francisco, already he has had one continuance until January 6th And I shudder to think how many more he will have under the present system.

I will not pretend to have the education that you gentlemen do, okay? But the education that I have received during the last four years since the night of our attack until the conclusion of the case last month, has given me an ample education and I m here to speak with you confidently and at least first hand about what we have gone through

Jury selection took six months in our case Preliminary hearing was four and a half months I answered more questions during the preliminary hearing than I did during the actual trial.

When you have continuances after continuance, it rips you apart It rips your family apart What we as survivors and victims are trying to do is not diminish the rights of the criminal, not one bit What we are trying to do is to bring our rights in line with theirs Under the present system, we are told to go away and be quiet and come back when we need you I've already had several people within the court system say, "Ginny, why don't you drop this?" I can't Some people -- it's very easy for them to go away and let the system overwhelm them I'm a fighter I will fight for what I believe and just as my husband does

I've been listening to you gentlemen debate this back and forth all day And let me say, I won t pretend to understand the intricacies of it But I do know that we do need reform I'm not going to waste your time here this afternoon All of us are anxious to get home My flight left ten minutes ago But one thing I do want to say is that if for some reason the People of California vote down this initiative -- two of the gentlemen, and they're absent -- I believe it was Senator (sic) Burton and Quentin -- I don't recall the last name, you'll have to excuse me -- I did have a memory loss from my injuries -- talked about political courage Please, Gentlemen, if this initiative is turned down for any reason, please among you find the political courage

to address this issue Senator (sic) Burton said that initiatives -- he has problems with because they're ill-conceived and poorly written We as victims and survivors are not out for retribution Please understand that We only want what is rightfully ours

I work with a third grade class every morning and we stand and we say the pledge of allegiance and the last four words are "and justice for all " Gentlemen, I gag on those words because there has been no justice for me Chris?

MR CHRISTOPHER PETERSEN I'd just like to add to my wife We're not here to acquire anything for ourselves today, but maybe we can prevent something like this happening to someone else what we've gone through for the last four and a half years I would -- if it stops one person from suffering the way my wife and daughter has, then it would be more than worthwhile

CHAIRMAN LOCKYER Now the defendant -- the criminal in your particular case has been convicted -- has been convicted in L A , but not San Francisco?

MS PETERSEN Right Charges were dropped in Orange County He is now in San Quentin and the appeal process has begun already

CHAIRMAN LOCKYER: Right But now he's convicted of first degree, special circumstance murder

MS. PETERSEN On thirteen counts He received two

CHAIRMAN LOCKYER And how is that -- I mean, you may -- I can understand why it might seem like it took too long -- that the process needs some improvement. But certainly in terms of the result, you couldn't ask for a clearer result

MS PETERSEN When you go through a living hell as we have for the last four and a half years, it was unnecessary Had time limitations that the gentlemen previously mentioned -- had they been met, this case probably would have been over with in a year That was -- we were victimized once by Mr Ramirez That was horrible enough in itself. The judicial system, through no fault of anyone, but the way that it operates -- we blame no one -- victimized us for three additional years, I truly feel And we cannot recover from that additional victimization unless, for us personally, we fight back.

MR PETERSEN We were shot My daughter couldn't read Now she can read the newspaper She's fully aware who shot us, where this person is now She's very up on it

MS PETERSEN. You know, when they -- when you talked about the average case not having a six month preliminary hearing, I can cite you several cases in California -- Richard Ramirez, 16 months, the McMartin Preschool molestation case, 18 months, still in trial, Randy Craft, 8 years The average case -- everyone of us counts in California Or I do not believe that one million people would have lent their voices

to this

CHAIRMAN LOCKYER Well, without getting into a long debate, what I see typically happen is the worst instances become the justification for rather major changes in all the cases, not just the worst kind And we'll see what the voters think, but I circulate petitions and I know what typically happens is when you say are you for lower taxes or fighting crime, they say, sure, and sign it No one at the signature level spends time figuring out well, 60 days or right to abortion or, you know, all these type of things that we tried to at least touch on today And -- well, this

MS PETERSEN Well, perhaps those that support and oppose the bill -- it is our duty to educate those voters so they can make an educated decision on what they want happening within their state

CHAIRMAN LOCKYER I think you're absolutely right.

MS PETERSEN Thank you, Sir

CHAIRMAN LOCKYER Thanks for coming Okay One more?

MS SUSAN KENNEDY I will be very brief There's a football game starting at six My name is Susan Kennedy I'm the Executive Director for Northern California of the California Abortion Rights Action League I'm not going to beat a dead horse I had a lot of things to say, but a lot of them were already covered, so I'm just going to make basically one point

For the record, we are a nonpartisan, single issue organization We did not take a position on Rose Bird, for whatever that's worth And we oppose the initiative because it tampers with the fundamental right to privacy

Now you heard very, very eloquent arguments on both sides -- very effective arguments on both sides saying that it will or will not affect the right to privacy nor to abortion But the very best argument that the proponents of this initiative can put up -- the very best argument is that it is unlikely that it would be used to affect abortion rights That is the strongest argument Even the Legislative Counsel's opinion which you cited before, and which has been cited by the proponents, ends with the conclusion that it is not free from doubt

That s not a lot to go on As a woman in California to be told with a completely straight face to rely on the good will and common sense of the courts in this state and to rely on the good will of the district attorneys in the state of California -- it s not a lot to go on And so it's -- it's unconscionable to tamper with the right to privacy with such a vague language in this initiative -- this or any initiative

ASSEMBLYMAN MC CLINTOCK If I may reiterate what Mr Danner said while, as you rightly point out, it is being argued on both sides whether or not it affects abortion, that provision very clearly affects a long range and very grievous decisions by the Rose Bird Court involving search and seizure And to remove that provision would, I

assume from what Mr Danner said, quite certainly eviscerate a very important part of that initiative

MS KENNEDY Well, I would have to agree with something that Senator Keene repeated over and over again There are other ways of dealing with these issues versus the sweeping changes that have unanticipated effects And I think the most apropos comment made today, was the Monday morning quarterback analogy Because we're not the players Yet we're going to have to be the recipients of the guy who missed the pass in the end zone

SENATOR KEENE You know, one thought, the fact that the Legislature refused to act to make sure that the initiative did not apply in the abortion situations

MS KENNEDY That's correct

SENATOR KEENE indicates, I think, that there are those who are concerned that -- to give a different signal to the public would not be well-received and that if it does apply, it does apply At least that's the way I interpreted some of the resistance to removing the privacy language

CHAIRMAN LOCKYER We could have corrected that

SENATOR KEENE We could have corrected that

MS KENNEDY That's correct And unfortunately, we're between a rock and a hard place at this point, but thank you

CHAIRMAN LOCKYER Thank you Thank you, Ladies and Gentlemen, members of the public, witnesses and the staff for a very complete analysis and we're adjourned for the rest of the day

PART 2

Staff Analysis

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman

ASSEMBLY PUBLIC SAFETY COMMITTEE
John Burton, Chairman

ANALYSIS OF CRIME VICTIMS

JUSTICE REFORM ACT

As Proposed for the

June 1990 Ballot

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Crime Victims Justice Initiative
December 11, 1989

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SENATE COMMITTEE ON JUDICIARY
BILL LOCKYER, CHAIRMAN

ASSEMBLY PUBLIC SAFETY COMMITTEE
JOHN BURTON, CHAIRMAN

CRIME VICTIMS JUSTICE REFORM ACT

SUMMARY

The following is a summary of the major provisions of the Crime Victims Justice Reform Act.

A Constitutional Amendments

1 State Constitution as Independent Source of Rights

Article 1, Section 24, would be amended to provide that criminal defendants and juveniles accused of criminal offenses would have no greater rights under the California Constitution than under the U S Constitution, including all rights to:

a Equal Protection of the Laws
b Due Process of Law
c Assistance of Counsel
d Personal Presence at Trial
e Speedy and Public Trial
f Compulsory Attendance of Witnesses
g Confrontation of Witnesses

h Freedom from Unreasonable Searches and Seizures

i Privacy

j Privilege Against Self-Incrimination

k Privilege Against Double Jeopardy

l Prohibition of Cruel and Unusual Punishment

2 Post-Indictment Preliminary Hearings

The California Constitution would be amended to provide that when a felony is prosecuted by indictment, there will be no post-indictment preliminary hearings Hawkins v Superior Court, 22 Cal.3d 584 (1978) would be abrogated

3 New Constitutional Rights for Prosecution

Sec 29 would be added to confer a constitutional right to due process of law and to a speedy and public trial to the People in criminal cases

4 Constitutional Recognition of Statutory Provisions of Initiative

Sec 30 would be added to give constitutional recognition to enactments admitting hearsay at preliminary hearings and providing reciprocal discovery rights to the prosecution

B Speedy Trial Provisions

1 Representation of Readiness

New Penal Code Sec 987 05 will require assigned counsel to represent that he or she will be ready within the time set for preliminary hearing or trial The time set may not exceed the statutory limits unless the court finds that that time would be insufficient if counsel did nothing else but prepare the assigned case during the interim The court, "shall not consider counsel's convenience, counsel's calendar conflicts, or counsel's other business "

2 Sanctions

If a defense counsel is not ready on the date set for preliminary hearing or trial, he or she can be removed from the case, and sanctions can include:

[a] holding counsel in contempt of court;
[b] fining counsel,
[c] denying any claim for compensation

3 Appellate Review of Continuances

If the trial court sets a trial beyond the statutory limit, or grants a continuance, the objecting party can obtain

immediate appellate review by writ pursuant to new Penal Code Sec 1511 The petition is given precedence "over all other cases in the court to which the petition is assigned "

C Preliminary Hearings

1 Hearsay Evidence

Current Penal Code Sec 872, which carefully limits the circumstances under which hearsay declarations may be received at preliminary hearings, is repealed A new provision permits out of court statements of declarants to be admitted without limitation, as long as they are offered through the testimony of a law enforcement officer who has five years' experience or a training course certificate from the P O S T Commission

2 Defense Witnesses

Penal Code Sec 866 is amended, to require, on prosecutorial demand, an offer of proof for the testimony of any defense witness, and the rejection of such testimony unless the magistrate find it reasonably likely to (a) establish an affirmative defense, (b) negate an element of a crime charged, or (c) impeach a prosecution witness or hearsay declarant Use of preliminary hearings "for purpose of discovery" is precluded

3 Appellate Review of Continuances

Penal Code Sec 871 6 is added to permit either side to gain immediate review in Superior Court if a preliminary hearing is set beyond the ten days after arraignment specified in Sec 859(b), or continued "without good cause " The superior court must grant such petitions "precedence over all other cases "

D Voir Dire Examinations for the Jury

1 Judge Conducted Voir Dire

Current Code of Civ Proc Sec 223, which gives counsel the right to conduct voir dire in repealed New section 223 provides that the "court shall conduct the examination of prospective jurors " Counsel may be permitted to supplement the examination

2 Scope of Voir Dire Questioning

New Code of Civ Proc Sec 223 will provide that examination of prospective jurors "shall be conducted only in aid of the exercise of challenges for cause " Current law permitting any question relevant to the intelligent exercise of peremptory challenges, would be abrogated

E Joinder of Defendants

The initiative contains various changes in current law which will make it more difficult to sever cases with joint defendants

F Death Penalty Amendments

1 First Degree Felony Murder

Penal Code Sec 189 is amended to add five new offenses to the list of crimes in the perpetration of which a murder is first degree murder:

a kidnapping
b train-wrecking
c. sodomy
d oral copulation
e rape by instrument

2 Special Circumstances

Penal Code Sec 190 2 would be amended, to incorporate the following changes:

a The "special circumstances" for killing a witness is expanded to include witnesses in juvenile proceedings

b The "special circumstance" for killings in perpetration of a felony is expanded to include:

1 Robbery in violation of Sec 212 5 (defining degrees) as well as Sec 211
2 Kidnapping in violation of Sec 207 or Sec 209
3 Arson in violation of Sec 451 (b), instead of Sec 447
4 Mayhem in violation of Sec 203
5 Rape by instrument in violation of Sec 289

c The "special circumstance" for infliction of torture is expanded to eliminate the requirement for proof of infliction of extreme physical pain

d The requirement of proof of intent to kill is limited to accomplices other than the actual killer

e Accomplices who participate in an enumerated felony "with reckless indifference to human life and as a major participant" are subject to the death penalty with no proof of intent to kill

f The requirement that the corpus delicti of a felony-based special circumstance be proven independently of defendant's extrajudicial statements in eliminated

G Life Imprisonment

1 Murder by 16-18 year old

Penal Code Sec 190 5 (b) is added to provide a sentence of life without parole or 25-life for a 16-18 year old convicted of first degree murder with special circumstances

2 Striking Special Circumstances

Penal Code Sec 1385 1 is added, to preclude a trial judge from striking a special circumstance finding pursuant to Sec 1385 This would abrogate the ruling in People v Williams (1981) 30 Cal 3d 470, which permits dismissal of a special circumstance finding to modify a sentence of life-without-parole to one of 25-life.

3 New Crime of torture

New Section 206 is added to the Penal Code, making it a felony punishable by life imprisonment to inflict injury on another, with intent to cause cruel or extreme pain for purposes of revenge, extortion, persuasion, or for any sadistic purpose

H Discovery in Criminal Cases

1 New right to discovery for prosecutors

New Penal Code Sec 1054 3 imposes a duty on the defense to disclose to the prosecution the names, addresses and statements of witnesses other than the defendant whom the defense intends to call at trial, including expert witnesses Real evidence to be offered at trial must also be disclosed

2 Delivery of Arrest Reports

The requirement that a copy of the arrest report be delivered to the defendant or to his or her attorney at the initial appearance or two days thereafter, as contained in Penal Code Sections 859 and 1430, is repealed

3 Defense Discovery

New Penal Code Sec 1054 1 limits the defense to discovery of (1) names and addresses of witnesses to be called at trial, and their "written or recorded statements,", (2) Statements of all defendants, (3) real evidence, (4) felony records of any material witness, (5) exculpatory evidence, and (6) reports of experts

COMMENT

I. CALIFORNIA CONSTITUTIONAL RIGHTS LIMITED FOR CRIMINAL DEFENDANTS

A Amendment to Article I, Section 24 of the California Constitution

Article I, Section 24 of the California Constitution currently provides that rights guaranteed by the California Constitution are not dependent on those guaranteed by the United States Constitution The initiative amends Section 24 to provide that, in a criminal case, the California Constitution shall be construed in a manner consistent with the United States Constitution and shall not be construed to afford greater rights to a defendant than those afforded by the Constitution of the United States

The initiative would amend Article I, Section 24 as follows·

"SEC 24 Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution

"In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront

the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States

"This declaration of rights may not be construed to impair or deny others retained by the people "

By restricting the rights of defendants to those contained in the United States Constitution, the initiative vitiates those greater protections and independent rights, such as the right to privacy, which are contained in our state constitution It thus limits the rights of any Californian accused of a crime to whatever rights are construed by the federal courts to be required by the U S Constitution It would also deny our own Supreme Court the opportunity to independently define those rights in this state

B Abrogating independent state grounds as a source of rights. surrendering individual states' rights for federal rule

1 Doctrine of federalism and independent states' rights abrogated for criminal cases

The United States Supreme Court, in numerous opinions by Chief Justice Burger, and Associate Justices Harlan, Brennan, Rehnquist and others, has stated that states have a right -- under the doctrine of states' rights -- to interpretations differing from the High Court's view of the federal constitution They recognize that this right is at the heart of the system of federalism -- that while a nation as a whole, composed of distinct geographic and political entities is bound together by a fundamental federal constitution, each state is independently responsible for the safeguarding of the rights of its citizenry Said then Associate Justice Rehnquist specifically in Pruneyard Shopping Center v Robins, 447 U S 74 (1980), a state may "exercise its police power or its sovereign right to adopt in its constitution individual liberties more expansive than those conferred by the Federal Constitution "

It was also well stated in the Federalist Papers (Numbers 31, 45, 46 and 82) that the need to preserve the authority, health and vigor of state government against potential abuse and unwarranted intrusion by the federal government has

been, historically, fundamental to the concept of a limited federal government, and that the powers reserved to the states are extensive and extend to concern over and protection of the lives, liberties and properties of its people

The doctrine of independent state grounds is explicitly stated in Section 24 of Article I of the California Constitution which provides that rights guaranteed by the California Constitution are not dependent on those guaranteed by the United States Constitution Thus, the California Supreme Court, in interpreting the state Constitution, possesses and has used the power to impose higher standards than those required by the federal constitution

This initiative follows the lead of Proposition 8 and would expand upon it to eliminate a court's ability to use the California Constitution as a basis for defining greater protections for California citizens in specified criminal law situations than are provided under the U S Constitution

2 Opposition to abrogation of states' rights

(a) No impropriety in relying on independent state grounds

Critics of the initiative point out that there is nothing improper or inappropriate in the California Supreme Court relying upon provisions of the California Constitution to provide Californians greater protections than are afforded under federal law Indeed, under Article I, Section 24 of the California Constitution, it is the court's constitutional duty to so do

Further, abrogation of the doctrine and restriction of California courts' authority to interpret its own constitution would force California courts to march in lockstep with its necessarily more conservative federal brethren, whose function is to establish a minimum floor for constitutional rights while leaving the authority and discretion to individual states to confer additional rights The proposed restraint would thus tie California law to federal law, and would provide its citizens with the minimum federal protections and no more

Finally, critics contend that proposed elimination of independent states' rights is an ill-conceived quick-fix solution to various complex problems, and would result in years of confusion and litigation

(b) Other states rely on independent state grounds

California is not alone in relying on independent state grounds to provide greater protection for its citizens than is required under the U S Constitution In fact, several jurisdictions have utilized the rule See, for example, New Jersey (State v Johnson, 346, A 2d 66 (N J 1975); Michigan, Iowa, New Mexico, and Alaska People v Turner, 210 N W 2d 336 (Mich 1973), State v Mullen 216 N W 2d 375 (Iowa 1974), 501 P 2d 1247, 1249, (N M 1972), Grossman v State, 457 P2d 226, 229 (Alaska 1969)

(c) Support for independent states' rights

Opponents of the initiative also argue that elimination of this important basis for defining fundamental civil rights appears not only historically shortsighted but destructive of the fundamental notion of states' rights As such, the measure represents a fundamental departure from the concept of federalism

Further, they argue, making federal decisions controlling even if they are jurisprudentially or intellectually unsound would do considerable harm to the rights of California citizens and to the integrity and vitality of the California Constitution

3 Support for abrogation of state rights

Proponents of the initiative state that California Supreme Court decisions and the criminal statutes of this state have unnecessarily expanded the rights of the accused They reject the notion of independent state rights for criminal defendants Proponents believe it is necessary to discard this doctrine in order to overturn "Bird Court" decisions not yet reversed by the current court and to guard against the impact of a future "Bird Court "

C Effect on abortion rights

1 California's Constitution provides broader protection of abortion rights

Both the California and United States Constitutions protect a woman's privacy right to choose whether or not to have a child Roe v Wade 410 U S 113 (1973) and

Conservatorship of Valerie N (1985) 40 Cal 3d 143

However, the California Constitution, unlike its federal counterpart, specifically mentions the right to privacy.

> "All people are by nature free and independent and have inalienable rights Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy"
> Article 1, Sec 1 of the California Constitution

California's explicit privacy right, added by the voters in 1972, is far broader than the implied right to privacy contained in the federal constitution In numerous cases, California courts have emphasized the independent force and vitality of such rights California privacy rights, including the right to reproductive freedom, are not affected by U S. Supreme Court cases construing the related federal right American Academy of Pediatrics v John K Van De Kamp (1989) 89 Daily Journal DAR 12619; Isbister v Boys Club (1985) 40 Cal 3d 72, 85; Robbins v Superior Court (1985) 38 Cal 3d 199; City of Santa Barbara v Adamson (1980) 27 Cal 3d 123; White v Davis (1975) 13 Cal.3d 850

Abortion rights under the federal constitution are much more limited than under the California Constitution For example, in 1980 the U.S Supreme Court decided that Roe v Wade does not require government to fund abortion services for low income women on the same basis it provides other medical services Harris v McRay (1980) 448 U.S 297. However, in 1981 the California Supreme Court ruled that the Legislature's refusal to fund abortions for indigent women while funding other comparable medical services violated the privacy clause of Article I Section I of the California Constitution Committee to Defend Reproductive Rights v Myers (1981) 29 Cal 3d 252

In Webster v Reproductive Health Services, ___ U S ___,109 S Ct 1040 (1989), a Missouri law was upheld which prohibits abortions from being performed in any public facility or any private facility with some nexus to the state Such an interpretation would likely be rejected under the California privacy right which requires that such regulations be strictly scrutinized In California, the government must demonstrate that there is a compelling state interest, and no lesser restrictive alternative, in order to justify a burden on the privacy right to abortion American Academy of Pediatrics v John Van De Kamp (1989) 89 Daily Journal DAR 12619 The U S Supreme Court appears to have

abandoned this strict scrutiny standard in its Webster decision

While the U S Supreme Court is apparently willing to permit the states to burden or further restrict the right of abortion, the privacy right to an abortion in this state appears to be secure from any legislative efforts to deter that right As the California Supreme Court stated in Myers.

> "By virtue of the explicit protection afforded an individual's inalienable right of privacy by Article I, Section 1 of the California Constitution, however, the decision whether to bear a child or to have an abortion is so private and so intimate that each woman in this state -- rich or poor -- is guaranteed the constitutional right to make that decision as an individual, uncoerced by governmental intrusion Because a woman's right to choose whether or not to bear a child is explicitly afforded this constitutional protection, in California the question of whether an individual woman should or should not terminate her pregnancy is not a matter that may be put to a vote of the Legislature " Committee to Defend Reproductive Rights v Myers 29 Cal 3d 252, 284 (1981)

2 Literal reading of the limitation on California privacy rights for criminal defendants may limit abortion rights.

The initiative amends Article I, Section 24 of the Constitution to provide that rights of a defendant in a criminal case, including the right to privacy, shall not be construed to afford greater protection than those contained in the U S Constitution

Therefore, it would appear from a literal reading that a criminal defendant may claim only the more limited privacy rights contained in the federal constitution and would thus be denied the benefit of California's independent right of privacy

Fear has been expressed that judicial withdrawal of the federal constitutional right to an abortion is around the corner In Webster v Reproductive Health Services (1989) 109 S Ct 3040, the Roe v Wade decision was severely limited A plurality of justices implied that Roe may be reversed entirely in the near future Justice Scalia expressly called for Roe to be overturned.

If the Roe v Wade decision is reversed, it is argued that there will be nothing to stop the prosecution of women who receive abortions under old abortion laws still on the books or new laws which might be enacted in the future Since the defendant in a criminal case would be limited to federal privacy claims, it is argued that the California privacy right to an abortion could not be raised as a defense in such a case

Opponents argue that if the initiative is adopted, prosecution could commence the day after Roe v Wade is overturned This is because most abortions in California are performed in violation of existing statutory law Without a right to privacy defense there is apparently nothing to prevent these laws from being enforced

It is currently a felony to perform or receive an abortion in violation of the Therapeutic Abortion Act Penal Code Sections 274 and 275

The Therapeutic Abortion Act forbids abortions from being performed anywhere other than a hospital Health and Safety Code Section 25951 This provision, as well as the criminal sanction, Penal Code Section 274, was upheld by the California Supreme Court prior to the passage of the privacy amendment People v

Barksdale (1972) Cal 3d 320, and would presumably be enforceable in the absence of Roe v Wade and the privacy amendment These statutes are not currently enforced because of Roe v Wade and the California privacy right

Since most abortions are currently performed in clinics rather than hospitals, thousands of women and their doctors would arguably be subject to prosecution should the initiative pass and Roe v Wade be overturned

However, proponents of the initiative believe that even without Roe v. Wade and the California privacy amendment, an independent right to abortion would survive in California based upon People v Belous (1969) 71 Cal 2d 954 In Belous, the court suggested that women have a right to choose whether to bear children based on both the right of privacy and a "liberty" interest in relation to marriage, family, and sex Since "liberty" is not limited by the new Article I, Section 24, it is argued that an independent right to abortion would survive in California This is problematic, however, since the concept of a "liberty" interest in Belous is based on the due process clauses of the U S and California Constitutions Because the initiative also mandates that the right of a criminal defendant to due

process of law is governed by the federal constitution, a reversal of Roe would also eliminate the argument for an independent privacy right under Belous

3 Statutory construction

Proponents of the initiative argue that it is unlikely that the California Supreme Court would interpret Article I section 24 to limit the substantive right of abortion They state that the initiative is intended to affect only procedural rights and that the term "privacy" was included only to assure that search and seizure protections are not expanded beyond that required by the federal constitution

Specifically, proponents seek to overturn DeLance v Superior Court (1982) 31 Cal 3d 865, a case establishing an expectation of privacy for conversations between pretrial detainees and their visitors However, it should be noted that the decision in that case was based upon the Penal Code, not upon the State Constitutional right to privacy

Proponents further state that they will clearly indicate in ballot arguments that the initiative in not intended to affect a woman's right to an abortion Ballot

arguments are important and can be considered by the courts in determining the intent of an initiative Carter v COO 14 Cal 2d 179

Proponents cite a Legislative Counsel's Opinion prepared for Senator Royce which concludes that, while a literal interpretation of that portion of the initiative relating to privacy would seem to limit procreative rights, such a construction would be an inappropriate interpretation of the initiative

Legislative Counsel cited the recent case of Lundgren v Deukmejian, (1989) 45 Cal 3d 727, to support the view that literal construction need not prevail if it is contrary to the legislative intent apparent in the statute In the view of the Legislative Counsel, the amendment to Article I Section 24 must be read in context with the purpose of the measure as expressed in Article I of the initiative That intent was summarized in the opinion as follows:

" the thrust of the initiative, if adopted by the electorate, would be to protect the rights of crime victims by reforming the existing laws of California as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state, which unnecessarily expanded the rights of accused criminals far beyond that which is required by the United States Constitution, thereby unnecessarily adding to the costs of criminal cases, and diverting the judicial process from its function as a quest for truth " Legislative Counsel's Opinion of October 18, 1989

Because there is no evidence of an intent to alter existing procreative rights presently recognized by Article I, Section I, it is argued that the initiative would not be construed to affect these substantive rights

However, the Legislative Counsel states that "the matter is not free from doubt", since there is a conflict between a literal reading of the amendments to Article I, Section 24 of the Constitution and the apparent intent as stated in Article I of the Initiative

It is precisely this doubt that is raised by opponents who believe that the Supreme Court is more likely to adopt the fundamental rule of statutory interpretation that where statutory language is clear and unambiguous, there is no need to examine intent Solberg v Superior Court (1977) 19 Cal 3d 182 Since the plain meaning of Article I, Section 24, as amended in the initiative, is to limit criminal defendants to the rights contained in the federal constitution, the Supreme Court could hold that the independent California right to privacy does not constitute a defense in a criminal case

Opponents point out that the "plain meaning" rule enunciated in Solberg was adopted by the California Supreme Court in upholding the provision of Proposition

8 (Victim's Bill of Rights) that all relevant evidence shall be admissible In Re Lance W (1985) 37 Cal 3d 873 Significantly, in that case the Court held that the plain meaning of the provision was that evidence seized in violation of the right against unreasonable search and seizure contained in the California Constitution was nevertheless admissible in a criminal case The right to exclude the evidence was thus limited to cases where the U S Constitutional is violated Opponents believe that the Court may follow a similar approach as to this initiative by holding that independent California rights, including the privacy right to an abortion, cannot be raised as an affirmative defense by criminal defendants

Opponents also believe that reliance on Lundgren is misplaced That case involved an out-of-context interpretation of a single sentence of Article 5, Section 5 of the Constitution which would have had the effect of rendering a previous sentence meaningless This is not the case with this initiative Here, the plain meaning of Article I, Section 28, as amended by the measure, is to limit criminal defendants to those privacy rights contained in the U S Constitution Opponents urge that the "poorly drafted and confusing" statement of purpose at the beginning of the initiative

provides little justification for the argument that the amendment is not intended to be read literally

The opponents also raise the general rule of statutory construction that the purpose of a new enactment is to change existing law and that the courts will not assume that a provision in such an enactment is superfluous In Re Lance W 37 Cal 3d 873 It is argued that if the term "privacy" were construed to apply only to the admission of evidence it would be rendered meaningless since Proposition 8 already requires the admission of evidence obtained in violation of California Constitution In Re Lance W 37 Cal 3d 873 Since the courts are generally unwilling to adopt a construction which renders a provision of a new law nugatory, opponents argue that the court would likely construe the restriction on privacy rights for criminal defendants to extend beyond Proposition 8's admissibility of evidence rule to include a limitation upon substantive rights to privacy

Proponents respond that the California Supreme Court is unlikely to hold that the initiative affects abortion rights since this interpretation would constitute an implied repeal of the privacy right contained in Article I Section I, implied repeals being strongly disfavored by our courts In Re Lance, 37 Cal 3d 873 However,

opponents believe that such an interpretation would not be construed as an implied repeal but solely as an expression by the voters that federal rather than state precedent be followed in criminal cases If Roe were reversed, federal precedent would be fatal to the abortion right

4 Conclusion

Both sides make persuasive legal arguments Legal scholars are divided as to the issue of statutory construction It is impossible to state, with any certainty, how the California Supreme Court will rule as to this issue if Roe v Wade is overturned If our court were inclined to follow the lead of the U S Supreme Court in overturning or drastically restricting abortion rights, it could do so by adopting a literal interpretation of the privacy clause of this initiative This would surely be easier than reversing 20 years of legal precedent in favor of an independent privacy right to abortion in California On the other hand, if the Court were not inclined to follow the lead of the U S Supreme Court in reversing Roe, it could just as readily adopt the interpretation urged by the proponents

The effect of the initiative on a woman's privacy right to an abortion is unknown It can be concluded, however, that the right to an abortion in California is more secure now than it would be if the proposed initiative were enacted For if the initiative is enacted, there will be a new provision in our constitution which arguably could be used to restrict or overturn a woman's right to an abortion

D Effect on other privacy rights

As indicated above, the explicit right to privacy under Article I, Section I of the state constitution is far broader than that recognized under the implied federal right to privacy

For example, under the California Constitution, unrelated adults have a privacy right to live together City of Santa Barbara v Adamson (1980) 27 Cal 3d 123 Similarly, unmarried couples have the right to cohabitate Atkisson v Kern County Housing Authority (1976) 59 Cal App 3d 89 However, the U S Supreme Court has held that there is no federal privacy right for unrelated persons to live together Village of Belle Terre v Borass (1973) 416 US 1 Nor has explicit privacy protection for unmarried couples been extended under the federal constitution

The U S Supreme Court recently refused to overturn a criminal statute prohibiting consenting adults from engaging in certain sexual conduct in the privacy of their home Bowers v Hardwick 106 S Ct 2841 While California does not have a similar law, there is no doubt such a law would not survive under California's right to privacy

That Article I, Section 1 provides a unique protection to residents of California is supported in the broad application attributed to this right:

> "The right of privacy is the right to be left alone It is a fundamental and compelling interest It protects our homes, our families, our thoughts, our emotions, our expressions, our personalities, our freedom of communion and the freedom to associate with the people we choose " White v Davis (1975) 13 Cal.3d 757, 774

Opponents of the initiative believe that the right to privacy is a precious one Careful consideration should be given to any provision which may be construed to limit or restrict these rights.

E Effect on other substantive rights

In addition to privacy, the initiative specifies various rights which it would require to be interpreted so as to accord no greater rights to criminal defendants than those provided by the U S Constitution Affected are the rights to

1 Equal protection of the laws;

2 Due process of law,

3 To assistance of counsel;

4 To be personally present with counsel,

5 To a speedy and public trial;

6 To compel attendance of witnesses;

7 To confront witnesses,

8 To be free from unreasonable searches and seizures;

9 To not be compelled to be a witness against oneself;

10 To be free from double jeopardy; and

11 To be free from cruel or unusual punishment

In addition, the initiative contains what could be construed as a catch-all provision that could affect other rights under the California Constitution It reads:

> "This Constitution shall not be construed to afford greater rights to criminal defendants than are afforded by the Constitution of the United States "

It is not clear if this provision applies only to the rights specified above or is intended to cover all other rights specified in the California Constitution For the purpose of this discussion it is assumed that other California rights are subject to the above provision

The following are examples of other substantive rights which could be affected by the initiative:

1 Free expression

In California there is a free speech right to petition and distribute literature in a shopping center which is open to the public Robins v Pruneyard Shopping Center (1979) 23

Cal 3d 899 This right does not exist, except in a very narrow context, under the First Amendment to the U S Constitution Lloyd v Tanner (1972) 407 US 551

If a person were arrested for trespass after refusing to cease distributing leaflets at a shopping center, the federal constitutional right would provide no protection Under the initiative, a criminal defendant might be precluded from raising the independent state right as a defense

2 Right to a jury trial

In California there is a broad right to challenge jury selection for racial prejudice People v Wheeler (1978) 22 Cal 3d 258 The federal right, which could become controlling under the initiative, is more narrow Datson v Kentucky 106 S Ct 1712

3 Right to speedy trial

The initiative could result in the denial of the right of a criminal defendant to a speedy trial by mandating that the federal rather than the state Constitution is controlling in this area In California, the right to a speedy trial arises upon the filing of a criminal complaint The case may be dismissed if there is substantial and unjustified delay between the filing of the criminal complaint and the service of the arrest warrant People v Hannon 19 Cal 3d 588 (1977)

However, under the federal Constitution, this right does not arise until the defendant is actually indicted or arrested, even if the delay is for months or years U S v Marion 404 U S. 307 (1977) Thus, the initiative could result in a diminution of the speedy trial right of a person accused of a crime

4 Due process

By adopting the federal standard for due process of law, the "Briggs Instruction", (i e , the instruction that a jury must be informed that a Governor has the power to commute a sentence of life-without-possibility-of-parole but which requires no mention of a similar authority to commute a death sentence) may be reinstated Also,the Engert case (31 Cal 3d 797) rejecting a death penalty special circumstance for an "especially heinous crime" could also be affected

5 Equal protection

To the extent that the equal protection clause of the California Constitution is construed more broadly than the U S Constitution, opponents have expressed fear that the initiative may hinder the ability of defendants to challenge racially motivated prosecutions. This is of particular concern due to recent U S Supreme Courts decisions restricting civil rights of women and minorities

6 Assistance of Counsel

The right to counsel at all stages of a death penalty appeal have been limited by the U S Supreme Court Murray v Giarratano, 89 Daily Journal DAR 8183 (1989) The initiative could abrogate the more extensive right to counsel granted under the California Constitution Maxwell v Superior Court 30 Cal 3d 606

7 Self incrimination, double jeopardy and cruel and unusual punishment

California's constitutional rights to be protected against self incrimination, double jeopardy and cruel and unusual punishment are broader than the protections provided under the federal constitution The initiative would adopt the federal standards.

F Possible erosion of civil rights

The independent state grounds doctrine is also used to provide greater protection to Californians in the civil arena Compare Serrano v Priest II (1976) 18 Cal 3d 728 in which the court held that wealth was a suspect classification, with San Antonio School District v Rodriguez (1973) 411 U S 1, which held otherwise under the federal constitution

Opponents express concern that this measure would create a dual system of justice: civil litigants would continue to enjoy additional state protections while criminal defendants would only retain the minimum federal protections They fear that this significant erosion could eventually result in complete abandonment of the independent state grounds doctrine

Critics also express grave concern that rights guaranteed under the federal Constitution have been narrowed by recent federal decisions They contend that California should be acutely sensitive to maintaining the independent force of its Constitution, particularly in light of the federal retrenchment and recent efforts to undermine the incorporation cases

II Constitutional Rights for Prosecutors

The initiative would attempt to create a specific state constitutional right of the People of the State of California to due process of law and to a speedy and public trial This provision would make prosecutors' challenges of defense continuances more successful.

With this provision the measure's proponents attempt to create constitutional rights for prosecutors which are broader than and independent of those granted under the U S Constitution This provision is inconsistent with the principle underlying other

provisions of the measure which specifically amend the State Constitution to provide that criminal defendants and juveniles would have no greater rights under the State Constitution than those given them under the U S Constitution

Opponents argue that these provisions could create significant conflicts between the defendant's constitutional right to due process and assistance of counsel and the prosecution's new right to a speedy trial While the prosecution may have spent a substantial amount of time investigating, building a case and becoming prepared for trial prior to filing a complaint, the defendant could be forced to begin a trial within 60 days, even if defense counsel was not prepared, in violation of the due process and effective assistance of counsel rights of a defendant, who is theoretically innocent until proven guilty Opponents further contend these provisions would vastly increase the number of appeals and the backlog in the criminal justice system

The amendment also stands on its head the fundamental notion that a bill of rights is necessary to protect individuals from the power of the state Here, the government would be granted constitutional protection against individuals

III Other Constitutional amendments

This initiative would add the following provisions to the Constitution:

(a) This Constitution would not be construed by the court to prohibit the joining of criminal cases,

(b) In order to protect victims and witnesses in criminal cases, hearsay evidence shall be admissible at preliminary hearings, as prescribed by the Legislature or by the People through initiative;

(c) In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the People through initiative

Apparently, the authors of this initiative are willing to abrogate to the United States Constitution all issues relating to the joining of criminal cases; the admission of hearsay evidence; and rules pertaining to discovery If the Constitution was amended as proposed by this initiative, the Legislature would be authorized to adopt any legislation relating to hearsay and discovery, and would not be confined by the California Constitution; the only constraint would be the U S Constitution It is arguable whether or not this broad abrogation of constitutional limits is good public policy

IV Speedy Trial Provisions

The initiative would

(a) prohibit courts from appointing felony defense counsel who do not indicate that they can proceed to preliminary examination or trial within the statutory time allowed

(b) authorize the prosecution to appeal continuances of preliminary examination hearings

(c) mandate priority for such appeals over other cases

(d) require courts to set a trial date that is within 60 days of defendant's arraignment except for good cause

(e) authorize sanctions against defense counsel who cannot begin trial on the appointed day

Proponents believe that the "speedy trial" provisions will save time and money They believe that it will also protect crime victims from the re-victimization that occurs when they are forced to make countless trips to the courthouse as their case is continually delayed

Opponents contend the speedy trial provisions would restrict the ability of a defendant to be represented by a prepared counsel of his choice if that attorney had other cases pending which would make it impossible for counsel to state that he or she could proceed on the initial statutory trial date It would also create a risk that counsel would be forced to trial before becoming adequately prepared in order to avoid sanctions Defendants would, in such cases, be forced to accept less experienced counsel or proceed to trial with experienced but unprepared counsel Opponents argue that this situation would violate the defendant's constitutional right to due process and effective assistance of counsel Experienced private defense counsel would be reluctant to represent more than one defense client at a time The increased use of inexperienced counsel would, opponents contend, increase the appellate court workload

Further, opponents argue that county public defenders would be more severely impacted by this provision because they would be able to accept fewer cases The consequence would be increased county costs as courts would be forced to substitute private counsel for county public defenders for indigent defendants, at a significantly higher cost than public defenders.

Opponents indicate that 90% of felony defendants are indigent and qualify for a public defender or a court appointed private attorney at taxpayer expense, as do hundreds of thousands of indigent misdemeanor defendants If the public defender system, which currently handles the bulk of these cases, rejects most of them to avoid trial conflicts, their cost efficiency, which is based on a high volume of clients, would be lost, as each deputy's caseload would need to be reduced from several hundred to 10 - 20 cases In 1987-88 California counties paid $206,716,885 to assigned private criminal counsel Opponents estimate this initiative would increase county criminal defense counsel costs to $600,000,000 annually, none of which is provided for by the initiative

V REPEAL OF HAWKINS AND THE REQUIREMENT OF A POST-INDICTMENT PRELIMINARY EXAMINATION

A Overview

The California Supreme Court in Hawkins v Superior Court (1978) 22 Cal 3d 584 held that the denial of post-indictment preliminary hearing to a defendant who is prosecuted by means of a grand jury indictment deprives the defendant of equal protection of the law guaranteed under the California Constitution

Contrasting the procedural rights available to a defendant who is prosecuted by a complaint and information against those available to a defendant prosecuted by grand jury indictment, the Supreme Court found that the denial of a post-indictment preliminary hearing to a defendant prosecuted by grand jury indictment deprives that defendant of equal protection of the law (See Comment 1)

This measure would amend the Constitution to state that a felony defendant prosecuted by indictment would not be entitled to a subsequent preliminary hearing

Proponents assert that Hawkins eliminated an important prosecutorial tool and has had a detrimental economic impact on the criminal justice system (See Comment 2)

Opponents argue that repeal of Hawkins would eliminate an important guarantee for all citizens The requirement of a preliminary examination following an indictment obtained by a one-sided presentation allows an accused to curtail an erroneous prosecution before a full-scale, expensive trial Opponents also assert that the initiative would burden superior courts with cases that could have been screened or pleaded out in municipal court, thereby offsetting any time savings (see Comments 3 & 4)

1 Supreme Court's criticism of grand jury procedures

In Hawkins, a majority (5-2, per Justice Mosk) of the California Supreme Court found that the grand jury indictment procedure, in contrast to a preliminary hearing, provides the following disadvantages to the defendant and advantages to the prosecution

a) Defendant's disadvantages

In the indictment procedure the defendant has no right to:

(1) appear;

(2) be represented by counsel;

(3) confront and cross-examine witnesses against him;

(4) object to prosecution evidence;

(5) make legal arguments;

(6) present evidence to explain or contradict the charge; or

(7) have the protection of a neutral magistrate supervising the fairness of the proceeding

b) Prosecutor's advantages

In the indictment procedure, the prosecutor has the undisputed authority to:

(1) select the witnesses;

(2) present the evidence;

(3) interpret the evidence;

(4) state and apply the law; and

(5) advise the grand jury on whether a crime has been committed

The Supreme Court described the indictment procedure as "a prosecutor's Eden" and found it perfectly understandable that, as stipulated by the parties, between January 1, 1974, and June 30, 1977, the San Francisco grand jury returned indictments in all 235 cases presented to it

The court also quoted United States District Judge and former prosecutor William Campbell, who said: "Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at anytime, for almost anything, before any grand jury "

2 Proponents' arguments to overturn Hawkins

a) Court's grand jury characterization disputed

Proponents object to the court's characterization of grand juries as a prosecutor's Eden They state that it is simply incorrect to assume that most indictments are obtained despite lack of evidence or unfair harassment of the accused by the prosecutors They note that grand jury indictments must be found on credible, admissible evidence, that the district attorney has the obligation of presenting exculpatory evidence, and that an unlawful indictment is immediately challengeable by a Section 995 motion to dismiss

b) Cost concerns

Proponents also argue that the requirement of a post-indictment preliminary hearing is a waste of judicial resources They assert that Hawkins has had a detrimental economic impact on the system by requiring two proceedings where formerly there was only one and by coercing prosecutors to proceed by information rather than by indictment

Proponents assert that the McMartin child abuse case is a glaring example of the result of the Hawkins decision In that case, indictments were issued by the Los Angeles County Grand Jury after 7-1/2 days of hearings and deliberations However, pursuant to Hawkins, the defendants demanded and received a preliminary examination which spanned over one year (including recesses) and consumed over $2 0 million dollars of public funds

3 Opponents' decry erosion of protection for innocent

Opponents assert that the initiative would deprive an accused of the right to confront his or her accusers at an early point in the criminal justice process, to present exculpatory evidence, and to have a ruling on the proffered evidence by a fair and impartial

magistrate They argue that the Hawkins case enables innocent people to avoid the great expense and humiliation of a felony trial and, in that manner, also saves the costs of unnecessary trials

Although one of the functions of the grand jury is to protect innocent citizens from unfounded accusations, opponents say that the reality is that the former procedures operated effectively to preclude the fulfillment of that function As Justice Mosk noted in the Hawkins decision, "the grand jury is independent only in the sense that it is not attached to the prosecutor's office, though legally free to vote as they please grand juries virtually always assent to the recommendations of the prosecuting attorney, a fact borne out by available statistical and survey data " Thus, opponents argue, it is necessary for the protection of the innocent that an indictment obtained by a one-sided presentation to a grand jury be followed by a preliminary hearing before an impartial magistrate

4 Burden on system

Opponents further assert that the initiative would burden superior courts with cases that should have been screened or pleaded out in lower courts Preliminary hearings allow screening of criminal cases which should

be tried from those which should not If prosecutors are overzealous, weaknesses will appear which alert judges throw out the case before it gets to trial If the evidence is overwhelming, defendants who might otherwise insist on a trial are often convinced it is in their best interests to enter a plea of guilty As grand juries usually act as a prosecutorial rubber stamp, they do no prosecutorial screening Since defendants are not present at grand jury proceedings, they do not feel the impact of the evidence against them

One might legitimately question whether this provision of the initiative would operate to encumber the courts with additional cases for trial, thereby adding congestion rather than providing relief

VI Preliminary hearings

A Provisions of the Initiative

The initiative permits hearsay evidence to be admitted by prosecutors at preliminary hearings, as long as it is offered through the testimony of a law enforcement officer with specified training or experience

The initiative severely limits the right of defendants to call witnesses at preliminary hearings unless the court makes specified findings

The initiative also provides for immediate appellate review of a decision to continue a preliminary hearing

B Purpose of preliminary hearings

The primary objective of the preliminary hearing is to screen out at this early but critical stage of the criminal process those cases that should not go to trial

The hearing also serves many collateral purposes It operates as a discovery device for the defendant to view the evidence against him or her in order to evaluate his or her case, preserves the testimony of witnesses who may later become unavailable at trial, and facilitates plea bargaining and proper charging by exposing strengths and weaknesses of both sides of the case

C Hearsay evidence

Hearsay evidence is testimony in court, or written evidence of, a statement made out of court, the statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the

out-of-court asserter (McCormick, Handbook of the Law of Evidence, 2nd Ed , 1972) Our Anglo-American tradition evolved three conditions under which witnesses ordinarily are required to testify: oath, personal presence at trial, and cross-examination; the rule against hearsay was designed to comply with these ideal conditions

This initiative would repeal Penal code Section 872, which carefully limits the circumstances under which hearsay declarations may be received at preliminary hearings The new provision would permit out of court statements of declarants to be admitted without limitation, as long as they are offered through the testimony of a law enforcement officer who has five year's experience or a training course certificate from the P O S T Commission

D Practical considerations

Many defense attorneys and prosecutors agree that one of the primary benefits of a thorough preliminary examination is a comprehensive review of defendants' case At that point, both sides can decide whether or not to proceed Defense attorneys have claimed that examination of witnesses enhances the ability of both the prosecution and the defense to evaluate the quality of a case Many times, information obtained through examination

may prevent expenditure of public funds in the prosecution of weak cases which "look good on paper " Prosecutors agree that once defendants hear the evidence, they will often plead

The federal courts utilize hearsay in preliminary hearing in much the same way as proposed in this initiative Opponents argue that this system is less effective because it results in fewer guilty pleas and more jury trials

According to Gerald Uelman, Dean, Santa Clara University School of Law, California currently disposes of ten times as many felony cases per year as the federal courts, with only one and one half times as many judges In federal courts, only 75% of felony cases are disposed of by a guilty plea In California, the rate is 95%-- and most of these dispositions are in municipal court at the preliminary hearing stage "Our system of full adversary preliminary hearings and broad discovery promotes the disposition of cases without trial A five-fold increase in the number of felony trials we must conduct each year is unthinkable without a substantial increase in resources "

E <u>Offer of proof</u>

Penal Code Section 866 would be amended, to require, on prosecutorial demand, an offer of proof for the testimony of an defense witness, and the rejection of such testimony

unless the magistrate found it reasonably likely to (a) establish a affirmative defense, (b) negate an element of a crime charged, or (c) impeach a prosecution witness or hearsay declarant Use of preliminary hearings "for purposes of discovery" is precluded

The right to present witnesses at a preliminary hearing recognized in Jennings v Superior Court (1967) 66 Cal 2d 867 would be limited by this initiative The practice of calling hostile witnesses for discovery purposes, permitted by McDaniel v Superior Court (1976) 55 Cal App 3d 803, may be abrogated The right to cross examine hearsay declarants currently contained in Penal Code Section 2(c) would be repealed

The initiative would specify that the judge would be required, upon prosecutorial demand, to require an offer of proof from the defense as to the testimony expected from the defense witnesses The magistrate would be required to stop the testimony of any witness if that testimony is not reasonably likely to impeach the written statement of a witness who was called by the prosecution, or to establish an affirmative defense This initiative would prohibit a judge from allowing in any evidence on behalf of the defense in a preliminary hearing without an offer of proof, if the prosecuting attorney requests such an offer of proof

It appears that this initiative would result in a substantial increase in cases set for trial This would probably result in a serious clogging of the superior court, which would cause further delays in both the civil and the criminal calendars

F Higher court to review if delay

The initiative would permit any objecting party to obtain immediate appellate review by writ if the trial court sets a trial beyond the statutory limit, or grants a continuance "without good cause " The initiative would permit either the prosecution or the defense attorney in a felony case to file a petition for writ of mandate or prohibition in the superior court seeking immediate appellate review of the ruling setting the hearing or granting the continuance Such a petition would have precedence over all other cases in the court to which the petition was assigned If the court granted a peremptory writ, it would become final as to the court if the action was necessary to prevent mootness or to prevent frustration of the relief granted, notwithstanding the rights of the parties to seek review in a court of appeal This may constitute a violation of the right to due process of law under the United States Constitution

This bill would give a statutory preference in the appellate courts to petitions relating to the granting of a continuance upon the petition of either party to a criminal case

The statutory preference could lead to delays of other cases pending on the appellate court calendars

VII VOIR DIRE-- EXAMINATION OF JURORS

A Voir Dire Provisions

Existing law permits reasonable examination of prospective jurors by counsel for the prosecution and defense Existing case law requires the voir dire of jurors on death penalty issues to be conducted individually and in sequestration

This initiative would state that the court would conduct the examination of prospective jurors; however, the court would be permitted to allow the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deemed proper, or to itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deemed proper In addition, the bill would require that, where practicable, voir dire of prospective jurors would occur in the presence of the other jurors in all criminal cases, including death penalty

The initiative would also specify that the examination of prospective jurors would be conducted only in aid of the exercise of challenges for cause The trial court's exercise of its discretion in the manner in which voir dire was conducted would not cause any conviction to be reversed unless the exercise of that discretion had resulted in a miscarriage of justice

B Attorney questions to challenge for cause

This initiative would permit the prosecutor and defense attorney to propose areas of questioning "in aid of the exercise of challenges for cause "

The California Supreme Court in People v Williams (1981) 29 Cal 3d 392 struck down the rule that prohibited voir dire from being conducted as a means to uncover bases for peremptory challenges The court unanimously agreed that the rule was arbitrary, difficult to apply, erratic in its effect, and inconsistent with the mandate that the defendant be tried before a fair and impartial jury

C Refusal as reversible error

This initiative would provide that the trial court's exercise of discretion in the manner in which voir dire was conducted would not be reversible error unless the exercise

of that discretion had resulted in a miscarriage of justice It is unclear what this provision means since a miscarriage of justice would always be claimed on appeal

D Presence of other jurors

The section created by this initiative would provide that voir dire of any prospective jurors "shall, where practicable, occur in the presence of other jurors in all criminal cases, including death penalty cases "

It is unclear whether this provision would abrogate the holding in Hovey v Superior Court (1980) 28 Cal 3d 1, which requires voir dire related to juror qualification in capital cases be conducted individually in sequestration It could be argued that Hovey renders such questioning "impracticable "

E Santa Cruz and Fresno pilot projects canceled

This initiative would delete the statutory authorization for the pilot projects operating in Fresno and Santa Cruz These projects were initiated in July, 1988 and are scheduled to terminate January 1, 1992. The intent of the pilot projects is to test the effectiveness of permitting judges to conduct voir dire The initiative mandates judge conducted voir dire for entire State of California

Opponents argue that judge conducted voir dire may hurt both defendants and prosecutors, as judges will not probe as deeply to determine whether a particular juror is biased

It is unclear why proponents of the initiative seek to impose this requirement statewide before the results of the pilot study are known

VIII JOINDER OF DEFENDANTS IN CRIMINAL CASES

This initiative would add Section 1050 1 to the Penal Code, to provide that good cause to continue the arraignment, preliminary hearing, or trial of one defendant would automatically provide good cause to continue the cases of all jointly charged defendants as well

The impact of this provision would be to severely limit the alternatives where proceedings against one defendant are delayed It could also violate the speedy trial rights of a defendant who wants to go to trial when a codefendant's case is delayed

The initiative would also provide that in cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory

pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of facts As a practical matter, this could result in evidence which is inadmissible against a particular defendant being heard by the jury because it is admissible as to some other crime that defendant is alleged to have committed This may constitute a violation to the right to a fair and impartial jury

VIII CHANGES RELATING TO DEATH PENALTY, MURDER, AND LIFE IMPRISONMENT

A DEATH PENALTY SPECIAL CIRCUMSTANCES PROVISIONS

1 Expansion of death penalty special circumstances provisions

Under existing law, first degree murder is punishable by a 25 year to life term If the act is committed with "special circumstance" (e g , killing of known peace officer), the crime is punishable by the death penalty or life imprisonment without possibility of parole

The initiative would clarify and expand California's death penalty law in several ways:

a The "special circumstance" for killing a witness to a criminal proceeding (P C Sec 190 2(a)(10)) is expanded to include witnesses in juvenile proceedings brought pursuant to Section 602 or Section 707 of the Welfare and Institutions Code It would not cover dependency proceedings

b The "special circumstance" for infliction of torture (Sec 190 2(a)(18)) is broadened to eliminate the present requirement of proof of infliction of extreme physical pain

c The "special circumstance" for killing in perpetration of a felony (felony-murder special circumstance) is expanded to include:

1) Mayhem in violation of Section 203

2) Foreign object rape in violation of Section 209

3) Re-enactment of "especially heinous" special circumstance murder provision (P C Section 190 2 (a)(14)) found unconstitutional in People v Superior Court (Engert),(1982) 31 Cal 3d 797

4 Robbery in violation of Section 212 5 (defining degrees) as well as Section 211

5 Kidnaping in violation of Section 207 or 209

6 Arson in violation of Section 451(b) instead of Section 447

d The initiative would provide that "proof of intent to kill" is required only in cases of accomplices, that no proof of intent to kill is required for an actual killer, and that even an accomplice may be subject to the death penalty without proof of intent to kill where the accomplice participated in the crime "with reckless indifference to human life and as a major participant "

e The initiative would also eliminate the present requirement that the corpus-delicti of a felony-based special circumstance must be proven independently of a defendant's extrajudicial statements (e g , out-of-court confession).

f. The initiative would eliminate the court's authority to strike a special circumstance finding, which would reduce a life sentence without parole to life with the possibility of parole

2 Analysis of death penalty special circumstance changes

a) Killing of witness in juvenile proceeding

In People v Weidert, (1985) 39 Cal 3d 836, the Supreme Court held that juvenile court proceedings were not included within the witness retaliation special circumstance provisions In Weidert, a defendant had murdered a witness to prevent his testimony in a juvenile detention hearing The Court held that since juvenile hearings were not criminal proceedings, and the statute only specified a special circumstance for persons who killed witnesses to prevent testimony in "criminal proceedings," the Briggs Initiative special circumstance did not apply to juvenile court proceedings

This measure would nullify the Weidert ruling and make punishable by a death sentence the killing of an eyewitness to prevent his testimony in a juvenile proceeding brought by reason of the minor's commission of a criminal offense The bill would apply only to Welfare and Institutions Code Section 602 or 707 petitions, but not to Section 300 dependency proceedings which are essentially civil in nature

b) Expansion of torture special circumstance

This provision would revise the special circumstance torture provision to repeal language stating that proof of the offense requires "proof of the infliction of extreme physical pain no matter how long its duration "

This provision may be held unconstitutional The Supreme Court has cited the language proposed for repeal -- 'infliction of extreme physical pain' -- as a statutory component which upholds the constitutionality of the torture-special circumstance (People v Davenport (1985) 41 Cal 3d 247, 271 [as construed to require proof of the 'infliction of an extremely painful act upon a living victim,' the torture-special circumstance is not unconstitutionally vague and overbroad]; accord: People v Wade (1988) 44 Cal 3d 975, 994) The removal of this proof requirement could thus expose the torture special circumstance to constitutional infirmity on the grounds "that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v Georgia, 408 U S 238 (1972) " (Maynard v Cartwright(1988) 88 Daily Journal, 88 DAR 7160)

c) Expansion of felony-murder special circumstance provisions

i Addition of mayhem and foreign object rape

Proponents assert that these offense are appropriate for inclusion, given their seriousness Proponents note that all the other felony sex offenses (rape, oral copulation, sodomy, and child molestation) are already included in the death penalty law

Critics of the initiative dispute the need or appropriateness to expand the special circumstance provision They note that the commission of foreign object rape could be accomplished by the insertion of a single finger, and that mayhem could be the slitting of a victim's lip

ii Possible re-enactment of "especially heinous" murder special circumstance

The initiative would also re-enact Section 190 2 (a)(14) -- relating to "especially heinous" murders -- with a small grammatical change That provision had been found unconstitutional by the California Supreme Court in People v Superior Court (Engert) as being unconstitutionally vague under the state constitution's due process clause Since another provision of the

initiative would eliminate "independent state grounds" as a basis for conferring rights, the effect of the initiative appears to overturn Engert and re-enact the "especially heinous" special circumstance murder provision

WOULD NOT RE-ENACTMENT OF THIS PROVISION INVITE FURTHER LITIGATION ON FEDERAL GROUNDS?

111 Robbery, arson, and kidnapping provisions

The proposed changes to these provisions may be deemed clarifying in nature Replacing "or" for "and" in the felony-murder kidnapping special circumstance reference corrects a drafting error in conformity with the ruling in People v Bigelow (1984) 37 Cal 3d 731 Referring to Sec 451(b) instead of Section 447 in the arson special circumstance provisions corrects a drafting error (incorrect citation to code provision repealed in 1929) criticized in People v Oliver (1985) 168 Cal App 3d 920 The addition of Section 212 5 to the robbery special circumstance reference incorporates the recently added section

d) Proof of intent to kill not required for special circumstance felony-murder conviction

i Codifying Anderson

In People v Anderson (1987) 43 Cal 3d 1104, the California Supreme Court stated: " intent to kill is not an element of the felony-murder special circumstance, but when the defendant is an aider and abettor rather than the actual killer, intent must be proved " In so ruling, the Court reversed its earlier position in Carlos v Superior Court (1983) 35 Cal 3d 131, in which it had ruled that intent to kill was an element of the felony-murder special circumstances

The initiative's provisions regarding "intent to kill" for accomplices are thus in conformity with the ruling of People v Anderson This codification is desired, according to the proponents, to avoid any possible future change in position which would once again impose an "intent-to-kill" requirement

ii Codifying Tison

The initiative would expand upon Anderson further and would broaden California law to provide that an accomplice could be subject to the death penalty without

an actual intent to kill if the accomplice acted with "reckless indifference to human life and as a major participant " This provision thus expands accomplice liability to the full extent of the law as permitted by the U S Supreme Court in Tison v Arizona (1987) 481 U.S 137

e) Eliminating judicial discretion to strike a special circumstance finding

In People v Williams (1981) 30 Cal 3d 470, the Court held that Penal Code Section 1385 permits a court, in the interests of justice, to strike a special circumstance finding and reduce a life sentence without parole to a life sentence with parole

This initiative would abrogate Williams, thereby eliminating judicial discretion

SHOULD NOT A COURT RETAIN DISCRETION TO STRIKE A SPECIAL CIRCUMSTANCE FINDING IN THE UNUSUAL CASE AND IN THE INTEREST OF JUSTICE?

f) Repeal of corpus delicti requirement

Generally, existing law requires that in every criminal prosecution the elements of the crime or the "corpus delicti" must be established by evidence; the defendant's confession is inadmissible The rationale for this rule is the need to guard against the defendant's confessing to a crime that was never committed However, after the corpus is independently established, an incriminating extrajudicial statement is admissible

As an exception to the general rule, however, the People are not required to establish the corpus delicti of an underlying felony used to convict a defendant on a felony-murder theory when the crime of murder has been established by independent evidence [see People v Cantrell (1973) 8 Cal 3d 672]

In the recent case of People v Mattson (1984) 37 Cal 3d 85, the California Supreme Court ruled that this exception was not applicable for proof of a special circumstance and that the corpus delicti of a felony-based special circumstance must be proved independently of a defendant's confession or admission Construing the relevant statute in the defendant's favor as it was required to do, the court found that the general law provision of Section 190 4 incorporates the corpus delicti requirement for felonies supporting

special circumstance allegations To rule otherwise, the court concluded, would produce an anomalous result of requiring the corpus delicti to be independently proved when a separate felony offense is charged, but not requiring independent proof when a felony-based special circumstance would subject the defendant to the death penalty

The proponents view Mattson as bad law and seek its nullification They contend that just as an extrajudicial statement may be used to prove the degree of a crime once the corpus delicti has been established by independent evidence [see People v. Miller (1951) 37 Cal 2d 801], the same principle should hold to permit the use of an admission to establish a special circumstance finding in the penalty phase of a trial They assert that the Mattson rule effectively rules out the availability of the death penalty for killers who murder their sex offense victims

Critics of the initiative proposal dispute that contention, saying that all types of evidence, e g physical and trauma evidence, are available to prove a sex offense murder They also argue that the rule is warranted because evidence used to support a special circumstance finding should be as reliable as possible. Opponents further note that the requirement is not difficult to meet "The corpus delicti

may be established by circumstantial evidence, or by the reasonable inferences to be drawn from such evidence " [People v Miller (1969) 71 Cal 2d 459, 477]

This initiative would abrogate Mattson

Legislative efforts to modify the rule sought to establish a middle ground SB 2 (Lockyer) of 1989-90 Regular Session would overturn Mattson and would permit the use of a defendant's extrajudicial statements to prove the underlying special circumstance felony charge where the court found both of the following:

(1) The statement was made under circumstances which indicate its trustworthiness and reliability

(2) No significant conflicting evidence has been presented to the court which would change that conclusion

The legislative approach appears to offer a more reasoned approach, instead of the "all-or-nothing" position proposed by the initiative

3 Effect of changes: possible court backlog

This initiative will result in the filing of additional death penalty cases Exactly how many is not known What is known, however, is that the present load of death penalty cases is straining the criminal justice system, particularly at the appellate level where the Supreme Court is devoting a disproportionate amount of its time to death penalty cases in order to reduce the backlog Passage of this initiative could well exacerbate that backlog

SHOULD NOT FUNDAMENTAL REFORM FOR HANDLING DEATH PENALTY APPEALS BE ENACTED ALONG WITH ANY EXPANSION OF THE DEATH PENALTY LAW, SO AS TO ENSURE THAT THE CASES COULD BE HEARD IN AN REASONABLY EXPEDITIOUS MANNER?

B First Degree Felony-Murder Rule Expanded

Existing law makes punishable as first degree murder any murder which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or child molestation This law is commonly referred to as the felony-murder rule

Under this rule, the ordinary elements for first degree murder malice and premeditation - are eliminated Any killing, whether intentional or unintentional, is deemed first degree

murder if committed during the perpetration or attempted perpetration of a specified felony The purpose of the rule, generally stated, is to deter the commission of specified inherently dangerous felonies by punishing any accidental or unintentional killing during the commission of the inherently dangerous felony just as if the offender had committed the murder with malice and premeditation

The initiative would add kidnapping, sodomy, oral copulation, foreign object rape and train wrecking to the list of first degree felony-murder crimes

1) Stated need

Proponents of similar measures have argued that there is an inconsistency between Sections 189 and 190 2, both of which involve the felony-murder rule Section 189 provides that all murders which are committed during the perpetration or attempted perpetration of certain enumerated felonies are special circumstance murders which are subject to the death penalty The felonies enumerated in the two sections are not the same, however This measure would conform the provisions and would add five offenses to the first degree felony-murder rule. kidnapping, sodomy, oral copulation, foreign object rape, and train wrecking

The proponents point out that because Section 190 2 lists a number of felonies not listed in Section 189 which defines first degree murder, the intentional killing of a person during commission of one of these omitted felonies would not be a first degree murder unless premeditation and deliberation were also proved For this reason, the list of felony-murder crimes in Section 189 needs to be conformed to those listed in Section 190.2

2) Opposition to expansion

Opponents assert that the felony-murder doctrine has been widely criticized and should be abandoned, not expanded They state that the rule, as a strict liability concept, violates the important general principle of criminal law that one is not ordinarily criminally liable for bad results which differ greatly from intended results

As stated by the Comment to Hawaii's statute abolishing the rule:

"Even in its limited formulation the felony-murder rule is still objectionable It is not sound principle to convert an accidental, negligent, or reckless homicide into murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class Engaging in certain penalty-prohibited behavior may, of course, evidence

a recklessness sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case "

The California Supreme Court has repeatedly criticized the felony-murder rule as a "barbaric concept that has been discarded in the place of origin" (People v Phillips (1966) 64 Cal 2d 574) and that in almost all cases in which it is applied it is unnecessary and erodes the relation between criminal ability and moral culpability (People v Washington (1965) 62 Cal 2d 777, People v Dillion (1983) 34 Cal 3d 441)

At the very least, opponents say, kidnapping, which may involve only minor movement and no harm to the victim, and foreign object rape, which may only involve the insertion of a finger, are not inherently dangerous felonies and should not be included in the list

3) Effects of expansion

These amendments would raise murders which occur in the perpetration of kidnapping, train-wrecking, or rape by instrument from second to first degree murder Further, absent these provisions, sodomy and oral copulation would

not even support use of the felony-murder theory, since they are not "inherently dangerous " ef People v Satchell (1971) 6 Cal 3d 28

It should be noted that the existing oral copulation and sodomy laws, Penal Code Sections 286 and 288a apply to some forms of consensual sodomy or oral copulation, as where one participant is under 18, or where the accused is confined in a jail or prison The proposed amendment to Penal Code Sec 189 recognizes no distinction between consensual sodomy or oral copulation and such acts accomplished against the victim's will

4) Similar legislative proposal

The proposed expanded first degree felony-murder provisions are also presently proposed by pending legislation -- SB 2 (Lockyer)

C Life sentence without parole for murder by 16 or 17 year old

Under existing case law, People v Spears, (1983) 33 Cal 3d 279, a juvenile convicted in adult court of first degree special circumstance murder may not be sentenced to death or to life without possibility of parole, but may be sentenced to a 25 years to life term with the possibility of parole

The initiative would overturn Spears and would provide that an offender found guilty of committing first degree special circumstance murder while 16 or 17 years of age shall be sentenced to state prison for life without the possibility of parole (LWOP) or for a term of 25 years to life

1 Stated need

Several reasons have been asserted for passage of this provision:

a The punishment not only fits the crime, but also protects society by deterring other juveniles by demonstrating the consequences of the proscribed conduct

b LWOP prevents the juvenile from committing other violent acts by isolating him/her from society

c Juveniles are often used as weapons bearers, as well as perpetrators, because the current juvenile court sanctions are so much more lenient that adult sanctions

d Homicides by juveniles most often occur as a result of concerted action, i e , gang activity, that is conspiratorial in nature and indicative of premeditation and deliberation

e Inasmuch as most violent felonies are committed by males between the ages of 17 and 24, the current law ignores this statistically significant fact by making an artificial distinction that arbitrarily exempts 16 and 17 year old murderers from LWOP even though the enumerated special circumstances are present

2 Effects of provision

This measure could make juvenile killers ineligible for assignment to the CYA. Persons receiving a LWOP sentence are not eligible for Youth Authority commitment; however, a juvenile who receives a 25 years to life term may still be housed by the CYA (Absent a finding of special circumstances, a juvenile offender would remain eligible for CYA commitment In re Jeanice D (1980) 28 Cal 3d 210)

Concern may be expressed over the sentencing impact of this provision

While the initiative would permit a LWOP sentence for certain juvenile killers, that sentence still could be reduced under existing law to 25 years-to-life by a judge in the interests of justice (See People v Williams (1981) 30 Cal 3d 470) However, another provision of the initiative

would overturn Williams, thereby leaving the court without any discretion to reduce a LWOP term in the interests of justice

SHOULD NOT THE COURT RETAIN DISCRETION TO REDUCE AN LWOP TERM TO LIFE WITH POSSIBILITY OF PAROLE IN SOME INSTANCES?

Opponents of the initiative contend that existing law adequately punishes juvenile killers and protects against premature releases They assert that a LWOP sentence would be too severe, particularly in cases of rehabilitation They also assert that the initiative would inevitably cause defense attorneys to expand the scope of their defense efforts, which would thereby slow the criminal proceedings

X New Crime of Torture: Life Sentence

Under existing law, murder by torture is first degree murder and is punishable by a 25 years to life sentence with the possibility of parole This offense requires the deliberate and premeditated intent to inflict extreme and prolonged pain If special circumstances are found, murder by torture is punishable by death

New Section 206 would be added to the Penal Code, making it a felony punishable by life imprisonment to inflict great bodily injury upon another, with the intent to cause cruel or extreme

pain for the purpose of revenge, extortion, persuasion, or any sadistic purpose As drafted, the provision does not require the death of the person tortured or an intent to kill Nor does the provision require proof that the victim suffered pain

The term "great bodily injury" is defined in Section 12022 7 as "a significant or substantial bodily injury " It has been construed to include bone fractures and knife wounds requiring extensive suturing

The proposed new crime of torture may impose a disproportionately high sentence Every intentional stabbing for the purpose of revenge could be subject to life imprisonment In contrast, current law punishes such conduct as an assault with a deadly weapon punishable by a 2, 3, or 4 year prison term (or 1 year jail term) and a 3 year enhancement for intentionally inflicting great bodily injury

In that the proposed crime appears to be very board, its enactment could result in very significant correctional expenditures to house the new inmates

XI Pretrial Discovery in Criminal Cases

A Provisions of the initiative

The initiative would amend California's Constitution and statutory provisions with respect to the defendant's and the prosecutor's pretrial discovery rights by limiting the defendant's discovery rights and creating new discovery rights for prosecutors

Under the Sixth Amendment of the U S Constitution, the accused in a criminal case has the right to be confronted with witnesses against him or her and to compulsory process to obtain witnesses on the accused's behalf The Fifth Amendment guarantees the accused the right to due process in criminal proceedings

The California Constitution similarly guarantees a defendant the right to be confronted with witnesses against the defendant, to compel the presence of witnesses in the defendant's behalf and not to be deprived of life, liberty or property without due process of law

Penal Code Sections 859, 1102 5, 1102 7 and 1430 codify these constitutional protections This initiative would repeal or amend those provisions by:

a Deleting the requirement that the government supply the defendant or counsel with a copy of the arrest report

b Eliminating the defendant's general right to discover any information which may aid the defense, substituting a specific, exclusive list of information which the accused could discover

c Creating a new constitutional right for prosecutors to discover information within the defendant's knowledge

B Defense Discovery

Current California law recognizes a defendant's right to obtain any information from the prosecutor "which may reasonably aid him in fashioning his defense" (People v Memro (1985) 38 Cal 3d 658) That includes police reports and statements of all witnesses to a crime

The federal rules similarly require prosecutors to permit a defendant or his defense counsel to discover all materials "which are material to the preparation of his defense" (F R Cr Proc 16(b))

The initiative would limit this broad state and federal right by specifying that the accused has a right to receive only the following:

a The names and addresses of witnesses the prosecutor intends to call at trial

b Statements of all defendants

c All relevant real evidence seized or obtained as part of the investigation of the offenses charged

d Felony conviction histories of material witnesses

e Exculpatory evidence

f Relevant statements or reports of statements of witnesses the prosecution intends to call at trial, including expert witnesses, and the results of examinations tests or experiments to be offered at trial Statements of witnesses the prosecution did not intend to call would not be discoverable

Proponents contend these limitations on current defense discovery rights will "benefit the quest for truth, reduce the number of trials, lead to reasonable plea bargains which will eliminate the need for trials, and reduce court congestion"

Opponents contend it will in reality have the opposite effect If the prosecution is not required to provide the defendant's counsel with "all information which could aid in fashioning a defense", including police reports, counsel would be unable to assess the existence of viable defenses and defense witnesses and consequently would be less inclined to offer or accept a plea bargain Opponents argue that recommending acceptance of a plea bargain without reviewing all prosecution information would constitute ineffective assistance of counsel, a basis for appeal This section of the initiative would, they contend, increase the number of trials and appeals Opponents also argue that this provision would violate the defendant's constitutional rights to effective assistance of counsel and confrontation of witnesses

C Prosecution discovery

Penal Code Section 1102 5 guarantees prosecutors the right to obtain, from the defendant or defense counsel, after a defense witness had testified on direct examination, all oral or preserved pretrial statements made by that witness, but limited at defense request to matters within the scope of the witness's direct testimony

This statute was ruled in violation of the California Constitution by the California Supreme Court in In Re Misener (1985) 38 Cal 3d 543 in which the court held that the statute

violated the defendant's privilege against self incrimination by requiring the defendant to assist the prosecution in obtaining evidence to impeach defense witnesses, thereby incriminating the defendant

The Court reasoned that since the sole purpose of the statute giving prosecutors access to pretrial defense discussions with defense witnesses was to "facilitate impeachment of defense witnesses" the statute could not be upheld The California Supreme Court thus established a rule that the constitutional privilege against self incrimination requires the prosecution to carry the entire burden of convicting the defendant and forbids compelled disclosures from the defendant that will aid the prosecution

In response to prosecution arguments that discovery should be reciprocal, a two way street or equal discovery for the prosecution and defense, the California Supreme Court in In Re Misener emphasized that "any view that discovery should be a two way street overlooks the fact that certain constitutional protections, particularly the Fifth Amendment privilege against self incrimination, are conferred on only one party " (In Re Misener, supra) (Blumenson, "Constitutional Limits on Prosecutorial Discovery" (1983) 18 Harv Civ Rights - Civ Lib L Rev 122, 176)

The Court further emphasized that the framers of the U S Constitution were well aware of the awesome (and unequal) investigative and prosecutorial powers of government; in order to limit those powers they spelled out in detail in the Constitution the procedure to be followed in criminal trials A defendant, they said, is entitled to notice of the charges against him, trial by jury, the right to counsel for his defense, the right to confront and cross-examine witnesses, the right to call witnesses in his own behalf, and the right not to be a witness against himself " (In Re Misener, id at pp 551)

In contrast, the U S Supreme Court has held that requiring the defense to provide prosecutors with reports of pretrial statements made by defense witnesses was not a violation of the U S Constitution's Fifth Amendment privilege against self incrimination

Under federal rules governing pretrial discovery in criminal cases, the prosecution is entitled to discovery of all tangible evidence and scientific reports from the defense, if the defense requests discovery of like material from the prosecution (F R Cr Pro 16(b)) Further, the federal rules permit pretrial discovery of the identity of defense witnesses providing alibi testimony (F R Cr Pro 12 1) Finally, the prosecution may, during the trial, obtain discovery of defense witnesses' pretrial statements under limitations established by the U S Supreme Court Those limitations require the trial court to

inspect and edit the requested material in camera and provide the prosecution with portions of pretrial statements which are relevant to the direct testimony the defense witness gave e g , contrary statements which would impeach the defense witness The Court held that F R Cr Pro 16(b), which would prohibit such discovery is applicable only to pretrial discovery but not to discovery during the course of a criminal trial

The initiative would enact a rule which, by permitting unlimited pretrial discovery of defense witnesses and evidence, would conflict with F R Cr Pros 16(b), and with the limitations established by the U S Supreme Court for prosecution discovery during trial thus, it would probably be held in violation of the U S Constitution

PART 3

Written Testimony in Support of Initiative

CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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Initiative Cost Savings Fact Sheet

I Jury Selection

Federally tried cases involving public figures

	Cost Based on State Court Figures
Senator Joseph Montoya 2 days	$ 11,666
Assemblyman Bruce Young 1 1/2 days	$ 8,749
Patrick Moriarity 1 1/2 days	$ 8,749

State trials of public figures

Roger Hedgecock	
3 weeks (1st trial)	$ 87,498
2 1/2 weeks (2nd trial)	$ 69,996
Ralph Dietrich 6 weeks	$174,996

1 Bruce Young, Patrick Moriarity, and Orange County Supervisor Ralph Dietrich were tried by the same prosecutor, Michael Cappizi, Chief Deputy District Attorney of Orange County Although the charges involved similar conduct, allegations involving bribery, Moriarity and Young faced a potertial sentence of over twenty years in federal court, but Dietrich faced a maximum prison term of eight years Moriarity and Young were separately tried by Mr Cappizi, cross-designated as a federal prosecutors In each case the jury was selected in less than two court days Mr Cappizi subsequently tried Supervisor Dietrich in the state court system Even though a change of venue was granted and the trial moved from Orange to San Diego county, jury selection still took six weeks

2 Roger Hedgecock was tried in the San Diego Superior Court twice In the first trial, jury selection took over three weeks One week of this time was spent in questioning individual jurors outside the presence of the rest of the panel The first jury deadlocked 11-1 for convictions Despite the extensive and time consuming voir dire examination, the holdout juror knew some of the defendants personally and had an association with them which he had not revealed when questioned on that subject Further, despite assurances to the contrary given during the jury

selection process, this individual absolutely refused to deliberate with other jurors When the jury reached the deliberation room, even before a foreman had been selected, he announced that the defendant was not guilty and he would not discuss it

The second trial included two and one half weeks of jury selection

The defendant was convicted

3 A clinical psychologist who works for the San Diego District Attorney's office assisting in jury selection has participated in the voir dire process in thirty-one special circumstance cases The shortest period of voir dire was fifteen court days The longest stretched over six and one half months He estimates the average of the thirty-one cases involved a jury selection of ten weeks

4 In Sacramento County the average time of jury selection for a misdemeanor Driving Under the Influence case is almost one court day Some misdemeanor cases have recently taken as much as three days to select a jury It is not unheard of to have the misdemeanor jury selection process last longer than the evidentiary portion of the trial

5 Superior Court cost of jury selection per hour

Court cost	$451 34	(1989 Judicial Council average cost per case related hour for Superior Courts)
District Attorney cost	$67.78	(based on avg hourly wages, benefits, and indirect cost factor)
Public Defender cost	$62 89	(same as for District Attorney)
Total hourly cost	$582.01	

Using the Judicial Council figure of $2,588 per Superior Court case related day and adding District Attorney and Public Defender costs, a day of jury selection costs $3,241.35 in governmental costs along Taking this analysis further, a three week voir dire costs $48,620 25, while a six month jury selection process would amass a mind-boggling $388,962 in costs

The National Center for State Courts places the average daily wage for California citizens at $72 Estimating an average felony jury panel at thirty-six people, voir dire is costing the private sector $2,592 per day Therefore, a week of jury selection costs private industry $12,960 and government $16,206 for a total cost of $29,166

California Superior Courts swore 5,570 criminal juries in the last Judicial Council reporting year If even one hour were saved in the jury selection process on average, governmental savings would

amount to $3,241,740 for that number of cases Adding juror wage costs to that hourly figure brings the total to $5,046,420 A five million dollar savings for a reduction of one court hour in the jury selection process of 5,570 criminal trials becomes a twenty-five million dollar savings if the average time saved is one court day

6 Siskiyou County received a change of venue on a homicide case The trial was moved to San Francisco Because the District Attorney has only a staff of four lawyers, it was necessary for him to contract with an experienced lawyer to try the case as it was not possible to send a deputy out of county for an extended period of time This lawyer was paid over $75 per hour and has been picking a jury since July of this year This process is ongoing and has the potential of bankrupting the county

II Preliminary Hearings

Average Municipal Court Cost per case related hour Figure taken from Judicial Council 1989 Annual Report	509 41
Average hourly cost of a deputy district attorney Figure based on salary, benefits, and indirect costs	67 78
Average hourly cost of a deputy public defender Figure based on salary, benefits, and indirect costs	62 89
Total hourly Municipal court cost for criminal proceeding	640 08

Number of felony filings in the Municipal Court	209,252
Preliminary Hearings = 83 perr 100 filings	x 83
Number of Preliminary Hearings held	173,679

Figures based on 1989 Judicial Council Annual Report

The Judicial Council has determined that the average felony filing uses 55 minutes of court time in the Municipal Court Therefore, if we assumed that a preliminary hearing took one hour we have cost of preliminary hearings in the Municipal Court of $111,168,556
(173,679 P H x $640 08 hourly cost)

However, since the fifty-five minute figure includes cases which were dismissed, plead out before Preliminary Hearing, or were reduced to misdemeanors, this number does not accurately represent the average time of a preliminary hearing The proceedings short of preliminary hearing on a felony in the Municipal Court are prefunctory and brief

The shortest prelims take about 1/2 hour The longest have been known to take several months Homicides, multiple count cases, and complex fraud cases frequently take days or weeks Therefore, the average time of a prelimirary hearing may well be two hours This would boost the cost of such hearings statewide to $222,337,112

The estimated duration of a hearsay preliminary hearing based on experience in other jurisdictions is fifteen minutes Therefore, a 75% savings of the $111,168,556 cost estimate would amount to $83,376,417 If the $222,337,112 estimate is used, an 87 5% savings of $194,544,973 would be realized

III Continuances

The 1989 Annual Report of the California Judicial Council lists twenty-two counties with six or more Superior Court judges In the last year reported, those counties swore a total of 4,852 juries Of that total, 2,872 jury trials began after the statutory sixty day period from the filing of the Information This figures represents 59% of California criminal trials Since courts almost always set cases within the sixty day limit, the vast majority of these cases must have been continued at least once This figure does not take into account the countless numbers of cases which are resolved short of trial In these same twenty two counties, jury trials account for only 4% of dispositions of criminal filings

Anecdotal evidence of the continuance problem abounds One case currently set for trial in the Sacramento County District Attorney's homicide section was filed in 1986 and has a trial date of September 1990 Of the 46 homicides pending in that unit, almost half are over one year from their filing date One case dates from 1984

Supervising Deputy District Attorney Albert Locher of the Sacramento Special Investigations Section estimates that the Major Fraud cases handled by his team are continued an average of three times in Superior Court prior to disposition He can recount instances of cases in which the Superior Court trial date alone was continued six and seven times He estimates the <u>average</u> time from filing to resolution of a case handled by his section is eighteen months Some have been known to take years

California Superior courts reported 115,595 criminal filings in 1988 Although this figure represents only 13% of total Superior Court filings, the Judicial Council's weighted caseload analysis indicates that criminal cases consume 38% of judicial time During this same time period, California Superior courts disposed of 111,120 criminal cases This 4,500 case differential between filings and dispositions coupled with the ten percent increase in filings for 1988 from the previous reported year strongly indicates that the courts must streamline and expedite judicial processes or substantial increases in judicial positions will be necessary to meet the increased load and backlog

THE CRIME VICTIMS JUSTICE REFORM ACT

by

ALBERT H. MacKENZIE

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and
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The Crime Victims Justice Reform Act is an initiative drafted by members of the California Justice Committee which seeks to bring about major reform of our state's criminal justice system.

The initiative is supported by countless victims, prosecutors, police officers, businesses, elected officials, and other concerned citizens throughout the state. With their help it will be qualified and placed on the ballot for the June, 1990 election.

The initiative seeks to bring about a vast improvement in our state criminal justice system in two ways. First, by overturning several Rose Bird Court decisions which are still law despite her having been voted out of office. Second, by adopting the common sense procedures that exist in every federal court in the nation as well as in most other states.

The following is a synopsis of the key provisions in the initiative.

Reform No. 1: Elimination of the Post-indictment Preliminary Hearing

One of the most devastating blows to effective major prosecutions in this state came about as a result of the 1978 Hawkins decision which created a new right for defendants indicted by a grand jury, that being a right to a post-indictment preliminary hearing. (Hawkins v. Superior Court (1978) 22 Cal.3d 584)

In contrast, the federal courts have repeatedly refused to create a right to a post-indictment preliminary hearing for defendants indicted by federal grand juries.

In addition, there is no such right for defendants indicted by grand juries in 47 other states.

The initiative will restore California's law to what it was for decades prior to the Hawkins decision, and what the law presently is in every federal jurisdiction and in 47 other states.

Reform No. 2. Allow Experienced Police Officers to Testify at Preliminary Hearings to Certain Statements They Have Obtained.

At the present time in California hundreds of thousands of preliminary hearings occur every year. The same rules of evidence that generally apply at trials apply at preliminary hearings. What this means is that victims and other important witnesses must appear and testify.

This process places a tremendous burden on our courts, witnesses, police officers, and taxpayers.

In California, if your car is stolen and a person is arrested driving it at a high rate of speed by a California Highway Patrol (CHP) officer, both you and the officer will have to testify at the defendant's preliminary hearing. You will lose a day of work to testify that you own the car, discovered the car missing and the defendant did not have permission to take or drive your car. The CHP officer will have to come to court to testify that he saw the car traveling at a high rate of speed, stopped the car, observed the defendant was the driver and discovered the ignition was hotwired. Both of you must come to court or the charges will be dismissed. You lose a day of work and society loses the benefit of having a police officer out on patrol doing productive work.

As a criminal case becomes more complex than the simple automobile theft case described above, more and more witnesses must come to court to testify at a preliminary hearing.

Contrast this with the preliminary hearing system that exists in every federal court in the nation and 36 other states. In every federal court, as well as those 36 other states, the investigating officer is allowed to relate to the court at a preliminary hearing what the victims and witnesses have told him or her during the course of the investigation. (Rule 5.1 Federal Rules of Criminal Procedure)

The initiative will reform California's preliminary hearing system to comport with the federal system and these other states. This will restore our preliminary hearing system to what it was originally intended to be, a probable cause hearing, and not a trial.

Reform No. 3: Eliminate Gridlock Caused by Attorneys Paid At Taxpayer Expense.

Some of the most frequent reasons why cases are continued and delayed are probably heard everyday in every criminal court in this state. "Your Honor, I am engaged in trial on another case." "Your Honor, I have not had time to prepare for the trial."

There are 103,000 attorneys in this State so the problem should not come about because lawyers are some rare fragile commodity like the California Condor.

The problem exists because attorneys overbook themselves. The problem is particularly acute when these attorneys are getting paid at taxpayer expense and the system which pays them, has to come to a halt because they are either not ready or not available.

The attorney-gridlock problem is certainly not easy to solve but one step can be taken which will help. An attorney who is appointed at taxpayer expense to represent an indigent defendant should not be appointed, unless he or she can be ready and available on the date that is selected. If that lawyer is too busy, appoint somebody else.

Reform No. 4: Give Judges the Opportunity To Conduct Voir Dire in Criminal Cases

California has probably the slowest and most protracted jury selection process in the nation.

One reason why criminal cases are tried quicker in the federal system than in California state courts is due to the

difference in how jurors are selected. In the federal system, voir dire questions of the jurors are asked by the judge instead of by the attorneys. Jury selection by judicial voir dire takes a fraction of the time it takes in our state court criminal trials.

Judicial voir dire has a proven track record of fairness throughout the United States federal court system Considering its success in complex federal criminal trials, it should be equally fair and effective in our state court misdemeanor and felony trials.

This initiative adopts the federal system of jury selection in criminal trials.

Reform No. 5: Elimination of Separate Voir Dire of Each Prospective Juror in Capital Cases.

In potential capital cases, the length of time involved in jury selection is staggering as a result of the 1980 Hovey decision by former California Supreme Court Chief Justice Rose Bird. (Hovey v. Superior Court (1980) 28 Cal 3d 1)

Potential capital cases are taking months of courtroom time just to select the jury. This has resulted in an extraordinary burden on the trial courts which greatly reduces their capacity to handle other criminal cases.

Elimination of the Hovey decision and the return of a jury selection proceeding in which all prospective jurors are present during voir dire will allow trial courts to handle far more cases than is presently possible.

This initiative eliminates the Hovey decision and restores California's jury selection process in potential capital cases to what it was prior to 1980 and what presently exists in other states which have the death penalty.

Reform No. 6: Voir Dire Questions of Prospective Jurors Shall Be Asked Only In Aid of the Exercise of Challenges For Cause.

This section of the initiative eliminates the decision of People v. Williams in which the court held that voir dire questions could not be limited to those questions which would uncover grounds to challenge a juror for cause as to whether or not that prospective juror could be fair. (People v. Williams (1981) 29 Cal.3d 392)

Reform No. 7: Mutual Discovery.

In California, discovery in criminal cases is a one-way street. The prosecution must reveal everything in its possession pertaining to the guilt or innocence of the defendant. The defendant gives nothing in return.

As a result, in a criminal trial, the defense can call alibi, character and expert witnesses to the stand without the prosecution having any knowledge of the witnesses or their testimony. This is not conducive to a truth-seeking process and encourages defendants to manufacture perjured testimony with consideration impunity.

This initiative adopts the reciprocal discovery rules which have existed in the state of Oregon for many years. It will

allow prosecutors to know what witnesses, other than the defendant, will be called as witnesses by the defense at the trial.

Reform No. 8. Joinder of Multiple Offenses.

For many years in California a defendant could be tried for several separate crimes of the same type in one proceeding pursuant to Penal Code Section 954. In 1986, former California Supreme Court Justice Rose Bird wrote the majority opinion in the Smallwood decision which reversed a conviction of a man who had been charged with two separate murders in one jury trial. (People v. Smallwood (1986) 42 Cal 3d 415)

This initiative eliminates the Smallwood decision and allows joinder of separate crimes of the same type without evidence of one offense having to be admissible to prove the other offenses in order for them to be tried together.

This will restore California's law as it existed for decades prior to the Smallwood decision.

Reform No. 9. Joinder of Multiple Defendants.

When several defendants participate in one crime and are charged together in one criminal case, the needs of justice, as well as judicial economy, are best satisfied if all defendants can be tried together. Unfortunately, this sensible approach does not always result because their attorneys are unavailable or unprepared.

The initiative seeks to address this problem by requiring that multiple defendant cases be kept together "unless it appears

to the court or magistrate that it will be impossible for all defendants to be available and prepared within a reasonable period of time." (Section 22 Initiative)

Reform No. 10: Provides Both The Prosecution and Defense With the Right to Appeal Improperly Granted Continuances.

Sections 17 and 28 of the initiative add sections to the Penal Code to give both the prosecution and the defense the right to appeal continuances of preliminary hearings, trials, and other matters which are granted without good cause.

Reform No. 11: A New Crime of Torture Is Added to The Penal Code.

California citizens recently were outraged to learn that a man given the maximum sentence allowed by law by the trial judge was released from prison after serving only eight years. That man had been convicted of rape and chopping both arms off his 15-year old victim.

Such heinous offenses should be punishable by at least life in prison.

Sections 13 and 14 of the initiative add Sections 206 and 206.1 to the Penal Code creating the crime of torture punishable by life in prison.

Reform No. 12. Restoring and Reforming the Death Penalty Law.

Sections 9, 10, 11, and 12 of the initiative do several things to clarify, restore, and overturn various Bird court decisions which affect potential capital cases.

Among the reforms are the following;

1. Adoption of the standard set forth by the United States Supreme Court as to when the death penalty is appropriate for accomplices to murder. (Tison v. Arizona (1987) 107 S.Ct. 1676) This will expand upon People v. Anderson.

2. Clarifies what murders require a specific intent to kill in order for the death penalty to be applicable.

3. Provides that juveniles between the ages of 16 and 18 who commit special circumstances murders can be sentenced to prison for life without possibility of parole or, at the discretion of the court, 25 years to life. This overturns People v. Spears

4. Provides that the intentional murder of a witness to prevent his or her testimony in any criminal or juvenile proceeding is a special circumstance murder. This overturns People v. Weidert.

5. Prohibits any judge from striking or dismissing any special circumstance admitted or found true by a jury or court. This clause overturns People v. Williams (1981) 30 Cal.3d 470.

CONCLUSION

The public has a right to a better justice system that will not only restore public confidence in the system but will also help alleviate our constantly overburdened courts.

Passage of the Crime Victims Justice Reform Act will be a big step toward that goal.

CITATIONS

1. Hawkins v. Superior Court (1978) 22 Cal.3d 584
2. Federal Rules of Criminal Procedure Rule 5.1
3. Hovey v. Superior Court (1980) 28 Cal.3d 1
4. People v. Williams (1981) 29 Cal.3d 392
5. People v. Smallwood (1986) 42 Cal.3d 415
6. Tison v. Arizona (1987) 107 S.Ct. 1676
7. People v. Anderson (1987) 43 Cal.3d 1104
8. People v. Spears (1983) 33 Cal.3d 279
9. People v. Weidert (1985) 39 Cal.3d 836
10. People v. Williams (1981) 30 Cal.3d 470

File: Initiative

HOW THE CRIME VICTIMS' CALIFORNIA JUSTICE COMMITTEE INITIATIVE WILL BENEFIT CALIFORNIA BUSINESS

by

Albert H. MacKenzie

In addition to creating a fairer and swifter criminal justice system in California, the Crime Victims' California Justice Committee initiative will save California businesses millions of dollars every year in employee salaries and lost work time.

The main reason for this is in the initiative's proposed procedure for changing the way preliminary hearings are conducted.

At the present time in California when a defendant is charged with any felony such as auto theft, burglary, forgery, grand theft, robbery, credit card fraud, insurance fraud, et al, the defendant is entitled to a preliminary hearing before he can be brought to trial.

Hundreds of thousands of preliminary hearings are conducted each year. At the present time the same rules of evidence that apply at a defendant's trial generally apply at that same defendant's preliminary hearing.

What that means is that the witnesses must come to court and testify at the defendant's preliminary hearing or the case will be dismissed.

For example, if an employee has his or her house burglarized or his or her car stolen, that employee must take time off work to testify at the preliminary hearing.

Businesses such as banks, savings and loans, insurance companies, and retail stores are especially affected. When a defendant is charged with forgery for example, or some other crime where a bank employee is a witness either to the transaction or has relevant business records of the transaction, that employee must come to court and testify at the preliminary hearing.

The testimony is frequently brief and routine. For example:

1. "I left my house at 8:00 a.m. and returned at 5:30 p.m. My front door lock was broken and my T.V. set was gone. I do not know the defendant and he did not have permission to enter my home or take my T.V."

2. "I parked my car and went into the market. When I came out it was gone. No one had permission to take it."

3. "This check was presented at my teller window for payment. I cashed the check."

4. "My credit card was taken without my permission. The signature on the credit card sales slip is not mine. No one had permission to sign my name."

5. "I sold a T.V. at the store where I work to a customer who presented this credit card for payment."

In California, if your car is stolen and a person is arrested driving it at a high rate of speed by a California Highway Patrol Officer, both of you will have to come to court to testify at the defendant's preliminary hearing. You will lose a day of work to testify you own the car, discovered the car missing, and the defendant did not have permission to take or drive your car. The CHP Officer will have to come to court to testify he saw the car traveling at a high rate of speed, stopped the car, and observed the defendant was the driver, and the ignition was hot-wired. Both of you must come to court or the charges will be dismissed. You lost a day of work; society loses the benefit of having a police officer out on patrol doing productive work.

The problem is compounded when different jurisdictions are involved.

When your car is stolen in Los Angeles County and the defendant is arrested driving it in another county or state, the

out-of-county or out-of-state officer must travel to Los Angeles County at taxpayer expense to testify at the preliminary hearing.

If your checkbook is stolen in Los Angeles and the defendant passes those forged checks in San Francisco, you will most probably have to go to San Francisco to testify those are your checks but you did not do the writing that appears on them nor is the signature yours.

Contrast this with other states where a detective would take the witness stand and relate to the court his interviews of you and the other witnesses. This cannot be done in California at the present time.

The initiative will adopt the type of preliminary hearing procedure that presently exists in these other states. If the initiative passes, a police officer will be able to testify to the statements of the witnesses and victims without their having to come to court and testify at the defendant's preliminary hearing.

The bottom line is, that if the initiative passes, banks and other businesses that regularly have employees in court testifying at preliminary hearings will have those employees on the job at work and not in court.

George G Weickhardt
235 Montgomery St, Suite 2700
San Francisco, CA 94104
415-981-1300

October 11, 1989

The Honorable Dianne Feinstein
909 Montgomery Street, Suite 400
San Francisco, CA 94133

Re: Crime Victims Justice Reform Act Initiative

Dear Mayor Feinstein:

You have asked for a legal opinion whether the Crime Victims Justice Reform Act Initiative will affect the right of women in California to choose whether to bear children. My opinion is that it will not. The Initiative refers only to rights of criminal defendants in their status as defendants in criminal cases. Any reading of the Initiative which would extend its scope to affect reproductive choice would be inconsistent with the Initiative's express purpose and meaning, would produce legally absurd results, would violate the "single subject" rule for initiatives, and would improperly repeal other constitutional rights by implication.

1. The Initiative and Other Relevant Constitutional Provisions.

The Initiative would amend the California Constitution as follows:

> In criminal cases, the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel and unusual punishment, shall be construed by the courts of this state in a manner consistent with the

> Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal cases than those afforded by the Constitution of the United States. [Emphasis added.]

Otherwise, the Initiative concerns such matters as speedy trials, discovery in criminal cases, redefinition of the crime of torture, and redefinition of certain elements of the crime of first degree murder.

Unlike the U. S. Constitution, the California Constitution, in Article I, Section 1, explicitly protects the right to privacy. This provision was added by initiative in 1972. The right to privacy has been found in the U. S. Constitution only by interpretation or implication. For example, in Roe v. Wade this implicit right was found to protect reproductive choice. That decision, however, has been eroded by recent decisions of the U. S. Supreme Court and may possibly be overruled in the future. The express privacy provisions in the California Constitution have been construed to give women a greater right to decide whether to have abortions than has the U. S. Constitution.

2. The Argument That The Initiative Infringes On Reproductive Freedom.

It has been argued by some, including Attorney General John Van de Kamp, that the underscored language in the Initiative would define the right to have abortions in California to be no greater than that under the U. S. Constitution. If Roe v. Wade were overruled by the U. S. Supreme Court, the argument goes, the right to privacy with respect to reproductive choice in California would disappear.

This argument is wrong because it ignores the intent and meaning of the Initiative. To distort the language of the Initiative to refer to reproductive choice would offend numerous well-established principles of constitutional and statutory interpretation.

3. The Limited Circumstances In Which The Issue Would Or Could Arise.

To keep Mr. Van de Kamp's argument in perspective, it should first be understood that nothing in the Initiative would itself criminalize abortion, a subject which the Initiative does not even mention. Before abortion could be recriminalized in California, three things (besides the passage of the Initiative) would first have to happen. First, the U. S. Supreme Court would have to overrule or extremely limit Roe v. Wade.

Second, the California Legislature would have to enact new legislation making abortion a crime. The old California abortion statutes would not spring back into life or be revalidated even if Roe v. Wade were entirely overruled. A subsequent constitutional amendment empowering the Legislature to enact a statute previously found unconstitutional cannot operate to "revive or validate" that statute, which is deemed void from its inception. Fleming v. Hance, 153 Cal. 162 (1908); Newberry v. United States, 256 U. S. 232 (1921). Both the old abortion statute, Penal Code § 274, dating from the 1850's, and most of the Therapeutic Abortion Act, dating from 1967, were found unconstitutional in People v. Belous, 71 Cal. 2d 954 (1969) and People v. Barksdale, 8 Cal. 3d 320 (1972), respectively. The portion of the Therapeutic Abortion Act which restricted abortions to the first twenty weeks of pregnancy was not found invalid in Barksdale, but was subsequently rendered invalid by Roe v. Wade and cannot be considered valid or enforceable today. Under the reasoning of the Fleming and Newberry cases cited above, any pre-Roe v. Wade statute which was rendered invalid by the operation of Roe will not be resurrected if Roe is overruled. Because the former California abortion statutes are now invalid, they cannot be revived by the Initiative or any other constitutional

amendment, unless the Initiative itself or the Legislature specifically reenacts them. The Initiative does no such thing.[1]

Third, even if the California Legislature passed new legislation criminalizing abortion, that legislation would have to pass muster under several other constitutional principles besides the right to privacy. The original California abortion statute, which forbade abortion except where necessary to save the life of the woman, was found unconstitutional in People v. Belous on the ground that the statute was too vague to regulate an area where constitutional rights were involved, including, but not limited to, the right to privacy. Belous found that abortion also involved the woman's right to liberty and the woman's right to life. 71 Cal. 2d at 954. The 1967 Therapeutic Abortion Act, which prohibited abortions except where a committee of physicians found "a substantial risk that continuance of the pregnancy would gravely impair the physical and mental health of the mother" was

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[1] The Therapeutic Abortion Act also prohibited abortions unless performed by licensed physicians and in accredited hospitals. Although Barksdale held that these provisions of the Act were not invalid, they are not enforced today. Some opponents of the Initiative believe that these portions of the Act might be revived by the Initiative. See Dennis P. Riordan, "Constitution Shields Choice," The Recorder, October 5, 1989, page 6. In fact, the licensed physician and accredited hospital requirements of the Therapeutic Abortion Act may not be subject to attack as violative of the right to privacy even under the California Constitution and may be enforceable even today. Under both the Barksdale case and the opinion of the U.S. Supreme Court in Connecticut v. Menillo, 423 U.S. 9 (1975), a state may impose criminal liability for an abortion performed by a non-doctor. The right to privacy, whether under the federal or state constitution, has never been extended to create a right to obtain an abortion from other than a licensed physician. It would thus probably make no difference to the validity or enforceability of these provisions if Roe were overruled or if the right to privacy were restricted. The Initiative is, thus, irrelevant to this issue. It may, in any event, be desirable to preserve the licensed physician requirement. On the other hand, with or without the Initiative, the only sure way to protect the unaccredited clinics which now perform abortions in California would be for the Legislature to repeal the accredited hospital provision of the Act.

found unconstitutional because this language was deemed so imprecise and ambiguous that it violated due process, regardless of what other constitutional rights were involved. Because other constitutional principles, like the due process protection from vague criminal statutes, were found to invalidate the previous criminal statutes against abortion, any new statute will face the same constitutional problems, which extend far beyond the right to privacy. It is, in fact, difficult to imagine a new criminal statute which could pass constitutional muster under these principles.

Because new legislation criminalizing abortion would trample on numerous other constitutional principles besides the right to privacy, the argument which Mr. Van de Kamp has made that the Initiative would infringe on reproductive rights could only come into play in remote and far-fetched circumstances. But even if all the above contingencies, in fact, occurred, and new legislation was somehow devised which could pass other constitutional tests, the Initiative still would not operate to authorize a statute criminalizing abortion.

4. Meaning and Intent of The Initiative.

Any constitutional analysis of the Initiative must begin with its meaning and intent. The Initiative refers only to the rights of criminal defendants in their status as defendants. The express purpose of the Initiative is to limit rights of criminal defendants and to protect victims of crime. In limiting the rights of criminal defendants in criminal cases to equal protection, due process, right to counsel, speedy trial, and protection from unreasonable searches, self-incrimination, double jeopardy, and cruel and unusual punishment, the Initiative does not intend to limit these rights generally. For those citizens other than criminal defendants in criminal cases, the California Constitution would continue to provide that "rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Article I, Section 24.

The reference in the Initiative to privacy was not intended to refer to reproductive choice. The issue of the right to privacy of a criminal defendant has arisen mainly in the context of contentions by prisoners that they should be free from surveillance during confinement. It has been held that, while a prisoner has the right to meet with his lawyer in private, he or she has no right to meet with relatives, friends or other prisoners without surveillance. See, for example, White v. Davis,

13 Cal. 3d 757 (1975), DeLancie v. Superior Court, 31 Cal. 3d 865 (1982) and People v. Crowson, 33 Cal. 3d 623 (1983). The U. S. Constitution has also been interpreted in Lanza v. New York, 370 U. S. 139 (1962) to mean that there is no reasonable expectation of privacy in places of confinement.

The intent of the Initiative is expressed in its Preamble. There is nothing in the Preamble or the Initiative which would indicate that its intent was to affect women's rights to have an abortion. The Preamble reads:

> The goals of the people in enacting this measure are to restore balance to our criminal justice system, to create a system in which justice is swift and fair, to create a system in which violent criminals receive just punishment, in which crime victims and witnesses are treated with care and respect, and in which society, as a whole, can be free from the fear of crime in our homes, neighborhoods and schools.

Neither does the Initiative state any new general definitions of what is a "crime," who is a "criminal," or who is a "victim." Other parts of the Initiative change specific portions of the substantive law defining crimes, such as felony murder and torture, but there is absolutely no reference to abortion. Except in the specific cases of torture and felony murder, the focus of the Initiative is not to change the substantive definition of crimes, only to restrict the procedural rights of criminal defendants.

As noted at the outset, the right to privacy under the U. S. Constitution exists only by judicial interpretation. It is an "unenumerated" right. The right to privacy under the California Constitution is explicit. Even if the U. S. Supreme Court reconstrues and narrows the scope of the implicit right to privacy in the U. S. Constitution, the express provision protecting privacy would remain in the California Constitution, even after the passage of the Initiative. The privacy provision and the Initiative will have to be balanced and harmonized.

In general the courts should interpret an express constitutional protection of privacy like California's to have stronger and broader force than an implicit or "unenumerated" right. Accordingly, the express protection of privacy in the

California Constitution should be construed to have the broadest independent vigor in areas not specifically limited by the Initiative, and the restrictions on privacy contemplated in the Initiative must be construed to be limited to the specific area the Initiative addresses, i.e., criminal procedure.

5. To Interpret The Initiative To Give The Legislature The Power to Criminalize Abortion Would Produce Absurd Results.

One well-recognized principle of constitutional law is that constitutions should be interpreted in such a way to avoid absurd results. To interpret the Initiative in the way Mr. Van de Kamp suggests would create gross inconsistencies between criminal rights and civil rights.

Some constitutional rights, including the right to privacy, exist separately and independently from the rights of a criminal defendant. Such civil rights are not subject to enlargement or limitation by the bringing of a criminal case. The right to equal protection, for example, indeed protects the right of racial minorities to equal treatment under the criminal law, but it also protects racial minorities from segregated schools and housing. Like equal protection, the right to privacy exists in both the criminal and civil contexts. The Initiative clearly does not limit the latter.

The substantive right to reproductive choice does not depend on whether it happens to be raised by a criminal defendant in a criminal case. The right to privacy with respect to reproductive choice was found to exist independently as a civil right in The Committee To Defend Reproductive Rights v. Myers, 29 Cal. 3d 252 (1981), which held that a woman has a civil right to receive Medical payments for an abortion. Her civil right to an abortion could also presumably be raised to defeat an attempt by her ex-husband to prevent her from having an abortion. The woman's right to reproductive choice may also be raised as a defense in a criminal case by a doctor who has performed an abortion. In such a case, the right to privacy being raised would not be the personal right of a criminal defendant, as contemplated in the Initiative. For example, in People v. Belous the privacy right of the woman, who was not a criminal defendant, was raised successfully by the doctor who was the defendant. The Initiative would have no effect on the right of the doctor to raise this defense.

Because the Initiative limits the rights only of a criminal defendant and because the substantive right to reproductive choice would continue to exist in civil matters, it would be absurd to interpret the Initiative to allow the Legislature to criminalize abortion. If a woman could defend her right to receive Medical payments for an abortion, it would be ridiculous to say that she could be prosecuted for having the same abortion. Civil and criminal rights must stand or fall together. Because the civil right to Medical payments will continue to stand, freedom from criminal sanctions for the same conduct must also continue to stand. It would be equally ridiculous to have a system where the doctor who performed the abortion could raise the patient's privacy as a defense, but the patient could not. The Initiative should, accordingly, be interpreted to avoid such anomalies.

These anomalies, in fact, do not exist in the Initiative, which was intended to have no affect on the substantive right to reproductive choice. They are created only by the erroneous interpretation of the Initiative advanced by Mr. Van de Kamp.

6. If The Initiative Were Interpreted to Repeal The Right of Privacy With Respect to Reproductive Choice, It Would Effect An Implied Repeal of A Constitutional Right.

There is a strong presumption against implied repeal. The Initiative cannot, therefore, be construed to repeal by implication the privacy rights protecting reproductive freedom in Article I, Section 1 of the Constitution. Limitations on procedural rights cannot, for example, be construed to repeal underlying substantive rights. In Re Lance W., 37 Cal. 3d 873 at 886 (1985), construed Proposition 8 not to repeal by implication the substantive protection against unreasonable search and seizure. The Proposition invalidated only the "exclusionary" rule that the fruits of a search and seizure should be excluded from evidence, and the court refused to extend it to related substantive rights. The presumption against implied repeal is so strong that it can only be overcome if the two provisions are "irreconcilable, clearly repugnant and so inconsistent as to prevent their concurrent operation," Mayna v. Harkness, 60 Cal. 2d 579 at 588 (1963). An Initiative not even indirectly mentioning such a controversial subject as abortion should not be read by implication to have removed rights relating to that subject. Courts will interpret initiatives in such a way that they are

constitutional and not violative of the "repeal by implication" principle.

7. The Initiative, If Construed to Both Reform Criminal Procedure And Withdraw The Substantive Right To Abortion, Could Not Survive Review Under The "Single Subject" Rule.

An initiative may deal with only one subject. Cal. Constitution Article II, § 8(d); Planned Parenthood Affiliates v. Swoap, 173 Cal. App. 1187 (1987). Reform of criminal procedure and abortion are two extremely profound, but separate, subjects, and abortion is no way related to the express purpose of the Initiative. The purpose of the "single subject" rule is to give the voters a chance to vote on each important issue separately, so that they do not have to balance one important issue against another. If the Initiative was interpreted to encompass both criminal procedure and the right to reproductive choice, the voters would be deprived of this choice. Again courts will interpret initiatives in such a way that they do not violate the "single subject" rule.

8. Conclusion.

The above discussion demonstrates that there are numerous constitutional principles which protect reproductive choice in California. It is difficult to conceive of any new anti-abortion legislation that could pass muster under all of these principles. The argument that Mr. Van de Kamp has made, that the Initiative would impinge on reproductive choice, could thus not come up except in the most far-fetched circumstances.

If, however, a court were to consider this issue, it would be constrained to reject Mr. Van de Kamp's argument on the basis of the clear meaning and intent of the Initiative, the absurd results that Mr. Van de Kamp's interpretation would produce, the presumption against implied repeal, and the "single subject" rule.

It adds nothing to Mr. Van de Kamp's argument to say that a California court might adopt a mistaken interpretation of the Initiative. The legal system has numerous safeguards to prevent mistaken interpretations, including two levels of appellate courts. We should trust the courts of this state to apply the above legal principles correctly. They are well

recognized principles which the courts of this state would be unlikely to disregard.

Very truly yours,

George G. Weickhardt

GGW:jp
cc: Hadley Roff
Darry Sragow (via FAX)

PART 4

Written Testimony in Opposition to Initiative

California Attorneys for Criminal Justice CACJ

Senator Bill Lockyer
hair, Senate Judiciary Committee
tate Capitol - Room 2032
acramento, CA 95814

March 14, 1990

Dear Senator Lockyer

At the hearing on the "Crime Victims' Justice Reform Act" in December of last year, you requested more information regarding the potential cost of this initiative CACJ has obtained this information and asks that you include it as part of the written documentation of the hearing

Very truly yours,

Melissa K Nappan

Melissa K Nappan
Legislative Advocate

10551 Jefferson Boulevard
Culver City, CA 90232
Phone (213) 204 0502
Fax (213) 204 2438

I C Daniel Vencill declare

1 I declare that I am an economist with the following degrees an M A (1965) and a Ph D (1971) from Stanford University and a B A from the University of California Riverside Currently I am a Professor and Chair of the Department of Economics at San Francisco State University where I have been employed since 1974 Prior to my appointment at San Francisco state I was an Assistant Professor of Economics at the University of California Davis from 1967 to 1974 I also worked for such federal government agencies as the Federal Reserve Bank and the President's Council of Economic Advisors, in Washington, D C

I teach economic principles monetary theory and finance the graduate seminar on macroeconomics, and specialty electives such as the economics of crime and criminal justice In addition to my research and publications I have testified extensively as an expert witness in projecting economic losses and providing valuations of damages, in both California Superior Court and Federal District Court I am a member of several professional associations including the Western Economic Association International and the National Association of Forensic Economists

A copy of my Curriculum Vitae with a list of my publications cases and expert testimony, is attached hereto as Exhibit 1

2 I have read Proposition 115 and have given careful consideration to the fiscal impact of the proposition if enacted and implemented, on state and local governments in California In my professional opinion, the minimum net cost of this proposition

000369

will be in excess of $500 million, and probably far more based on my initial assessment of available empirical information published data, my own personal knowledge research and experience, and the informed opinions of individuals in the criminal justice sector of our state's economy My calculations allow for certain identified, offsetting cost savings to counties should the measure be adopted and implemented The basis for forming my opinions is fully detailed below in the Analysis together with appended data and information sources, as well as my own knowledge and experience and the other Declarations filed in support of this Petition for Writ of Mandate

ANALYSIS

3 A sample of fiscal budgets from California's 58 counties indicates that Proposition 115 will result in both cost savings and additional budgetary expenses A complete analysis would require more research time and resources However, on the basis of initial empirical evidence and statistical analysis, it is possible to conclude that the measure's cost impact on additional required staff, especially in Public Defender and District Attorney offices, far outweighs the cost savings for California taxpayers There is ample evidence to conclude, allowing for projected offset savings resulting from the proposition (e g in the form of streamlined hearings, additional "joined" felony cases, and court-conducted voir dire) that there will be significant net incremental cost

4 Reports from a sample of Public Defender offices show that Proposition 115 will undoubtedly increase the required number of felony attorneys by 100 percent It is conceivable that the

enactment of the proposition will require more than a doubling of attorneys together with the attendant increase in office space equipment investigators paralegals and legal secretaries This is because there is currently no slack or excess capacity in the system The cost estimates are provided by a sample which includes San Diego Sacramento Santa Cruz San Francisco and Alameda counties which I understand will be set forth in documents and declarations filed herewith Based on the reported range of increases in the budgets of these Public Defender offices I extrapolated to include all 58 counties using a fixed ratio based on the percentage of annual felony sentencing which each county accounted for For instance if San Diego had 6% of the total felony convictions with an increase of $10 million projected for its Public Defender felony attorney budget and Los Angeles had 42% (7 times the rate), then it is reasonable to project that Los Angeles would incur an additional $70 million in Public Defender staff costs if the proposition were implemented My calculations did not include any costs for additional office space or equipment.

5 Based on the sample of Public Defender office projections of additional budget needs under Proposition 115 I estimated that all Public Defender offices will require an additional $152 million per annum for additional attorneys and support staff.

6 I am informed that in California counties, the staffing proportion coefficient is 2 District Attorney felony attorneys to 1 Public Defender attorney That is, two prosecuting attorneys (together with complementary staff and indirect costs such as

office space) are hired by the District Attorney's office for each felony attorney hired by the corresponding Public Defender's office. Some counties reported a ratio as high as 4 1 Conservatively I have assumed a need to merely match staff and resources on the prosecutor side on a 1 1 ratio Also, I assumed the salaries are the same for both Public Defender and District Attorney staff Therefore the $152 million added costs to Public Defender budgets implies a $152 million cost increment on the District Attorney side in the 58 counties

7 In sum if Proposition 115 is enacted, the total added attorney and support staff required statewide to implement it are projected to be in excess of $300 million

COSTS OF COMPARATIVELY MORE FELONY DEFENDANTS WHO ARE CONVICTED AT TRIAL WITHOUT A PLEA OF GUILTY

8 If Proposition 115 is enacted, many cases which previously terminated by guilty plea are now expected to be tried due to the absence of a "reality check" and the opportunity afforded by the preliminary hearing procedure and associated discovery to disclose and test the evidence against the defendant Grand jury indictments would, under Proposition 115, eliminate the preliminary hearing process in which both sides test the strength of their respective cases, and confront actual witnesses and evidence

9. This forecast reduction in historical conviction rates via guilty pleas before trial implies substantial downstream increases in both court costs and prison costs as additional cases reach full trial stage in Superior Courts, and longer sentences

are imposed for convictions following trial than would be the case with a plea of guilty prior to trial

10 Attached as Exhibit 2 is a true and correct copy of California Superior Courts Table 16 published by the Judicial Council of California in its Annual Data Reference volume for 1988-89 Table 16 indicates there were 113 386 felony convictions in California in the 1988-89 fiscal year Of these 107 525 individuals were convicted before trial on a plea of guilty 1 686 persons were convicted after court trial and 4 175 were convicted after jury trial for a total of 5 861 convicted in trials Except where otherwise indicated, I developed the projections below utilizing these data

11 Approximately 94 8% of all cases are resolved by entering a guilty plea prior to trial (but generally after the preliminary hearing under current California criminal justice system procedures)

12 I understand that the criminal procedures that Proposition 115 would impose on California trial courts, such as the absence of post-indictment preliminary hearings are based on the procedures now used in the federal courts In the streamlined" federal court system, only 84 81% plead guilty prior to trial This figure was determined on the basis of Exhibit 3 attached hereto, which is a data compilation prepared by the Administrative Office, U S Courts Criminal Branch, Statistics and Reports Division Washington, D C Thus, assuming that if Proposition 115 passes, the guilty plea rate in the state court system will approximate that in the federal court system This would mean that an additional 10% of cases now resolved by a

guilt plea would instead proceed to a trial thus incurring more costs to the state At the currently observed felony conviction rates shown in Exhibit 2 approximately 11,147 extra trials would result

13 The estimate of 11,147 extra trials is very conservative because the data presented in Exhibit 2 refer only to convictions, not trials They do not include the number of additional felony trials which would result in dismissals or acquittals

14 In California the average cost per case-related minute (judge plus indirect court costs) is $7 5223 or $2,588 per case-related day This data is taken from Table A-3 p 73, Judicial Council of California 1989 Annual Report Vol I, a true and correct copy of which is attached as Exhibit 4

15 Applying this average cost factor to the case rate we currently have and the additional trials that would result under Proposition 115 (as noted in paragraphs 10 and 12 above) and assuming an average trial of 5 days for felony cases, the resulting added cost to the California criminal justice system is

11 147 more cases x 5 = 55,735 added case days

x $2 588 per case-related day

= $144,242,000

PPOPOSITION 115 IMPACT ON CALIFORNIA PRISON COSTS

16 Given the forecast additional 11,147 convictions after Superior Court trials per annum, it is feasible to estimate the incremental cost burden to the California Department of Corrections (CDC) based on the fact that according to empir

studies and experience sentences following trial have greater average length (I assumed 8 to 12 months more) than those sentences imposed on felony defendants who plead guilty prior to trial (which under the current system saves the State the cost of court time)

17 Exhibit 5 attached hereto is a true and correct copy of an article entitled 'California Prisons " authored by the Legislative Analyst and published in The 1989-90 Budget Perspectives and Issues which states at page 210 that the CDC s 1988-89 fiscal year per inmate average operating cost was $19 355 Applying this figure the range of additional annual costs under Proposition 115 is estimated to be $172,600,148 to $215 750 185

18 Note that the figures of $173 to $215 million do not include the longer sentences for persons convicted of crimes that are classified as "more serious" under Proposition 115 As the State Legislative Analyst implies, these costs which I have not yet estimated may indeed be "significant "

ALLOWANCE FOR COST SAVINGS TO THE CRIMINAL JUSTICE SYSTEM UNDEP PPOPOSITION 115

19 Some significant cost savings and efficiencies clearly would result from the implementation of Proposition 115 These must be included in the analysis to obtain a fair and proper benefit-cost analysis and weight the total positive and negative fiscal impacts of the measure in order to provide a net system cost Again we need to examine the opportunity cost of the measure -- that is, what are the tradeoffs and what must be sacrificed in terms of alternative uses of the funds required by this proposition

20 There will be possible savings gained by the elimination of the preliminary hearing process To be safe I made the conservative assumption that there are now 100 000 cases with preliminary hearings I ignored the extra costs entailed by the approximately 11,000 additional trial setting conferences implied by Proposition 115

21 It is estimated that on average elimination of the need of testimony from percipient witnesses in preliminary hearings would save 45 minutes per case This results in the following budget savings

100 000 preliminary hearings
× 45 court-related minutes
= 4,500,000 judge/court minutes

= 75 000 judge/court hours saved
× $ 7 5223 cost per case-related minute
= $33,850 350 cost savings per year

22 Next, I forecast the cost savings due to a significant reduction in the voir dire process Assume that on average one-half day is saved per felony trial for all 17,000 trials This gives the following result:

17,000 trials
× 180 minutes court-time saved per trial
= 3,060,000 minutes saved per year

× $ 7 5223 cost per case-related minute
= $23,018 238 costs savings per year

23 Finally, I provide the budgetary savings estimate which will flow from the consolidation of trials In my judgment, this will be of minor overall significance in comparison with other provisions already estimated above

Assume that 1% of all trials will be consolidated if Proposition 115 passes. That implies at currently observed rates

	170	fewer trials per year
×	5	average days per felony trial in California
=	850	trial days saved by the system
×	$ 2 588	cost per case-related day
=	$ 2 199 800	total cost savings per year

24. This projection assumes there is currently no slack in the judicial system. According to the 1989 Judicial Council Annual Report, the indication is exactly the opposite, namely, the system is operating in excess of its efficient capacity, and the implementation of Proposition 115 will exacerbate the existing situation because the court/judge time saved under one provision will be cancelled by the increase in court judge time required under other provisions.

25. I prepared the following two tables to summarize most of the calculations referred to above.

TABLE 1 SUMMARY

Additional Costs to PD Offices	$152 Million
Additional Costs to DA Offices	$152 Million
Increased Cost of Trials	$144 Million
Increased Prison Costs	$173-$215 Million
Subtotal	$621 Million - $663 Million
Less Cost Saving Offset	
Preliminary Hearing Elimination	$33 9 Million
Voir Dire Streamline	23 0 Million
Consolidation of Trials	2 2 Million
Subtotal	$59 1 Million
Total Projected Net Cost based on above factors	$561 9 Million

TABLE 2

COMPARATIVE DATA AND CALCULATIONS
FEDERAL COURTS V STATE COURTS CONVICTIONS AT TRIAL
IN CONTRAST TO CONVICTIONS BY GUILTY PLEA PRIOR TO TRIAL

1988-89 FY
[SOURCE EXHIBIT 2 CALIFORNIA SUPERIOR COURTS TABLE 16]

Total Felony Convictions after Jury Trial	4 175
Total Felony Convictions after Court Trial without Jury	1 686
Subtotal	5 861
Total Felony Convictions Including Guilty Please	113 386
15% of 113 386	17 008
less	5 861
	11,147
Percent Convictions at Trial (Proportion of Convictions not achieved prior to trial) for California	5 169%
Percent Convictions at Pre-Trial Stage (Proportion of convictions achieved prior to trial)	94 831%
Comparable Rate in the Federal Judicial System	84 81%
Percent convictions at Trial (Proportion of Convictions not achieved prior to trial) for Federal Courts	15 19%
Difference between two Rates (15 19% - 5 169%)	10 02%

Result If Proposition 115 passes approximately 10% more felony convictions will be achieved by trial as opposed to a conviction by a pretrial guilty plea

I declare under penalty of perjur, that the foregoing is true and correct and that this Declaration is executed this 2nd da. of March 1990 in Berkeley California.

C Daniel Vencill Ph D

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MEMORANDUM

To Senator Bill Lockyer

From David Nagler

Date November 9, 1989

Re Enclosed Paper on "Crime Victims Justice Reform Act"

Glen Mowrer, Chief Public Defender for the County of Santa Barbara, authored the enclosed guest editorial currently being run in newspapers throughout California. Glen is a member of the Board of Directors of the California Public Defenders Association, a client of this firm.

As you well know, petitions are currently circulating to qualify the Crime Victims Justice Reform Act. This initiative, if enacted, would make significant changes in both penalties and procedures in criminal law in California. In the eyes of the public defenders, defendants' rights would be dangerously curtailed while penalties would be increased as a means of retribution rather than public safety.

Glen Mowrer's article describes but one of the significant problems arising out of the hidden effect of the proposed initiative. I thought you might be interested in reading this.

I would be more than willing to provide additional information if you would like.

cc: Glen Mowrer

Enclosure

"CRIME VICTIM'S JUSTICE REFORM ACT"

PROMISES BIG BUCKS FOR DEFENSE LAWYERS

by

Glen Mowrer

Prosecutors around California have come out strongly in support of the "Crime Victim's Justice Reform Act of 1990," an initiative which they claim will speed criminal trials and protect victims and witnesses in criminal cases

Ironically, they may find an ally in defense lawyers who could be inclined to support their courtroom adversaries in the passage of this multi-part initiative because of one provision which has the potential to reduce defense attorney's workloads while adding millions of dollars yearly to their income

Like all complicated initiatives, this one contains some "sleeper clauses" which have not been considered, are not being discussed, and which, if adopted could have impact well beyond what the public is being told

For example, only recently did the public learn what proponents of the initiative knew all along, that passage in its current form could revive California anti-abortion laws

Another overlooked section of the initiative also seems destined to have an impact far greater than advocates acknowledge Buried in the proposal is language adding a Penal Code section which would require assigned counsel in criminal cases to guarantee, at the time they are appointed

to a case, that they will be ready to try that case within minimum statutory times (often as short as 10 days)

If passed, this law will specify that a court may not continue a case beyond these minimum times unless the judge finds that the attorney could not get ready for the hearing even if he or she did nothing else in the interim except prepare the case Problems created by the attorney's other business are not to be considered cause for a continuance

To enforce this rule, the initiative creates dire consequences If the lawyer is unable to proceed the court may hold the attorney in contempt, may fine the attorney and may refuse to pay the attorney for the work already done on the case

Probably to non-attorneys such language sounds laudable but in practice what it creates may be better titled the "Criminal Defense Lawyer's Full Employment Act of 1989 "

Consider that well over 90% of felony defendants are indigent and unable to hire their own attorney, therefore qualifying for the appointment of counsel at public expense In addition, hundreds of thousands of indigent misdemeanor defendants are given assigned counsel in California every year

In most California counties the bulk of this indigent representation is provided by a public defender system This system is universally acknowledged to be the least expensive and most efficient way of meeting the state's

constitutional mandate to provide effective representation to the criminally accused

Public defender systems are able to do this for many reasons, including specialization, training, dedication and hard work However, as any observer can attest, a major part of their efficiency comes from handling large caseloads

Generally, these large caseloads can be undertaken because participants in the system know that not every case will be tried An attorney representing indigents counts on a great percentage of her or his caseload settling without trial Up to now this was acceptable, even though occasionally cases backed up when the lawyer did go to trial

Under the initiative, however, appointed attorneys will no longer be able to accept these traditional heavy loads They will know that should they be otherwise engaged when one of their cases comes up for hearing they may go unpaid, they may be fined and they may be held in contempt of court

This means that each attorney will be able to take only as many cases as can be handled if every case is litigated to its fullest In other words, a lawyer may not accept more than one case if that case potentially requires all of that lawyer's time Deputy public defenders accustomed to open caseloads of several hundred will be restricted to 10 or 20 To carry the load abandoned by the public defenders, courts will be required to find huge numbers of private attorneys to appoint to these cases

More importantly to the taxpayers, the efficiency created by the present volume practice will be lost Attorneys will expect to be paid more for each case so that they maintain their income, pay their bills and keep open their offices Failure to pay an adequate rate will result in these attorneys refusing to accept appointed cases at all If lawyers cannot be found cases will be dismissed

How much additional cost will result from this scenario is unclear In 1987-88 California counties paid $206,716,885 to assigned counsel in criminal cases If this initiative is adopted and is strictly enforced the best we can expect in the future is that this payment will cover less than 25% of the cost of assigned counsel Thus it seems reasonable that the increase in the cost to the taxpayers of paying for indigent representation in California could be on the order of $600,000,000 each year, none of which is provided by the initiative To county governments currently reeling from Proposition 4 and Proposition 13 limits, funding this expense could be the final impossible demand

The bottom line on the "Crime Victim's Justice Reform Act of 1990" is that it attempts to do too much Whether or not intended, passage of this proposal could be amazingly expensive, surprisingly destructive and essentially counterproductive

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THE CRIME VICTIMS JUSTICE REFORM ACT OF 1989
AN ANALYSIS

Office of the Public Defender
City and County of San Francisco
Research Unit

BACKGROUND HISTORY OF THE INITIATIVE

The original Crime Victims Justice Reform Act of 1988 was drafted and sponsored by the California District Attorneys' Association[1] It was subsequently withdrawn

A "new" initiative, virtually identical to the 1988 one, is currently being circulated, with the stated aim of placing it on the June 1990 ballot The three leading gubernatorial candidates have taken positions Senator Pete Wilson serves as honorary chairman of the initiative campaign[2] and former Mayor Diane Feinstein supports it[3] Attorney General Van de Kamp has stated that he is prepared to support it if the initiative's backers remove the portion restricting criminal defendants' rights to privacy[4]

THE INITIATIVE SUMMARY AND ANALYSIS[5]

ELIMINATION OF THE POST-INDICTMENT PRELIMINARY HEARING

By adding section 14 1 to Article I of the state constitution, the initiative eliminates the right to a post-indictment preliminary hearing This right was granted to indicted defendants by the California Supreme Court in Hawkins v Superior Court (1978) 22 Cal 3d 584, on the grounds that its denial constituted a violation of equal protection under article I, section 7 of the California Constitution The Court declined to reach the issue whether it also violated equal protection rights under the federal constitution, but made the following rather telling comment

> For the reasons stated the denial of a postindictment preliminary hearing deprives the defendant of "such fundamental rights as counsel, confrontation, the right to appear in person, the right to a hearing before a judicial officer, and the right to be free from unwarranted prosecution These guarantees are expressly or impliedly grounded in both the state and federal Constitutions and must by any test be deemed fundamental'" (cit om , emphasis added) (Id at 593)

The United States Supreme Court has held that defendants do not have the right to preliminary hearings (see Gerstein v Pugh (1975) 420 U S 103, 95 S Ct 854) If the state conducts such hearings, they are a "critical stage" of the prosecution, and counsel must be provided (Coleman v Alabama (1970) 399 U S 1, 90 S Ct 1999) The court has not approved a system where some defendants may be denied hearings while some receive them

IMPACT

Prosecutors may choose to proceed by indictment in many more cases, although in 1975, before Hawkins, only 3 5% of cases prosecuted in San Francisco proceeded by indictment[6] If the pattern continued after the initiative, then the savings to the criminal justice system would be minimal

Those defendants prosecuted by indictment would be denied the right to appear and confront witnesses, the right to counsel, and the right to present a defense As Justice Mosk stated in Hawkins,

> The prosecuting attorney is typically in complete control of the total process in the grand jury room he calls the witnesses, interprets the evidence, states and applies the law, and advises the grand jury on whether a crime has been committed (cit om) grand jurors virtually always assent to the recommendations of the prosecuting attorney, a fact borne out by available statistical and survey data (See Morse, A Survey of the Grand Jury System (1931) 10 Ore L Rev 101, 153-154, other cit om) Indeed the fiction of grand jury independence is perhaps best demonstrated by the following fact to which the parties herein have stipulated between January 1, 1974, and June 30, 1977, 235 cases were presented to the San Francisco Grand Jury and indictments were returned in all 235 (Id at 590, emphasis added)

In short, depending upon the whim of the prosecutor, either a small number or a very large number of defendants will be denied the right to a preliminary hearing before a neutral magistrate

This may well result in less bargained dispositions and consequently, a greater

number of jury trials The preliminary hearing is currently used (by both sides) as a device for testing the strength of the case Without an opportunity for seeing and cross-examining the witnesses, the attorneys will find it difficult to formulate and consider plea offers

ELIMINATION OF RIGHTS GROUNDED IN THE STATE CONSTITUTION

The initiative amends section 24 of Article I of the Constitution to forbid courts from affording greater rights to criminal defendants (and minors prosecuted under the juvenile law) under the state constitution than those granted by the federal constitution

The rights affected are

- the right to equal protection,
- the right to due process of law,
- the right to assistance of counsel,
- the right to be personally present with counsel,
- the right to speedy trial,
- the right to compel the attendance of witnesses,
- the right to confront witnesses,
- the right against unlawful searches and seizures,[7]
- the right to privacy,
- the right not to be placed twice in jeopardy,
- the right against cruel and unusual punishment

IMPACT

The impact is enormous Scores of cases that have been precedent in California for years rest on independent state grounds[8] The confusion that followed the passage of Proposition 8, where for years no practitioner could really say what the law on search and seizure was with any certainty, would be repeated many times over

The final result would be a diminution in the rights California traditionally granted its citizens charged with crimes

In addition, the amendment is actually more than a "Proposition 8" for rights other than search and seizure Proposition 8 only limited the right to seek exclusion of evidence in a criminal proceeding

as a sanction, it did not affect the right itself This initiative affects the rights themselves

One question immediately raised is when does a suspect become a defendant to be accorded lesser rights? After an officer believes there is probable cause, or after charging, or after indictment? The poor drafting of this provision may raise questions of federal due process and equal protection

EFFECT ON ABORTION

This possible impact is treated separately because it has aroused the most controversy A number of authorities believe that abortion would be criminalized in California if the United States Supreme Court overrules Roe v Wade[9]

California criminalizes the killing of a fetus (Penal Code section 187(a)), but exempts abortions that comply with the Therapeutic Abortion Act (Health and Safety Code section 25950 et seq), abortions done to save the life of the mother, and abortions solicited by the mother of the fetus (Penal Code section 187(b))

These limitations are more restrictive than those contained in Wade[10], and therefore are not currently in force But if Wade is overruled, which appears to be only a matter of time[11], the law would return to the interpretation of the Therapeutic Abortion Act contained in People v Barksdale (1972) 8 Cal 3d 320, 105 Cal Rptr 1[12] In short, that interpretation upheld only the requirements that abortions be performed by doctors in hospitals, and that abortions after the twentieth week were prohibited except to save the life of the mother The other provisions were invalidated on vagueness grounds

Subsequent decisions (note that Barksdale pre-dates Wade), hold that the killing of a fetus before it becomes viable is not murder (see People v Smith (1976) 59 Cal App 3d 751, People v Hamilton (1989) _____ Cal 3d _____, 259 Cal Rptr 701) These decisions rest upon Wade (Smith, supra at 757)

On the other hand, the California Supreme Court, in Committee to Defend Reproductive Rights v Myers (1981) 29 Cal 3d 252, 172 Cal Rptr 866 recognized an independent right to procreative choice under the

California Constitution, Article I, section 1 (the right to privacy) (at 263)

Thus, if Wade is overruled and independent state constitutional rights in criminal cases are lost, abortion would become homicide, subject only to whatever new rules the United States Supreme Court might devise, and subject to the remaining provisions of the Therapeutic Abortion Act

In addition, other statutes currently being challenged on state privacy grounds, such as the right of minors to obtain abortions (see e.g , American Academy of Pediatrics v Van de Kamp (Nov 1989) ____ Cal App 3d ____, 263 Cal Rptr 46) would be affected, since the challenges rest exclusively upon the state right to privacy. If the state right to privacy did not exist for criminal defendants, then doctors providing abortions for minors could be prosecuted

Proponents of the Initiative claim that they did not intend to affect abortion rights Yet is difficult to conceive how a state can eliminate a constitutional right for certain defendants and not for others Either the right to privacy exists or it does not It cannot be said to exist for doctors charged with abortion and not to exist for persons charged with burglary

SPEEDY TRIAL AND CONTINUANCES

The initiative is widely known as "The Speedy Trial Act"[13] The "speedy trial" provisions begin with an amendment to the state constitution which adds Section 29 to Article I and grants "the People" a right to due process of law and to a speedy and public trial

IMPACT

This seemingly innocuous sentence has meaning, since arguments have been made in the past that the State did not possess such rights, heretofore thought to be simply individual rights The anomalous aspect of this provision is that "the people" will have greater rights (under the state constitution) than an individual person (who will only have federal constitutional rights) Granting the State greater rights than the individual appears to run somewhat contrary to the original intent of the drafters

THE "ONE COUNSEL-ONE CASE" RULE

Penal Code section 987 05 requires ("shall") that in appointing counsel (whether privately appointed or public defender), the court appoint only counsel that represents that "he or she will be ready to proceed with the preliminary hearing or trial" within the relevant time provisions One exception exists, for unusual cases where the court finds that no counsel could be prepared, assuming he or she were to "begin preparing forthwith and continue to make diligent and constant efforts to be ready" If the court finds that additional time is necessary, it is required to set a "reasonable time period for preparation" Important language follows

> In making this determination, the court shall not consider counsel's convenience, counsel's calendar conflicts, or counsel's other business

If the attorney makes the required representation, and subsequently is not ready "without good cause", the court may relieve the attorney and may impose sanctions including fines, contempt and denial of payment

IMPACT

In actual practice, this will be the most important provision in the initiative, and yet it has received the least amount of debate In the opinion of this writer[14], no public defender or reasonably busy private practitioner will be able to make the required representation even on routine cases, much less complicated ones Appointed counsel and public defenders currently juggle very large caseloads Delays due to calendar conflicts or "other business" are common For a public defender to make such a representation, in the face of the threatened punishments, would be folly of the highest degree

The result, without any doubt, would be to create a situation, the day after the passage of the initiative, where no public defender in the state would be able to make the required representation, and no court could appoint any but the newest graduate of the Bar, who had no other cases that could possibly interfere The extraordinarily rigid language permits no other interpretation

This provision is apparently a badly-drafted, "knee-jerk" response to the unusual delays encountered in one case[15], and is a perfect example of throwing the baby out with the bath water Courts currently possess the power to remove counsel who delays a case without good cause This statute is completely unnecessary, and will create a crisis in judicial resources unparalleled in the history of California

The provision applies only to poor defendants who require private counsel Rich defendants would still be able to retain busy counsel who would not have to make any representations, and who could operate subject only to the courts' discretion Serious questions of equal protection arise here

FELONY TRIAL SETTINGS

Penal Code section 1049 5 is added to the Penal Code to require courts to set felony trials within 60 days of arraignment in the Superior Court, and to state on the record reasons for continuing a case pursuant to Penal Code section 1050

IMPACT

Existing law[16] requires trials to be set within 60 days of the filing of the information in the Superior Court, which sometimes pre-dates the arraignment, and mandates dismissal for failure to try a defendant within that time period The new section creates a conflict that may result in dismissals for defendants[17] In addition, Penal Code section 1050(f) already requires a statement of reasons for granting a continuance

CONTINUANCE OF CO-DEFENDANTS' CASES

The initiative amends Penal Code section 1050 1 to provide that the continuance of one jointly charged defendant's case automatically supplies good cause for the continuance of the cases of all the other jointly charged co-defendants, even if they are in custody and the defendant obtaining the continuance is not

IMPACT

Minor participants jointly charged with more culpable co-defendants (i e , white collar fraud

cases, or cases where only defendant is charged with a capital offense) will spend sometimes lengthy periods in jail while the chief defendant, who may be out of custody, prepares.

EXPEDITED WRITS IN CONTINUANCE MATTERS

Penal Code section 1511 provides for an expedited pretrial writ addressed directly to the Court of Appeal to challenge the continuance of any matter

IMPACT

Substantively, this measure is harmless In practice, it will disrupt the appellate courts and delay other cases In addition, it will vastly increase the Court of Appeal's caseload, since it permits direct writ petitions to the Court of Appeal even in Municipal Court cases ("the hearing of any matter")

PRELIMINARY HEARINGS - LIMITATION ON DEFENSE EVIDENCE

The defense is not permitted to present evidence unless the magistrate finds that it establishes an affirmative defense, negates an element, or impeaches prosecution testimony (Penal Code section 866(a)) The preliminary hearing may not be used for discovery (section 866(b))

IMPACT

When viewed together with the elimination of the post-indictment preliminary hearing, the admission of hearsay and the delays in discovery (see infra), this provision constitutes a further erosion of the hearing as a means of filtering out felonies The net effect has to be an increase in the Superior Court caseload due to a greater number of trials

PRELIMINARY HEARINGS - REMEDY FOR DELAY

Penal Code section 871.6 is added to grant the parties an expedited writ proceeding to the Superior Court to challenge a magistrate's continuance of a preliminary hearing. The petition has precedence over that court's other business

IMPACT

No adverse impact upon parties, but will increase the Superior Court's caseload and delay other matters.

JOINDER OF ACTIONS

In Article I, section 30(a), the initiative removes state constitutional impediments to the joining of unrelated charges against a defendant in one accusatory pleading

New Penal Code section 954 1 provides that "cross-admissibility" of different offenses is not a condition precedent to joinder of those offenses on the same accusatory pleading

IMPACT

In Williams v Superior Court (1984) 36 Cal 3d 441, the Court ruled that, before permitting separate offenses to be joined on the same pleading, trial courts had to consider whether the offenses would have been admissible at separate trials in any event This decision recognized the fact that joined offenses have an extremely prejudicial effect on juries, and in practice almost guarantee convictions. This provision abrogates the underlying rationale of Williams and will probably result in more defendants being forced to accept plea bargains

HEARSAY AT PRELIMINARY HEARINGS

State constitutional arguments against the admission of hearsay at preliminary hearings are removed by the addition of section 30(b) to Article I

Section 1203 1 is added to the Evidence Code to permit hearsay at preliminary hearings, as provided for in Penal Code section 872

Section 872(b) of the Penal Code is amended to permit hearsay evidence in support of a finding at a preliminary hearing, but only if the hearsay emanates from a police officer who has more than five years' experience or who has completed a training course that includes courses in investigation and reporting of cases and testifying at preliminary hearings

IMPACT

These provisions work a limited abrogation of Mills v Superior Court (1986) 42 Cal 3d 951, 232 Cal Rptr 141 [18]

Traditionally, and in practical terms, the preliminary hearing provides the first opportunity for the defense attorney and the defendant to see the witnesses and hear their testimony, and to get a feel for the strength of the prosecution's case This experience results in many negotiated pleas following the hearing Hearing the police report repeated by an officer will not give the attorney any idea of the true strength of the prosecution case, since the witness' demeanor is almost as important as the testimony It will be difficult for a defense attorney who hears the case from a police officer to offer intelligent advice regarding settlement to the client The result is bound to result in more trials The advantage to crime victims in avoiding one appearance at the preliminary hearing may be outweighed by having to appear at a trial before a jury

Denying criminal defendants the right of confrontation in certain cases only may violate the federal constitutional right of due process (see footnote above) and equal protection[19] It will be difficult to justify the denial of confrontation to a defendant arrested by a police officer who has been on the force for five years and a day while granting it to a similarly situated accused arrested by an officer who has worked only four years and 364 days

RECIPROCAL DISCOVERY

California currently provides for discovery of evidence in the hands of the prosecution or its agents, but denies reciprocal discovery to the prosecution This right is grounded upon interpretations of the California Constitution[20] The addition of section 30(c) to Article I washes away those grounds, and leaves the ground open for prosecutorial discovery statutes

LIMITATIONS ON DEFENSE DISCOVERY

A number of new provisions (beginning with new Penal Code section 1054) codify discovery in criminal cases, which heretofore has largely been a creature of caselaw The net result is a considerable limitation on discovery For example

• Prosecutors will be required to reveal only that evidence they know to be in the possession of investigating agencies This makes it easy for a prosecutor to withhold discovery by simply not asking the police if they have additional material

• Only felony convictions of material witnesses "whose credibility is likely to be critical to the outcome of the trial" must be disclosed Under current law, defendants are entitled to information regarding other types of offenses, such as prior assaults when relevant, and all witnesses are included

• Only statements of witnesses whom the prosecutor intends to call at trial need be disclosed Current law provides for the disclosure of all statements

• Defense attorneys are not permitted to disclose the addresses or telephone numbers of witnesses to their own clients without a court order

• The new provisions only require "disclosure" There is no requirement that the parties provide copies of the material[21]

• The defendant may not obtain discovery from any other investigating agency or agent of the prosecution by any other means Currently, defendants may obtain material from other agencies via subpoenas duces tecum

IMPACT

The prosecutor will be able to control the defendant's access to important information While "exculpatory evidence" must still be turned over (since this is a federal constitutional requirement), evidence that is not clearly exculpatory will now be concealable

PROSECUTORIAL DISCOVERY

New Penal Code section 1054 3 requires, for the first time in California, that the defendant disclose information to the prosecution

• The name and addresses of all witnesses he/she intends to call at trial, and all statements made by those witnesses Reports by experts are included

• A list of all real evidence the defendant intends to offer

LIMITATION ON REMEDIES FOR NON-DISCLOSURE

The parties are required to seek discovery informally, and may not request a court order until 15 days have passed since the request Remedies for non-disclosure are provided, including contempt and suppression of evidence

IMPACT

The fifteen-day delay in this section means that in many cases the parties will be denied discovery Preliminary hearings must proceed within 10 days of arraignment The fifteen-day remedy would come too late, and will effectively preclude any enforcement of discovery requests It is doubtful whether suppression could be used as a punishment for non-disclosure, in light of Proposition 8 ("all relevant evidence is admissible") Furthermore, the remedy of dismissal, the most powerful tool, is only available when required by the prosecution, and prohibition of testimony is only permitted after "all other sanctions" have been exhausted

Penal Code section 1054 7 requires disclosure 30 days prior to trial without a showing of good cause Information received after the 30-day period must be disclosed immediately, absent good cause "Good cause" is defined as threats to safety of a victim or witness, possible loss or destruction of evidence, "or possible compromise of other investigations by law enforcement" Upon a showing of such good cause, discovery may be delayed, restricted, or even denied

IMPACT

The 30-day requirement makes no sense in the case of in-custody misdemeanors, which must proceed to trial within 30 days In practice, this means incarcerated misdemeanants will be denied timely discovery The "good cause" restriction can be used to deny a defendant the right to any discovery

DISCOVERY EXEMPTIONS

Penal Code section 1054 6 exempts from disclosure privileged material and work product

RESTRICTIONS ON DISCOVERY

The existing provision requiring the prosecutor to give defense counsel copies of the police report upon arraignment or within two days at the latest is removed from Penal Code section 859

IMPACT

In combination with the new discovery procedures instituted by the initiative, the deletion of this requirement means that defendants will be forced to proceed to preliminary hearing without even so much as a copy of the police report. This also will have a negative impact on dispositions before preliminary hearings, since no competent attorney can advise on the desirability of a disposition without even having seen the discovery

JURY VOIR DIRE

By repealing Code of Civil Procedure section 223, and re-enacting it, the initiative places the right to voir dire jurors squarely in the trial judge's hands The court "may permit" the parties to "supplement" its examination only upon a showing of good cause Examination of jurors "shall, where practicable", occur in the presence of the jurors Examination is permitted only insofar as it aids in the exercise of challenges for cause

IMPACT

In People v Williams (1981) 29 Cal 3d 392, the California Supreme Court ruled that questions relevant to the exercise of peremptory challenges must be permitted This decision would be abrogated by the new statute

The portion regarding the presence of other jurors during voir dire cancels the ruling in Hovey v Superior Court (1980) 28 Cal 3d 1, which provides for sequestered voir dire, especially during death penalty cases The introduction of the phrase, "where practicable" introduces considerable ambiguity, since the word is not defined

Sequestered voir dire is occasionally used in child molest and sexual assault cases, where jurors may be embarrassed by having to answer questions about their own personal experiences that might disable them from sitting as impartial jurors This provision would make it more difficult for jurors to obtain privacy in which to answer questions candidly

This provision may discourage trials, especially in sensitive cases where careful voir dire is essential

HOMICIDE AND DEATH PENALTY PROVISIONS

Penal Code section 189 adds kidnapping, train wrecking, sodomy (including consensual sodomy with one under the age of 18 and consensual sodomy in jail or prison), oral copulation and rape by instrument to the list of offenses in the perpetration of which a killing is first degree murder

Penal Code section 190 2 changes some of the requirements for special circumstances Most are codifications of current Supreme Court rulings (both federal and state) Significant changes include

-Killing a witness in a juvenile proceeding is added as a special circumstance

-Eliminates requirement that infliction of pain be proved in torture murders

-Expands the liability of accomplices to the limits of Tison v Arizona (1987) 107 S Ct 1676

-Extends the penalty of life without parole or 25-life for 16-18 year olds convicted of first degree murder with special circumstances

Judges will be prohibited from striking or dismissing special circumstances found true by a jury or admitted (new Penal Code section 1385 1)

IMPACT

This provision abrogates the decision in People v Williams (1981) 30 Cal 3d 470

NEW OFFENSES

Penal Code section 206 makes it a life term offense to torture someone, even if the person did not suffer pain, as long as great bodily injury is inflicted

IMPACT

Penal Code section 205 already punishes aggravated mayhem with life imprisonment This provision would extend such punishment to situations where great bodily injury was inflicted

AMENDMENT OF PROVISIONS

None of the provisions may be amended except by two-thirds vote of the legislature or by another initiative

COMMENTS AND OPINION

Proponents of the initiative may argue that prosecutors will not abuse the provisions, and will use their power fairly That may be, but the role of statutory analysis is to foresee all possible interpretations and uses of the provisions

Good prosecutors may not abuse these statutes But then again, good prosecutors do not need statutes to tell them what discovery they should give to a criminal defendant Statutes such as these are intended to control abuses, and assume that power granted will be exercised to its logical limits It is with those realities in mind that we must analyze the potential effect of this initiative

The initiative lumps together some provisions (extending eligibility for the death penalty, for example) that, while morally arguable, do not violate the constitutions, with others (such as the hearsay evidence at preliminary hearings provision) which are of doubtful validity, and yet others (the "one-counsel, one case" rule of Penal Code section 987 05) which are simply ridiculous and wasteful

This "lumping" presents two problems First, it makes the initiative difficult to understand and analyze This difficulty is exarcebated by the lack of organization of the document itself Second, it forces upon proponents, opponents and the public an "all-or-nothing" choice There is no way to choose just the good parts and drop the bad In order to obtain the benefits from the few provisions that might actually materially improve the lot of crime victims, the voters will have to swallow whole the provisions that will cause great expense, litigation, and unfairness

For public defenders, appointed counsel, and courts, the "one counsel-one case" rule will present an enormous problem No reasonably busy private practitioner, and certainly no public defender, will be able to make the required representation The average public defender has several trials on the calendar every week If sent out on one case, the attorney cannot try the other one Yet the provision very clearly states, with no exceptions, that calendar conflicts do not constitute an excuse No proponent of the Initiative has come out with an explanation of how this provision will work out in practice, but the only possible scenario is that the courts will have to appoint a lot more attorneys, or the counties will have to hire a lot more public defenders

These provisions should have been presented to the Legislature in an orderly manner, and exposed to the analysis and criticism of those learned in the law, instead of being thrust at the lay public, accompanied by blatant emotional appeals[22]

ENDNOTES

1 Source Uelmen, Gerald, "CACJ Foundation Special Report Proposed Ballot Initiative 'Crime Victims Justice Reform Act of 1988'" (CACJ Forum March/April 1988)

2 San Francisco Chronicle undated article

3. Ibid

4 Speech before the California District Attorneys' Association, August 1 1989

5 The provisions are analyzed in the order in which they first appear (see Appendix A of this document for the full text of the initiative)

6 Hawkins, supra at 606

7 The remedy of suppression for violations of this right have already been abrogated by Proposition 8

8 See e g People v Ramos (1984) 37 Cal 3d 136 (due process) People v Superior Court (Engert) (1982) 31 Cal 3d 797 (same), People v Ramirez (1979) 25 Cal 3d 260 (same), People v Hannon (1977) 19 Cal 3d 588 (speedy trial) White v Davis (1975) 13 Cal 3d 757 (privacy), People v Hood (1969) 1 Cal 3d 370 (double jeopardy) In re Lynch (1972) 8 Cal 3d 410 (cruel/unusual punishment)

9. 410 U S 113 93 S Ct 705

10 410 U S 113 93 S Ct 705, (1973) Under Roe, a state may not restrict a woman's decision undertaken with the advice of a physician to end a pregnancy during the first trimester The state may regulate second trimester abortions in ways reasonably related to maternal health (at p 164), and may restrict third trimester procedures, even to the extent of forbidding them except when necessary to preserve the life or health of the mother (at 165) The key element is viability the State is held to acquire a compelling interest in the life of the fetus only after it is viable Roe rests upon an interpretation of the rights derived from the federal Due Process Clause (Webster v Reproductive Health Services (1989) _____ U S _____ 109 S Ct 3040 3058

11 The plurality in Webster and Justice Scalia "would overrule Roe (the first silently the other explicitly" (Webster, supra at S Ct 3067, Blackmun, J dissenting)

12 The Therapeutic Abortion Act which is still on the books as originally passed, permits abortions only in a hospital, after approval by a committee of the medical staff of the hospital, and only if there is "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother", or the pregnancy resulted from rape or incest (Health and Safety Code section 25951) "Mental health" is defined as mental illness to the extent that the woman is dangerous to herself or others or is in need of supervision or restraint (Health and Safety Code section 25954) In Barksdale the California Supreme Court held that the "gravely impair" and "mental health" definitions were void for vagueness This ruling rested both upon the federal and state constitutions (Barksdale, supra at 332) This left only the prohibition against abortions after the twentieth week which the Court upheld with an exception for pregnancies which risked the life of the mother

13 Except among defense lawyers, where it is commonly known as "The prosecutor's wish list"

14 A deputy public defender with twelve years' experience currently a supervisor, and a Criminal Law Specialist

15 The "Nightstalker" case in southern California

16 Penal Code section 1382(b)

17 For instance if the defendant is arraigned two days after the information is filed this provision could result in a trial setting two days past Penal Code section 1382's sixty day limit This would result in a mandatory dismissal

18 Mills held that former Penal Code section 872(b) which permitted hearsay testimony under certain limited situations violated a defendant's due process rights under Article I section 15 of the California Constitution Although there is no indication in the decision to prevent its rationale from resting upon federal due process rights Justices Lucas, Panelli (and Grodin) dissented, and would have found the section constitutional

19 A point not presented by Mills

20 In re Misener (1985) 38 Cal 3d 543 213 Cal Rptr 569 Prudhomme v Superior Court (1970) 2 Cal 3d 320

21 C f Penal Code section 1430 deleted by this initiative which required the prosecution to "deliver to or make accessible for inspection and copying by the defendant " The change in wording should be construed to carry a change in intent

22 The California District Attorneys' Association has published photographs of grieving families gathered around gravesites and enlisted the families of Sharon Tate and Mickey Thompson

TEXT OF THE INITIATIVE

December 11, 1989

Analysis of Section 3, Crime Victims Reform Act, Limiting State Constitutional Rights of Criminal Defendants

By Gerald F Uelmen
Dean, Santa Clara University School of Law

I happen to believe that the criminal justice system is badly in need of reform Increasing public frustration with long delays and spiraling costs creates a receptive climate for dramatic change At first blush, the Crime Victims Justice Reform Act Initiative might seem responsive to these concerns But I believe that closer scrutiny will reveal that this proposal is ill-considered, poorly drafted and fraught with hidden costs and the prospects of making the situation worse rather than better

Unfortunately, there is a strong parallel here to our experience with the initiative adopted in 1982, Proposition 8 After seven years of experience, there is no longer even a serious debate as to whether Prop 8 was a success or a failure A convoluted path through the courts left great havoc in its wake, before all the inconsistencies were sorted out and the contradictions were reconciled Meanwhile, any meaningful reform was put on hold. The lesson of Prop. 8 strongly suggests that the initiative process is not the best way, and may well be the worst way to accomplish reform of the criminal justice system Two researchers who analyzed the impact of Prop 8 on plea bargaining for the Attorney General concluded that the only effect the

initiative had was to move plea bargaining to an earlier point in the process, when lawyers were not as well-prepared and public scrutiny was impossible They questioned "whether serious and well-meaning efforts at changing our system of justice and eventually reducing intolerably high rates of crime can succeed within such highly politicized environments. If the public comes to believe that ending plea bargaining and raising the penalties for certain offenders is all that is necessary to both improve justice and reduce crime, then innovative but delicate policies to accomplish those ends may never be implemented " (McCoy & Tillman, "Controlling Felony Plea Bargaining in California: The Impact of the 'Victim's Bill of Rights'," Calif. Dept. of Justice, Bureau of Criminal Statistics, Aug , 1986)

Before replanting the same seeds of frustration with yet another initiative, I think it's useful to subject this proposal to careful analysis, to see if any drafting flaws will create unanticipated effects, and to assess its real cost.

There are some key differences between Prop 8 and the 1990 initiative in terms of their impact on the state constitution Prop 8 left the substantive rights defined by the state constitution and interpreted by our courts basically intact. All it changed was the remedy for their violation, by precluding the suppression of evidence. Thus, the California prohibition of unreasonable searches and seizures still prohibits searches that the federal constitution permits; it's just that those prohibitions won't be enforced by exclusionary rules.

The 1990 initiative would redefine the rights themselves, providing that criminal defendants have no greater rights than under the U S. constitution This is going to raise some very difficult questions of interpretation Many of the rights defined by the consitution have greatest application in the investigatory phase, before one has become a "criminal defendant." Presumably, greater rights under the California constitution are still available to those who are not yet "defendants "

When one has been subjected to a search, to police interrogation or to an identification procedure before being arrested, are his substantive rights defined by his status at the time the violation takes place, or at the time he objects to the violation after criminal charges have been filed? The initiative doesn't tell us. It speaks only in terms of the "rights" of "criminal defendants," oblivious of the fact that many of the most important rights in our state constitution protect suspects who are not yet defendants

Frankly, I believe the limitation of the "no greater rights" provision to criminal defendants raises significant questions under the equal protection clause of the federal constitution Is it rational to treat someone's right to due process of law, for example, differently from other citizens' simply because the state has accused him of a crime? One aspect of the protection of due process is the prohibition against vague laws If the California Supreme Court finds a statute is unconstitutionally vague under the California Constitution, is one precluded from raising this

objection after criminal charges are brought, even though he would be free to assert this claim in a suit for injunctive relief?

Even worse, the 1990 initiative declares that the prosecution has a constitutional right to due process of law and to a speedy and public trial, and leaves the California courts free to interpret these rights more broadly than under the federal constitution. The limitation of independent state interpretation of these same rights applies only when they are asserted by a defendant

One of the most serious ambiguities in the 1990 initiative is whether it affects the right to jury trial The right to jury trial under the California constitution is much broader than under the federal constitution. We guarantee the right in all misdemeanor cases, while the federal right is limited to cases where more than six months imprisonment is at stake We require twelve jurors and unanimous verdicts. Section 3 of the 1990 initiative amends the state constitution to provide that "the rights of a defendant to . (then enumerating twelve specific constitutional rights) . . . shall be construed by the courts of this state in a manner consistent with the Constitution of the United States." That clause leaves out the right to jury trial. But that clause is relatively harmless An interpretation of a right under the state constitution to give greater protection than the parallel right under the federal constitution is hardly inconsistent with the federal constitution. The federal constitution itself leaves the states free to do so.

The real "killer clause" is the next sentence of the initiative.

"This constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States "

That sentence is breathtaking in its sweep Note that it doesn't say "the above enumerated rights." It says "this constitution " That would mean no part of this constitution including the right to jury trial, can be construed to afford greater rights than the federal constitution

If the right to jury trial under the California constitution cannot be construed to afford any greater right than under the U S constitution, California citizens may be giving up more than they realize, including much broader protection against the use of racially motivated use of peremptory challenges to exclude ethnic groups from serving on juries, and the absolute guarantee of unanimity in jury verdicts. Ironically, by leaving out the right to jury trial in the first clause, the drafters seem to suggest that their intent is to leave the right to jury trial unaffected But the breadth of the language they employ in the second clause leaves room for no exceptions: the entire constitution must be construed to confer no greater rights than the federal constitution

If this draft were submitted to me by a law student, I'd return it for a rewrite with a grade of D-. For it to be presented

to the voters of California to be enacted as an amendment to the constitution is an insult to their intelligence

Unfortunately, the concept of interpreting our state constitutional guarantees more broadly than the parallel provisions of the federal constitution is being presented to the public by the promoters of this initiative as a liberal excess of the Bird Court era that we can well do without I believe in giving credit where credit is due The chief promoter of separate and independent guarantees of rights in individual state constitutions was not Rose Bird, or Stanley Mosk, but none other than Thomas Jefferson. After having served as President of the United States, Jefferson concluded that:

> " . . the true barriers of our liberty in this country are our State governments, and the wisest conservative power ever contrived by man is that of which our Revolution and present government found us possessed. Seventeen distinct states . . can never be so fascinated by the arts of one man, as to submit voluntarily to his usurpation. Nor can they be constrained to it by any force he can possess."

(Dumas Malone, Jefferson and the Ordeal of Liberty, p 394, Little, Brown, 1962)

The federalist ideal, with, as Justice Louis Brandeis put it, fifty different "laboratories of democracy," can hardly be described as a "liberal" or "activist" phenomenon As former Chief Justice Warren Burger aptly put it quite recently:

"It is vital that the states continue to serve, as Hughes and Brandeis put it, as the laboratories of democracy.

Indeed, most of the original 13 states had their own Bills of Rights before 1791. Those powers of government affecting perhaps the most intimate and personal aspects of an individual's life - such as family, health, moral and criminal matters - are the province of the states and subject to regulation under state law. Principles of federalism permit state courts to apply and develop state constitutional doctrine independent of - but consistent with - the federal Constitution. The Framers' decision in 1787 to leave this independent power and responsibility to the states is a significant part of our Constitution that, like so much else, deserves continuing study and reflection."

(Burger, Foreward, "Emerging Issues in State Constitutional Law, National Association of Attorneys General, 1988).

Chief Justice William Rehnquist concurs. In addressing the national conference of State Chief Justices last year, he noted.

"Our Court has neither the authority nor the inclination to oppose efforts to construe state constitutional provisions more liberally than their federal counterparts are construed. The movement is a classic example of Justice Brandeis' praise for the federal system as making possible experimentation in 50 different state laboratories to see what the proper solution to a

question is."

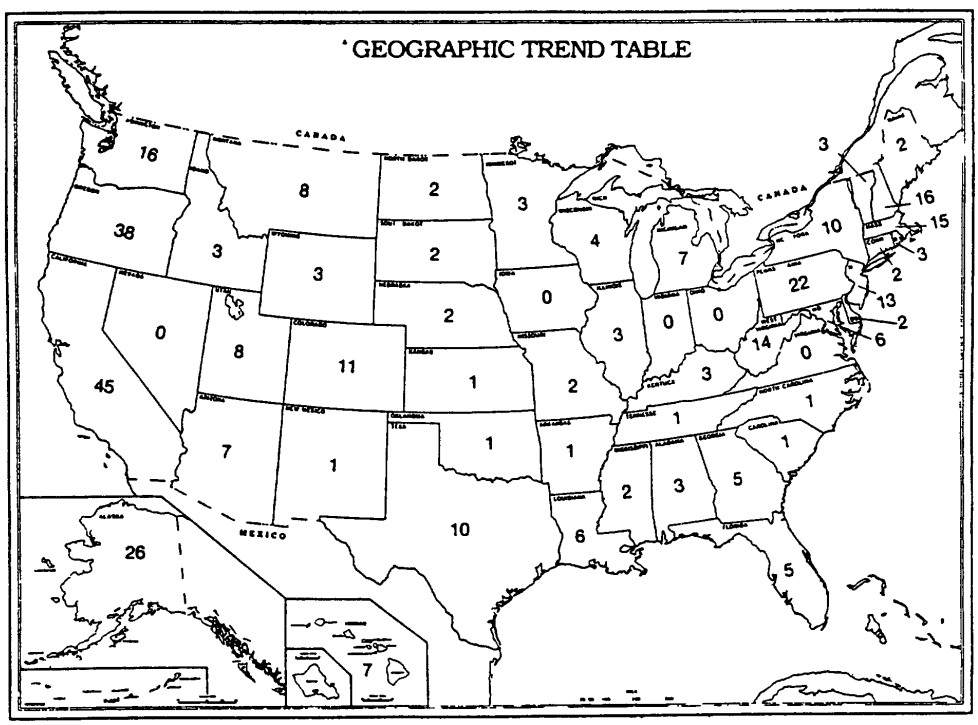
(Rehnquist, Conference of Chief Justices, Williamsburg, Va , Jan 27, 1988)

In the past ten years, the supreme courts of nearly every state have rendered over 600 decisions construing their state constitutions independently of parallel federal provisions A chart compiling the decisions rendered up to 1986 is attached It graphically attests to the national diversity of this trend Enactment of the 1990 initiative would simply announce that, after 140 years of membership, California is simply opting out of its role as one of the fifty laboratories of federalism.

Ironically, many of the cases in which the California Supreme Court interpreted our state constitution more broadly than the federal constitution have served as models for other states, and ultimately even persuaded the U S Supreme Court Most recently, for example, the U.S Supreme Court, inspired by the California Supreme Court decision in People v. Wheeler, imposed limitations on the use of peremptory challenges to exclude blacks from sitting on juries. Unfortunately, Batson v. Kentucky falls short of the protections recognized in Wheeler, and Wheeler is one of the decisions which will be abrogated by the new initiative.

I can address only one of the thirty sections contained in the initiative Many others present similar ambiguities and contradictions. Some are thoughtful and worthwhile proposals that will improve the quality of justice in California. Unfortunately, the initiative process precludes any picking and choosing, and

prevents any editing or correcting of drafting flaws Even corrective action by the legislature is prohibited unless a 2/3 vote can be mustered. While concern for the victims of crime is commendable, I fear that the enactment of this initiative will turn us all into victims, who have simply given up the protection of our own state constitution, and the 200 years of historical struggle which it represents While the real cost of this initative is yet to be assessed, the greatest price it exacts is our independence as a state


GEOGRAPHIC TREND TABLE
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ABORTION RIGHTS AND THE 1990 COURT REFORM INITIATIVE

By Dennis P. Riordan, Mary Stearns and Tana Linn

A bitter war of words over a court reform initiative to be placed on the ballot on 1990 has erupted between its chief sponsor, Senator Pete Wilson, and Attorney General John Van de Kamp, both declared candidates for governor. Van de Kamp claims Wilson's initiative, which provides that criminal defendants shall have no greater rights under the state than under the federal constitution, endangers a woman's constitutional right to an abortion. Wilson retorts that Van de Kamp's raising of the "choice" issue is a smoke screen masking his distaste for tough anti-crime measures. Since abortion is a civil right, Wilson argues, it cannot be affected by an initiative which concerns only criminal defendants. While the Attorney General's motives in challenging the initiative are known only to himself, the potential impact of the measure on abortion rights is subject to reasoned analysis

That analysis begins with California's statutory law on abortion Many may be surprised to learn that

the Penal Code of California criminalizes most of the abortions performed each year in this state Penal Code sections 274 to 276, passed in 1976, make it a crime to perform, receive, or solicit an abortion which fails to meet the requirements set forth in the Therapeutic Abortion Act Health and Safety Code Sections 25950 et. seq The Act does not allow abortions to be performed in clinics. Thus, the hundreds of thousands of clinical abortions performed in California each year violate the Penal Code If prosecutors were free to enforce statutes now "on the books" in this state, the legions of doctors, nurses, health workers, and pregnant women involved in clinical abortions could be subjected to immediate prosecution and possible incarceration.

Such prosecutions have not occurred in this state for nearly two decades, however, because women in California enjoy both a federal and state constitutional right to abortion. Since constitutional rights prevail over legislative enactments, women need not fear prosecution for receiving abortions, nor doctors for performing them, as long as their constitutional rights are not abrogated by amendment or judicial revision of existing constitutional doctrine.

Pro-choice advocates across the country are, however, profoundly fearful that judicial withdrawal of the federal constitutional right to an abortion is around the corner. That right, established by Roe v Wade (1973) 410 U.S 113 and its sister opinion, Doe v. Bolton (1973) 410 U S 170, presently includes constitutional protection of clinical abortions In July, however, the Roe right was limited by the United States Supreme Court's decision in Webster v. Reproductive Health Services (1989) 89 C D.O S. 5129. Many court watchers believe that Roe will be entirely overruled in the coming term. In his Webster concurrence, Justice Scalia wrote of overruling Roe·

> I think it should be done, but would do it more explicitly The real question is whether there are valid reasons to go beyond the most stingy possible holding today It seems to me there are not only valid but compelling ones. Id , at 5136-37

If the court jettisons Roe v. Wade and its progeny as urged by Justice Scalia, there will be no federal constitutional impediment to enforcing the sort of radical restrictions on abortion found in existing statutes in California and other states

Nevertheless, unlike citizens of most other states,

Californians need not be affected by a Roe reversal. The constitutional right to an abortion was established in this state not by the 1973 decision of the United States Supreme Court in Roe, but by the 1969 decision of the California Supreme Court in People v. Belous (1969) 71 Cal 2d 954 cert den. 397 U.S 915. Belous involved the criminal prosecution of one of the state's most prominent physicians for providing a pregnant woman with information as to where an abortion could be obtained.

The Belous court determined that the former version of Section 274 of the Penal Code, which permitted abortions only when necessary to save a woman's life, was unconstitutional The court held that the statute impermissibly infringed on a woman's fundamental constitutional rights to life and to choose whether to bear children. Id., at 963, 969.

> [T]he fundamental right of the woman to choose whether to bear children follows from the Supreme Court and this Court's repeated acknowledgment of a 'right to privacy' or 'liberty' in matters related to marriage, family, and sex. That such a right is not enumerated in either the United States or California Constitutions is no impediment to the existence of the right. Id., at 963.

When, in the years following Belous, abortion prosecutions were renewed in California under successor

statutes, our Supreme Court again voided them on state constitutional grounds People v. Barksdale (1972) 8 Cal.3d 320 arose from the prosecution of a doctor who performed an abortion during the first trimester of a woman's pregnancy. Citing Belous, the Barksdale court found unconstitutional certain portions of the Therapeutic Abortion Act, including the provision limiting the abortion right to pregnancies that "gravely impair" the "mental health" of the mother. Belous and Barksdale illustrate that abortion rights were initially established in this state through the adjudication of state constitutional claims raised by criminal defendants

In 1972, Californians specifically amended Article I, Section 1 of the state's constitution to include the right of privacy among the various "inalienable" rights of all people. While this amendment has been construed to afford protection against technically advanced surveillance by law enforcement authorities (White v. Davis (1975) 13 Cal.3d 757, 774), it most commonly has been invoked to protect one's privacy in sexual or other intimate matters See, e.g., City of Santa Barbara v.

Adamson (1980) 27 Cal.3d 123, 130 (right to choose the people with one whom lives); People v. Katrinak (1982) 136 Cal. App.3d 145, 153 (right to associate with people of one's choice); Atkisson v Kern County Housing Authority (1976) 59 Cal. App 3d 89, 90 (right of unmarried person to cohabitate).

Certainly, the most important case decided under the new privacy clause concerned abortion rights. In 1980, the United States Supreme Court decided that Roe does not require governments to provide abortion procedures to poor women on the same basis it provides other medical services. Harris v. McRae (1980) 448 U.S. 297. Harris left states free under the federal constitution to refuse to pay for abortions needed by women without funds or medical insurance. For most of these women, Roe has become a theoretical abstraction, a constitutional right they have no practical means of exercising.

This is not the case in California. Our Supreme Court found reflected in the 1972 amendment a clear desire by Californians to supplement the privacy rights available under the federal constitution. In 1981, it ruled that the legislature's refusal to fund abortions

for indigent women while funding other comparable medical services violated the privacy clause of Article I, Section 1 of the California Constitution. Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252. Each year since then, Myers has been reaffirmed, a clear statement that the state constitutional right of choice is broader than that declared in Roe and Doe

In sum, left untouched, the state constitution's privacy provision will prevent prosecution under present abortion laws even if Roe falls. Were the state privacy provision to die at the same time as Roe, however, women and their doctors would be no safer from criminal prosecution here than they would be in the Deep South.

That is where the new crime initiative comes in. By its express terms, it amends the California Constitution to eliminate all state constitutional rights of criminal defendants which are not also guaranteed under the federal constitution In other words, under the initiative, a woman or her doctor prosecuted for participating in a clinical abortion could defend themselves only by raising whatever federal constitutional rights they possess. Cases like Belous

and Barksdale would no longer provide independent state law protection for abortion defendants The initiative's passage having wiped out present state constitutional protections, California women choosing to abort pregnancies would be vulnerable to prosecution the day after Roe is overruled

Senator Wilson points out that his initiative, applying only to criminal defendants, leaves the civil right to abortion untouched. That is quite true If a city brought a civil suit seeking an injunction closing an abortion clinic, the initiative would not prevent a successful defense by the clinic based on the state constitution That will be cold comfort, however, to a woman or physicians (like Doctors Belous or Barksdale, facing a criminal charge of abortion, for the initiative's privacy-stripping provision concededly applies to them This sort of bifurcated constitutional right was first established in 1982 by Proposition Eight, which, while leaving state civil rights against unreasonable searches and seizures intact, barred criminal defendants from invoking those rights to suppress evidence Thus, should the initiative pass, the only thing needed to convert a woman who enjoys a

constitutional right to an abortion into a criminal defendant who does not, will be the filing of a charge under Penal Code sections 274-276. Does anyone doubt there are prosecutors in this state eager to file just such a criminal complaint?

Pete Wilson has also said that he does not intend that the initiative restrict abortion rights in California That statement is no doubt as true as it is irrelevant Since the intent of a law's proponent is often impossible to ascertain, well-established principles require that the courts ignore that intent if the terms of a legal provision are clear See Solberg v Superior Court (1977) 19 Cal 3d 182, 198. ("When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it ") The initiative's terms leave no room for doubt or exception. if passed, no criminal defendant will be able to protect herself from prosecution for abortion or any other crime by invoking her state constitutional right of privacy. Some may choose to support the initiative for that reason, others to oppose it , but the initiative's impact on abortion prosecutions is certainly a large factor to be weighed

in assessing its merits.

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LEGAL ANALYSIS

Constitutional Rights Affecting Abortion

There is no right of privacy expressed in the U S Constitution However, the U S Supreme Court has constructed a right to privacy through a number of decisions, including Roe v Wade

The California State Constitution was amended by the people in 1972 to recognize a specific right to privacy That privacy right was ruled to guarantee women in California the right to abortion in the 1981 case of Committee to Defend Reproductive Rights v Myers In Myers, the California Supreme Court ruled the state Constitutional guarantee to be "at least as broad as that described in Roe v Wade "

California Criminal Statutes Still on the Books Affecting Abortion

There are several statutes still on the books in California which criminalize abortions In 1969, the original laws dating from 1850 were deemed to be constitutionally unenforceable in People v Belous, partially on privacy grounds and partially because of vagueness These laws (Penal Code sections 274, 275 and 276) make it a felony to perform or solicit human abortions other than as provided in the Therapeutic Abortion Act (Health & Safety Code, secs 25950-25958)

The Therapeutic Abortion Act mandates that an abortion is legal only if performed by a doctor after a physician committee makes a finding that the woman's physical or mental health would be "gravely impaired" without the abortion or that the pregnancy was caused by rape or incest And the Act further specifies that abortions after the 20th week of pregnancy are illegal without exception, including risk of death to the mother

Most of the Therapeutic Abortion Act was held to be constitutionally unenforceable in People v Barksdale in 1972 when the California Supreme Court held that the Act's language requiring medical criteria for a Committee's approval of abortion was impermissibly vague The Court did not make a vagueness ruling with respect to Health and Safety Code section 25953, the provision which outlawed all abortions after the 20th week since conception

The Court did not consider whether the Therapeutic Abortion Act violated the right of privacy since at that time there was no separate state guarantee Lower courts have since ruled that the Act is unconstitutional on both federal and state privacy grounds

Speedy Trial Initiative Reforms

The Speedy Trial Initiative is premised on the notion that the rights of criminal victims have been ignored by the courts and the Legislature in favor of the rights of criminal defendants (see Sec 1 of the Initiative) The ostensible goal of the Initiative is to eliminate certain steps in the prosecutorial process, with the intent of quickening the pace of criminal trials by limiting the rights of criminal defendants to those rights which are afforded by the U S Constitution

In Section 3 of the Initiative, Section 24 of Article 1 of the California Constitution would be amended to state that among other rights, the right to privacy of criminal defendants in the State of California must be construed in a manner consistent with the Federal Constitution Moreover, the California Constitution may not be construed to afford criminal defendants any greater right than they would be afforded by the United States Constitution Essentially, the Initiative abdicates to five United States Supreme Court Justices complete control over the rights of Californians

How Abortion Could Become a Crime Under the Initiative

If the Initiative is passed and the U.S. Supreme Court overturns or weakens Roe v Wade (a distinct possibility given the decision in Webster and the Court's decision to hear three more abortion cases next term), holding that the right to privacy under the federal Constitution no longer protects a woman's right to choose to terminate a pregnancy, then Penal Code sections 274, 275 and 276 and the whole Therapeutic Abortion Act could become enforceable

By definition, under the language of the Initiative, if there is no U S Constitutional right to privacy that covers a woman's right to reproductive choice, there could not possibly be a greater right to privacy under the California Constitution

Using laws now on the books, prosecutors then would be able to try, as criminal defendants, a woman who sought an abortion or the physician who performed an abortion The right to privacy under the State Constitution could no longer be raised as a defense in a prosecution for a violation of those criminal sections

Or, again assuming that Roe is overturned and the Initiative passes, a new statute could criminalize abortion after a simple majority vote of the Legislature and the signature of an anti-choice governor Note that Initiative co-sponsor state Senator Edward Royce has also introduced this session S B 1630 which would create criminal penalties for "fetal abuse" which could include abortion With Roe overturned and the Initiative passed, Royce's abortion crime law could be enforced

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To: All Interested Parties

From. Sheila Kuehl and Abby Leibman
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Re: Crime Victim's Justice Reform Initiative-impact on California Constitutional Right to Privacy, an Analysis

The following brief analysis represents our opinion of the effect the Initiative could have, if passed as presently drafted, on the right to privacy contained in the state Constitution of California.

I. Could the Initiative Limit the Right to Reproductive Choice as Specifically Protected by the California Constitution?

We believe, without question, that the particular language limiting the privacy rights of criminal defendants and contained in the Crime Victim's Justice Reform Initiative would impact the privacy rights of women seeking to terminate pregnancies in California.

A. Does the claim that the Initiative only applies to criminal prosecutions alter this opinion?

No. The claim that the Initiative was only meant to apply to criminal prosecutions does not alter our opinion since Penal Code Sections 274, 275 and 276, which criminalize specific actions pertaining to abortion, are still part of the criminal law in California.

Section 274 makes it a crime to perform an abortion except under the terms of the Therapeutic Abortion Act, Health and Safety Code Section 25950, et seq. Section 275 makes it a crime punishable by imprisonment in the state prison for a woman to solicit an abortion except as provided in the Therapeutic Abortion Act.

Section 276 makes it a crime punishable by time in the county jail or by a $10,000 fine to solicit a woman to have an abortion, except under the terms of the Therapeutic Abortion Act. Each of these sections actually refers, not to abortion, but to "procuring a miscarriage."

The only legal abortions in California before Roe v. Wade were those performed under the terms of the Therapeutic Abortion Act: in a hospital, approved in advance by a hospital committee (if the committee had three or less members, the decision had to be unanimous), and there had to be a substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or the pregnancy had resulted from rape or incest. The Therapeutic Abortion Act was considered a liberal law before 1973.

After Roe v. Wade, the landmark decision of the United States Supreme Court holding that the right to privacy contained in the Federal Constitution included the right to choose to terminate a pregnancy, neither the Therapeutic Abortion Act nor the Penal Code sections could be applied or prosecuted.

There are, however, in addition to the Constitutional protections announced in Roe v. Wade under the federal Constitution, independent state grounds under which the constitutional rights of women to terminate their pregnancies overcome the Penal Code sections and the provisions of the Therapeutic Abortion Act. There is a state constitutional right to privacy and such a right was announced by the California Supreme Court even before the word "privacy" was actually added to the state Constitution by the voters.

These grounds for overturning state statutes that infringe on rights are called "independent" because they depend not on the Federal Constitution, but only on the State Constitution as interpreted by the State Supreme Court, which is the last word on the meaning of provisions of the state Constitution.

The California Supreme Court announced that the California State Constitution protects physicians providing abortions and women seeking them from prosecution under the Penal Code in People v. Belous, 458 P. 2d 194 (1969). The primary ground for the decision was that the Penal Code sections were unconstitutionally vague. But the Court also struck the sections down on the basis of the fact that women had a constitutional right to choose whether or not to bear children, in other words, privacy.

In People v. Barksdale, 503 P. 2d 257 (1972), the Court declared most of the Therapeutic Abortion Act unconstitutional on state grounds--that the provisions were impermissably vague and did not satisfy the state requirement of due process. No mention was made in that case (about a civil, not a criminal statute) of privacy rights but since an explicit right to privacy was added to the state Constitution, lower courts in California have ruled that the Act is unconstitutional on both federal and state privacy grounds.

B. How might the Initiative affect this independent right?

So far, even should the federal court decide that states can infringe even more deeply on the federal privacy right, the state court could, as things now stand, interpret our state right to privacy as offering more protection.

The Initiative, however, specifically limits the state right to privacy for criminal defendants to the limits of the federal right as interpreted by the Supreme Court. It requires that the state right to privacy be "construed by the courts in this state in a manner consistent with the Constitution of the United States. This Constitution (California's) shall not be construed by the (state) courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States." This can clearly impact on the right to choose whether or not to terminate a pregnancy. It would be a crime in California to do so were it not for Roe v. Wade and People v. Belous. Indeed, Roe overturned a criminal statute in Texas.

As the federal court shrinks the right to privacy by expanding a state's ability to infringe upon the federal right, as it did in Webster, and shows signs of continuing in the next term, the state of California would have an expanded ability to limit the state constitutional right to privacy, unfettered by any independent state constitutional grounds. Where the California Constitution might have provided independent constitutional grounds to overcome civil and criminal statutes, it would be limited by the Initiative to the scope of the federal right to privacy as announced by the federal Supreme Court.

Without question, this could allow California to criminalize abortion, should the federal court allow it, and nothing would limit the scope of those laws constitutionally but the decisions of the federal Supreme Court.

C. Could passage of the Initiative affect the civil rights of women seeking abortion in California?

Possibly. In 1981, in Committee to Defend Reproductive Rights v. Myers, the Court stated plainly that the independent right to privacy contained in the State Constitution was broader in scope than that interpreted by the federal Supreme Court. In Myers, the Court held that the state constitution did not allow the state to forbid MediCal funding for abortion while allowing funding for the medical expenses of women who decided to bear a child. The underpinning of the decision, which went exactly opposite to that announced by the federal court in Harris v. McRae, was that the receipt of government benefits could not be conditioned on waiving a fundamental state constitutional right, such as the right to privacy contained in the California Constitution.

The Initiative would not, on its face, limit the Myers interpretation of the state right to privacy and create an immediate threat to MediCal funding of abortions. This fact has led some to argue that the Initiative, since it applies only to criminal defendants, does not actually threaten the right to choose in California. However, the California Supreme Court is not immune to public pressure. The Justices may possibly be more concerned about that public pressure since the defeat of three Supreme Court Justices at the polls.

It is equally possible that the Justices would read passage of the Initiative as an expression of the will of the people that the whole right to privacy should be considerably limited in California.

Finally, even should the ballot arguments contain an indication that the proponents of the measure really don't mean to limit a constitutional right to choose whether or not to terminate a pregnancy, such a ballot argument would not necessary impact on a state court's interpretation of the measure, since the court is required to look at the plain language of the Initiative, as passed. Only if the language is found to be ambiguous in some supportable way can the Court even look to the ballot arguments and, in our opinion, the language of the Initiative does not seem to be that ambiguous.

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December 11, 1989

Senator Bill Lockyer, Chair
Senate Committee on Judiciary

Assemblymember John Burton, Chair
Assembly Committee on Public Safety

Re "Crime Victim Justice Reform Act" Initiative

Dear Committees

The American Civil Liberties Union of Northern California (ACLU), a nonpartisan organization, was established to defend our Bill of Rights and is dedicated to advancing the civil rights and individual liberties of the people of California Toward that end, the ACLU appreciates this opportunity to comment on the "Crime Victim Justice Reform Act" Initiative.

The ACLU opposes the initiative because it represents a serious and real threat to the civil liberties of all persons in California In particular, the ACLU opposes the initiative because it (1) curtails severely a criminal defendant's rights to a fair trial and to present a defense, (2) eliminates substantive rights uniquely protected by the California Constitution, including the use of the California right to privacy as a defense in a criminal proceeding, (3) expands the scope of the death penalty, while at the same time it removes important protections now afforded capital defendants, and (4) imposes arbitrary and unnecessary punishments This letter of opposition addresses only our major concerns with the initiative

Crime is a major problem in California, one that deserves the utmost attention from public leaders This initiative, however, fails utterly to prevent crime in our State or to assist victims of crime Indeed, rather than advancing a solution to the crime problem, the initiative will further hinder crime control efforts

I THE INITIATIVE UNFAIRLY CURTAILS THE ACCUSED'S RIGHTS TO DEFEND AGAINST UNFOUNDED CHARGES AND TO A FAIR TRIAL

A Preliminary hearing provisions

The initiative severely restricts the right to a speedy determination that the State lacks sufficient evidence to proceed with the charges. Under current law, a criminal defendant is entitled to a preliminary hearing in which a independent judicial officer decides whether the prosecution has sufficient evidence to proceed with the case If the case lacks merit, the charges are dismissed and the innocent party no longer faces the ordeal of lengthy court proceedings

The initiative eliminates preliminary hearings altogether if the felony is prosecuted by indictment from a grand jury, thus overturning the California Supreme Court's decision in Hawkins v Superior Court (1978) 22 Cal 3d 584 In addition, the initiative fundamentally changes the nature of the proceeding for those criminal cases in which the right to a preliminary hearing remains First, the initiative permits police officers to testify about hearsay statements made by any witnesses to the crime The right to confront one's accusers becomes meaningless because, under the initiative, the prosecution need not present eyewitnesses to the crime or even the complaining witness at the preliminary hearing Second, the initiative greatly restricts the ability of a defendant to present witnesses at a preliminary hearing, by limiting the scope of permissible defense witnesses In addition, the initiative eliminates the right to cross examine witnesses at a preliminary hearing (See Penal Code section 872(c) (to be repealed by the initiative)) Moreover, the initiative eliminates using a preliminary hearing for "discovery" purposes or for preparing a defense for trial

The problem with these provisions is that they ignore the fundamental purpose of a preliminary hearing to serve as an essential check on abusive governmental action A preliminary hearing provides the opportunity for an independent judicial evaluation of whether there is sufficient evidence to proceed with the legal process When the right to a preliminary hearing is curtailed, the purpose of protecting the innocent against protracted and expensive legal proceedings is thwarted

In addition, the provisions may exacerbate delay in the criminal justice process The preliminary hearing as it is currently used provides a fairly accurate assessment of the strength of the state's case This assessment permits a defense counsel to advise the client about whether to proceed to trial The limitations imposed on the presentation of defense witnesses

and the restrictions on the scope of questioning will greatly reduce the opportunity for a defense counsel to determine accurately of whether the case should be resolved by a guilty plea. Thus, rather than reducing delay, the initiative might significantly increase the number of cases going to trial and thus further delay justice

B Juror questioning

At the start of criminal trials in California, attorneys question jurors regarding their ability to judge the case impartially and free from bias This process -- known as "voir dire" -- provides that the jury chosen will be fair to both the defendant and to the prosecution

The initiative eliminates the right of counsel to voir dire in criminal cases unless permitted by the court upon a showing of good cause The initiative also drastically curtails protection against biased jurors First, the initiative prohibits questioning that would aid in the competent use of a defendant's preemptory challenges, the only questioning permitted is that which aids in challenges for cause In addition, the initiative requires that all questioning occur in the presence of other jurors, thus making it more difficult for a reluctant juror to reveal potential biases

The civil liberties concerns presented by these provisions are quite substantial The fundamental theory behind the right to the trial by one's peers is that one's peers will fairly apply the law to the facts of the case Should a jury be infected with racial hatred or other biases against a defendant, justice is obviously thwarted The process by which to avoid such breakdowns in our criminal justice system is by thoroughly questioning prospective jurors before a trial starts

C Criminal discovery

Under the current law, a defendant is entitled to any information that reasonably aids in the defense The initiative changes that standard to a narrow list of information Thus, for example, a defendant may not be able to obtain a police officer's personnel records indicating prior complaints of brutality unless the federal constitution required such disclosure In addition, the initiative abrogates the attorney-client and work-product privilege by requiring a defense attorney to disclose the names and addresses of all witnesses and any statements made by those witnesses

D Speedy trial provisions

The initiative requires that any attorney indicate that he or she is ready for the preliminary hearing or trial If counsel has other matters, the case will be reassigned and/or sanctions imposed on the attorney Although the purported goal of this provision is to increase the swiftness of justice, the effect will be to restrict the ability of a criminal defendant to obtain counsel of choice and to prepare for trial

Justice is not served by requiring criminal defendants to proceed to trial unprepared or with inexperience or inadequate counsel Our standards of decency require that due process be afforded to all criminal defendants and that all persons are presumed to be innocent until proved guilty The initiative vitiates these fundamental precepts by forcing a defendant to chose between proceeding to trial unprepared or to forego the right to counsel of his or her choice In addition, the "assembly-line" process envisioned by the drafters of the initiative will increase rather that decrease the cost and delay in the criminal process In order to comply with the initiative's mandates, counties will be forced to increase greatly the number of county public defenders and the use of appointed attorneys Moreover, courts will have to rely to a greater extent on inexperienced attorneys to comply with the initiative's mandate, thereby increasing the chance of mistakes and reversals in the appellate process

II. **THE INITIATIVE ELIMINATES INDEPENDENT STATE CONSTITUTIONAL PROTECTION FOR CRIMINAL DEFENDANTS.**

The California Constitution -- like many state constitutions -- has always provided protections that differ from those guaranteed by the U S Constitution The need for different protection stem from the unique concerns and problems of the state For example, the people of California have long insisted on greater protection of a person's privacy than that recognized under the U S Constitution Thus, the California Constitution's privacy provision protects a woman's right to choose an abortion to an extent greater than provided by the U S Constitution

The initiative will severely curtails the rights guaranteed by the California Constitution The measure eliminates state constitutional protection of criminal defendants that exceed the protection offered by the U S Supreme Court The amendment to the California Constitution would require the following provisions to be interpreted in criminal cases identically to the federal Constitution equal protection, due process, assistance of counsel, right to be present with counsel, speedy and public

trial, compulsory attendance of witnesses, confrontation of witnesses, search and seizure, privacy, self-incrimination, double jeopardy, and cruel or unusual punishment.

For each of these provisions, a criminal defendant could no longer rely on the California Constitution for protection The loss of these rights, of course, are devastating to the people of California. However, the loss to the California system of governing its people might be even more serious What the initiative does is make California rights identical to that of the federal government, and it does so by eliminating the California rights By federalizing "California" rights, the initiative forever precludes the State from adapting different, more protective rights for the benefit of Californians The recognition that California is different has led to the recognition of California constitutional rights that exceed the federal standards. By lowering our level of rights to the common federal denominator, California will lose the opportunity to address the unique problems of its people

III THE INITIATIVE UNJUSTIFIABLY AND UNCONSTITUTIONALLY EXPANDS THE USE OF THE DEATH PENALTY

California already has one of the most expansive death penalty laws in the nation And that law has been used to produce the third largest death row in the country Despite these facts, the initiative greatly expands the application of the death penalty The initiative adds a number of special circumstances to the law to include the following circumstances as capital offenses the victim was killed to prevent testimony in juvenile proceeding, and that death during the commission of arson, mayhem, or rape by penetration by a foreign object. The initiative also amends the murder by torture special circumstance to eliminate the need to prove that the defendant inflicted extreme physical pain The death penalty may also be imposed on a non-killer who aids in commission of special circumstance felonies if he or she had reckless indifference to human life

The major problem with expanding the death penalty to include a whole host of felony-murder crimes is that the the initiative's scope encompasses criminal conduct that, although serious conduct, was never intended to constitute a capital crime For example, the major problem with making arson a special circumstance is that after People v Anderson (1987) 43 Cal 3d 1104, Penal Code section 190 2 requires no intent to kill Thus a person who kills during a robbery is subject to the death penalty without the State having to prove that he or she intended to harm the victim Although this might make a modicum of sense to a minority of criminologists, the situation is completely

inapplicable to an arson killing With rare exceptions, an arson killing occurs accidentally and without the knowledge of the perpetrator Indeed, most arsonists go to great lengths to avoid confrontation and the loss of life Rather than subjecting the worst criminals to the death penalty, this provision will punish the businessperson who burns the building for insurance, unaware that the homeless person was sleeping in the basement

Indeed, the most serious problem with the initiative is that it further strains the constitutionality of the California death penalty scheme As the U.S Supreme Court has held, a State's death penalty scheme "must, in short, provide a 'meaningful basis for distinguishing the few cases in which (the penalty) is imposed from the many cases in which it is not '" (Godfrey v Georgia (1980) 446 U S 420, 427-428, quoting Gregg v Georgia (1976) 428 U.S 153, 188 (opinion of Stewart, Powell, and Stevens, JJ).) The initiative would further enlarge the application of the death penalty in California with overly broad special circumstances, further blurring the distinction between those murders deserving the death penalty and those that do not

Moreover, the initiative further removes the Legislature from the process of defining which crimes and criminals are the most deserving of the ultimate penalty Instead, by broadening the application of the death penalty to an every-widening set of murders, California's death penalty law will transfer the responsibility to the juries

The initiative would also eliminate the corpus delicti requirement in proving the existence of special circumstances The corpus delicti rule currently in force requires that the State prove that a crime was committed The basis for the rule is that a person cannot be convicted of a crime based solely on his or her extrajudicial statements unless those statements are corroborated by some evidence of the corpus delicti The strong rationale for such a rule is obvious many people wrongly "confess" to crimes that they did not commit Without independent evidence that a special circumstance is true, there is every reason to expect that innocent people will be sentenced to death To eliminate the requirement that a defendant's statements must be corroborated by other evidence -- even slight corroborating evidence -- the risk of executing innocent people is greatly enhanced

IV THE INITIATIVE GREATLY EXPANDS THE PUNISHMENT FOR MURDER WITHOUT ANY CONSIDERATIONS FOR THE PENOLOGICAL PURPOSE TO BE SERVED

The initiative greatly expands criminal penalties for murder and provides that 16 and 17 year olds must be sentenced to life without the possibility of parole or 25 to life if a special circumstance is proved By mandating that children 16 and 17 years old must be sentenced to life without the possibility of parole or 25 years to life, the initiative drafters have made the determination that these children are beyond rehabilitation or redemption Such generic applications of severe criminal penalties violate norms of common decency and common sense

The ACLU appreciates this opportunity to express the organization's views on "Crime Victim Justice Reform Act" Initiative.

Sincerely,

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186-J

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