Ernest DeWayne Jones v. Robert K. Wong Doc. 59 Att. 4

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**UNITED STATES DISTRICT COURT**

**FOR THE CENTRAL DISTRICT OF CALIFORINIA, SOUTHERN DIVISION**

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

# EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING VOLUME 4

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| TAB | EXHIBIT |
|---|---|
| **VOLUME 1** | |
| A | Declaration of Floyd Nelson |
| B | Declaration of Larry Williams |
| C | Declaration of Jimmy Camel |
| D | Declaration of James S. Thomson |
| E | Declaration of Quin Denvir |
| F | Declaration of David Baldus |
| G | Declaration of George Woodworth, Ph.D. |
| H | Declaration of Steven F. Shatz |
| I | Declaration of Gerald Uelman |
| J | Declaration of Donald H. Heller |
| K | Transcript of Proceedings From *Troy Adam Ashmus v. Robert K. Wong*, U.S. District Court For The Northern District Of California, Case No. C93-0594 (Nov. 19, 2010) |
| L | Transcript of Proceedings From *Troy Adam Ashmus v. Robert K. Wong*, U.S. District Court For The Northern District Of California, Case No. C93-0594 (Nov. 22, 2010) |
| M | Legislative History Material Regarding California's Death Penalty Statutes (Part 1 of 4) |
| **VOLUME 2** | |
| M | Legislative History Material Regarding California's Death Penalty Statutes (Part 2 of 4) |
| **VOLUME 3** | |
| M | Legislative History Material Regarding California's Death Penalty Statutes (Part 3 of 4) |
| **VOLUME 4** | |
| M | Legislative History Material Regarding California's Death Penalty Statutes (Part 4 of 4) |
| **VOLUME 5** | |
| N | Newspaper Articles Regarding California Death Penalty Statutes (Part 1 of 2) |

| TAB | EXHIBIT |
|---|---|
| **VOLUME 6** | |
| N | Newspaper Articles Regarding California Death Penalty Statutes (Part 2 of 2) |

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# EXHIBITS IN SUPPORT OF MOTION FOR AN EVIDENTARY HEARING
# VOLUME 4

## EXHIBIT M
## LEGISLATIVE HISTORY MATERIAL REGARDING CALIFORNIA'S DEATH PENALTY STATUTES
## (PART 4 OF 4)

## Argument Against Proposition 115

All Californians want accused criminals brought to trial swiftly with minimum inconvenience and discomfort for their victims. But in politics what starts with good intentions often ends with the taxpayer getting something we *don't* want.

PROPOSITION 115 IS TOO BROAD AND COMPLICATED.

In order to speed up trials for those charged with felony crimes in state courts, Proposition 115 asks all Californians to make big sacrifices. Why should we become victims of the Crime Victims Justice Reform Act?

PROPOSITION 115 TAKES AWAY OUR STATE CONSTITUTIONAL RIGHT TO PRIVACY.

- THE RIGHT TO MAKE THE PERSONAL DECISION TO CHOOSE AN ABORTION WILL BE THREATENED. Until now our privacy rights have protected our right to choose abortion free from government intrusion. If Proposition 115 passes and the U.S. Supreme Court overrules *Roe v. Wade*, women and their doctors will be open to prosecution for participating in an abortion.

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- DOCTORS AND PATIENTS WILL HAVE A MORE DIFFICULT TIME KEEPING THEIR MEDICAL RECORDS PRIVATE.
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- WE WILL NO LONGER BE PROTECTED FROM THOSE WHO WOULD VIOLATE OUR SEXUAL PRIVACY. IF PROPOSITION 115 PASSES, CALIFORNIA POLITICIANS WILL BE FREE TO CRIMINALIZE CERTAIN SEXUAL PREFERENCES AS HAPPENS TODAY IN GEORGIA AND OTHER STATES.
- CRIMINAL TRESPASS CHARGES COULD AWAIT THOSE EXERCISING THEIR FREE SPEECH RIGHTS. Our right to pass out leaflets and circulate petitions at shopping malls would no longer be protected by the California Constitution.

Proposition 115 treats us all like criminals in order to get tough with those accused of real crimes.

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- CALIFORNIA TAXPAYERS WILL HAVE TO PAY MILLIONS OF DOLLARS IN NEW TAXES to reduce trial delays for only 5% of those charged with crimes. 95% plead guilty and don't go to trial. The additional lawyers, judges and court rooms needed to implement Proposition 115 will produce an unfair burden on taxpayers.
- EVEN WITH MORE TAX REVENUES, COURT CONGESTION WILL WORSEN. More trials may result when District Attorneys eliminate preliminary hearings. Preliminary hearings give those charged with crimes their first look at how strong the case is against them. In California, after preliminary hearings 95% plead guilty. WITHOUT PRELIMINARY HEARINGS THE RESULT MAY BE FEWER GUILTY PLEAS, MORE TRIALS, MORE COURT CONGESTION AND SLOWER JUSTICE.

The good intentions of the initiative's backers is not the issue. However well-meaning, they carelessly open a can of worms. It is a complicated business to restructure the judicial system and the sponsors of Proposition 115 create far more serious problems than we have now.

IT DIDN'T HAVE TO BE WRITTEN THIS WAY. PROPOSITION 115 IS NOT A "VICTIMS' RIGHTS INITIATIVE." WE SAY START OVER. IT'S NOT WORTH THE SACRIFICES AND THE COST. VOTE NO ON PROPOSITION 115.

**ROBIN SCHNEIDER**
*Executive Director*
*California Abortion Rights Action League (CARAL)*

**SHIRLEY HUFSTEDLER**
*Former Judge, U.S. Court of Appeals for the 9th Circuit*
*Former Secretary of Education*

**W. BENSON HARER, JR., M.D.**
*Chairman, District 9 (Calif.)*
*American College of Obstetricians and Gynecologists*

## Rebuttal to Argument Against Proposition 115

CALIFORNIA WOMEN ARE GUARANTEED REPRODUCTIVE CHOICE AND OTHER "PRIVACY RIGHTS" BY OUR *STATE* CONSTITUTION.

Therefore, even if the *U.S.* Supreme Court overturned Roe vs. Wade, and then our Legislature somehow passed legislation against abortion, neither the legislation nor the Court's decision could restrict a California woman's RIGHT of reproductive choice.

A CALIFORNIA WOMAN'S CONSTITUTIONALLY GUARANTEED RIGHT OF CHOICE *CANNOT BE TAKEN AWAY EXCEPT BY A FUTURE VOTE OF THE PEOPLE EXPRESSLY REPEALING THAT RIGHT.* THAT'S NOT ABOUT TO HAPPEN IN 70% PRO-CHOICE CALIFORNIA.

This initiative doesn't criminalize or permit criminalization of any activity protected by California's constitutional "right to privacy." IT WAS CAREFULLY WRITTEN BY 50 PROSECUTORS TO APPLY ONLY TO *CRIMINAL TRIALS*, NOT TO ABORTION, RELIGION, OR FREE SPEECH. IT'S ENDORSED BY EVERY DISTRICT ATTORNEY IN CALIFORNIA—BOTH DEMOCRATS AND REPUBLICANS.

Opponents cynically raise this false objection to frighten and mislead voters into believing 115 threatens their rights.

BALONEY.

THE REAL OPPONENTS—THOSE FRONTING THE MONEY TO ATTACK 115 WITH FALSE, MISLEADING TELEVISION ADS—ARE THE SAME CRIMINAL DEFENSE AND COURT APPOINTED LAWYERS WHO EARN FAT GOVERNMENT FEES, PLUS A FEW LIBERAL JUDGES AND POLITICIANS WHO SYMPATHIZE MORE WITH CRIMINALS THAN VICTIMS.

Studies show shorter trials under 115 mean reduced lawyer fees and taxpayers cost. Yet opponents claim shorter trials will cost more than the McMartin case.

Opponents promise a "corrected" crime initiative in November. But they deliberately combined their initiative with a huge tax increase they *know* voters *won't* approve.

Don't let them con you. Vote YES.

**PETE WILSON**
*U.S. Senator*

**WILLIAM G. PLESTED III, M.D.**
*President, California Medical Association*

**WOMEN PROSECUTORS OF CALIFORNIA**

# Full Text

**Record: 932**

**Proposition #** **115**
**Title** **Criminal Law.**
**Year/Election** **1990** primary
**Proposition type** initiative constitutional and statute
**Popular vote** Yes: 2,690,115 (57.03%); No: 2,026,599 (42.97%)
**Pass/Fail** Pass

**Summary** Amends state Constitution regarding criminal and juvenile cases: affords accused no greater constitutional rights than federal Constitution affords; prohibits post-indictment preliminary hearings; establishes People's right to due process and speedy, public trials; provides reciprocal discovery; allows hearsay in preliminary hearings. Makes statutory changes, including: expands first degree murder definition; increases penalty for specified murders; expands special circumstance murders subject to capital punishment; increases penalty for minors convicted of first degree murder to life imprisonment without parole; permits probable cause finding based on hearsay; requires court to conduct jury examination. Summary of Legislative Analyst's estimate of net state and local government fiscal impact: The net fiscal effect of this measure is unknown. The measure makes several significant changes to the criminal justice system. How the measure will be implemented and interpreted is unknown. There may be only a minor fiscal impact on state and local governments, or there may be a major fiscal impact.

**Analysis** **Analysis by the Legislative Analyst**

**Background**

The California Constitution guarantees citizens certain rights which are not dependent on those guaranteed by the United States Constitution. Some of these rights have been judicially interpreted to be broader than the rights guaranteed under the United States Constitution.

Current state law contains the judicial procedures that must he followed in criminal cases to protect the rights of victims and the accused. These procedures include requirements regarding preliminary court hearings, trials, the use of hearsay as evidence, information disclosure by attorneys, questioning of prospective jurors hy attorneys, and the joining of criminal cases.

Under California law, the crime of first-degree murder is defined as one which is deliberate, or takes place during the commission of certain other crimes, or involves

torture or the use of poison or certain destructive devices. In general, first-degree murder is punishable by 25 years to life imprisonment with the possibility of parole. If "special circumstances" are found or the commission of a specific crime is involved, adults may be sentenced to life imprisonment without the possibility of parole, or to death. Minors who were 16 or 17 years of age at the time of the crime and who are tried as adults, may not be sentenced to life imprisonment without the possibility of parole or to death.

**Proposal**

The proposal makes numerous significant and complex changes in criminal law and in the judicial procedures that must be followed in criminal cases. The more important of these changes are summarized below.

*Rights of Defendants in Criminal Cases.* The measure provides that the California Constitution shall not be construed by the courts to afford greater rights to criminal defendants, including minors, than those afforded by the Constitution of the United States. These rights include the right to equal protection of the laws, to due process, 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.

*First Degree Murder and Special Circumstances.* This measure:

. Expands the definition of first-degree murder to include murder committed during the commission or attempted commission of additional serious crimes.

. Expands the list of "special circumstances" to include a variety of serious crimes, such as the killing of a witness to prevent his or her testimony in certain juvenile proceedings.

. Prohibits the dismissal of a special circumstance finding by a judge.

. Allows minors who are 16 or 17 years of age at the time of the crime and convicted of first-degree murder with special circumstances to be punished by life imprisonment *without* the possibility of parole.

*Crime of Torture.* This measure creates a new crime of torture which would be punished by life imprisonment with the possibility of parole.

*Preliminary Hearings.* This measure prohibits a preliminary hearing when a felony is prosecuted by grand jury indictment.

*Speedy Trial.* Generally, this measure:

. Provides the people of California with the right to due process of law and to a speedy and public trial.

. Requires the court to assign felony cases only to defense attorneys who will be ready to proceed within specified time limits.

. Requires felony trials to be set within 60 days of the defendant's arraignment except upon a showing of good cause.

. Establishes a court review procedure for felony cases when preliminary hearings or trials are scheduled beyond the time specified by law or postponed "without good cause." Petitions for a court review would have priority over all other cases in the court.

*Disclosure of Information.* This measure:

. Changes the rule under which prosecutors and defense attorneys must reveal information to each other in their prospective criminal cases.

. Repeals the requirement that a copy of the arrest report be delivered to the defendant at the initial court appearance, or within two days of the appearance.

*Hearsay Evidence.* This measure allows the use of hearsay evidence at preliminary hearings if these out-of-court statements are introduced through the testimony of certain trained and experienced law enforcement officers.

*Examination of Prospective Jurors.* This measure makes major changes in the way juries are selected for criminal trials. Specifically, the measure:

. Repeals a requirement which generally permits reasonable examination of prospective jurors by counsel for the people and for the defendant for purposes of making peremptory challenges and challenges for cause.

. Requires the court to conduct the examination of prospective jurors, but allows further examination by the parties or the court itself upon a showing of good cause.

. Requires that the examination of prospective jurors be conducted only in aid of the exercise of challenges for cause.

*Joining Criminal Cases.* This measure:

. Prohibits the Constitution from being construed by the courts to prohibit the joining of criminal cases as prescribed by statute.

. Prohibits the severing of jointly charged cases due to the unavailability of or unpreparedness of one or more defendants, except as specified.

**Fiscal Effect**

The net fiscal effect of this measure is unknown. The measure makes several significant changes to the criminal justice system. How the measure will be implemented and interpreted is unknown. There may be only a minor fiscal impact on state and local governments, or there may be a major fiscal impact.

**For** **Argument in Favor of Proposition 115**

YOUR MOST BASIC RIGHT AS AN AMERICAN IS TO BE SAFE FROM VIOLENCE AND FREE FROM FEAR.

But while politicians keep talking about tougher laws, your chances of becoming a victim keep climbing.

Why?

For years, politicians in Sacramento have refused to enact tougher laws, like those in other states and the federal law, that permit hardened criminals to get a fair but prompt trial without the useless delays that frustrate criminal justice in California.

Why? Because defense lawyers love delays. Witnesses die or their memories fade. Busy people avoid drawn-out jury service. Prolonged trials go haywire. With judges and prosecutors frustrated by delay, plea bargaining runs rampant. And, the longer the trial, the higher the legal fees.

ONE COURT-APPOINTED DEFENSE LAWYER RECENTLY RECEIVED $515,000 IN TAXES YOU PAID. MANY OTHERS ROUTINELY RECEIVE SIX-FIGURE INCOMES.

Proposition 115 does several needed things:

ITS "NIGHTSTALKER" COMPONENT conforms California's criminal law to federal procedures, bringing California back into the mainstream of American criminal justice. This will mean major time savings for the typical California criminal proceeding. It took an incredible four years just to bring the "Nightstalker" to justice! Imagine how much that cost you, the taxpayer, and how much anguish it caused his surviving victims through multiple, drawn-out court appearances.

ITS "SINGLETON" TORTURE PROVISION assures that no criminal will ever again rape a young girl and hack off her arms, and serve only a minimal punishment, such as the 7 1/2 years Singleton served. Instead, Proposition 115 will send such a criminal to prison for life.

ITS "BIRD COURT" DEATH PENALTY PROVISIONS improve our death penalty law and overturn decisions by Rose Bird and her allies which made it nearly inoperative.

PROPOSITION 115 HAS THE OVERWHELMING SUPPORT OF CALIFORNIA'S DISTRICT ATTORNEYS, POLICE CHIEFS, AND SHERIFFS.

It also has the support of thousands of innocent victims of crime who have been the objects of violence, or have lost loved ones, and been dragged through the courts for years by the delaying tactics of highly paid lawyers and an unfeeling legal bureaucracy.

The same people who opposed the "Victims Bill of Rights," the death penalty, and the ouster of Rose Bird from the Supreme Court -- a small but vocal cadre of liberal

politicians, defense lawyers, and law professors -- are trying to discredit this much-needed reform.

They falsely claim it may curb abortion.

DON'T BE FOOLED!

The authoritative non-partisan Counsel to the California State, Legislature has ruled Proposition 115 affects only the rights "to privacy" of criminals on trial -- not your privacy rights, or the constitutionally guaranteed civil right of a woman to an abortion -- and further ruled that any doubt raised by opponents is eliminated by this simple statement we the proponents make that our intent is not to limit in any way a woman's right to choose to have an abortion.

Proposition 115 simply remedies gross inequities and will bring more violent criminals to justice. PLEASE HELP CALIFORNIA LAW ENFORCEMENT AND CRIME VICTIMS BY VOTING YES.

**FOR(au)** Pete Wilson |t U.S. Senator

**FOR(au)** California District Attorney's Association |t

**FOR(au)** Collene Thompson Campbell |t Chair, Memory of Victims Everywhere (M.O.V.E.)

**Rebuttal** **Rebuttal to Argument in Favor of Proposition 115**

*All of us are angry about escalating violent crime.*

Proposition 115 is a political appeal to our anger *by politicians* running for office. In their rush to qualify Proposition 115 for the ballot, they overlooked provisions which compromise our right to an abortion, to free speech and to a fair trial.

Proposition 115 supporters tell us to ignore our doubts. Their horror stories of "Nightstalker" and "Singleton" suggest only the most vicious criminals will be affected.

THE TRUTH IS THE RIGHTS OF ALL CALIFORNIANS ARE JEOPARDIZED.

Proposition 115 eliminates California's Constitutional RIGHT OF PRIVACY which protects a women's right of choice. If *Roe v. Wade* is overturned by the U.S. Supreme Court, the passage of Proposition 115 threatens the right of women to safe and legal abortions.

Senator Wilson's denial is not convincing. He says his "intent" is "authoritative," but to whom? We do not look forward to another judge somewhere deciding what Proposition 115 means and whether we lose our right of choice.

WE HAVE A CONSTITUTIONALLY GUARANTEED RIGHT OF CHOICE TODAY, LET'S KEEP IT.

Proposition 115's "hidden flaws" don't stop with CHOICE. Our rights to religious privacy, doctor-patient confidentiality, and sexual privacy are also threatened.

Prosecutors face difficulties with complicated cases like McMartin or "Night

Stalker." Let's solve the problem without causing judicial chaos, socking the taxpayer with millions of dollars of new court expenses and eroding our privacy rights.

PROPOSITION 115 IS FLAWED. WE CAN'T GIVE UP OUR PRIVACY RIGHTS. VOTE NO ON 115.

**Rebuttal(au)** Michael G. W. Lee |t President, San Francisco Bar Association

**Rebuttal(au)** William R. Robertson |t Executive Secretary-Treasurer, Los Angeles County Federation of Labor (AFL-CIO)

**Rebuttal(au)** Linda M. Tangren |t State Chair, California National Women's Political Caucus

**Against** **Argument Against Proposition 115**

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**Against(au)** Robin Schneider |t Executive Director, California Abortion Rights Action League (CARAL)

**Against(au)** Shirley Hufstedler |t Former Judge, U.S. Court of Appeals for the 9th Circuit Former Secretary of Education

**Against(au)** W. Benson Harer, Jr., M.D. |t Chairman, District 9 (Calif.) American College of Obstetricians and Gynecologists

**Rebut Against**

**Rebuttal to Argument Against Proposition 115**

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Don't let them con you. Vote YES.

**Rebut Against-au** Pete Wilson |t U.S. Senator

**Rebut Against-au** William G. Plested III, M.D. |t President, California Medical Association

**Rebut Against-au** Women Prosecutors of California |t

**Text of Prop.** **Text of Proposed Law**

This initiative measure is submitted to the people in accordance with the provisions of Article II, Section 8 of the Constitution.

This initiative measure expressly amends the Constitution by amending and adding sections thereto, repeals and adds sections to the Code of Civil Procedure, adds a section to the Evidence Code, amends, repeals, and adds sections to 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. (a) We the people of the State of California hereby find that the rights of crime victims are too often ignored by our courts and by our State Legislature, that the death penalty is a deterrent to murder, and that comprehensive reforms are needed in order to restore balance and fairness to our criminal justice system.

(b) In order to address these concerns and to accomplish these goals, we the people

further find that it is necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state. These decisions and statutes have 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.

(c) 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, and 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.

(d) With these goals in mind, we the people do hereby enact the Crime Victims Justice Reform Act.

SEC. 2. Section 14.1 is added to Article I of the California Constitution, to read:

*SEC. 14.1. If a felony is prosecuted by indictment, there shall be no postindictment preliminary hearing.*

SEC. 3. Section 24 of Article I of the California Constitution is amended to read:

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.

SEC. 4. Section 29 is added to Article 1 of the California Constitution, to read:

*SEC. 29. In a criminal case, the people of the State of California have the right to due process of law and to a speedy and public trial.*

SEC. 5. Section 30 is added to Article I of the California Constitution, to read:

*SEC. 30. (a) This Constitution shall not be construed by the courts to prohibit the*

*joining of criminal cases as prescribed by the Legislature or by the people through the initiative process.*

(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 the initiative process.

(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 the initiative process.

SECTION 6. Section 223 of the Code of Civil Procedure is repealed.

~~223. In criminal cases:~~

(a) It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. Except as provided in Section 223.5, the trial court shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant, such examination to be conducted orally and directly by counsel.

(b) In each case it shall be the duty of the trial judge to provide for a voir dire process as speedy, focused, and informative as possible, and to protect prospective jurors from undue harassment and embarrassment and from inordinately extensive, repetitive, or unfocused examinations.

(c) In discharging its duties, the court shall have discretion and control with respect to the form and subject matter and duration of voir dire examination. In exercising that discretion and control, the trial judge shall be guided by, among other criteria, the following:

(1) The nature of the charges and the potential consequences of a conviction.

(2) Any unique or complex elements, legal or factual, in the case.

(3) The incidental responses or conduct of jurors which may reveal attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case.

(4) The attorneys' need, under the circumstances, for information on which to exercise peremptory challenges intelligently.

(d) The trial court shall not permit questions which the trial court concludes would, as their sole purpose, do any of the following:

(1) Educate the jury panel to the particular facts of the case.

(2) Compel the jurors to commit themselves to vote in a particular way.

(3) Prejudice the jury for or against any party.

(4) Argue the case.

(5) Indoctrinate the jury.

(6) Instruct the jury in a matter of law.

(7) Attempt to accomplish any other improper purpose.

(c) The trial court shall require that questions be phrased by counsel in a neutral and nonargumentative form.

SEC. 7. Section 223 is added to the Code of Civil Procedure, to read:

*223. In a criminal case, the court shall conduct the examination of prospective jurors. However, the court may permit the parties, upon a showing of good cause, to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors upon such a showing, such additional questions by the parties as it deems proper. Voir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors in all criminal cases, including death penalty cases.*

Examination of prospective jurors shall 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 is conducted shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice, as specified in Section 13 of Article VI of the California Constitution.

SEC. 7.5. Section 223.5 of the Code of Civil Procedure is repealed.

~~223.5. (a) As a pilot project applicable solely to criminal cases in the superior courts in Fresno and Santa Cruz Counties during the period July 1, 1988, to June 30, 1991, inclusive, all questions designed solely for assisting in the intelligent exercise of the right to peremptory challenge and not applicable to the determination of implied or actual bias, shall be propounded by the court. If such a question is requested by the prosecution or by counsel for the defense and is one of the standardized questions developed by the Task Force on Voir Dire, the court shall propound the questions unless the court determines that the question is clearly inappropriate. If a nonstandardized question is proposed by the prosecution or by counsel for the defense, the court may propound the question in its discretion.~~

(b) The Task Force on Voir Dire shall consist of eight members who shall serve without compensation, two of whom shall be appointed by the Judicial Counsel, two by the Governor, two by the Speaker of the Assembly, and two by the Senate Rules Committee. All appointees shall have been members of the State Bar for at least five years prior to their appointment. The Judicial Counsel may provide staff to assist the task force.

All appointments to the Task Force on Voir Dire shall be made on or before March

1, 1988. The task force shall submit to the pilot project counties a list of standardized questions which meet the purposes of subdivision (a) on or before July 1, 1988.

(c) Notwithstanding the provisions of Section 206, the Judicial Council and any other bona fide research or research organization shall be permitted access to any data regarding the conduct or evaluation of the pilot project. On or before January 1, 1992, the Judicial Council shall report to the Legislature on the effects of the pilot project on the efficiency in jury selection and on any effect on the conviction rate for particular crimes compared to a similar prior period in each pilot project county.

SEC. 8. Section 1203.1 is added to the Evidence Code, to read:

*1203.1. Section 1203 is not applicable if the hearsay statement is offered at a preliminary examination, as provided in Section 872 of the Penal Code.*

SEC. 9. Section 189 of the Penal Code is amended to read:

189. All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, *kidnapping, train wrecking,* or any act punishable under ~~Section 288,~~ *Section 286, 288, 288a, or 289,* is murder of the first degree; and all other kinds of murder are of the second degree.

As used in this section, "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code.

To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or act [sic].

SEC. 10. Section 190.2 of the Penal Code is amended 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 or 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 *or her* 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 prefect, or attempt to perfect an escape from lawful custody.

(6) The murder was committed by means of a destructive device, homb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or cause to be mailed and delivered and the defendant knew or reasonably should have known that his *or her* 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 *or her* 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 *or her* 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 *or her* official duties.

(8) The victim was a federal law enforcement officer or agent, who, while engaged in the course of the performance of his *or her* 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 *or her* duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his *or her* 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 *or her* 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 *or her* duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his *or her* testimony in any criminal *or juvenile* proceeding, and the killing was not committed during the commission, or attempted commission ~~or~~ *of* the crime to which he *or she* was a witness, or the victim was a witness to a crime and was intentionally killed in retaliation for his *or her* testimony in any criminal *or juvenile* proceeding. *As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.*

(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 *intentionally* 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 *intentionally* 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~~ *federal government,* a local or ~~State~~ *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~~. *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 *or her* 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 *or 212.5.*

(ii) Kidnapping in violation of ~~Sections~~ *Section 207* ~~and~~ *or* 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 288a.

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

(viii) Arson in violation of *subdivision (b) of* Section ~~447~~ *451.*

(ix) Train wrecking in violation of Section 219.

*(x) Mayhem in violation of Section 203.*

(xi) Rape by instrument in violation of Section 289.

(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 in 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.~~ *Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer as to whom such special circumstance has been found to be true under Section 190.4 need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in state prison for a term of life without the possibility of parole.*

(c) Every person not the actual killer who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists 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 subdivision (a) of this section has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a), which felony results in the death of some person or persons, who is found guilty of murder in the first degree therefor, shall suffer death or confinement in state prison for life without the possibility of parole, in any case in which a special circumstance enumerated in paragraph (17) of subdivision (a) of this section has been found to be true under Section 190.4.

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

SEC. 11. Section 190.41 is added to the Penal Code, to read:

*190.41. Notwithstanding Section 190.4 or any other provision of law, the corpus delicti of a felony-based special circumstance enumerated in paragraph (17) of subdivision (a) of Section 190.2 need not be proved independently of a defendant's extrajudicial statement.*

SEC. 12. Section 190.5 of the Penal Code is amended to read:

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 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.

*(b) The penalty for a defendant found guilty of murder in the first degree, in any case in which one or more special circumstances enumerated in Section 190.2 or 190.25*

*has been found to be true under Section 190.4, who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.*

(c) The trier of fact shall determine the existence of any special circumstance pursuant to the procedure set forth in Section 190.4.

SEC. 13. Section 206 is added to the Penal Code, to read:

*206. Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture.*

The crime of torture does not require any proof that the victim suffered pain.

SEC. 14. Section 206.1 is added to the Penal Code, to read:

*206.1. Torture is punishable by imprisonment in the state prison for a term of life.*

SEC. 15. Section 859 of the Penal Code is amended to read:

859. When the defendant is charged with the commission of a public offense over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he or she shall, without unnecessary delay, be taken before a magistrate of the court in which the complaint is on file. The magistrate shall immediately deliver to the defendant a copy of the complaint, inform the defendant that he or she has the right to have the assistance of counsel, ask the defendant if he or she desires the assistance of counsel, and allow the defendant reasonable time to send for counsel. However, in a capital case, the court shall inform the defendant that the defendant must be represented in court by counsel at all stages of the preliminary and trial proceedings and that the representation will be at the defendant's expense if the defendant is able to employ counsel or at a public expense if he or she is unable to employ counsel, inquire of him or her whether he or she is able to employ counsel and, if so, whether the defendant desires to employ counsel of the defendant's choice or to have counsel assigned for him or her, and allow the defendant a reasonable time to send for his or her chosen or assigned counsel. The magistrate must, upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer shall, without delay and without a fee, perform that duty. If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him or her; in a capital case, if the defendant is able to employ counsel and either refuses to employ counsel or appears without counsel after having had a reasonable time to employer counsel, the court shall assign counsel to defend him or her. If it appears that the defendant may be a minor, the magistrate shall ascertain whether that is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he or she shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor. ~~The prosecuting attorney shall deliver to, or make accessible for inspection and copying by,~~

~~the defendant or counsel, copies of the police, arrest, and crime reports, upon the first court appearance of counsel, or upon a determinatioin [sic] by a magistrate that the defendant can represent himself or herself. If unavailable to the prosecuting attorney at the time of that appearance or determination, the reports shall be delivered within two calendar days. Portions of those reports containing privileged information need not be disclosed if the defendant or counsel has been notified that privileged information has not been disclosed. If the charges against the defendant are dismissed prior to the time the above-mentioned documents are delivered or made accessible, the prosecuting attorney need not deliver or make accessible those documents unless otherwise so compelled by law. The court shall not dismiss a case because of the failure of the prosecuting attorney to immediately deliver copies of the reports or to make them accessible for inspection and copying.~~

SEC. 16. Section 866 of the Penal Code is amended to read:

866. *(a)* When the examination of witnesses on the part of the people is closed, any ~~witnesses~~ *witness* the defendant may produce ~~must~~ *shall* be sworn and examined.

*Upon the request of the prosecuting attorney, the magistrate shall require an offer of proof from the defense as to the testimony expected from the witness. The magistrate shall not permit the testimony of any defense witness unless the offer of proof discloses to the satisfaction of the magistrate, in his or her sound discretion, that the testimony of that witness, if believed, would be reasonably likely to establish an affirmative defense, negate an element of a crime charged, or impeach the testimony of a prosecution witness or the statement of a declarant testified to by a prosecution witness.*

(b) It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery.

(c) This section shall not be construed to compel or authorize the taking of depositions of witnesses.

SEC. 17. Section 871.6 is added to the Penal Code, to read:

*871.6. If in a felony case the magistrate sets the preliminary examination beyond the time specified in Section 859b, in violation of Section 859b, or continues the preliminary hearing without good cause and good cause is required by law for such a continuance, the people or the defendant may 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 shall have precedence over all other cases in the court to which the petition is assigned. If the superior court grants a peremptory writ, it shall issue the writ and a remittitur three court days after its decision becomes final as to the court if this action is 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. When the superior court issues the writ and remittitur as provided in this section, the writ shall command the magistrate to proceed with the preliminary hearing without further delay, other than that reasonably necessary for the parties to obtain the attendance of their witnesses.*

The court of appeal may stay or recall the issuance of the writ and remittitur. The failure of the court of appeal to stay or recall the issuance of the writ and remittitur shall not deprive the parties of any right they would otherwise have to appellate review or extraordinary relief.

SEC. 18. Section 872 of the Penal Code is amended to read:

872. (a) If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe *that* the defendant is guilty ~~thereof~~, the magistrate ~~must~~ *shall* make or indorse on the complaint an order, signed by him *or her*, to the following effect: "It appearing to me that the offense in the within complaint mentioned (or any offense, according to the fact, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe *that* the within named A.B. is guilty ~~thereof~~, I order that he *or she* be held to answer to the same."

~~(b) The finding of sufficient cause may be based in whole or in part upon hearsay evidence in the form of written statements of witnesses in lieu of testimony. At the time the defendant appears before the magistrate for assignment, the prosecuting attorney may file with the court, and furnish a copy to the defendant, a statement made under penalty of perjury of the testimony of any witness which the prosecution wishes to introduce into evidence at the examination in lieu of the testimony of the witness. The statement shall be considered as evidence in the examination. This subdivision shall not apply if the witness is a victim of a crime against his or her person, or the testimony of the witness includes eyewitness identification of a defendant, or the prosecuting attorney has not filed with the court and furnished a copy to the defendant the statement of the testimony of the witness at the time of the arraignment or at least 10 court days prior to the date set for the preliminary hearing. For the purposes of this section an "eyewitness" is any person who sees the perpetrator during the commission of the crime charged, whether or not he or she can identify the perpetrator.~~

(c) Nothing in this section shall limit the right of the defendant to call any witness for examination at the preliminary hearing. If the witness called by the defendant is one whose statement of testimony was offered by the prosecuting attorney as provided in subdivision (b), the defendant shall have the right to cross/examine the witness as to all matters asserted in the statement. If the defendant makes reasonable efforts to secure the attendance of the witness but is unsuccessful in securing his or her attendance, the court shall grant a short continuance at the request of the defendant and shall require the prosecuting attorney to present the witness for cross/examination. If the prosecuting attorney fails to present the witness for cross/examination, the statement of the testimony of the witness shall not be considered as evidence in the examination.

*(b) Notwithstanding Section 1200 of the Evidence Code, the finding of probable cause may be based in whole or in part upon the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted. Any law enforcement officer testifying as to hearsay statements shall either have five years of law enforcement experience or have completed a training course certified by the Commission on Peace Officer Standards and Training which includes training in the investigation and reporting of cases and identifying at preliminary hearings.*

SEC. 19. Section 954.1 is added to the Penal Code, to read:

*954.1. 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 fact.*

SEC. 20. Section 987.05 is added to the Penal Code, to read:

*987.05. In assigning defense counsel in felony cases, whether it is the public defender or private counsel, the court shall only assign counsel who represents, on the record, that he or she will be ready to proceed with the preliminary hearing or trial, as the case may be, within the time provisions prescribed in this code for preliminary hearings and trials, except in those unusual cases where the court finds that, due to the nature of the case, counsel cannot reasonably be expected to be ready within the prescribed period if he or she were to begin preparing the case forthwith and continue to make diligent and constant efforts to be ready. In the case where the time of preparation for preliminary hearing or trial is deemed greater than the statutory time, the court shall set a reasonable time period for preparation. In making this determination, the court shall not consider counsel's convenience, counsel's calendar conflicts, or counsel's other business. The court may allow counsel a reasonable time to become familiar with the case in order to determine whether he or she can be ready. In cases where counsel, after making representations that he or she will be ready for preliminary examination or trial, and without good cause is not ready on the date set, the court may relieve counsel from the case and may impose sanctions upon counsel, including, but not limited to, finding the assigned counsel in contempt of court, imposing a fine, or denying any public funds as compensation for counsel's services. Both the prosecuting attorney and defense counsel shall have a right to present evidence and argument as to a reasonable length of time for preparation and on any reasons why counsel could not be prepared in the set time.*

SEC. 21. Section 1049.5 is added to the Penal Code, to read:

*1049.5. In felony cases, the court shall set a date for trial which is within 60 days of the defendant's arraignment in the superior court unless, upon a showing of good cause as prescribed in Section 1050, the court lengthens the time. If the court, after a hearing as prescribed in Section 1050, finds that thee is good cause to set the date for trial beyond the 60 days, it shall state on the record the facts proved that justify its finding. A statement of facts proved shall be entered in the minutes.*

SEC. 22. Section 1050.1 is added to the Penal Code, to read:

*1050.1. In any case in which two or more defendants are jointly charged in the same complaint, indictment, or information, and the court or magistrate, for good cause shown, continues the arraignment, preliminary hearing, or trial of one or more defendants, the continuance shall, upon motion of the prosecuting attorney, constitute good cause to continue the remaining defendants' cases so as to maintain joinder. The court or magistrate shall not cause jointly charged cases to be severed due to the*

*unavailability or unpreparedness of one or more defendants 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.*

SEC. 23. Chapter 10 (commencing with Section 1054) is added to Title 6 of Part 2 of the Penal Code, to read:

*CHAPTER 10. DISCOVERY*

1054. This chapter shall be interpreted to give effect to all of the following purposes:

(a) To promote the ascertainment of truth in trials by requiring timely pretrial discovery.

(b) To save court time by requiring that discovery be conducted informally between and among the parties before judicial enforcement is requested.

(c) To save court time in trial and avoid the necessity for frequent interruptions and postponements.

(d) To protect victims and witnesses from danger, harassment, and undue delay of the proceedings.

(e) To provide that no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.

1054.1. The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.

(b) Statements of all defendants.

(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.

(d) The existence of a felony conviction of any material witness whose credibility is likely to he critical to the outcome of the trial.

(e) Any exculpatory evidence.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which

the prosecutor intends to offer in evidence at the trial.

1054.2. No attorney may disclose or permit to be disclosed to a defendant the address or telephone number of a victim or witness whose name is disclosed to the attorney pursuant to subdivision (a) of Section 1054.1 unless specifically permitted to do so by the court after a hearing and a showing of good cause.

1054.3. The defendant and his or her attorney shall disclose to the prosecuting attorney:

(a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.

(b) Any real evidence which the defendant intends to offer in evidence at the trial.

1054.4. Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting agency from obtaining nontestimonial evidence to the extent permitted by law on the effective date of this section.

1054.5. (a) No order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant, or any other persons or agencies which the prosecuting attorney or investigating agency may have employed to assist them in performing their duties.

(b) Before a party may seek court enforcement of any of the disclosures required by this chapter, the party shall make an informal request of opposing counsel for the desired materials and information. If within 15 days the opposing counsel fails to provide the materials and information requested, the party may seek a court order. Upon a showing that a party has not complied with Section 1054.1 or 1054.3 and upon a showing that the moving party complied with the informal discovery procedure provided in this subdivision, a court may make any order necessary to enforce the provisions of this chapter, including, but not limited to, immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order. Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure.

(c) The court may prohibit the testimony of a witness pursuant to subdivision (b) only if all other sanctions have been exhausted. The court shall not dismiss a charge pursuant to subdivision (b) unless required to do so by the Constitution of the United States.

1054.6. Neither the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (c) of Section 2018 of the Code of Civil Procedure, or which are privileged pursuant to an

express statutory provision, or are privileged as provided by the Constitution of the United States.

1054.7. The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. "Good cause" is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. In its discretion, the trial court may after trial and conviction, unseal any previously sealed matter.

SEC. 24. Section 1102.5 of the Penal Code is repealed.

~~1102.5. (a) Upon motion, the prosecution shall be entitled to obtain from the defendant or his or her counsel, all statements, oral or however preserved, by any defense witness other than the defendant, after that witness has testified on direct examination at trial. At the request of the defendant or his or her counsel, the court shall review the statement in camera and limit discovery to those matters within the scope of the direct testimony of the witness. As used in this section, the statement of a witness includes factual summaries, but does not include the impressions, conclusions, opinions, or legal research or theories of the defendant, his or her counsel, or agent.~~

(b) The prosecution shall make available to the defendant, as soon as practicable, all evidence, including the names, addresses and statements of witnesses, which was obtained or prepared as a consequence of obtaining any discovery or information pursuant to this section.

(c) Nothing in this section shall be construed to deny either to the defendant or to the people information or discovery to which either is now entitled under existing law.

SEC. 25. Section 1102.7 of the Penal Code is repealed.

~~1102.7. Notwithstanding any other provision of law, the prosecution shall not be required to furnish to the defendant himself or herself, but only to his or her attorney, the address or telephone number of any victim or witness absent a showing of good cause as determined by the court, unless the defendant is acting as his or her own attorney. When an address or telephone number is released to the defendant's attorney, the court shall order the defendant's attorney not to disclose the information to the defendant.~~

If the defendant is acting as his or her own attorney in a case involving force or

violence, dangerous or deadly weapons, or witness intimidation and where there is a possibility that the defendant poses a continuing threat to the victim or witness, the court shall protect the address and telephone number of the victim or witness by providing for contact only through a court/appointed licensed private investigator or by imposing other reasonable restrictions. When an address or telephone number is released to a court/appointed licensed private investigator, the court shall order the investigator not to disclose this information to the defendant.

SEC. 26. Section 1385.1 is added to the Penal Code, to read:

*1385.1. Notwithstanding Section 1385 or any other provision of law, a judge shall not strike or dismiss any special circumstance which is admitted by a plea of guilty or nolo contendere or is found by a jury or court as provided in Sections 190.1 to 190.5, inclusive.*

SEC. 27. Section 1430 of the Penal Code is repealed.

~~1430. The prosecuting attorney shall deliver to, or make accessible for inspection and copying by, the defendant or counsel, copies of the police, arrest, and crime reports, upon the first court appearance of counsel, or upon a determination by a magistrate that the defendant can represent himself or herself. If unavailable to the prosecuting attorney at the time of that appearance or determination, the report shall be delivered within two calendar days. Portions of those reports containing privileged information need not be disclosed if the defendant or his or her counsel has been notified that privileged information has not been disclosed. If the charges against the defendant are dismissed prior to the time the above/mentioned documents are delivered or made accessible, the prosecuting attorney need not deliver or make accessible such documents unless otherwise so compelled by law. The court shall not dismiss a case because of the failure of the prosecuting attorney to immediately deliver copies of the reports or to make them accessible for inspection and copying.~~

SEC. 28. Section 1511 is added to the Penal Code, to read:

*1511. If in a felony case the superior court sets the trial beyond the period of time specified in Section 1049.5, in violation of Section 1049.5, or continues the hearing of any matter without good cause, and good cause is required by law for such a continuance, either party may file a petition for writ of mandate or prohibition in the court of appeal seeking immediate appellate review of the ruling setting the trial or granting the continuance. Such a petition shall have precedence over all other cases in the court to which the petition is assigned, including, but not limited to, cases that originated in the juvenile court. If the court of appeal grants a peremptory writ, it shall issue the writ and a remittitur three court days after its decision becomes final as to that court if such action is necessary to prevent mootness or to prevent frustration of the relief granted, notwithstanding the right of the parties to file a petition for review in the Supreme Court. When the court of appeal issues the writ and remittitur as provided herein, the writ shall command the superior court to proceed with the criminal case without further delay, other than that reasonably necessary for the parties to obtain the attendance of their witnesses.*

The Supreme Court may stay or recall the issuance of the writ and remittitur. The

Supreme Court's failure to stay or recall the issuance of the writ and remittitur shall not deprive the respondent or the real party in interest of its right to file a petition for review in the Supreme Court.

SEC. 29. If any provision of this measure or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the measure which can be given effect without the invalid provision or application, and to this end the provisions of this measure are severable.

SEC. 30. The statutory provisions contained in this measure may not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

# 114 Murder of a Peace Officer. Criminal Penalties. Special Circumstance. Peace Officer Definition. Legislative Initiative Amendment

## Official Title and Summary

MURDER OF A PEACE OFFICER. CRIMINAL PENALTIES. SPECIAL CIRCUMSTANCE. PEACE OFFICER DEFINITION. LEGISLATIVE INITIATIVE AMENDMENT. The Briggs Death Penalty Initiative Act defined "peace officer" for cases where a defendant is found guilty of first degree murder and the victim was a peace officer. No changes have been made to this section since its enactment. The Legislature has reclassified peace officers by grouping them into different categories and has made other changes since 1979. This statute conforms the definition found in the Initiative Act to the new classifications, thereby increasing the numbers and types of peace officers covered by the act. Summary of Legislative Analyst's estimate of net state and local government fiscal impact: Increases the number of peace officers for which the special circumstance for first degree murder applies. To the extent longer prison terms result, there will be unknown increases in state costs.

## Final Vote Cast by the Legislature on SB 353 (Proposition 114)

| | | | |
|---|---|---|---|
| Assembly: | Ayes 78 | Senate: | Ayes 37 |
| | Noes 0 | | Noes 0 |

## Analysis by the Legislative Analyst

### Background

In 1978, the voters adopted an initiative pertaining to the penalties for first-degree and second-degree murder. With regard to the punishment for first-degree murder, the Death Penalty Initiative expanded the special circumstances under which the death penalty, or a life sentence without the possibility of parole, would be imposed. These special circumstances include the murder of certain peace officers, as defined in various sections of the Penal Code.

The California Constitution provides that the Legislature may amend an initiative by another statute, but the statute becomes effective only when approved by the voters.

Since 1978, there have been no changes to the Death Penalty Initiative. The Legislature, however, has amended the Penal Code. These amendments have resulted in some persons being deleted from, and other persons being added to, the definition of a peace officer. These persons include various employees of the state and local governments.

### Proposal

By reference, this measure would incorporate the legislative changes in the definition of a peace officer into the provisions of the 1978 Death Penalty Initiative. As a result, this measure expands the number and types of peace officers the murder of whom would be a special circumstance under the 1978 Death Penalty Initiative.

### Fiscal Effect

This measure increases the number of crimes for which the special circumstances for first-degree murder may apply. To the extent these changes result in longer prison terms, there will be unknown increases in state costs.

## Text of Proposed Law

This law proposed by Senate Bill 353 (Statutes of 1989, Chapter 1165) is submitted to the people in accordance with the provisions of Article II, Section 10 of the Constitution.

This proposed law amends a section 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

SEC. 16. Section 190.2 of the Penal Code is amended 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 *or her* 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 caused to be mailed or delivered and the defendant knew or reasonably should have known that his *or her* 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, *830.32, 830.33, 830.34,* 830.35, 830.36, *830.37,* 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 *or her* duties was intentionally killed, and ~~such~~ *the* defendant knew or reasonably should have known that ~~such~~ *the* victim was a peace officer engaged in the performance of his *or her* 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 *or her* official duties.

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

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

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his *or her* testimony in any criminal proceeding, and the killing was not committed during the commission, or attempted commission ~~or~~ *of* the crime to which he *or she* was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his *or her* 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~~. *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 *or her* 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 288a.

(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~~ *paragraph* (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.

# 114 Murder of a Peace Officer. Criminal Penalties. Special Circumstance. Peace Officer Definition. Legislative Initiative Amendment

## Argument in Favor of Proposition 114

Proposition 114 will require your approval if the death penalty is to be imposed as the voters demanded back in 1978. It updates and clarifies provisions regarding the murder of our peace officers.

In 1978 the voters approved Proposition 7, the Death Penalty Initiative, which established the circumstances and conditions under which a murderer might be sentenced to death. One such circumstance is the murder of a peace officer engaged in his or her duties, when the defendant knew or reasonably should have known that the victim was in fact an officer. For purposes of imposing this sentence, the various classes of peace officers—police officers, sheriffs' deputies, investigators, and security officers—are listed in the law by reference to the statutes which establish their special authority. Only your vote can change that law.

In the years since the death penalty was enacted, new categories of peace officers have been created by the Legislature. Most of these are investigators whose pursuit of white collar criminals supplements the work of regular police and sheriffs. Some provide public safety services on special public lands. All are sworn to your service, and willingly face danger and hardship in the interests of law and order.

Proposition 114 simply adds these new categories of peace officers to the list of those whose deaths can trigger a death penalty sentence for the perpetrator. The will of the people has been made clear: the murder of a peace officer should carry the ultimate sentence. Your "yes" vote will guarantee that no murderer of a peace officer will avoid the ultimate penalty solely because the law is technically not up to date.

Please vote "yes" on Proposition 114. Keep the message clear: the murder of *any* peace officer in the State will not be tolerated.

ROBERT PRESLEY
*State Senator, 36th District*

WILLARD MURRAY
*Member of the Assembly, 54th District*

## Rebuttal to Argument in Favor of Proposition 114

We object to so many bureaucrats being designated as "peace officers," thus having the power to carry weapons, visit and inspect the premises of any licensee affected by their agency, and to make arrests.

Some employees of the Department of Motor Vehicles, the Office of Statewide Health Planning and Development, and the Department of Housing and Community Development, to name a few, to have such vast powers.

We oppose the phenomenal growth of state government. The California budget has doubled since 1982, and there are more state employees on the payroll. The agencies listed in Proposition 114 often don't cost much in the budget, but the money they cost due to excessive regulation of businesses and jobs is hard to measure.

We are the Libertarian Party candidates for Attorney General, Lt. Governor, and Insurance Commissioner. The appropriate bureaucrat violated our First Amendment rights by not allowing us to sign this rebuttal and the following argument as candidates.

Strike a blow for liberty. VOTE NO on Proposition 114.

PAUL N. GAUTREAU
*Attorney at Law*
*Member, State Central Committee, Libertarian Party of California*

ANTHONY G. BAJADA
*Professor of Music, California State University/Los Angeles*
*Member, State Central Committee, Libertarian Party of California*

TED BROWN
*Member, State Executive Committee, Libertarian Party of California*

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# Murder of a Peace Officer. Criminal Penalties. Special Circumstance. Peace Officer Definition. Legislative Initiative Amendment

114

## Argument Against Proposition 114

Proposition 114 is part of legislation that defines which officials are "peace officers" and under what conditions they can exercise their law enforcement authority. It looks as if a large percentage of state employees meet these specifications.

Everyone considers a California Highway Patrol officer or a State Police officer to be a peace officer. The officers of such rinky-dink agencies as the Board of Dental Examiners, the California Horse Racing Board, the Division of Labor Standards Enforcement, and the Department of Corporations are defined as "peace officers" as well.

The authors of this proposal want even more state employees to be designated as "peace officers" so that they can expand the "special circumstances" under which a convicted murderer can be sentenced to death or life imprisonment without possibility of parole.

The "special circumstances" are extensive and mostly sound, such as when "the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity." However, many of the "circumstances" have to do with *who* is killed, not how the murder is committed. If the victim is an elected official, a judge, or a "peace officer," the killer has met the special circumstances and is treated accordingly.

While we certainly oppose killing any of these officials, we also oppose exalting their lives to more importance than the lives of average citizens. Proposition 114 will add more of these "special people" to the list.

Murder is murder—when it's an intentional, premeditated act. We do not believe that the law should provide different penalties for killing one class of people. The murder of a police officer is tragic, but is that any more tragic than the murder of a store owner, a school teacher, or anyone else? In America, all persons are supposed to be equal before the law.

We urge you to vote NO on Proposition 114 for two reasons: (1) the death penalty or life in prison without parole should *not* depend on the victim's identity; and (2) more government bureaucrats should not be designated as "peace officers" capable of enforcing regulations that strangle the economy and violate individual rights.

PAUL N. GAUTREAU
*Attorney at Law*
*Member, State Central Committee,*
*Libertarian Party of California*

ANTHONY G. BAJADA
*Professor of Music, California State University/*
*Los Angeles*
*Member, State Central Committee,*
*Libertarian Party of California*

TED BROWN
*Member, State Executive Committee,*
*Libertarian Party of California*

## Rebuttal to Argument Against Proposition 114

Opponents argue against an existing law which the voters enacted over a decade ago—the Death Penalty for the killing of a peace officer. Their "two reasons to vote No" are no reasons at all.

They argue that the death penalty should not be imposed depending on the identity of the victim. There is merit to this notion. In fact, it is the general rule in our law. But you have chosen to create a separate rule, in this one instance, regarding the murder of a person *known* by the assailant to be a police officer because such a crime is more than an attack on a individual. It is an attack on order in our society, personified by our officers, which must be maintained if we are to have a civilized state.

But this issue, this "reason" to vote No, is simply not relevant. The special circumstance the opponents reject is existing law and not a new proposal in this measure.

The "second reason" is based on a total misunderstanding of this proposition, and the legislation which generated it. This measure does *not* designate new classes of peace officers. The bill which caused this proposal to appear on the ballot did *not* designate new officers. All the individuals covered have been peace officers for some time. Proposition 114 only guarantees that criminals who commit the murder of *any* peace officer face the possibility of a death sentence.

Stand by *all* of California law enforcement. Vote *Yes* on 114.

ROBERT PRESLEY
*State Senator, 36th District*

BILL ANALYSIS
Bill Lockyer, Chairman
1993-94 Regular Session

SB 310 (Ayala)
As amended March 29
Hearing date: March 30, 1993
Penal Code
GWW/jt

MURDERS COMMITTED FROM MOTOR VEHICLES
-STATUTORY CLASSIFICATION OF FIRST DEGREE MURDER-
-DEATH PENALTY FOR INTENTIONAL KILLING-

HISTORY

Source: Author; OCJP

Prior Legislation: None

Support: Women Prosecutors of California

Opposition: Friends Committee on Legislation; CACJ; ACLU

(THIS ANALYSIS REFLECTS AUTHOR'S AMENDMENTS TO BE OFFERED IN
šCOMMITTEE.)

KEY ISSUES

SHOULD ANY MURDER WHICH IS COMMITTED BY SHOOTING A FIREARM FROM A
šMOTOR VEHICLE, INTENTIONALLY AT ANOTHER PERSON OUTSIDE THE VEHICLE
šWITH THE INTENT TO INFLICT DEATH OR GREAT BODILY INJURY, BE DEEMED
šBY LAW TO BE FIRST DEGREE MURDER?

SHOULD SUCH A MURDER, COMMITTED INTENTIONALLY, BE PUNISHABLE BY THE
šDEATH PENALTY?

PURPOSE

Existing law makes first degree murder, as defined, punishable by a
š25 year to life sentence which can be reduced one-half by work-time
šcredits. Release on parole, however, is at the discretion of the
šBoard of Prison Terms. Second degree murder is punishable by a 15

(More)

year to life term.

Existing law makes any first degree murder committed with special
šcircumstances punishable by life imprisonment without possibility of
šparole or by death.

This bill would classify as first degree murder any murder which is
šperpetrated by means of discharging a firearm from a motor vehicle,
šintentionally at another person or persons outside the vehicle with
šthe intent to inflict death or great bodily injury (gbi).

This bill would also make that murder, when committed intentionally,
ša "special circumstance" offense punishable by the death penalty or
šby life imprisonment without parole.

The purpose of this bill is to increase the penalty for murders
šcommitted by drive-by shootings.

COMMENT

1. Stated need to raise penalties

According to the author's office and sponsor, current law does not adequately punish the murder of an innocent victim perpetrated by a drive-by shooting. Under current law, a drive-by first degree murder is punishable by a 30 years to life sentence (25 years to life for murder and a five year enhancement for use of a firearm with the intent to inflict death or gbi). A second degree drive-by murder with a firearm is punishable by a 20 years to life sentence (15 to life plus 5 years).

OCJP contends that all drive-by shootings should be deemed first degree murders, that drive-by killers should never be eligible for parole release, and that these killers should be subject to the death penalty as retribution for their victims.

2. Easing the elements of first degree murder for drive-by killings

Under existing law, murder is the unlawful killing of a human being with malice aforethought. Without malice, an unlawful killing is manslaughter. Murder is classified as either first degree or second degree. First degree murders are murders committed by means of destructive devices, explosives, knowing use of armor piercing bullets, lying in wait, torture, or any other kind of willful, deliberate and premeditated killing, or murders committee during the commission of a list of enumerated felonies (felony-murder). All other murders are second degree murders (i.e., no premeditation or deliberation).

(More)

SB 310 would classify as first degree murder any murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person with the intent to inflict death or great bodily injury. In operation, the provision would change the elements of first degree murder to make it easier to obtain a first-degree murder conviction for a drive-by shooting murder.

Opponents argue that this provision blurs the distinction between first and degree murder and in effect operates to bootstrap what is now a second degree murder into first degree murder. For example, shooting a weapon at an inhabited dwelling involves a reckless disregard of the probable consequences, and if death occurs, can lead to a second degree murder conviction. (See People v. White (1992) 4 Cal.App 4th 1299 - malice implied from reckless act.) It is, however, not first degree murder unless the defendant acted with deliberation and premeditation.

This distinction is grounded in fundamentals of criminal law, which requires that a defendant to have a guilty mind ("mens rea") to commit the crime and that the punishment must fit the guilty mind of the perpetrator. If the murder was not committed with premeditation and deliberation (or under the felony-murder doctrine) the offense is not first degree murder.

To address these concerns, the author has amended SB 310 to require that the shooting be "intentionally at another person or persons with the intent to inflict death or great bodily injury". While the amendment ensures that malice must be shown for a first degree murder conviction, it would not require a showing of "premeditation and deliberation" for a first degree murder conviction. Proponents assert that the requirement of proving premeditation and deliberation in a spontaneous drive-by shooting is often difficult and thus allows drive-by murderers to escape full punishment for their crimes. Proponents also note that other first degree murder crimes do not require an express showing of premeditation and deliberation, such as the felony-murder crimes or murders committed by use of explosives, and that drive-by killings are as heinous as those crimes. (Author's amendments in committee are expected to add language that the victim was not a vehicle occupant to characterize the offense as a drive-by shooting.)

2. Death penalty for intentional, drive-by murders

SB 310 would also make a drive-by shooting murder punishable by the death penalty (or by life imprisonment without possibility of parole) when the murder was intentional. The requirement of an "intentional" murder was added at the suggestion of committee

(More)

staff and mirrors several other provisions of the death penalty law which requires an intentional murder for a death sentence.

3. Meaningful basis required for distinguishing between special
š circumstance crimes and other murders

Historically, California's special circumstance death penalty law was first enacted n 1973 by SB 450 (Deukmejian) in response to a line of U.S. Supreme Court edicts that the arbitrary imposition of the death penalty constitutes cruel and unusual punishment. Since those early conceptual stages, beginning with the first draft of SB 450, the Legislature has only considered application of the death penalty sanction to criminals who murdered under "special circumstances."

The argument was that the death penalty should be reserved for the most serious of offenses. Trivializing it or applying it to general crimes could cause a diminution of its deterrent effect as well as subject it to constitutional challenge for failure to provide a "meaningful basis" for distinguishing between those who receive the sentence and those who do not (see "Godfrey v. Georgia (1980) 446 U.S. 420).

The defense bar opposes SB 310's expansion of the death penalty and asserts that it is seriously flawed in that it fails to provide a meaningful basis for distinguishing between death penalty murders and other murders. The fact that a victim was shot from a vehicle compared to being shot from a location other than a vehicle does not establish a meaningful basis for deciding who gets the death penalty and who does not.

Another opponent of a prior measure, SB 159 (Floyd) which was held by the Assembly Committee on Public Safety, stated "A special circumstance for drive by shooting appears to us to be illogical and unwarranted. Death Penalty homicides are determined by the gravity of the offense not the location of the defendant."

4. Other opposition arguments

The Friends Committee on Legislation opposes any expansion of the list of death penalty crimes. FCL asserts that the death penalty is not a deterrent to murder and that SB 310 would not deter drive-by-shootings.

CACJ also contends that implementation of the death penalty law is very costly and that scarce criminal justice resources could be better spent by dealing directly with social factors which contribute to the homicide rate.



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BILL ANALYSIS

SB 60

Date of Hearing: July 13, 1993
Counsel: Paul M. Gerowitz

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Bob Epple, Chair

SB 60 (Presley) - As Proposed to be Amended In Committee

ISSUE: SHOULD THE NEW CRIME OF CARJACKING BE CREATED, AS SPECIFIED?

DIGEST

Under current law carjacking is punishable, under the robbery statute, by two, three, or five years in state prison and a fine up to $10,000. (Penal Code sections 211 and 212.5(b).)

This bill:

1) Creates the new crime of carjacking, punishable by three, six, or nine years in state prison and a fine up to $10,000.

2) Creates sentence enhancements specific to the crime of carjacking, as specified.

3) Makes appropriate cross-reference changes as specified.

COMMENTS

1) Purpose. According to the author:

> There has been considerable increase in the number of persons who have been abducted, many have been subjected to the violent taking of their automobile and some have had a gun used in the taking of the car. This relatively "new" crime appears to be as much thrill-seeking as theft of a car. If all the thief wanted was the car, it would be simpler to hot-wire the automobile without running the risk of confronting the driver. People have been killed, seriously injured, and placed in great fear, and this calls for a strong message to discourage these crimes. Additionally law enforcement is reporting this new crime is becoming the initiating rite for aspiring gang members and the incidents are drastically increasing.
>
> Under current law there is no carjacking crime per se and many car jackings cannot be charged as robbery because it is difficult to prove the intent required of a robbery offense (to permanently

- continued -



SB 60

http://info.sen.ca.gov/pub/93-94/bill/sen/sb_0051-0100/sb_60_cfa_930710_145124_asm_comm

deprive one of the car) since many of these gang carjackings are šthrill seeking thefts. There is a need to prosecute this crime.

2) Penalties. This bill creates sentences of up to nine years for the š crime of carjacking, which is three years more than the maximum sentence for robbery.

3) Sentence Enhancements. This bill also creates sentence enhancements š specifically designed to punish serious carjacking offenders. For example, it provides for an enhancement of four, six, or eight years, for personal use of a firearm during the commission of a carjacking. The standard enhancement for personal use of a firearm during the commission of a felony is three, four, or five years. The bill also contains enhancement provisions for use of a deadly weapon other than a firearm, and for the discharging of a firearm causing great bodily injury. In addition, other existing sentence enhancements would be applicable.

4) Compared to Current Law. Under current law, a carjacking would be š prosecuted as robbery, and would be subject to existing sentence enhancements. The maximum sentence for a carjacker who uses a gun and causes great bodily injury is, under current law, fourteen years. Under this bill, the same carjacker could receive a sentence of up to twenty years.

5) Cross-reference Changes. Because the law of robbery has an impact š upon many other sections of the codes, the author of this bill has included in the bill various cross-reference changes. Among the most noteworthy of these are:

a) Juvenile Justice: Under current law, persons 16 years of age or older are presumed to be triable as adults if accused of specified offenses. Among these specified offenses are the crime of robbery while armed with a dangerous or deadly weapon. This bill adds carjacking with a dangerous or deadly weapon to the list.

b) Probation and Plea Bargaining: This bill provides that plea bargaining and probation limitations such as those which apply in robbery cases also apply in carjacking cases.

c) Petty Theft With a Prior: Under current law a person who commits petty theft, and who has previously served time for a theft-related offense, is guilty of a felony. This bill adds carjacking to the list of theft- related offenses which will qualify a defendant for felony status on the subsequent offense.

6) Related Legislation. On February 9, 1993 this Committee passed AB 6 (Burton), a bill which also created the crime of carjacking. That bill is currently in the Senate. Through a series of amendments and negotiations, the authors of AB 6 and SB 60 have agreed that the two bills shall be rendered identical with one another. The proposed

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amendments to this bill, which are reflected in this analysis, are consistent with that agreement.

SOURCE: California District Attorneys Association
San Diego County District Attorneys Office
Governor's Office

SUPPORT: Greater Riverside Chambers of Commerce
Doris Tate Crime Victims Bureau
Personal Insurance Federation of California

OPPOSITION: California Attorneys for Criminal Justice

- continued -

BILL NUMBER: SB 32 INTRODUCED
BILL TEXT

INTRODUCED BY Senator Peace

DECEMBER 9, 1994

An act to amend Section 190.2 of the Penal Code, relating to murder.

LEGISLATIVE COUNSEL'S DIGEST

SB 32, as introduced, Peace. Murder: special circumstances.

Existing law specifies that the penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole, where one or more special circumstances have been found to be true.

This bill would include within that list of special circumstances a murder that was committed while the defendant was engaged in, or an accomplice to, the commission or attempted commission of a carjacking, as defined, an intentional murder where the defendant intended to kill more than one person at the time of the murder, an intentional murder where the defendant knowingly created a grave risk of death to more than one person, or where the victim was a juror, as specified.

Because the bill amends an initiative statute, the bill would provide that its provisions would become effective only when submitted to, and approved by, the voters.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 190.2 of the Penal Code is amended to read:

190.2. (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in *the* state prison for ~~a term of~~ life without the possibility of parole ~~in any case in which~~ *if* one or more of the following special circumstances has been 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 *previously* of murder in the first ~~degree~~ or second degree. For the purpose of this paragraph , an offense committed in another jurisdiction ~~which~~ *that,* 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 , *has* 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 or her act or acts would create a great risk of death to ~~a human being or~~ *one or more* 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~~ *caused* to be mailed or delivered , and the defendant knew , or reasonably should have known , that his or her act or acts would create a great risk of death to ~~a human being or~~ *one or more* human beings.

(7) The victim was a peace officer , as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11 , or 830.12, who, while engaged in the course of the performance of his or her duties , was intentionally killed, and the defendant knew , or reasonably should have known , that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer , as defined in the ~~above enumerated~~ *above-enumerated* sections ~~of the Penal Code~~ , or a former peace officer under any of ~~such~~ *those* sections, and was intentionally killed in retaliation for the performance of his or her official duties.

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

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

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission ~~,~~ or attempted commission , of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph , "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(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 *of* a federal prosecutor's office , and the murder was intentionally 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

intentionally 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~~ *used* in this section, the phrase ~~especially~~ *"especially* heinous, atrocious , or cruel , manifesting exceptional ~~depravity~~ *depravity"* means a conscienceless ~~,~~ or pitiless crime ~~which~~ *that* 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 or her 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)~~

*(A)* Robbery in violation of Section 211 or 212.5.

~~(ii)~~

*(B)* Kidnapping in violation of Section 207 ~~or~~ , 209 *, or 209.5* .

~~(iii)~~

*(C)* Rape in violation of Section 261.

~~(iv)~~

*(D)* Sodomy in violation of Section 286.

~~(v)~~

*(E)* 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.

~~(vi)~~

*(F)* Oral copulation in violation of Section 288a.

~~(vii)~~

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

~~(viii)~~

*(H)* Arson in violation of subdivision (b) of Section 451.

~~(ix)~~

*(I)* Train wrecking in violation of Section 219.

~~(x)~~

*(J)* Mayhem in violation of Section 203.

~~(xi)~~

*(K)* Rape by instrument in violation of Section 289.

*(L) Carjacking, as defined in Section 215.*

(18) The murder was intentional and involved the infliction of torture.

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

*(20) The defendant intentionally killed the victim and intended to kill more than one person at the time of committing the murder.*

*(21) The defendant intentionally killed the victim and knowingly*

*created a grave risk of death to more than one person, other than another principal in the murder, at the time of committing the murder.*

*(22) The victim was a juror in any court of record in the local, state, or federal system in any state of the United States, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.*

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer *,* as to whom ~~such~~ *the* special circumstance has been found to be true under Section 190.4 *,* need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance *,* in order to suffer death or confinement in *the* state prison for ~~a term of~~ life without the possibility of parole.

(c) Every person *,* not the actual killer *,* who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree *,* shall suffer death or confinement in *the* state prison for ~~a term of~~ life without the possibility of parole ~~, in any case in which~~ *if* one or more of the special circumstances enumerated in subdivision (a) ~~of this section~~ has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person *,* not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a), which felony results in the death of some person or persons, who is found guilty of murder in the first degree therefor, shall suffer death or confinement in *the* state prison for life without the possibility of parole ~~, in any case in which~~ *if* a special circumstance enumerated in paragraph (17) of subdivision (a) ~~of this section~~ has been found to be true under Section 190.4.

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

SEC. 2. This act affects an initiative statute, and shall become effective only when submitted to and approved by the voters pursuant to subdivision (c) of Section 10 of Article II of the California Constitution.

# CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION

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**EXECUTIVE DIRECTOR**
GREGORY D. TOTTEN


March 6, 1995

The Honorable Steve Peace
Member, California Senate
State Capitol, Room 2066
Sacramento, CA 95814

RE: SB 32

Dear Senator Peace:

On behalf of the California District Attorneys Association, I am writing to advise you that the Association will support your measure, if amended to limit its expansion of California's death penalty law to "car-jacking" only. We believe the other proposed additions to the special circumstance list are unnecessary and could lead to a potential attack upon California's death penalty law.

If you or any member of your staff have any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,

Gregory D. Totten
Executive Director

GDT/ar

pc: Senate Committee on Criminal Procedure

SENATE COMMITTEE ON CRIMINAL PROCEDURE
Milton Marks, Chair
1995-96 Regular Session

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SB 32 (Peace)
As proposed to be amended
Hearing date: March 7, 1995
Penal Code
MLK:js

MURDER: SPECIAL CIRCUMSTANCE

HISTORY

Source:Author

Prior Legislation: SB 1311 (Presley 1994) held in Public Safety

Support: Unknown

Opposition: Friends Committee on Legislation of California; ACLU; California Attorneys for Criminal Justice; California Public Defender's Association

KEY ISSUES

SHOULD MURDER DURING THE COMMISSION OF A CARJACKING BE A CAPITAL OFFENSE?

SHOULD MURDER DURING THE COMMISSION OF A KIDNAP-CARJACKING BE A CAPITAL OFFENSE?

SHOULD THE MURDER OF A JUROR IN RETALIATION FOR OR TO STOP THEM FROM PERFORMING THEIR OFFICIAL DUTIES BE A CAPITAL OFFENSE?

SHOULD THE INTENTIONAL MURDER OF ONE PERSON AND THE ATTEMPTED MURDER OF ANOTHER PERSON BE A CAPITAL OFFENSE?

SHOULD THE MURDER OF ONE PERSON WHILE KNOWINGLY CREATING A HIGH

PROBABILITY OF RISK OF DEATH TO MORE THAN TWO OTHERS BE A CAPITAL OFFENSE?

PURPOSE

Existing law provides that the penalty for a defendant found guilty of murder in the first degree, where one or more special circumstance has been charged and found to be true, shall be by death or confinement in state prison for a term of life without the possibility of parole. (Penal Code Section 190.2)

Under existing law, a murder committed during the commission or attempted commission of a carjacking is first degree murder punishable by confinement in the state prison for a term of 25 years to life. (Penal Code Section 190)

Under existing law, a murder committed during a robbery, is a special circumstance which if charged and found to be true is punishable by death or confinement in the state prison for life without parole. (Penal Code Section 190.2)

This bill would make a murder committed during the commission or attempted commission of a carjacking a special circumstance which if charged and found to be true would be punishable by death or confinement in state prison for life without parole.

Under existing law a person convicted of a kidnapping in commission of a carjacking shall be punished by life without the possibility of parole. (Penal Code 209.5)

This bill would make a murder occurring during a kidnapping in the commission of a carjacking punishable by death or life without he possibility of parole.

Under existing law, the intentional killing of one victim along with the attempt to kill another victim would be either first or second degree murder (depending on the circumstances of the murder) and attempted murder. This is punishable by 15 years to life if the murder is in the second degree or 25 years to life, death or life with out parole if the murder is in the first degree plus either life with parole, if the attempt was willful deliberate or premeditated murder, or 5, 7 or 9 years if the attempt was for any other murder. (Penal Code Sections 190, 664)

This bill would make the intentional killing of the victim and

attempt, with malice aforethought, to kill more than one person at the time of committing the murder a special circumstance which if charged and found to be true would result in the sentence of either death or life with out parole.

Under existing law the murder of one person is either first or second degree murder, even if the murder occurred where there was a high probability of risk to others.

This bill would make the murder of one victim which knowingly created a high probability of risk to at least two others a crime punishable by death or life without parole.

This bill would make the murder of a juror in any court for retaliation for or to prevent the performance of the victim's official duties a special circumstance which if charged and proven would be punishable by either death or life without parole.

The purpose of this bill is to add five special circumstances to the enumerated list of when the sentence for first degree murder shall be death or life without the possibility of parole.

COMMENTS

1. Need for the bill.

The author asserts that the addition to the list of special circumstances of carjacking and kidnap-carjacking are merely "clean-up" provisions since a carjacking is essentially a robbery and robbery is already a special circumstance and kidnapping is also a special circumstance.

The author asserts that since the current death penalty law covers retaliatory killings against witnesses and judges but does not cover jurors "\i\t is obvious that given the central role that jurors play in the administration of justice, killing a juror because of his or her official actions is just as much an outrage as killing a judge or a witness."

The author asserts that the addition to the list of special circumstances where the defendant intentionally killed one victim but attempted to kill more than one and where the defendant

intentionally killed one victim but knowingly created a high probability of death to more than two persons, are "designed to apply to situations wherein the defendant intentionally killed a victim under circumstances wherein the defendant either intended at the time to kill more than one person or created a risk that a number of persons would be in fact killed by his or her actions." The author states that this would apply to more than just drive-by shootings.

2. Murder

Under existing law, murder is the unlawful killing of a human being with malice aforethought. Without malice, an unlawful killing is manslaughter. Murder is classified as either first degree or second degree. First degree murders are murders committed by means of destructive devices, explosives, knowing use of armor piercing bullets, lying in wait, torture, or any other kind of willful, deliberate and premeditated killing, or murders committed during the commission of a list of enumerated felonies (felony-murder). All other murders are second degree murders (i.e., no premeditation or deliberation).

Murder in the First Degree is punishable by imprisonment for 25 years to life unless specified "special circumstances" are charged and found to be true, then the punishment is either death or life imprisonment without the possibility of parole.

The list of special circumstances include: murder for financial gain; the defendant was previously convicted of murder; the defendant has been convicted of more than one murder in the current proceeding; murder committed by means of a destructive devise concealed in a building; murder committed to avoid a lawful arrest; the victim was a peace officer, federal law enforcement officer, firefighter, witness to a crime, prosecutor, judge, elected official in retaliation for or to prevent the victim from carrying out his/her duties; the murder was unnecessarily torturous to the victim; the victim was killed because of their color, race, nationality, religion or country of origin; the felony was committed during the commission or attempted commission of specified felonies; the victim was poisoned.

3. Meaningful basis required for distinguishing between special circumstance crimes and other murders.

Historically, California's special circumstance death penalty law was first enacted in 1973 by SB 450 (Deukmejian) in response to a line of U.S. Supreme Court edicts that the arbitrary imposition of the death penalty constitutes cruel and unusual punishment. Since those early conceptual stages, beginning with the first draft of SB 450, the Legislature has only considered application of the death penalty sanction to criminals who murdered under "special circumstances."

The argument was that the death penalty should be reserved for the most serious of offenses. Trivializing it or applying it to general crimes could cause a diminution of its deterrent effect as well as subject it to constitutional challenge for failure to provide a "meaningful basis" for distinguishing between those who receive the sentence and those who do not (See "Godfrey v. Georgia (1980) 446 U.S. 420).

4. Carjacking as a "special circumstance".

a. Felony -murder

Existing law, added by SB 60 (Presley) of 1993, makes punishable as first degree felony-murder any murder which is committed in the perpetration or attempted perpetration of the offense of carjacking. ("Carjacking" is the forcible taking of another person's motor vehicle, from his or her or another person's possession and immediate presence, and with the intent to either permanently or temporarily deprive the person of possession of the motor vehicle, accomplished by means of force or fear.)

Under the felony-murder rule, the ordinary elements for first degree murder --malice and premeditation -- are eliminated. Instead, any killing, whether intentional or unintentional, is deemed first degree murder if committed during the perpetration or attempted perpetration of the 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 offense just as if the offender had committed the murder with malice and premeditation.

This bill would make a first degree felony-murder carjacking offense subject to the death penalty.

b. Need for the bill.

The author asserts that since a murder during the course of a robbery is a first degree felony-murder, and because first degree felony-murder robbery is a special circumstance, then carjacking "...which in many respects is simply the robbery of a vehicle", should also be a special circumstance.

c. Opposition

California Attorneys for Criminal Justice assert that there is no need to add carjacking to the list of crimes in Penal Code Section 190.2 with essentially the same argument the author uses to say it should be included. "Any carjacking is also a robbery already included in that list. Thus a defendant who commits first degree murder in the course of committing or attempting to commit a carjacking is already subject to the death penalty."

Opponents also argue that by continuously adding more felonies to the list of special circumstances the distinction required in Godfrey is blurred and the risk that the statute will be invalidated becomes greater.

IF THE DEATH PENALTY CAN ALREADY BE OBTAINED FOR MURDERS

OCCURRING DURING A CARJACK WHERE THE DEFENDANT IS CHARGED WITH ROBBERY, IS IT NECESSARY TO ADD ANOTHER SPECIAL CIRCUMSTANCE TO THE STATUTE?

DOES THE ADDITION OF ANOTHER FELONY TO THE FELONY-MURDER LIST DETRACT FROM THE "MEANINGFUL BASIS" FOR DISTINGUISHING A SPECIAL CIRCUMSTANCE MURDER FROM OTHER FIRST DEGREE MURDERS?

5. Kidnap-carjack as a special circumstance.

This bill would make first degree felony-murder committed during a kidnapping during the commission or attempted commission of a carjacking a special circumstance punishable by the death penalty.

The author asserts that since kidnapping is a special circumstance then kidnapping during a carjacking should also be a special circumstance.

However, kidnapping during carjacking is a separate felony from kidnapping and thus opponents assert that by adding more crimes to the list of special circumstances the distinction required in Godfrey is blurred and the risk that the statute will be invalidated becomes greater.

IF THE DEATH PENALTY CAN ALREADY BE OBTAINED FOR MURDERS OCCURRING DURING A KIDNAPPING DURING THE COMMISSION OF CARJACKING BECAUSE BOTH ROBBERY AND KIDNAPPING ARE SPECIAL CIRCUMSTANCES, IS IT NECESSARY TO ADD ANOTHER SPECIAL CIRCUMSTANCE TO THE STATUTE?

DOES THE ADDITION OF ANOTHER FELONY TO THE FELONY-MURDER LIST DETRACT FROM THE "MEANINGFUL BASIS" FOR DISTINGUISHING A SPECIAL CIRCUMSTANCE MURDER FROM OTHER FIRST DEGREE MURDERS?

6. Victim is juror as a special circumstance.

Under existing law a murder where the victim is a witness to a crime, a prosecutor, or a judge and the murder was committed in retaliation for or to interfere with the victim carrying out his/her official duties is an offense punishable by death or life without parole.

This bill would make the murder of a juror in retaliation for or to interfere with the victim carrying out his or her official duties an offense punishable by death or life without parole.

The author asserts that since jurors are important to the justice system the murder of a juror due to their capacity as a juror should be a death penalty offense.

7. Murder of one victim and attempt to murder another as a

special circumstance.

Under existing law the murder of more than one person in the same incident is a death penalty offense.

This bill would make the murder of one person and the attempt, with malice aforethought, to murder another a capital offense. This thus expands the death penalty greatly by allowing the death penalty for a single murder which would not otherwise be punishable by death.

a. Author's stated need for legislation.

The author asserts that the murder of one person with the attempt, with malice aforethought to kill another person, is necessary to cover random and intentional killings where a number of victims are intended. He asserts that this would include drive-by shootings but also cover more situations.

b. Opposition.

The ACLU states that "the broader the cases that are eligible for the death as a punishment, the greater the risk that the death penalty will be applied in an arbitrary and unconstitutional manner."

SHOULD NOT A DISTINCTION BE MADE BETWEEN TWO MURDERS AND ONE MURDER AND ONE ATTEMPTED MURDER? DOES A FAILURE TO MAKE THIS DISTINCTION RUN THE RISK OF VIOLATING THE "MEANINGFUL" BASIS REQUIREMENT AND THUS PUT THE ENTIRE DEATH PENALTY STATUTE IN JEOPARDY?

8. The murder of one person with a "high probability" of death to others as a special circumstance.

This bill would make intentionally killing a victim and knowingly creating a high probability of death to more than two persons, other than the principal in the murder, a death penalty offense.

a. Author's stated need.

The author asserts that section is needed to cover situations where the defendant created a risk that a number of persons would have been killed by his or her actions.

b. High probability.

Under this statute someone who kills one person and in doing so knowingly creates a "high probability" to others, could be sentenced to the death penalty. It is unclear what would constitute a high probability.

The Supreme Court "\i\n Furman V. Georgia, ... held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, reaffirmed this holding:

> 'Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life, should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" 428 U.S., at 189 (opinion of STEWART, POWELL and STEVENS, JJ.)." (Godfrey v. Georgia, 446 U.S. 420, 427 (1979))

Would this vague standard lead to great discretion by the prosecutor and court as to when a murder would be second degree and when it would be first degree with special circumstances thus allowing the imposition of the death penalty?

c. Opposition.

California Attorneys for Criminal Justice assert that this section would apply to a broad range of homicides and that "\t\his will leave it open to prosecutors to choose which of these potentially numerous crimes are to be prosecuted as capital cases-- a decision which may be made differently by different counties. This lack of uniformity will almost certainly lead to constitutional challenges that will tie the law up in the courts for many years."

The ACLU also assert that the vagueness of the term "high probability of death" increase the risk that the death

penalty will be applied in an arbitrary and unconstitutional manner.

DOES THE USE OF THE BROAD STANDARD "HIGH PROBABILITY OF DEATH TO MORE THAN TWO PERSONS" ALLOW FOR THE ARBITRARY APPLICATION OF THE DEATH PENALTY AND INCREASE THE LIKELIHOOD THAT THE DEATH PENALTY STATUTE WILL BE FOUND UNCONSTITUTIONAL UNDER FURMAN AND GODFREY?

9. Opposition arguments.

The ACLU states that it "opposes the death penalty in all circumstances as a violation of the Constitution because it denies equal protection of the laws, is cruel and unusual punishment, and removes guarantees of due process of law. The death penalty offers society no greater protection than the alternative of life in prison without the possibility of parole."

The Friends Committee on Legislation points out "that Justice Harry Blackmun, who for more than 20 years voted to enforce the death penalty in numerous U.S. Supreme Court cases, stated that he will never do so again. He believed that the 'death penalty experiment has failed,' because it wrongfully kills some defendant, and permits the issue of race to determine who lives or dies." They further state that every responsible study has shown that the death penalty is not a deterrent.

California Attorneys for Criminal Justice believes "that the expansion of the death penalty is neither necessary or good policy." They point out that there are nearly 2,000 people on death row nationwide and that California alone has nearly 400 people on death row.

The California Public Defenders Association also uniformly opposed the expansion of the death penalty. They point out that the California Supreme Court, "appointed by governors supportive of the death penalty has warned about the risk of statutorily expanding the special circumstance list to a point where they will be forced to find the death penalty unconstitutional."

10. Will be on the ballot.
Because this bill affects an initiative statute, if it passes the Legislature, it will be placed on the ballot.

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**SENATE COMMITTEE ON CRIMINAL PROCEDURE**

Milton Marks, Chair
1995-96 Regular Session

**S B 9**

SB 9 (Ayala)
As introduced
Hearing date March 7, 1995
Penal Code
MLK:js

MURDER: PUNISHMENT

HISTORY

Source: Author

Prior Legislation: SB 310 (Ayala), Chapt. 609, Stats. 1993: SB 21X (Ayala) (Failed in Public Safety)

Support: California District Attorneys Association

Opposition: ACLU; Friends Committee on Legislation; California Attorneys for Criminal Justice; California Public Defenders Association

KEY ISSUE

SHOULD A MURDER COMMITTED BY THE INTENTIONAL DISCHARGE OF A GUN FROM A MOTOR VEHICLE BE A CAPITAL OFFENSE?

PURPOSE

Existing law provides that the penalty for a defendant found guilty of murder in the first degree, where one or more special circumstance has been charged and found to be true, shall be by death or confinement in state prison for a term of life without the possibility of parole. (Penal Code Section 190.2)

(More)

Under existing law, murder perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside the vehicle, with the intent to inflict death, is murder of the first degree. (Penal Code Section 189) The punishment for first degree murder without special circumstances is 25 years to life. (Penal Code Sections 190 et. seq.)

This bill makes murder intentionally perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside the vehicle, with the intent to inflict death, a special circumstance which when charged and found to be true will result in a sentence of death or life without the possibility of parole.

COMMENTS

1. Background

SB 310 (Ayala) of 1993 classified as first degree murder any murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person with the intent to inflict death. In operation, the provision assumes as a matter of law that premeditation or deliberation are present in a drive-by shooting committed with the intent to inflict death, thereby making it easier to obtain a first degree murder conviction for a drive-by shooting murder.

SB 310 (Ayala) 1993, also amended Penal Code Section 190 to provide that "Every person guilty of murder in the second degree shall suffer confinement in the state prison for a term of 20 years to life if the killing was perpetrated by means of shooting a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict great bodily injury."

Having been amended in the Senate Committee on Judiciary, SB 21X passed out of the Senate in a form substantively the same as this bill. It did not pass the Assembly Committee on Public Safety.

2. Need for the bill.

The author states that this bill is necessary because the 25 years to life sentence currently imposed on a defendant convicted of a drive-by murder is too lenient.

(More)

3. The addition of drive-by shooting as a special circumstance

Under existing law, murder is the unlawful killing of a human being with malice aforethought. Without malice, an unlawful killing is manslaughter. Murder is classified as either first degree or second degree. First degree murders are murders committed by means of destructive devices, explosives, knowing use of armor piercing bullets, lying in wait, torture, or any other kind of willful, deliberate and premeditated killing, or murders committed during the commission of a list of enumerated felonies (felony-murder). All other murders are second degree murders (i.e., no premeditation or deliberation).

Murder in the First Degree is punishable by imprisonment for 25 years to life unless specified "special circumstances" are charged and found to be true, then the punishment is either death or life imprisonment without the possibility of parole.

The list of special circumstances include: murder for financial gain; the defendant was previously convicted of murder; the defendant has been convicted of more than one murder in the current proceeding; murder committed by means of a destructive devise concealed in a building; murder committed to avoid a lawful arrest; the victim was a peace officer, federal law enforcement officer, firefighter, witness to a crime, prosecutor, judge, elected official in retaliation for or to prevent the victim from carrying out his/her duties; the murder was unnecessarily torturous to the victim; the victim was killed because of their color, race, nationality, religion or country of origin; the felony was committed during the commission or attempted commission of specified felonies; the victim was poisoned.

Under existing law intentional murder perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside the vehicle is first degree murder, but is not one of the enumerated special circumstances. (Penal Code Sections 189 and 190.2) This bill adds intentional murder perpetrated by means of discharging firearm from a motor vehicle at a person or persons to the list of enumerated "special circumstances".

4. Meaningful basis required for distinguishing between special circumstance crimes and other murders

Historically, California's special circumstance death penalty law was first enacted in 1973 by SB 450 (Deukmejian) in response to a line of U.S. Supreme Court edicts that the arbitrary imposition of the death penalty constitutes cruel and unusual punishment. Since those early conceptual stages, beginning with the first draft of SB 450, the Legislature has only considered application of the death penalty sanction to criminals who murdered under "special circumstances."

(More)

The argument was that the death penalty should be reserved for the most serious of offenses. Trivializing it or applying it to general crimes could cause a diminution of its deterrent effect as well as subject it to constitutional challenge for failure to provide a "meaningful basis" for distinguishing between those who receive the sentence and those who do not (See "Godfrey v. Georgia (1980) 446 U.S. 420).

IS MURDER COMMITTED BY A DRIVE-BY SHOOTING DISTINGUISHABLE ENOUGH FROM OTHER TYPES OF FIRST DEGREE MURDER SO AS TO MAKE IT A DEATH PENALTY OFFENSE?

DOES THE ADDITION OF ANOTHER SPECIAL CIRCUMSTANCE DETRACT FROM THE "MEANINGFUL BASIS' FOR DISTINGUISHING A SPECIAL CIRCUMSTANCE MURDER FROM OTHER FIRST DEGREE MURDERS?

5. Opposition arguments.

The ACLU states that it "opposes the death penalty in all circumstances as a violation of the Constitution because it denies equal protection of the laws, is cruel and unusual punishment, and removes guarantees of due process of law. The death penalty offers society no greater protection than the alternative of life in prison without the possibility of parole."

The Friends Committee on Legislation points out "that Justice Harry Blackmun, who for more than 20 years voted to enforce the death penalty in numerous U.S. Supreme Court cases, stated that he will never do so again. He believed that the 'death penalty experiment has failed,' because it wrongfully kills some defendant, and permits the issue of race to determine who lives or dies." They further state that every responsible study has shown that the death penalty is not a deterrent.

California Attorneys for Criminal Justice believes "that the expansion of the death penalty is neither necessary or good policy." They point out that there are nearly 2,000 people on death row nationwide and that California alone has nearly 400 people on death row.

The California Public Defenders Association also uniformly opposed the expansion of the death penalty. They point out that the California Supreme Court, "appointed by governors supportive of the death penalty has warned about the risk of statutorily expanding the special circumstance list to a point where they will be forced to find the death penalty unconstitutional."

(More)

6. Will be on the ballot.

Because this bill affects an initiative statute, if passed by the Legislature, it will be on the ballot.

**********

# California State Senate


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COORDINATION OF PUBLIC POLICY RESEARCH


September 15, 1995

Governor Pete Wilson
State Capitol
Sacramento, CA

Re: SB 32

Dear Governor Wilson:

You have before you for your consideration my SB 32.

As you know, the penalty for a defendant found guilty of murder in the first degree, where one or more special circumstance has been charged and found to be true, is death or confinement in state prison for life without parole.

A finding that any one of these special circumstances are true would result in a sentence of death or confinement in state prison for life without parole.

SB 32 adds three special circumstances to Penal Code section 190.2.

The first two special circumstances relate to carjackings. SB 32 would make a murder committed during the commission or attempted commission of a carjacking, in violation of Penal Code section 215, or a kidnap-carjacking, in violation of Penal Code section 209.5, special circumstances.

Violations of Sections 209.5 and 215 are the only crimes that are subject to the first degree felony murder rule that are not special circumstances under current law.

As such, the addition to the list of special circumstances of carjacking and kidnap-carjacking are merely "clean-up" provisions since a carjacking is essentially a robbery and robbery is already a special circumstance and kidnapping is also a special circumstance.

The only reason Sections 209.5 and 215 are not on the special circumstance list is that they were not properly cross-referenced into Section 190.2 at the time the initial

carjacking legislation was enacted in 1993. This failure to cross-reference resulted solely from the aversion of certain legislators to the imposition of the death penalty. It had no logical basis in fact.

The third special circumstance that SB 32 proposes relates to the first degree murder of jurors because of their performance of their duties.

Under existing law a murder where the victim is a witness to a crime, a prosecutor, or a judge and the murder was committed in retaliation for or to interfere with the victim carrying out his/her official duties is a special circumstance.

Jurors are just as important to the justice system as are judges. Indeed, the jury system represents one of the few times that average Californians interact with the justice system.

The first degree-intentional murder of a juror because of that person's acts as a juror strikes at the very heart of our free institutions and system of justice. Also, as jurors go about performing their civic duty they have the right to know that they will be protected for performing their duty.

Therefore, SB 32 provides that the first degree murder of a juror for performing his or her duties can only be answered with one response - the ultimate penalty that we can meet out.

SB 32 is supported by the California District Attorney's Association, PORAC, the State Sheriff's Association, the California Peace Officer's Association, CCPOA and other groups.

SB 32 and SB 9 both must be submitted to the voters. To that end, chaptering language has been inserted in both bills to assure that if both of these bills are approved by the voters, they will both go into effect.

Since you will be having a bill signing ceremony on this bill, I would request that Senator Kopp (the source of the juror provision), as well as Assemblymembers Conroy, Frusetta and Martinez be invited to attend the ceremony given their important role in SB 32 reaching your desk.

Your prompt approval of SB 32 is appreciated.

Sincerely,

STEVE PEACE

# DEPARTMENT OF FINANCE ENROLLED BILL REPORT

**AMENDMENT DATE:** August 21, 1995
**RECOMMENDATION:** Sign

**BILL NUMBER:** SB 9
**AUTHOR:** R. Ayala
**RELATED BILLS:** SB 32 (Peace)

**ASSEMBLY:** 55/12
**SENATE:** 29/3

## BILL SUMMARY

This bill represents a Governor's initiative which would: (1) add various offenses to the list of crimes punishable by death or life imprisonment, as specified; (2) provide that the provisions in the bill will become effective only when approved by the voters; and (3) make minor nonsubstantive changes to existing law. This bill is joined to SB 32 (Peace).

## FISCAL SUMMARY

The Department of Corrections (CDC) indicates that there is no available data regarding the number of persons who were convicted of murder during the commission of the aforementioned crimes. Based on 1993-94 admissions data for Murder in the First Degree, Finance estimates that this bill could result in 25 persons serving longer prison sentences resulting in a General Fund cost of approximately $558,000 annually (if Section 2 becomes effective) or $186,000 annually (if Section 1 becomes effective), assuming an incarceration cost of $22,000 per inmate year. We note that this cost will not materialize until the year 2010.

MJ

| Analyst/Principal | Date | Program Budget Manager | Date |
|---|---|---|---|
| (0234) L. Sauseda | 9-21-95 | S. Calvin Smith | 9-22-95 |
| Louise Sauseda | | Calvin Smith | |

Department Deputy Director — Date

Diane M. Cummins 9/22/95

ENROLLED BILL REPORT — Form DF-43 (Rev 03/92 Pink)

CJ:SB9-5.TMT 09/21/95 3:57 PM

BILL ANALYSIS/ENROLLED BILL REPORT--(CONTINUED) Form DF-43

| AUTHOR | AMENDMENT DATE | BILL NUMBER |
|---|---|---|
| R. Ayala | August 21, 1995 | SB 9 |

ANALYSIS

A. Programmatic Analysis

Existing law enumerates special circumstances for which a crime would constitute murder in the first degree and thus be punishable by death or life imprisonment without the possibility of parole.

Section 1 of this bill would amend PC §190.2 by adding murder by means of discharging a firearm from a motor vehicle to the list of special circumstances punishable as a first degree murder.

Section 2 of this bill would also amend PC §190.2 by adding murder while fleeing after the commission of carjacking; murder by means of discharging a firearm from a motor vehicle; and murder of a court juror, as specified, to the list of special circumstances punishable as a first degree murder.

This bill is joined to SB 32 (Peace). Section 2 of this bill will be operative if (1) both this bill and SB 32 are approved by the voters and become effective on the same date, (2) each bill amends PC §190.2, and (3) this bill receives more affirmative votes than SB 32. We note that if only 1 of the 2 bills is enacted, then Section 1 of that bill will be operative and Section 2 will not. The following displays the impact of both bills:

| | Drive by Shooting | Carjacking | Victim as Juror |
|---|---|---|---|
| SB9--Section #1 | X | | |
| Section #2 | X | X | X |
| SB32--Section #1 | | X | X |
| Section #2 | X | X | X |

If Section 2 of this bill becomes operative, this legislation would add all of the above enumerated offenses to the list of special circumstances punishable by death or life imprisonment without the possibility of parole.

If Section 1 of this bill becomes operative, then carjacking and murder of a juror would not be added to this list and therefore would not be punishable by death or life imprisonment without the possibility of parole.

B. Fiscal Analysis

CDC indicates that there is no available data regarding the number of persons who were convicted of the aforementioned offenses, however CDC did indicate that the fiscal impact would be minor. If Section 2 becomes operative, we estimate (for illustrative purposes) the following fiscal impact to

BILL ANALYSIS/ENROLLED BILL REPORT--(CONTINUED) Form DF-43

| AUTHOR | AMENDMENT DATE | BILL NUMBER |
|---|---|---|
| R. Ayala | August 21, 1995 | SB 9 |

the state prison system based on 1993-94 Offender Based Information System (OBIS) admissions data and assuming a cost of approximately $22,000 per inmate year, a length of stay of 30 years and 15% work credit reduction.

| | OBIS admissions | Number of felons impacted | Time served under existing law | Additional time served [1] | Annual cost |
|---|---|---|---|---|---|
| Murder-flight | 656[3] | 10 | 15 years | 15 years | $186,000 |
| Murder-vehicle | 468[2] | 10 | 30 years | 0 to 5 years | $186,000 |
| Murder-juror | 468 | 5 | 30 years | 0 to 5 years | $186,000 |
| Total | | | | | $558,000 |

[1]Term served under existing law subtracted from proposed 30 year term.
[2]Based on admissions to state prison for Murder in the First Degree.
[3]Based on admissions to state prison for Murder in the Second Degree.

If Section 1 is operative, this estimate would be reduced to $186,000.

| Code/Department Agency or Revenue Type | SO LA CO RV | (Fiscal Impact by Fiscal Year) (Dollars in Thousands) PROP 98 | FC | 1995-1996 | FC | 1996-1997 | FC | 1997-1998 | Fund Code |
|---|---|---|---|---|---|---|---|---|---|
| 5240/Corrections | SO | No | ---------- See Fiscal Analysis ---------- | | | | | | 0001 |

| Fund Code: | Title |
|---|---|
| 0001 | General Fund |

# Full Text

**Record: 1015**

**Proposition #** 195
**Title** **Punishment. Special Circumstances. Carjacking. Murder of Juror.**
**Year/Election** **1996** primary
**Proposition type** initiative (leg)
**Popular vote** Yes: 4,847,966 (85.82%); No: 800,857 (14.18%)
**Pass/Fail** Pass

**Summary**

**Official Title and Summary Prepared by the Attorney General**

**PUNISHMENT. SPECIAL CIRCUMSTANCES.**

**CARJACKING. MURDER OF JUROR.**

**LEGISLATIVE INITIATIVE AMENDMENT.**

. Adds murder during a carjacking, murder resulting from a carjacking kidnap and the intentional murder of a juror in retaliation for, or prevention of, the performance of the juror's official duties to the existing list of special circumstances for first-degree murder for which the death penalty or life imprisonment without the possibility of parole is authorized.

. Joined to Proposition 196 (Chapter 478, Statutes of 1995). If both measures pass, murder by intentional discharge of firearm at persons from a motor vehicle is also added to the list of special circumstances.

**Summary of Legislative Analyst's**

**Estimate of Net State and Local Government Fiscal Impact:**

. Probably minor additional state costs.

**Analysis**

**Analysis by the Legislative Analyst**

**Background**

First-degree murder is generally defined in state law as murder which is planned in advance, or which takes place during certain other crimes, including robbery, kidnapping, rape, or arson. It is generally punishable by a sentence of 25-years-to-life imprisonment with the possibility of release from prison on parole. However, a

conviction for first-degree murder results in a more severe sentence of death or life imprisonment *without* the possibility of parole if the prosecutor charges and the court finds that one or more "special circumstances" specified in state law apply to the crime.

Currently, a first-degree murder resulting from a "carjacking" -- taking a vehicle against the will of a driver or passenger by force or fear of force -- is not such a special circumstance. However, state law specifies that carjackers can also be charged with robbery, which is a special circumstance crime. Consequently, under current law, a person convicted of first-degree murder during the commission of a carjacking and additionally convicted of robbery could be sentenced to death or life imprisonment without the possibility of parole.

Similarly, a first-degree murder resulting from the kidnapping of an individual during a carjacking is not considered a special circumstance. Such offenders could be charged, as the law allows, with kidnapping as a special circumstance crime resulting in a sentence of death or life imprisonment without the possibility of parole.

Finally, state law provides that the first-degree murder of a judge, prosecutor, or certain other puhlic officials is a special circumstance punishable by a sentence of death or life imprisonment without the possibility of parole. However, the law does not provide such a penalty in the case of the first-degree murder of a juror.

**Proposal**

This measure adds first-degree murder during either a carjacking or a carjacking-kidnap to the list of special circumstances punishable by the death penalty or life imprisonment without the possibility of parole. This measure also specifies that the first-degree murder of a juror -- either in retaliation for performing his or her official actions or to prevent the juror from carrying out his or her official duties -- is a special circumstance.

**Fiscal Effect**

Because this measure increases the number of crimes for which the special circumstances for first-degree murder applies, it would result in longer prison terms for some offenders, thereby increasing state costs. However, state law already permits carjackers or carjack-kidnappers who commit first-degree murder to be charged with robbery or kidnapping, thereby subjecting them to the harsher penalties for special circumstance crimes. Thus, the changes in the law made by this measure explicitly listing those two crimes as special circumstances are likely to result in minor additional incarceration costs.

The provision of this measure designating the first-degree murder of a juror as a special circumstance crime is likely to have little fiscal effect because such crimes occur infrequently.

In summary, we estimate that the measure would probably result in minor additional state costs.

**For** **Argument in Favor of Proposition 195**

Proposition 195 updates California's death penalty law. In order to impose the death penalty or a sentence of life without possibility of parole, a defendant must be found guilty of first-degree murder and a special circumstance.

First-degree murder includes various types of felony murder. Under the first-degree felony murder rule, when a criminal participant kills a non-participant during a robbery, carjacking, sexual assault crime, kidnapping or other listed felony, all criminal participants are guilty of first-degree murder.

The list of special circumstances includes murders for financial gain, the victim was a law enforcement officer or firefighter, retaliatory murders of witnesses, prosecutors, or judges; and with two exceptions, all first-degree felony murders.

The two categories of first-degree felony murders which are not currently special circumstances are carjacking and kidnapping- carjacking first-degree felony murders. All other first-degree felony murders are also special circumstances. Proposition 195 would make the law of first-degree felony murder conform with the law of special circumstances by adding these two categories to the list of special circumstances.

As noted above, the current death penalty law covers retaliatory murders of witnesses, prosecutors, and judges, but does not include a retaliatory murder of a juror as a special circumstance murder. Murdering a juror because of his or her official actions is an equal outrage and should be treated as such. Proposition 195 adds retaliatory first-degree murders of jurors to the special circumstance list.

Proposition 195 is supported by Governor Wilson, the California District Attorneys Association, the California Peace Officers Association, the California State Sheriffs Association, the California Correctional Peace Officers Association, and the Doris Tate Crime Victims Bureau.

Vote Yes on Proposition 195!

**FOR(au)** Steve Peace |t Senator, 40th District

**FOR(au)** Peter Frusetta |t Assemblyman, 28th District

**FOR(au)** Michael Bradbury |t District Attorney of Ventura County

**Rebuttal** **Rebuttal to Argument in Favor of Proposition 195**

The death penalty has failed whenever and wherever it has been tried. Enactment of Proposition 195 would extend this failed policy, draining resources needed for our children's education and for improvement of human life. As voters, we have moral obligations to insist on more effective policies to safeguard the limited public resources needed to enhance our communities. Do not extend use of the death penalty, even in appearance.

For too long, societies have experimented with death as an outlet for vengeance, or as a shortcut solution to difficult social problems. The experiment has failed, and our communities have suffered. The very existence of Proposition 195 attests to this.

History shows that the threat of death, when used as a policy instrument inevitably erodes our collective vision of the dignity of the human person. The death penalty

undermines the value of human life on which democracy rests, and tends to increase those same violent attitudes and actions that the policy seeks to prevent.

We must use methods of preventing and penalizing violent crime which do not promote the attitudes underlying the wanton carjackings we abhor. Our policies should instead promote awareness that human life is a priceless gift endowed with inalienable value and dignity.

**Rebuttal(au)** Rabbi Leonard I. Beerman |t Los Angeles, CA

**Rebuttal(au)** Jeanette G. Arnquist |t Director of Human Concerns, Roman Catholic Diocese of San Bernardino

**Rebuttal(au)** Sam Reese Sheppard |t Director, Murder Victims' Families for Reconciliation

**Against** **Argument Against Proposition 195**

A NO Vote on Proposition 195 will improve public safety by re- focusing legislative attention on effective ways to actually prevent violence.

Chiefs of police and law enforcement officers across the country publicly acknowledge that the death penalty does virtually nothing to prevent murder. In fact, attention to the death penalty diverts law enforcement resources from truly effective measures to reduce violence and make communities safer. The best steps to reduce crimes of all kinds include more neighborhood watch programs, improved police training, effective community policing, tough programs to reduce drug and alcohol abuse, early juvenile offender intervention programs, weapons control efforts, speedier trials, domestic violence programs, and better funded probation and parole services.

The death penalty already diverts too many dollars from more worthy activities, and takes too much valuable time of police and courts. Because some 50 capital cases are investigated and prosecuted to effect a single execution, millions of dollars must be spent and countless hours of court time must be consumed to bring about infrequent executions many years after the crime. Although the death penalty may fascinate the media and the public, the high cost of any extension of it cannot be justified.

Too much attention to the extreme punishment distracts policy makers and the public from the more critical daily task of preventing violence. It also burdens courts with lengthy death penalty trials and years of appeals. From the perspective of those who see crime up close on a daily basis, other priorities are more deserving of public attention and support. The sooner we order crime prevention priorities toward solutions with proven records of effectiveness, the sooner we will be able to make a serious dent in California's problems of violence.

Knowledgeable prosecutors and attorneys have pointed out that this proposal would not add anything of substance to the law. It is nothing more than a cosmetic change. Let it he known that you want more effective attention to the problem of violence by voting NO on Proposition 195.

**Against(au)** Senator Milton Marks |t Chair, Senate Committee on Criminal Procedure

**Against(au)** Right Reverend Jerry A. Lamb, Bishop of the Episcopal Diocese of Northern California

**Against(au)** Mike Farrell |t President, M, J & E Productions, Inc.

**Rebut** **Rebuttal to Argument Against Proposition 195**

**Against**

The opponents of Proposition 195 fail to make any valid argument against the merits of this necessary change to California's Death Penalty Law.

Instead, the opponents who are clearly philosophically opposed to the death penalty engage in a typical attack on the utility and wisdom of the death penalty.

In truth, the death penalty is a deterrent. Those who are executed never kill again. Moreover, society rightly expects that those who commit the most aggravated murders may, after careful procedures are followed, forfeit their own lives for their heinous crimes.

On three separate occasions in the last 25 years, California voters have overwhelmingly voted to support the death penalty. The opponents of 195 choose to ignore this mandate by making a misleading argument that is simply untrue.

Proposition 195 simply updates the death penalty law by adding "carjacking" and "kidnapping-carjacking" first-degree felony murders to a list of special circumstances that make a criminal eligible for the death penalty.

Also, while the current death penalty law covers retaliatory murders of witnesses, prosecutors, and judges, it does not include a retaliatory first-degree murder of a juror. Proposition 195 therefore adds this terrible crime to the special circumstance list.

Contrary to the arguments of the opposition, the death penalty *is* supported by cops, prosecutors, and crime victims. That is why these same groups overwhelmingly support 195.

The bottom line is that the opposition has no merit.

Vote Yes on 195!

**Rebut Against-au** Susan A. Davis |t Assemblywoman, 76th District

**Rebut Against-au** Jim Morrissey |t Assemblyman, 69th District

**Rebut Against-au** Michael Ferguson |t District Attorney of Nevada County

**Text of Prop.**

**Proposition 195: Text of Proposed Law**

This law proposed by Senate Bill 32 (Statutes of 1995, Chapter 477) is submitted to the people in accordance with the provisions of Article II, Section 10 of the Constitution.

This proposed law amends a section 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 190.2 of the Penal Code is amended to read:

190.2. (a) The penalty for a defendant *who is* found guilty of murder in the first degree shall be death or ~~confinement~~ *imprisonment* in *the* state prison for ~~a term of~~ life without the possibility of parole ~~in any case in which~~ *if* one or more of the following special circumstances has been 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 *previously* 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 , *has* 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 or her act or acts would create a great risk of death to ~~a human being~~ *one* or *more* human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest ~~or to perfect, or attempt~~ , *or perfecting or attempting* 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~~ *caused* to be mailed or delivered , and the defendant knew , or reasonably should have known , that his or her act or acts would create a great risk of death to ~~a human being~~ *one* or *more* human beings.

(7) The victim was a peace officer , as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11 , or 830.12, who, while engaged in the course of the performance of his or her duties , was intentionally killed, and the defendant knew , or reasonably should have known , that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer , as defined in the ~~above enumerated~~ *above-enumerated* sections ~~of the Penal Code~~, or a former peace officer under any of ~~such~~ *those* sections, and was intentionally killed in retaliation for the performance of his or her official duties.

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

(9) The victim was a firefighter , as defined in Section 245.1, who , while engaged in the course of the performance of his or her duties , was intentionally killed, and the

defendant knew , or reasonably should have known , that the victim was a firefighter engaged in the performance of his or her duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission ~~;~~ or attempted commission ~~;~~ of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph , "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(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 ~~-~~ *of* a federal prosecutor's office , and the murder was intentionally 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~~ *this or* any other state ~~of the United States~~ , and the murder was intentionally 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, *or of* ~~a~~ *any* local or state government of ~~California, or of any local or state government of any other state in the United States~~ *this or any other state,* 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~~ *used* in this section, the phrase ~~especially~~ *"especially* heinous, atrocious , or cruel , manifesting exceptional ~~depravity~~ *depravity"* means a conscienceless~~;~~ or pitiless crime ~~which~~ *that* 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 or her 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)~~

*(A)* Robbery in violation of Section 211 or 212.5.

~~(ii)~~

*(B)* Kidnapping in violation of Section 207 ~~or~~ , 209, *or 209.5* .

~~(iii)~~

*(C)* Rape in violation of Section 261.

~~(iv)~~

*(D)* Sodomy in violation of Section 286.

~~(v)~~

*(E)* 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.

~~(vi)~~

*(F)* Oral copulation in violation of Section 288a.

~~(vii)~~

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

~~(viii)~~

*(H)* Arson in violation of subdivision (b) of Section 451.

~~(ix)~~

*(I)* Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

*(L) Carjacking, as defined in Section 215.*

(18) The murder was intentional and involved the infliction of torture.

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

*(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.*

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer , as to whom ~~such~~ *the* special circumstance has been found to be true under Section 190.4 , need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in *the* state prison for ~~a term of~~ life without the possibility of parole.

(c) Every person , not the actual killer , who, with the intent to kill, aids, abets,

counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall ~~suffer~~ *be punished by* death or ~~confinement~~ *imprisonment* in *the* state prison for ~~a term of~~ life without the possibility of parole ~~, in any case in which~~ *if* one or more of the special circumstances enumerated in subdivision (a) ~~of this section~~ has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person , not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) ; which ~~felony~~ results in the death of some person or persons, *and* who is found guilty of murder in the first degree therefor, shall ~~suffer~~ *be punished by* death or ~~confinement~~ *imprisonment* in *the* state prison for life without the possibility of parole ~~, in any case in which~~ *if* a special circumstance enumerated in paragraph (17) of subdivision (a) ~~of this section~~ has been found to be true under Section 190.4.

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

SEC. 2. Section 190.2 of the Penal Code is amended to read:

190.2. (a) The penalty for a defendant *who is* found guilty of murder in the first degree shall be death or ~~confinement~~ *imprisonment* in *the* state prison for ~~a term of~~ life without the possibility of parole ~~in any case in which~~ *if* one or more of the following special circumstances has been 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 *previously* 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 , *has* 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 or her act or acts would create a great risk of death to ~~a human being~~ *one* or *more* human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest ~~or to perfect, or attempt~~ , *or perfecting or attempting* 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~~ *caused* to be mailed or delivered , and the defendant knew , or reasonably should have known , that his or her act or acts would create a great risk of death to ~~a human being~~

*one* or *more* human beings.

(7) The victim was a peace officer , as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11 , or 830.12, who, while engaged in the course of the performance of his or her duties , was intentionally killed, and the defendant knew , or reasonably should have known , that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer , as defined in the ~~above enumerated~~ *above-enumerated* sections ~~of the Penal Code~~, or a former peace officer under any of ~~such~~ *those* sections, and was intentionally killed in retaliation for the performance of his or her official duties.

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

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

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission ; or attempted commission , of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph , "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(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 *of* a federal prosecutor's office , and the murder was intentionally 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~~ *this or* any other state ~~of the United States~~ , and the murder was intentionally 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, *or of* ~~a~~ *any* local or state government of ~~California, or of any local or state government of any other state in the United States~~ *this or any other state,* 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~~ *used* in this section, the phrase ~~especially~~ *"especially*

heinous, atrocious , or cruel , manifesting exceptional ~~depravity~~ *depravity"* means a conscienceless ; or pitiless crime ~~which~~ *that* 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 or her 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)~~

*(A)* Robbery in violation of Section 211 or 212.5.

~~(ii)~~

*(B)* Kidnapping in violation of Section 207 ~~or~~ , 209 , *or 209.5* .

~~(iii)~~

*(C)* Rape in violation of Section 261.

~~(iv)~~

*(D)* Sodomy in violation of Section 286.

~~(v)~~

*(E)* 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.

~~(vi)~~

*(F)* Oral copulation in violation of Section 288a.

~~(vii)~~

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

~~(viii)~~

*(H)* Arson in violation of subdivision (b) of Section 451.

~~(ix)~~

*(I)* Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

*(L) Carjacking, as defined in Section 215.*

(18) The murder was intentional and involved the infliction of torture.

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

*(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.*

*(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.*

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer , as to whom ~~such~~ *the* special circumstance has been found to be true under Section 190.4 , need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in *the* state prison for ~~a term of~~ life without the possibility of parole.

(c) Every person , not the actual killer , who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall ~~suffer~~ *be punished by* death or ~~confinement~~ *imprisonment* in *the* state prison for ~~a term of~~ life without the possibility of parole ~~, in any case in which~~ *if* one or more of the special circumstances enumerated in subdivision (a) ~~of this section~~ has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person , not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) , which ~~felony~~ results in the death of some person or persons, *and* who is found guilty of murder in the first degree therefor, shall ~~suffer~~ *be punished by* death or ~~confinement~~ *imprisonment* in *the* state prison for life without the possibility of parole ~~, in any case in which~~ *if* a special circumstance enumerated in paragraph (17) of subdivision (a) ~~of this section~~ has been found to be true under Section 190.4.

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

SEC. 3. This act affects an initiative statute and shall become effective only when submitted to and approved by the voters pursuant to subdivision (c) of Section 10 of Article II of the California Constitution.

SEC. 4. Section 2 of this bill incorporates amendments to Section 190.2 of the Penal Code proposed by both this bill and SB 9. It shall only become operative if (1) both this bill and SB 9 are submitted to and approved by the voters pursuant to subdivision (c) of Section 10 of Article II of the California Constitution and become effective on the same date, (2) each bill amends Section 190.2 of the Penal Code, and (3) this bill receives more affirmative votes from the voters than SB 9, in which case Section 1 of this bill shall not become operative.

# Full Text

**Record: 1016**

**Proposition #** 196

**Title** **Punishment for Murder. Special Circumstances. Drive-By Shootings.**

**Year/Election** **1996** primary

**Proposition type** initiative (leg)

**Popular vote** Yes: 4,873,194 (85.80%); No: 806,481 (14.20%)

**Pass/Fail** Pass

**Summary**

**Official Title and Summary Prepared by the Attorney General**

**PUNISHMENT FOR MURDER. SPECIAL CIRCUMSTANCES. DRIVE-BY SHOOTINGS. LEGISLATIVE INITIATIVE AMENDMENT.**

. Adds the intentional murder of a person by discharging a firearm from a motor vehicle with the intent to inflict death to the list of special circumstances for first-degree murder for which the death penalty or life imprisonment without the possibility of parole is authorized.

. Joined to Proposition 195 (Chapter 477, Statutes of 1995). If both measures pass, murder during carjacking, murder resulting from a carjacking kidnap, and murder of juror in retaliation for, or to prevent, performance of juror's duties, are also added to the list of special circumstances.

**Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:**

: Adoption of this measure would result in unknown state costs, potentially ranging into several millions of dollars annually in the long run.

**Analysis**

**Analysis by the Legislative Analyst**

**Background**

First degree murder is generally defined in state law as murder which is planned in advance, or which takes place during certain other crimes, including robbery, kidnapping, rape, or arson. It is generally punishable by a sentence of 25-years-to-life imprisonment with the possibility of release from prison on parole. However, a conviction for first-degree murder results in a sentence of death or life imprisonment *without* the possibility of parole if the prosecutor charges and the court finds that one or more "special circumstances" specified in state law apply to the crime.

Currently, a murder resulting from a "drive-by shooting" -- shooting someone from a motor vehicle -- is a first-degree murder if the firearm was intentionally discharged with the intent to kill another person. Such a murder is punishable by a sentence of 25-years-to-life imprisonment with the possibility of parole. Such a murder is not a special circumstance warranting the more severe penalty of death or life imprisonment without the possibility of parole.

**Proposal**

This measure adds first-degree murder resulting from a drive-by shooting to the list of special circumstances punishable by the death penalty or life imprisonment without the possibility of parole.

**Fiscal Effect**

This measure would increase state costs primarily as a result of longer prison terms for offenders who receive a life sentence without the possibility of parole. The magnitude of these costs is unknown, potentially ranging into several millions of dollars annually in the long run.

**For** **Argument in Favor of Proposition 196**

Murder by drive-by shooting has reached epidemic levels in California.

An average of more than one young person under the age of 18 was a victim of a drive-by shooting in Los Angeles alone *every week* in 1991, according to a recent study in the New England Journal of Medicine; 36 of these youths died.

The study found that drive-by shootings are no longer confined to the inner city, but have spread everywhere. Because the shooting is done from a moving vehicle, too often the victim is an unintended target -- an innocent child, a high school student with no gang affiliation, a young mother who happens to live in a neighborhood targeted by drive-by shooters, or a harmless passer-by.

It's got to stop.

Proposition 196 would put drive-by shooters on notice that they can be subjected to the strongest penalty California can impose: the death penalty.

Proposition 196 would allow the death penalty, or life in prison without possibility of parole, for *intentional,* cold- blooded, first-degree murder committed by the discharge of a firearm from a motor vehicle at a person outside the vehicle.

Please help us free our society from the senseless outrage of drive-by murder. Vote YES on Proposition 196.

**FOR(au)** Ruben S. Ayala |t State Senator, 32nd District

**FOR(au)** Gregory D. Totten |t Executive Director, California District Attorneys Association

**Rebuttal** **Rebuttal to Argument in Favor of Proposition 196**

Everywhere it has been used, the death penalty has failed to reduce murders and other kinds of violence. In fact, studies actually show violence decreases after repeal of death penalties. If you want to stop drive-by shootings, work to rebuild communities, and vote NO on Proposition 196.

Any drive-by killing is deplorable and needs to be punished. Today, if a "special circumstance" such as a prior murder conviction is involved, the death penalty applies, otherwise the penalty may be life in prison without possibility of parole.

Proponents of Proposition 196 want to distinguish this crime from less heinous murders simply by the location of the defendant when the crime was committed. They want a killer who shoots from a car to be eligible for the death penalty, while the same killer who walks into a restaurant and shoots a child is not.

Applying the death penalty in this way would raise grave constitutional questions. According to the United States Supreme Court, there must be a meaningful basis for distinguishing between those who receive the death penalty and those who do not. The entire justification for a death penalty rests on the idea that "special circumstances" justify a special penalty. If this proposal is enacted, it would merely underline the irrationality of the entire death penalty.

As a voter, this is your chance to say NO to laws that divert attention and law enforcement resources from the really effective ways to reduce crime. VOTE NO ON PROPOSITION 196.

**Rebuttal(au)** Michael Hennessy |t Sheriff, City and County of San Francisco

**Rebuttal(au)** Wilson C. Riles, Jr. |t Executive Director, American Friends Service Committee of Northern California

**Against** **Argument Against Proposition 196**

Proposition 196:

-- WASTES TAX DOLLARS, a cost largely borne by cities and counties;

-- FAILS to address actual causes of violence;

-- IGNORES LAW ENFORCEMENT views on the priorities for effective policing of cities and communities;

-- MAKES MISTAKES LIKELY in the administration of justice.

This measure does not focus on the real steps needed to reduce violence and crime.

It is clear that the existence of capital punishment in California already COSTS TAXPAYERS MILLIONS of dollars due to the more extensive police work and court proceedings involved -- much more than the cost of sentences to life in prison without possibility of parole. Expanding the death penalty would take even more money away from education, recreation, and other programs that actually do keep young people away from gangs and criminal activity. These costs would largely be borne by cities and counties which are already in financial trouble.

There is no evidence to suggest that the threat of the death penalty will stop the gang activity which often leads to a drive-by shooting. Experts recognize that CAPITAL PUNISHMENT FAILS TO REDUCE VIOLENCE. In fact, a recent poll found that although most police chiefs support the death penalty in concept, they do not think expanding its use would reduce violence in their jurisdictions.

When asked about steps which would have a big impact on violence, law enforcement officers most often recommend strengthening families, neighborhoods, and churches; more swift and sure penalties for all crimes; improving control over illegal drugs; allowing greater latitude on rules of evidence; creating more jobs and greater economic opportunities; and getting guns out of circulation. ONLY 2% OF POLICE CHIEFS SUGGEST INCREASED USE of the death penalty as a priority for reducing violent crime.

Church leaders recognize that Proposition 196 is likely to harm suspects at lower income levels. Worse than that, it RISKS WRONGFUL CONVICTIONS of innocent individuals caught in ambiguous circumstances who will not be able to afford to resist a plea bargain. Plea bargains and separate trials also mean that in cases involving several defendants it is not unusual for the most culpable person to be spared the death penalty that is given to others. California voters should not make justice more capricious than it already is.

This legislation fails to take affirmative steps to reduce crime. Vote NO on Proposition 196.

**Against(au)** Senator Milton Marks |t Chair, Senate Committee on Criminal Procedure
**Against(au)** Robert P. Owens |t Retired Chief of Police, Oxnard Police Department
**Against(au)** Right Reverend Jerry A. Lamb |t Bishop of the Episcopal Diocese of Northern California

**Rebut Against**

**Rebuttal to Argument Against Proposition 196**

Don't be misled by empty rhetoric!

FACT: PROPOSITION 196 is strongly supported by EVERY major law enforcement organization in California.

PROPOSITION 196 is supported by prosecutors, victims' organizations, and others concerned with the rising tide of gang violence in our communities.

FACT: PROPOSITION 196 directly deals with one of the major crimes of violence plaguing California. According to the Los Angeles County Sheriff's Department, there were 1,816 drive-by shootings in Los Angeles County alone in 1994. In 1993 drive-hy shooters claimed 97 lives in Los Angeles County.

FACT: DRIVE-BY MURDER is no longer just an inner city problem.

Cowardly gang-related shootings are spreading like wildfire to the suburbs and even rural California. Vicious though they are, drive-by murders are usually perverse thrill killings, not crimes of passion. All too often, the victims are innocent bystanders. Perpetrators of these senseless murders must face the most severe sanction the law can

impose: THE DEATH PENALTY.

PROPOSITION 196 is supported by:

Attorney General's Office

California Correctional Peace Officers Association

California Police Chiefs' Association

California Peace Officers' Association

California State Sheriffs' Association

California Organization of Police and Sheriffs

California District Attorneys Association

Women Prosecutors of California

Doris Tate Crime Victims Bureau

Los Angeles District Attorney

MAKE THE PENALTY FIT THE CRIME. Join these and other organizations and individuals who are sick and tired of gang- members preying on our communities. VOTE YES ON PROPOSITION 196.

**Rebut Against-au** Pete Wilson |t Governor

**Rebut Against-au** Ruben S. Ayala |t State Senator, 32nd District

**Rebut Against-au** Greg Totten |t Executive Director, California District Attorneys Association

**Text of Prop.** **Proposition 196: Text of Proposed Law**

This law proposed by Senate Bill 9 (Statutes of 1995, Chapter 478) is submitted to the people in accordance with the provisions of Article II, Section 10 of the Constitution.

This proposed law amends a section 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 190.2 of the Penal Code is amended to read:

190.2. (a) The penalty for a defendant *who is* found guilty of murder in the first

degree ~~shall be~~ *is* death or ~~confinement~~ *imprisonment* in *the* state prison for ~~a term of~~ life without the possibility of parole ~~in any case in which~~ *if* one or more of the following special circumstances has been 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 *previously* 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 *been convicted* 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 or her 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~~ *caused* to be mailed or delivered , and the defendant knew , or reasonably should have known , that his or her 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, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11 , or 830.12, who, while engaged in the course of the performance of his or her duties , was intentionally killed, and the defendant knew , or reasonably should have known , that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer , as defined in the ~~above enumerated~~ *above-enumerated* sections ~~of the Penal Code~~, or a former peace officer under any of ~~such~~ *those* sections, and was intentionally killed in retaliation for the performance of his or her official duties.

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

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

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission, or attempted commission , of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph , "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(11) The victim was a prosecutor or assistant *prosecutor, or a former* prosecutor or ~~a~~ former *assistant* prosecutor ~~or assistant prosecutor~~ , of any local or state prosecutor's office in this ~~state~~ or any other state, or ~~a~~ *of any* federal prosecutor's office, and the murder was intentionally 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~~ *this or* any other state of the United States , and the murder was intentionally 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 a former elected* or former *appointed* official, of the federal government, *of* a local or state government of ~~California~~ *this state*, or of any local or state government of any other state ~~in~~ *of* the United States , and the ~~killing~~ *murder* 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~~ *"especially* heinous, atrocious , or cruel , manifesting exceptional ~~depravity~~ *depravity"* means a conscienceless ~~,~~ or pitiless crime ~~which~~ *that* 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 or her 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)~~

*(A)* Robbery in violation of Section 211 or 212.5.

~~(ii)~~

*(B)* Kidnapping in violation of Section 207 or 209.

~~(iii)~~

*(C)* Rape in violation of Section 261.

~~(iv)~~

*(D)* Sodomy in violation of Section 286.

~~(v)~~

*(E)* 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.

~~(vi)~~

*(F)* Oral copulation in violation of Section 288a.

~~(vii)~~

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

~~(viii)~~

*(H)* Arson in violation of subdivision (b) of Section 451.

~~(ix)~~

*(I)* Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

(18) The murder was intentional and involved the infliction of torture.

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

*(20) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.*

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer , as to whom ~~such~~ *the* special circumstance has been found to be true under Section 190.4 , need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to ~~suffer~~ *be punished by* death or ~~confinement~~ *imprisonment* in *the* state prison for ~~a term of~~ life without the possibility of parole.

(c) Every person , not the actual killer , who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall ~~suffer~~ *be punished by* death or ~~confinement~~ *imprisonment* in *the* state prison for ~~a term of~~ life without the possibility of parole ~~, in~~

~~any case in which~~ *if* one or more of the special circumstances enumerated in subdivision (a) ~~of this section~~ has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person , not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a), which felony results in the death of some person or persons, *and* who is found guilty of murder in the first degree therefor, shall ~~suffer~~ *be punished by* death or ~~confinement~~ *imprisonment* in *the* state prison for life without the possibility of parole ~~, in any case in which~~ *if* a special circumstance enumerated in paragraph (17) of subdivision (a) ~~of this section~~ has been found to be true under Section 190.4.

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

SEC. 2. Section 190.2 of the Penal Code is amended to read:

190.2. (a) The penalty for a defendant *who is* found guilty of murder in the first degree ~~shall be~~ *is* death or ~~confinement~~ *imprisonment* in *the* state prison for ~~a term of~~ life without the possibility of parole ~~in any case in which~~ *if* one or more of the following special circumstances has been 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 *previously* 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 , *has* 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 or her act or acts would create a great risk of death to ~~a human being~~ *one* or *more* human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest ~~or to perfect, or attempt~~ , *or perfecting or attempting* 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~~ *caused* to be mailed or delivered , and the defendant knew , or reasonably should have known , that his or her act or acts would create a great risk of death to ~~a human being~~ *one* or *more* human beings.

(7) The victim was a peace officer , as defined in Section 830.1, 830.2, 830.3,

830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11 , or 830.12, who, while engaged in the course of the performance of his or her duties , was intentionally killed, and the defendant knew , or reasonably should have known , that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer , as defined in the ~~above enumerated~~ *above-enumerated* sections ~~of the Penal Code~~, or a former peace officer under any of ~~such~~ *those* sections, and was intentionally killed in retaliation for the performance of his or her official duties.

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

(9) The victim was a firefighter , as defined in Section 245:1, who , while engaged in the course of the performance of his or her duties , was intentionally killed, and the defendant knew , or reasonably should have known , that the victim was a firefighter engaged in the performance of his or her duties.

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission ~~,~~ or attempted commission , of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph , "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(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 *of* a federal prosecutor's office , and the murder was intentionally 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~~ *this or* any other state ~~of the United States~~ , and the murder was intentionally 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, *or of* ~~a~~ *any* local or state government of ~~California, or of any local or state government of any other state in the United States~~ *this or any other state,* 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~~ *used* in this section, the phrase ~~especially~~ *"especially* heinous, atrocious , or cruel , manifesting exceptional ~~depravity~~ *depravity"* means a conscienceless ~~,~~ or pitiless crime ~~which~~ *that* 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 or her 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)~~

*(A)* Robbery in violation of Section 211 or 212.5.

~~(ii)~~

*(B)* Kidnapping in violation of Section 207 ~~or~~ , 209 , *or 209.5*.

~~(iii)~~

*(C)* Rape in violation of Section 261.

~~(iv)~~

*(D)* Sodomy in violation of Section 286.

~~(v)~~

*(E)* 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.

~~(vi)~~

*(F)* Oral copulation in violation of Section 288a.

~~(vii)~~

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

~~(viii)~~

*(H)* Arson in violation of subdivision (b) of Section 451.

~~(ix)~~

*(I)* Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

*(L) Carjacking, as defined in Section 215.*

(18) The murder was intentional and involved the infliction of torture.

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

*(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.*

*(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.*

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer , as to whom ~~such~~ *the* special circumstance has been found to be true under Section 190.4 , need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in *the* state prison for ~~a term of~~ life without the possibility of parole.

(c) Every person , not the actual killer , who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall ~~suffer~~ *be punished by* death or ~~confinement~~ *imprisonment* in *the* state prison for ~~a term of~~ life without the possibility of parole ~~, in any case in which~~ *if* one or more of the special circumstances enumerated in subdivision (a) ~~of this section~~ has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person , not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) ; which ~~felony~~ results in the death of some person or persons, *and* who is found guilty of murder in the first degree therefor, shall ~~suffer~~ *be punished by* death or ~~confinement~~ *imprisonment* in *the* state prison for life without the possibility of parole ~~, in any case in which~~ *if* a special circumstance enumerated in paragraph (17) of subdivision (a) ~~of this section~~ has been found to be true under Section 190.4.

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

SEC. 3. This act affects an initiative statute, and shall become effective only when submitted to, and approved by, the voters pursuant to subdivision (c) of Section 10 of Article II of the California Constitution.

SEC. 4. Section 2 of this bill incorporates amendments to Section 190.2 of the Penal Code proposed by both this bill and SB 32. It shall only become operative if (1) both this bill and SB 32 are submitted to and approved by the voters pursuant to subdivision (c) of Section 10 of Article II of the California Constitution and become

effective on the same date, (2) each bill amends Section 190.2 of the Penal Code, and (3) this bill receives more affirmative votes from the voters than SB 32, in which case Section 1 of this bill shall not become operative.

# OFFICE OF THE DISTRICT ATTORNEY
## County of Ventura, State of California


**MICHAEL D. BRADBURY**
District Attorney

**KEVIN J. McGEE**
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RONALD C. JANES, Chief Deputy
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LELA HENKE-DOBROTH, Chief Deputy
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GREGORY D. TOTTEN, Chief Deputy
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JEFFREY G. BENNETT, Chief Deputy
Bureau of Investigation


December 4, 1997

**(Via facsimile and U.S. Mail)**

Mr. Charles Fennessey
Deputy Legislative Secretary
Governor's Office
State Capitol, First Floor
Sacramento, California 95814

Re: **Proposed Amendments to Penal Code Section 190.2**

Dear ~~Mr. Fennessey~~ Charlie:

As a follow up to our meeting on Tuesday, I am hopeful you can assist this office in pursuing two separate proposed amendments to Penal Code section 190.2.

The purpose of the first amendment is to overturn a fundamentally flawed 4-3 decision by the Rose Bird court in *People v. Green*, 27 Cal. 3d 1 (1980). In *Green*, the court held that a special circumstance based on one of the 12 enumerated felonies in the above section is not satisfied if the underlying felony is committed for the purpose of facilitating the murder.

This highly technical legal barrier was artificially erected by the court despite the complete absence of any statutory language compelling such a result. The independent purpose doctrine limits the application of 12 enumerated felony special circumstances to those situations in which the murderer commits the felony for a purpose other than the murder itself. Thus, for example, where a defendant kidnaps and murders a victim pursuant to a preexisting plan to execute him, the kidnaping special circumstance does not apply. As a consequence, the defendant avoids a potential death penalty or life without possibility of parole sentence. Conversely, if a defendant kidnaps the victim for some initial purpose other than the murder itself, such as sexual assault, robbery, car jacking, etc., and then kills the victim spontaneously to prevent apprehension, the special circumstance applies. As such, the second defendant would be subject to a potential death penalty or life without possibility of parole sentence.


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In *Green*, the defendant took his wife to a remote location, forced her to undress, and killed her. At trial, the defendant was convicted of both robbery and murder. A robbery special circumstance allegation was also found true. On appeal, the Supreme Court (in a 4-3 decision) sustained the murder and robbery convictions, but overturned the robbery special circumstance finding because the sole object of the robbery was to facilitate or conceal the primary crime of murder. The court reasoned that by taking the victims clothing, rings and purse to make identification of the victim difficult, the defendant lacked an independent purpose for the robbery.

In *People v. Weidert*, 39 Cal. 3d 836 (1985), the defendant and a friend kidnaped a 17-year-old who had been the "lookout" at a burglary the defendant committed. The victim had confessed his involvement and was expected to testify against the defendant. The defendant and his friend forced the victim into a truck, drove to an isolated location in the mountains, and beat the victim to death. In a decision written by Rose Bird, it was held that since the defendant's avowed purpose was to kill the victim to prevent him from testifying, the special circumstance finding of kidnaping must be set aside. Again, the court concluded the evidence showed the purpose of the kidnap was to kill rather than to advance some felonious purpose independent of the killing.

In Ventura County, a female defendant was recently convicted of kidnaping a mother of two, killing her and leaving her body in a rural location where it was not found for several weeks. Evidence showed the defendant, who was having an affair with the victim's husband, had planned this abduction, rented a car and obtained a wig and handcuffs that were used in the crime. Unfortunately, we could not charge her with the special circumstance of kidnaping because her purpose in perpetrating the kidnaping was to kill the victim.

We strongly believe that both the *Green* and *Weidert* opinions should be statutorily overturned. Certainly, a defendant who carefully plans and executes a kidnaping for the purpose of murdering his victim is no less culpable than a defendant who kidnaps and then kills to avoid apprehension. In both cases, the defendant should be subject to a potential death penalty or life without possibility of parole sentence.

The second proposed amendment contemplates conforming section 190.2(a)(15), the "lying in wait" instruction for special circumstances to the lying in wait requirement for proof of first-degree murder. At present, to prove lying in wait for a first-degree murder, it is only necessary to prove that the murder was perpetrated by means of lying in wait. However, because of the way 190.2(a)(15) is worded, that section has been interpreted to require more rigorous proof for the special circumstance. In *Domino v. Superior Court*, 129 Cal. App. 3d 1106 (1982), the court found it was necessary to show the murder was committed "<u>while</u> lying in wait" to prove the special circumstance. The *Domino* court concluded that evidence which showed the victim had

been captured during a period of lying in wait, but had not been killed until one to five hours later was, as a matter of law, insufficient to prove the lying in wait special circumstance.

In the Ventura County case described above, the victim was kidnaped from a shopping center and found dead several weeks later in a remote location. We were unable to prove a lying in wait special circumstance because it was unclear where the killing took place, even though it seemed apparent that the defendant did lie in wait for the victim. We believe this distinction is not a fair or just one and should be eliminated by the law.

We hope you agree that common sense and justice require the above changes in the law. These technical legal barriers to the finding of a special circumstance imposed by the Rose Bird court must be eliminated. Once you have reviewed this matter, please contact me to discuss how best to proceed. Thank you in advance for your assistance.

Very truly yours,

GREGORY D. TOTTEN
Chief Deputy District Attorney

GDT/jad

Attachment

pc: Michael D. Bradbury
Kevin J. McGee
Larry Brown
Jim Anderson
Chuck Nickel
Pete Kossoris

SENATE COMMITTEE ON Public Safety
Senator John Vasconcellos, Chair
1997-98 Regular Session

SB 1878 (Kopp)
As Introduced
Hearing date: April 21, 1998
Penal Code
MK:jm

MURDER: SPECIAL CIRCUMSTANCES

HISTORY

Source: Ventura County District Attorney's Office

Prior Legislation: AB 490 (Ashburn) 1997 - on Assembly suspense file
SB 1079 (Calderon) - failed passage in Senate Public Safety 1/13/98
AB 1538 (Havice) - currently in Senate Public Safety
SB 1376 (Peace) 1996 - failed passage in Senate Criminal Procedure
AB 1741 (Bordonaro) 1996 - failed passage in Senate Criminal Procedure
SB 1404 (Ayala) 1996 - returned to and held in Senate Criminal Procedure
SB 32 (Peace) Chapter 477, Statutes of 1995; Proposition 195
SB 9 (Ayala) Chapter 478, Statutes of 1995; Proposition 196

Support: California District Attorneys Association; Los Angeles District Attorneys Association; Attorney General's Office; Doris Tate Crime Victim's Bureau; Los

Angeles County Deputy Sheriffs, Inc.; California State Sheriffs' Association

Opposition:
Friends Committee on Legislation; California Public Defenders Association; American Civil Liberties Union; California Attorneys for Criminal Justice

(NOTE: THIS ANALYSIS REFLECTS PROPOSED AMENDMENTS TO BE OFFERED IN COMMITTEE BY THE AUTHOR.)

## KEY ISSUES

SHOULD THE SPECIAL CIRCUMSTANCE FOR "LYING IN WAIT" BE AMENDED TO PROVIDE THAT THE DEFENDANT INTENTIONALLY KILLED THE VICTIM "BY MEANS OF" INSTEAD OF "WHILE" LYING IN WAIT?

SHOULD THE LAW PROVIDE THAT TO BE SENTENCED UNDER THE ARSON SPECIAL CIRCUMSTANCE THE PROSECUTOR MUST ONLY PROVE THE ELEMENTS OF THE SPECIFIC FELONY ALLEGED, EVEN IF THE FELONY WAS COMMITTED PRIMARILY OR SOLELY FOR THE PURPOSE OF FACILITATING THE MURDER?

SHOULD THE LAW PROVIDE THAT TO BE SENTENCED UNDER THE KIDNAPPING SPECIAL CIRCUMSTANCE THE PROSECUTOR MUST ONLY PROVE THE ELEMENTS OF THE SPECIFIC FELONY ALLEGED, EVEN IF THE FELONY WAS COMMITTED PRIMARILY OR SOLELY FOR THE PURPOSE OF FACILITATING THE MURDER?

## PURPOSE

The purpose of this bill is to overturn specific court cases regarding the death penalty by changing the language regarding lying in wait, and to eliminate the distinction between committing a murder during the commission of an arson or kidnapping and committing an arson or kidnapping to facilitate a murder.

Existing law provides that all murders perpetrated by means

of lying in wait are murder in the first degree. (Penal Code section 189)

Existing law provides that the penalty for a defendant found guilty of murder in the first degree, where one or more special circumstance has been charged and found to be true, shall be by death or confinement in state prison for a term of life without the possibility of parole. (Penal Code Section 190.2)

Existing law provides that a first degree murder where the defendant intentionally killed the victim while lying in wait is a special circumstance which, if charged and proven to be true, may be punishable by the death penalty. (Penal Code section 190.2(a)(15))

This bill provides that a first degree murder where the defendant intentionally killed the victim by means of lying in wait is a special circumstance which, if charged and proven to be true, may be punishable by the death penalty.

Existing law provides for the death penalty when a first degree murder was committed while the defendant was engaged in the commission of specified felonies including arson or kidnapping. (Penal Code section 190.2(a)(17))

Existing law makes a distinction, for the purposes of the death penalty, between a murder committed during the commission of one of the specified felonies and when one of the specified offenses is committed to facilitate the murder. (see People v. Green (1980) 27 Cal. 3d 1; People v. Weidert (1985) 39 Cal. 3d 836; 3 Witkin and Epstein California Criminal Law 2nd Section 1583)

This bill provides that in order to prove either arson or kidnapping as a special circumstance it is only required that there be proof of the elements of the specific felony alleged, even if the arson or kidnapping is committed primarily or solely for the purpose of facilitating the murder.

COMMENTS

1. Need for the bill

According to the sponsor:

> This measure seeks to correct two separate problems with the law of special circumstances in capital murder cases that are the result of court decisions. The proposed changes are modest and do not seek to add another special circumstance or dramatically expand California's death penalty law. Instead, they simply seek to ensure it applies to the most serious crimes committed.
>
> The first provision in SB 1878 would eliminate the "independent purpose" doctrine for arson and kidnapping special circumstances. Court decisions have illogically and unreasonably held that these special circumstances do not apply if the arson or kidnapping was committed for the purpose of facilitating the murder. This means that if a defendant kidnapped a victim with the intent to kill him or set fire to a building with the intent to kill him, the special circumstances would not be applicable. On the other hand, if the defendant kidnapped the victim with the intent to assault the victim and decided after the kidnapping to kill him, the special circumstance would apply and the defendant would receive either death or life without possibility of parole.
>
> The second provision of SB 1878 applies to the "lying in wait" special circumstance. Case law has interpreted this special circumstance to require that the killing must occur during the lying in wait period, which is almost immediately

upon confrontation. This means that the lying in wait special circumstance does not apply if the defendant lies in wait, captures the victim and transports him to some other location and then kills him.

I believe these distinctions are arbitrary, inequitable and unfair. They unwisely circumvent the intent of our special circumstances law to reserve the serious punishment of death or life without parole for the most serious and culpable murderers. In my view, for example, one who kidnaps with the intent to kill and does in fact kill should be no less subject to the death penalty than one who kidnaps for another purpose and elects to kill as an afterthought.

2. Murder

Under existing law, murder is the unlawful killing of a human being with malice aforethought. Without malice, an unlawful killing is manslaughter. Murder is classified as either first degree or second degree. First degree murders are murders committed by means of destructive devices, explosives, knowing use of armor piercing bullets, lying in wait, torture, or any other kind of willful, deliberate and premeditated killing, or murders committed during the commission of a list of enumerated felonies (felony-murder). All other murders are second degree murders (i.e., no premeditation or deliberation).

Murder in the first degree is punishable by imprisonment for twenty-five years to life unless specified "special circumstances" are charged and found to be true; then the punishment is either death or life imprisonment without the possibility of parole.

The list of special circumstances include: murder for financial gain; the defendant was previously convicted of murder; the defendant has been convicted of more than one

murder in the current proceeding; murder committed by means of a destructive device concealed in a building; murder committed to avoid a lawful arrest; the victim was a peace officer, federal law enforcement officer, firefighter, witness to a crime, prosecutor, judge, elected official in retaliation for or to prevent the victim from carrying out his or her duties; the murder was unnecessarily torturous to the victim; the victim was killed because of their color, race, nationality, religion or country of origin; the felony was committed during the commission or attempted commission of specified felonies; the victim was poisoned.

3. Meaningful Basis Required for Distinguishing Between Special Circumstance Crimes and Other Murders

Historically, California's special circumstance death penalty law was first enacted in 1973 by SB 450 (Deukmejian) in response to a line of U.S. Supreme Court edicts that the arbitrary imposition of the death penalty constitutes cruel and unusual punishment. Since those early conceptual stages, beginning with the first draft of SB 450, the Legislature has only considered application of the death penalty sanction to criminals who murdered under "special circumstances."

The argument was that the death penalty should be reserved for the most serious of offenses. Trivializing it or applying it to general crimes could cause a diminution of its deterrent effect as well as subject it to constitutional challenge for failure to provide a "meaningful basis" for distinguishing between those who receive the sentence and those who do not. (See Godfrey v. Georgia (1980) 446 U.S. 420)

4. Elimination of Requirement that Murder Must Be During

the Commission of Arson or Kidnapping.

As proposed to be amended, this bill will provide that to prove the special circumstances of arson or kidnapping it is only required that there be proof of the elements of the arson or kidnapping alleged. If so established, the special circumstance is proven even if the arson or kidnapping is committed primarily or solely for the purpose of facilitating the murder.

The California Supreme Court in People v. Weidert (1985) 39 Cal. 3d. 836 stated that:

> This court recently held that where an accused's primary goal was not to kidnap but to kill, and where a kidnapping was merely incidental to a murder not committed to advance an independent felonious purpose, a kidnapping-felony murder special circumstance finding cannot be sustained. (People v. Weidert 39 Cal. 3d. at 842 citing People v. Green (1980) 27 Cal. 3d 1, 47-62; see People v. Thompson (1980) 27 Cal. 3d 303, 321-322)

The sponsor believes that the Weidert and Green should be overturned and that "[c]ertainly, a defendant who carefully plans and executes a kidnapping for the purpose of murdering his victim is no less culpable than a defendant who kidnaps and then kills to avoid apprehension." The sponsor cites the following case as an example:

> In Ventura County, a female defendant was recently convicted of kidnapping a mother of two, killing her and leaving her body in a rural location where it was not found for several weeks. Evidence showed the defendant, who was having an affair with the victim's husband, had planned this abduction, rented a car and obtained a wig and handcuffs that were used in the crime. Unfortunately, we could not charge her with the

special circumstance of kidnapping because her purpose in perpetrating the kidnapping was to kill the victim.

5. Arbitrary and Capricious

The Supreme Court "[i]n Furman v. Georgia . . . held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. Gregg v. Georgia, 428 U.S. 153, reaffirmed this holding:

> Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. 428 U.s., at 189 (opinion of STEWART, POWELL and STEVENS, JJ.). (Godfrey v. Georgia, 446 U.S. 420, 427 (1979))

In looking at the felony murder provisions of California's death penalty statute, the court in People v. Green stated:

We infer that the purpose of the Legislature was to comply insofar as possible with what it understood to be the mandate of Furman and Gregg, et al. At the very least, therefore, the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. The Legislature declared that such distinction could be drawn, inter alia, when the defendant committed a "willful, deliberate and premeditated" murder "during the commission of a . . . listed felony." The provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose. (People v. Green (1980) 27 Cal. 3d 1, 61)

The opposition believes the deletion of the requirement requiring the murder to occur during the commission of the kidnapping or arson, with the kidnapping or arson the main goal of the crime, would make the imposition of the death penalty arbitrary and capricious under Furman and Gregg since it would result in one person, who has the intent to kill and kills, not being subject to the death penalty, while another person, who has the intent to kill and uses arson or kidnapping to help accomplish that intent, would be subject to the death penalty.

The opposition points to language in Green to support their position:

> To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive "the risk of wholly arbitrary and capricious action" condemned by the high court plurality in Gregg. [citations omitted] (Green 27 Cal. 3d at 61-62)

WOULD THE DELETION OF THE REQUIREMENT THAT THE MURDER BE DURING THE COMMISSION OF THE FELONY AS OPPOSED TO THE FELONY BEING COMMITTED TO FACILITATE THE MURDER BE "ARBITRARY AND CAPRICIOUS" AND THUS UNCONSTITUTIONAL UNDER GREGG?

6. Felony Murder in General

In general, under the "felony-murder" doctrine the only

criminal intent required is the specific intent to commit the particular felony. However, the California Supreme Court has found that a felony murder conviction could not be based on a felony that was an integral part of the homicide. (See generally 1 Witkin and Epstein California Criminal Law 2nd section 470 et seq.; People v. Ireland (1969)70 Cal. 2nd 522; People v. Wilson (1969) 1 Cal. 3d. 431)

The California Public Defenders Association is opposed to this bill because it "would eliminate the requirement that a felony murder be based on an independent felony. This would create a major change in the law and would contravene numerous California Supreme court cases dating back thirty years."

WHAT EFFECT DOES THIS BILL HAVE ON THE FELONY MURDER DOCTRINE.?

DOES THE ELIMINATION OF THE REQUIREMENT THAT THE SPECIAL CIRCUMSTANCE BE AN INDEPENDENT FELONY CONTRAVENE WELL-ESTABLISHED CASE LAW?

7. Lying in Wait

Existing law provides for any murder perpetrated by means of lying in wait to be a first degree murder. (Penal Code section 189) Existing law further creates a special circumstance when the defendant intentionally killed the victim while lying in wait. (Penal Code section 190.2) An appellate court has interpreted the "while lying in wait" special circumstance to require the murder to be committed during the time the person was lying in wait, whereas "by means of lying in wait" under section 189 has in general been interpreted to require the killing to follow closely after the periods of watching and waiting. (See Domino v. Superior Court (1982) 129 Cal. App. 3d. 1000)

This bill changes the language in the "lying in wait" special circumstance to conform with the language in Penal Code section 189.

**********

# OFFICE OF THE DISTRICT ATTORNEY
## County of Ventura, State of California


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GREGORY D. TOTTEN, Chief Deputy
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JEFFREY G. BENNETT, Chief Deputy
Bureau of Investigation


April 23, 1998

**(Via Facsimile and U.S. Mail)**

The Honorable Quentin L. Kopp
California State Senate
State Capitol, Room 2057
Sacramento, California 95814

**Re: SB 1878 (Kopp)**

Dear Senator Kopp:

This letter is written to respond to your recent inquiry concerning the appropriateness of alternative language proposed by Irwin Nowick. While we appreciate Mr. Nowick's good faith effort, we strongly believe you should retain the original language approved by the Senate Public Committee on April 21, 1998. The approved version was drafted to surgically and unambiguously correct problems in a manner that does not imperil California's death penalty law.

At the outset, we believe it is wise to follow several important guidelines when drafting contemplated changes to the law of special circumstances:

First, where possible, it is prudent to avoid the addition of new special circumstances that seek simply to address problems over court interpretation of existing special circumstances. While it may be necessary to ask for new special circumstances to deal with the changing nature of crime (e.g., car jacking, drive-by shootings and gang-motivated homicides), adding a new special circumstance solely to address an interpretation issue may carry significant risk. This is because adding new special circumstances subjects California's death penalty law to challenge for being so broad and inclusive that virtually all murders are subject to the death penalty. See *Tuilaepa v. California*, 129 L.Ed. 2d 750, 759-762 (1994).

Second, any amendment of existing special circumstance law must be concise, clear and unambiguous. Failure to meet this objective can result in costly and extensive litigation over interpretation at both the trial and appellate court levels. Ultimately, drafting errors of this nature


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produce delays, conflicting court decisions and other problems that can never be fully anticipated.

Third, where possible, amendments should seek to use existing, previously defined terminology. In recognition of the above criteria, the current version of SB 1878 makes only minor changes to existing special circumstances that are concise and clearly designed to abrogate *People v. Green*, 27 Cal. 3d 1 (1980), *People v. Weidert*, 39 Cal. 3d 836 (1995) and *Domino v. Superior Court*, 129 Cal. App. 3d 1106 (1982).

On the other hand, Mr. Nowick's proposal, while clearly well intentioned, contains potentially confusing and controversial amendments that may not accomplish their intended purpose. This proposal unwisely seeks to add three new, separate special circumstances (subsections 22, 23 and 24) to our death penalty law.

The new proposed arson special circumstance is particularly problematic. This section does not use the actual term *arson* and raises significant issues concerning the exact meaning of "burning him or her to death." For example, does the use of this terminology suggest that the perpetrator must commit some other act beyond an arson of a building in which he intends to kill a victim located inside? Must he actually set the victim on fire? As drafted, this language would be subject to multiple interpretations.

The kidnapping proposal also uses inartful, potentially confusing language. This proposed subsection states, ". . . the means to accomplish the killing was by the defendant kidnapping the victim." This terminology is by no means clear. For example, does this language mean that the defendant must personally commit the kidnapping or killing. The current kidnapping special circumstance does not require the defendant to personally commit the act of kidnapping. The reason for this policy involves the fact that many kidnap murders are the product of conspiracies in which one defendant carries out the act at the behest or direction of another defendant. Indeed, the aggravated "love triangle" kidnap murder raised during testimony on SB 1878 involved this exact fact pattern. It is also unclear whether this language would require the killing to actually occur during the course of the kidnapping. In many kidnap murders, the defendant transports the victim to another location where the victim is held until the killing occurs.

The lying in wait proposal appears to contain a typographical error. This proposed section states, ". . . the defendant intentionally killed the victim *while by means* of lying in wait." (Italics added) The italics portion, we believe, should have eliminated the word "while."

In our view, Mr. Nowick's proposal carries significant risk of undermining California's death penalty law by adding special circumstances covering underlying felony crimes already addressed in other sections. We believe quite strongly the defense would use such additions to

wage a new and vigorous attack on the law claiming it is overly broad. Although we believe we should prevail, given the unpredictable nature of court proceedings, possible charges in court makeup and the high likelihood such an attack will be made, we do not want to unnecessarily provide additional ammunition.

In summary, we believe the current version of SB 1878 offers a more conservative, less risky and clearer approach to address narrow problems with our death penalty law. As a consequence, we strongly recommend that you retain the existing language. If necessary, we would be happy to meet with you and Mr. Nowick to discuss this matter further.

Very truly yours,

GREGORY D. TOTTEN
Chief Deputy District Attorney

PETER D. KOSSORIS
Senior Deputy District Attorney

GDT/PDK/jad

pc: Michael D. Bradbury
Kevin J. McGee
Lawrence G. Brown, Executive Director, California District Attorneys Association

LQKIRWIN.GDT

# DEPARTMENT OF FINANCE BILL ANALYSIS

SA

**AMENDMENT DATE:** April 28, 1998
**POSITION:** Neutral

**BILL NUMBER:** SB 1878
**AUTHOR:** Q. Kopp

~~SE~~ LM

5/20

**BILL SUMMARY: Murder: Special Circumstances**

This bill would amend Penal Code Section (PC§) 190.2, part of the murder statute dealing with special circumstances, to broaden the applicability of the special circumstances of lying in wait, kidnapping and arson. Because this bill would affect an initiative statute, it shall become effective only when submitted to, and approved by the voters of California.

## FISCAL SUMMARY

There are no data available which identify the number of persons which would fall into the circumstances established by this bill and explained below. However, for illustrative purposes, we assume that 10 persons per year would fall into these categories. We also assume these changes would become effective January 1, 1999, with an average annual per capita incarceration cost of $20,758, average pre-confinement credits of 7.16 months, and good time credits of 15%. With these assumptions, we would expect this bill to first impact fiscally in FY 2019-20 with a cost of approximately $3,000, and increase to a total annual cost of $882,000 in FY 2024-25 and thereafter.

## COMMENTS

Current law, Penal Code Section (PC§) 190, states that a person convicted of murder in the first degree shall suffer death, confinement in the state prison for life without the possibility of parole, or confinement in the state prison for a term of 25 years to life. Existing PC§190.2 indicates that if special circumstances are present in a murder (including lying in wait, kidnapping and arson) the sentencing options are limited to death and life without the possibility of parole.

Proponents of this bill indicate, that in cases where a murder is committed, and the killer was lying in wait for the victim, for the lying in wait to apply as a special circumstance under PC§ 190.2, the murder must have occurred during the time the killer was lying in wait. Existing PC§ 189 defines first and second degree murder, with lying in wait being one of the circumstances which differentiates First degree murder from second degree murder. Under this code section, the circumstance of lying in wait may be established even in cases where the murder closely follows the period of waiting. This allows some persons to satisfy the requirements for first degree murder without satisfying the requirements to limit their sentencing options to death or life without the possibility of parole. This bill would amend PC§ 190.2 so that the same set of circumstances which make lying in wait result in first as opposed to

| Analyst/Principal | Date | Program Budget Manager | Date |
|---|---|---|---|
| (0232) F. Nissen | | S. Calvin Smith | |
| Frank Nissen | 5/13/98 | J.W. Miller | 5-13-98 |
| Department Assistant Director | | | Date |

| Governor's Office: | By: | Date: | Position Noted |
|---|---|---|---|
| | | | Position Approved |
| | | | Position Disapproved |

BILL ANALYSIS — Form DF-43 (Rev 03/95 Buff)

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second degree murder, are the same set of circumstances which would make this a special circumstance of murder.

Also, it had been found that in cases where kidnap or arson were part of the murder plot, they have not been considered special circumstances on the basis that they were only perpetrated as part of the more serious crime of murder. The distinction being that murder to accomplish a kidnap or arson is more egregious than kidnap or arson to carry out a murder. This bill would amend PC§ 190.2 to eliminate this distinction and the sentencing loophole it causes.

| | SO | (Fiscal Impact by Fiscal Year) | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Code/Department | LA | (Dollars in Thousands) | | | | | | |
| Agency or Revenue | CO | PROP | | | | | | Fund |
| Type | RV | 98 | FC | 1997-1998 | FC | 1998-1999 | FC | 1999-2000 | Code |
| 5240/Corrections | SO | No | ---------- See Fiscal Summary ---------- | | | | | | 0001 |

**Public Safety Committee** **Support**

# SB 1878 (KOPP)
## MURDER: SPECIAL CIRCUMSTANCES

**Version:** 7/16/98 Last Amended
**Vote:** Majority
**Support**

**Vice-Chair:** Jim Cunneen
**Tax or Fee Increase:** No

Overturns two key Rose Bird-Court decisions relating to the special circusmtance statute and the death penalty interpreting the meaning of "lying in wait" and "specific intent to kill."

## Policy Question

Should two California Supreme Court decisions, written by Rose Bird, relating to the special circumstance statute be overturned?

## Summary

1. Would amend the special circumstance provision for "lying in wait" in existing law to provide that the defendant intentionally killed the victim "by means of" instead of "while" lying in wait."
2. Provides that to be sentenced under the arson or kidnapping special circumstance, if there is specific intent to kill, the prosecutor must only prove the elements of the specific felony alleged, even if the felony was committed primarily or solely for the purpose of facilitating the murder.
3. Provides that upon approval by the legislature, this bill shall be made into an initiative and placed on the November 1998 statewide ballot in a supplemental pamphlet.

## Support

Ventura County District Attorney's Office (source), California District Attorneys Association, Los Angeles District Attorneys Association, Attorney General's Office, Doris Tate Crime Victims Bureau, Los Angeles County Deputy Sheriffs, Inc., and California State Sheriffs Association

## Opposition

Friends Committee on Legislation, California Public Defenders Association, American Civil Liberties Union (ACLU), California Attorneys for Criminal Justice, Catholic Conference

## Arguments In Support of the Bill

A defendant who carefully plans and executes a kidnapping for the purpose of murdering his victim is no less culpable than a defendant who kidnaps and then kills to avoid apprehensions. In both cases, the defendant should be subject to a potential death penalty or life without the possibility of parole sentence.

## Arguments In Opposition to the Bill

Persons who oppose the death penalty would view this bill as an expansion of the death penalty, and thus oppose this bill on philosophical grounds.

## Fiscal Effect

1. Unknown, potentially significant costs for incarceration and death penalty appeals.
2. Death penalty appeals cost between $85,000 and $130,000 per year and average 4-10 years in duration. The annual cost for incarceration in state prison is $20,758. Assuming that only one conviction meets these special circumstance criteria, the cost would range between $83,032 and $207,580 for the appeals period. Some of the more notorious appeals processes have taken 15 to 20 years to resolve.
3. Assuming that this bill takes effect on January 1, 1999 and that 8 persons per year fall into this special circumstance category, those inmates with life without parole sentences will create a fiscal impact in excess of $150,000 annually, beginning in 2023-24.
4. Unknown, probably $50,000 to $100,000 to the Secretary of State to place this initiative on the November 1998 ballot. (Version: 7/16/98)

**Senate Republican Floor Votes** (24-4) 5/27/98 PASS
Ayes: All Republicans Except
Noes: None
Abs. / NV: Craven, Hurtt, Lewis

**Assembly Republican public safety Votes** (7-1) 6/23/98
Ayes: Cunneen, Bowler, House
Noes: None
Abs. / NV: None

**Assembly Republican** **Votes** (0-0) 1/1/98
Ayes: None
Noes: None
Abs. / NV: None

**Assembly Republican** **Votes** (0-0) 1/1/98
Ayes: None
Noes: None
Abs. / NV: None

## Comments

1. The purpose of the first section of this bill is to conform the definition of "lying in wait" as used in the special circumstance statute to the "lying in wait" requirement for proof of first degree murder. In first-degree mmurder, it is necessary only to prove that the murder was perpetrated by means of lying in wait. However, in special circumstance cases, "lying in wait" has been held to require that the murder was committee while lying in wait.
2. In one case, the court held that although a victim had been captured during a period of lying in wait, he had not been killed until one to five hours later, as a matter law, this was insufficient to prove the killing occurred while the killer was lying in wait. Domino v. Superior Court 129 Cal. App. 3d 1106 (1982).
3. The purpose of section two of this bill is to overturn a fundamentally flawed 4-3 decision by the Rose Bird court in People v. Green 27 Cal.3d 1 (1980). In Green, the court held that a special circumstance based on one of the 12 enumerated felonies in the above section is not satisfied if the underlying felony is committed for the purpose of facilitating the murder. This highly technical barrier was artificially erected by the court despite the complete absence of any statutory language compelling such a result.
4. In People v. Weidert, 39 Cal. 3d 836 (1985), the defendant and a friend kidnapped a 17 year old who had been the "lookout" at a burglary the defendant committed. The victim had confessed his involvement and was expected to testify against the defendant. The defendant and his friend forced the victim into a truck, drove to an isolated location in the mountains, and beat the victim to death. In a decision written by Rose Bird, it was held that since the defendant's avowed purpose was to kill the victim to prevent him from testifying, the special circumstances finding of kidnapping must be set aside. The Court concluded the evidence showed the purpose of the kidnap was to kill rather than to advance some felonious purpose independent of the killing.
5. This bill states that if passed, it shall be placed in a supplemental pamphlet for the November 1998 statewide ballot. However, if there are no other measures on the supplemental ballot, this legislation will be included on the November 2000 ballot instead. **This bill will not create a whole supplemental ballot for the November 1998 election, but if one is already going to be issued, this legislation would be placed on it.**

**Policy Consultant:** Erika Lorenz 7/21/98
**Fiscal Consultant:** Catherine Kennard 7/23/98

Date of Hearing: June 23, 1998
Chief Counsel: Judith M. Garvey

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Don Perata, Chair

SB 1878 (Kopp) - As Proposed to be Amended in Committee

SUMMARY: Makes several changes to California's special circumstance statutes which allows the imposition of a sentence of life without parole or death where an individual is convicted of first-degree murder. Specifically, this bill:

1) Provides that to be sentenced under the arson special circumstance where the defendant intended to kill the victim, the prosecutor must only prove the elements of the specific felony alleged even if the felony was committed primarily or solely for the purpose of facilitating the murder.

2) Provides that to be sentenced under the kidnaping special circumstance where the defendant intended to kill the victim, the prosecutor must only prove the elements of the specific felony alleged even if the felony was committed primarily or solely for the purpose of facilitating the murder.

3) Provides that the special circumstance for "lying in wait" be amended to provide that the defendant intentionally killed the victim "by means of" instead of "while" lying in wait.

4) States it is the Legislature's intent, as to #1 and #2 above, to create a statutory exception to the "independent purpose doctrine" requirement set forth in People v. Weidert (1985) 39 Cal.3d 836 and People v. Green (1980) 27 Cal.3d 1, for the special circumstances of kidnapping and arson, when specific intent to kill is proven.

5) Contains an urgency clause.

EXISTING LAW:

1) Provides that murder is the unlawful killing of a human being or a fetus with malice aforethought. Malice may be express or implied. Without malice, an unlawful killing is manslaughter.

2) Classifies murder as either first degree or second degree. First-degree murders are murders committed by means of destructive devices, explosives, knowing use of armor-piercing bullets, lying in wait, torture, or any kind of willful, deliberate, and premeditated killing, or murders committed during the commission of a list of enumerated felonies (felony murder). All other kinds of murder are second-degree murders. (Penal Code Section 187, et seq.)

3) The punishment for first-degree murder without special circumstances is 25 years to life. (Penal Code Sections 190, et seq.)

4) Penalties for a defendant found guilty of murder in the first degree is be death or confinement in the state prison for a term of life without the possibility of parole when one or more of 31 enumerated special

circumstances has been charged and found to be true by the trier of fact. (Penal Code Section 190.2.(a).)

COMMENTS:

1) Purpose. According to the author, "This measure seeks to correct two separate problems with the law of special circumstances in capital murder cases that are the result of court decisions. The proposed changes are modest and do not seek to add another special circumstance or dramatically expand California's death penalty law. Instead, they simply seek to ensure it applies to the most serious crimes committed."

2) Murder. Under existing law, murder is the unlawful killing of a human being with malice aforethought. Malice requires one of the following mental elements:

   a) An intent to kill.

   b) Subjective knowledge that one's conduct will result in a high probability of death.

   c) Commission or attempted commission of certain enumerated felonies where the commission or attempted commission of the felony results in the death of a third party.

   d) Commission of non-enumerated felonies inherently dangerous to human life and result in death to a third party.

3) First-Degree Murder. First-degree murders are the following forms of murder committed with designated intent, by designated means, or in committing or attempting to commit designated means:

   a) Means. Murders committed by means of destructive devices, explosives, knowing use of armor-piercing bullets, lying in wait, torture.

   b) An intentional, premeditated killing.

   c) An intentional killing by means of a drive-by shooting.

   d) Murders (deaths occurring) during the commission or attempted commission of child molesting, rape, sodomy, oral copulation, foreign object rape, robbery, burglary, kidnaping, carjacking,

   As can be seen, first-degree murder does not necessarily require an intent to kill.

4) Special Circumstance. Murder in the first degree is punishable by imprisonment for 25 years to life unless specified "special circumstances" are charged and found to be true. If so, the punishment is either death or life imprisonment without the possibility of parole.

5) Death Eligible Crimes - Constitutional Concerns.

   a) Overview. In order to be death eligible, the crime must require a meaningful basis required for distinguishing between special

circumstance crimes and other murders. California's special circumstance death penalty law was first enacted in 1973 by SB 450 (Deukmejian) in response to a line of United States Supreme Court edicts that the arbitrary imposition of the death penalty constitutes cruel and unusual punishment.

Since those early conceptual stages, beginning with the first draft of SB 450, the Legislature has only considered application of the death penalty sanction to criminals who murder under "special circumstances".

The argument was that the death penalty should be reserved for the most serious of offenses. Trivializing the death penalty or applying it to general crimes could cause a diminution of its deterrent effect as well as subject the death penalty to constitutional challenge for failure to provide a "meaningful basis" for distinguishing between those who receive the sentence and those who do not (see Godfrey v. Georgia (1980) 446 U.S. 420).

b) Pushing the envelope? Since the enactment by initiative of the 1978 expansion of special circumstances, special circumstances have been revised or clarified by voter sponsored or legislative initiatives approved in 1990 and 1996. In addition, last year this Committee added two special circumstances involving intentional murders of minors under age 14 and "gang-motivated" intentional murders.

Concerns have been raised that California may be "pushing the envelope" in adding to the list of special circumstances. The California District Attorney's Association and the Attorney General's (AG) Office have informally advised staff that Justices Blackmun and O'Connor warned the AG's Office, at oral argument, against expanding the death penalty.

The California Supreme Court has upheld against "Godfrey-style" attacks - with the exception of the "heinous-atrocious" special circumstance - the 1990 changes. People v. Arias, (1996) 13 Cal.4th 92, 187.

"Envelope pushing" concerns have been raised and noted by this Committee. Prior to the approval of any additional special circumstance bill, this Committee has required both an intentional murder and additional proof that the proposed addition has been upheld and exists in another state.

6) California Overview: the General Scheme. Most states that have the death penalty do so by statutorily defining certain categories of crimes as first-degree murder or capital murder. Typically, these felony murders involve sexual assaults or kidnaping at the narrowest. In addition, most states include robbery and certain other crimes.

In addition, these states include as capital murder intentional murder with premeditation and deliberation or with other qualifying factors such as the status of the victim, means or circumstances by which death was inflicted, or that there were multiple victims. Once a defendant is found guilty of first-degree murder, he or she is then taken into a sentencing hearing with aggravating and mitigating factors.

Other states, particularly California, take a three-step process. Step one is whether or not the defendant committed first-degree murder. The next step is whether or not the defendant committed the crime with special circumstances which screen out this type of first-degree murder or some other form of first-degree murder so that the sentence of death is limited. Once that is done, a penalty hearing is held with aggravating and mitigating factors.

In a three-step state, the special circumstance serves the same function as defining a crime as first degree or capital murder.

7) Current California Special Circumstances. There are at least 31 special circumstances under current law and fall into four generic categories. One special circumstance involving non-defined "heinous/atrocious" murders has been struck down on due process grounds. (People v. Superior Court (Engert) (1982) 31 Cal.3d 797.) Other special circumstances have been narrowed by the California Supreme Court to survive constitutional attack.

The most common special circumstances are felony murder special circumstances. These involve murders wherein the defendant was committing another crime, typically an armed robbery or a sexual assault. The felony murder special circumstance involves a murder 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, robbery, rape, kidnaping, sodomy, the performance of a lewd or lascivious act upon the person of a child under the age of 14 years, oral copulation, arson, burglary, train wrecking, mayhem, foreign object rape, and carjacking.

Even accidental killings can be punishable by death or life without possibility of parole under California law. This is true because it falls under the felony murder rule and that involves intent to commit an act totally distinct from the homicide.

Save for the felony murder special circumstance, where there is one victim, the People have to show that the defendant intentionally killed the victim and either the victim was killed by behavior that constitutes truly vile means or because of, or in retaliation for, the victim's performing certain acts or because of the danger to multiple victims.

8) The Independent Felonious Purpose Doctrine.

a) Green. In People v. Green (1980) 27 Cal.3d 1, the defendant thought his wife/paramour was cheating on him and he lured her to a secluded area. He forced her to disrobe and hand her identification over to him. He then killed her.

Green was convicted under the 1977 death penalty law of first-degree murder based on an intentional killing with premeditation and deliberation and felony murder based upon the underlying felony of robbery. At that time, kidnaping was not a predicate offense for the first-degree felony murder rule. In addition, Green was convicted of robbery and kidnaping based on special circumstances. Under the 1977 death penalty law, all special circumstance were predicated on an intentional and premeditated killing.

On appeal, on a 4-to-3 vote, the Supreme Court speaking through Justice Mosk set aside the death sentence based upon two grounds. First, the Supreme Court unanimously held that the "robbery" was committed to conceal the identity of the victim. (Killing a crime victim at the time of the initial crime in order to prevent him or her from testifying was - and is - not a special circumstance. [People v. Beardslee, (1991) 53 Cal.3d 68,95-96; People v. Garrison, (1989) 47 Cal.3d 746, 792; People v. Silva, (1988) 45 Cal.3d 604, 631.]

As such, the "robbery" was merely a means to cover up the murder. In addition, at that time of Green, the death penalty statute in force was quite narrow in response to the strictures of Gregg v. Georgia, (1976) 428 U.S. 153 which strongly suggested that death penalty statutes had to be so narrowly drafted to cover the "worst of the worst".

In this context, given the the fact that killing a person at the scene was not a special circumstance under the "witness murder" special circumstance and Gregg, supra., Justice Mosk stated:

> We infer that the purpose of the Legislature to comply insofar as possible with what it understood to be the mandate of Furman and Gregg, et al. At the very least, therefore, the Legislature must have intended that each special circumstance provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. The Legislature declared that such distinction could be drawn, inter alia, when the defendant committed a "willful, deliberate and premeditated" murder "during the commission of a...listed felony." The provision thus expressed a legislative belief that it was not unconstitutionally arbitrary to expose to the death penalty those defendants who killed in cold blood in order to advance an independent felonious purpose. 27 Cal.3d at 61.

The portion of the holding in Green as to the "robbery special circumstance" was a unanimous holding.

The second portion of the Green majority held that there was insufficient evidence of a forcible "asportation" to prove kidnaping. The dissenters held that there was sufficient evidence to hold that a kidnaping occurred. They further argued that the independent felonious purpose doctrine was not applicable to kidnaping. As such, they would have upheld the kidnaping special circumstance and the resulting death sentence. Justice Mosk expressly reserved for a further date whether the independent felonious purpose doctrine applied to the kidnaping special circumstance. 27 Cal.3d at 74, footnote 67.

b) Weidert. In People v. Weidert, (1985) 39 Cal.3d. 836, the defendant intentionally murdered an accomplice in a burglary in order to prevent him from testifying as a witness in a juvenile proceeding. The defendant abducted the victim and brought him to a secluded location to commit the murder. Weidert was convicted of first-degree murder

with special circumstances of witness murder and kidnapping-murder. On appeal, the AG's Office conceded that the kidnaping-murder special circumstance did not apply as the kidnapping was done to intentionally kill the victim.

In so stating, the Supreme Court stated:

> This court recently held that where an accused's primary goal was not to kidnap but to kill, and where a kidnapping was merely incidental to a murder not committed to advance an independent felonious purpose, a kidnapping-felony murder special circumstance finding cannot be sustained. (39 Cal. 3d. at 842 (citing People v. Green, (1980) 27 Cal. 3d 1, 47-62; see People v. Thompson, (1980) 27 Cal. 3d 303, 321-322).

c) Application of the independent felonious purpose doctrine in practice outside of kidnapping and arson. Outside the kidnapping and arson area, the "independent felonious purpose" doctrine in practice does limit the application of the death penalty to assure that the felony-murder rule is not broadly interpreted. This is particularly true in the area of burglary.

As has been noted in prior analyses, burglary is a predicate offense for the felony murder rule. Also, as has been noted on numerous occasions, burglary involves the entry into various structures with the intent to commit any felony or theft. As such, entry into a building to assault or murder a person is burglary. People v. Sears, (1970) 2 Cal.3d 180, 187-188; People v. Morelock, (1956) 46 Cal.2d 141, 145-147.

However, to avoid "bootstrapping", the California Supreme Court has found that a felony murder conviction cannot be based on a felony an integral part of the homicide. [People v. Sanders, (1990) 51 Cal.3d 471, 509-510; Garrison, supra. at 778; People v. Wilson, (1969) 1 Cal.3d 431 (burglary where intended entry was assault not predicate offense for the application of the felony murder rule), People v. Ireland (1969) 70 Cal.2d 522, 531-539 (assault with a deadly weapon).]

Likewise, the Supreme Court has held that a willful, deliberate and premeditated killing which would otherwise be first-degree murder may not be made a special circumstance because the defendant entered a residence to commit the killing. While the entry would be a burglary, it would not be a special circumstance because there would be no purpose to the entry other than to kill. People v. Farmer, (1989) 47 Cal.3d 888, 914-915.

The requirement of "independent felonious purpose" in the context of burglary clearly ensures the constitutional viability of the death penalty because it eliminates the possibility that every "walk in killing" is a death-eligible case. Without such a limitation, it is clear that the death penalty would be invalid. Loving v. United States, 517 U.S. 748, 755-756 (1996).

d) The independent felonious purpose doctrine and "concurrent intent". Since Weidert, the Supreme Court has attempted to narrow the doctrine

to make clear that that the doctrine applies only where the evidence is overwhelming that the underlying felony was committed solely as a means to kill the victim. If there are concurrent intents, the doctrine does not apply. People v. Douglas, (1990) 50 Cal.3d 584, 606-609; People v. Ainsworth, (1988) 45 Cal.3d 984, 1026; People v. Williams, (1988) 44 Cal.3d 883, 927-929.

e) Kidnapping and the independent felonious purpose doctrine. In the area of kidnapping, the Supreme Court has held that if the defendant kidnaps the victim to kill the victim and kills him or her, that is not a special circumstance. If the defendant kidnaps the victim and then decides to kill the victim, that is a special circumstance. People v. Barnett, (1998) 17 Cal.4th 1044, 1157-1159.

In People v. Raley, (1992) 2 Cal.4th 870, 902-904, speaking for the Supreme Court, Justice Mosk upheld a death sentence based upon kidnapping as the underlying felony where it was clear that the defendant kidnaped two victims to torture and kill them and in fact killed one victim.

9) Improbable Results Flowing from the Independent Felonious Purpose Doctrine in Arson and Kidnapping Cases. The effect of the independent felonious purpose doctrine in arson and kidnapping cases is that if a defendant intending to kill a victim either burns down a residence to kill the victim or abducts him or her, that is not a special circumstance. If the defendant kidnaps the victim and then decides to kill him or her, that is a special circumstance. Likewise, burning a residence to collect insurance and a person dies as a result it is a special circumstance.

10) Ventura County Case.

a) The sponsor. The sponsor believes that Weidert should be overturned and that "[c]ertainly, a defendant who carefully plans and executes a kidnapping for the purpose of murdering his victim is no less culpable than a defendant who kidnaps and then kills to avoid apprehension." The sponsor cites the following case as an example:

> In Ventura County, a female defendant was recently convicted of kidnapping a mother of two, killing her and leaving her body in a rural location where it was not found for several weeks. Evidence showed the defendant, who was having an affair with the victim's husband, had planned this abduction, rented a car and obtained a wig and handcuffs that were used in the crime.
>
> Unfortunately, we could not charge her with the special circumstance of kidnapping because her purpose in perpetrating the kidnapping was to kill the victim.

b) Sacramento Bee article. On Wednesday, June 10, 1998, the Sacramento Bee reported that one individual was sentenced to life without parole in the above case. As to the male who orchestrated the kidnap-murder, staff has confirmed a jury found him guilty of special circumstances of: (i) intentional murder for financial gain and (ii) intentional murder by lying-in-wait.

The female who committed the actual killing was found guilty and the special circumstance of financial gain was found to be true, but the lying in wait special circumstance was found not to be true due to issues discussed above, i.e., whether the killing occurred during the lying in wait or a period after the kidnapping.

11) Other Jurisdictions do not use the Green-Weidert Doctrine. While a number of jurisdictions have adopted the "merger doctrine" for felony murder and to determine whether the movement of the victim has independent significance to constitutes "kidnapping", it appears that no jurisdiction other than California has the "independent felonious purpose doctrine" that limits the application of the death penalty in arson and kidnapping cases where the arson or kidnapping is done precisely and solely to intentionally kill the victim.

12) This Bill.

a) Proposal. This bill states that where the defendant, with the intent to kill the victim, does so by means of arson or kidnapping, that is sufficient to constitute a special circumstance. This bill also specifically states that it overrules Weidert and Green as applied to kidnapping and arson as the underlying felonies alone.

b) Bottom Line. Currently, the "merger doctrine" does apply to arson. It is unclear if the merger doctrine applies to kidnapping. People v. Escobar, (1996) 48 Cal.App.3d 999. Because of the intent to kill requirement in this bill and the fact that this bill does not purport to touch the "merger doctrine", the "real world" effect of this bill is to make willful, deliberate, and premeditated killings committed by means of abduction or burning victims to death special circumstances.

c) Validity of this bill as to arson and kidnapping changes. As is the case with any additional special circumstance - which this bill creates, there is a legitimate concern that this new addition is the one that invalidates the death penalty.

The new special circumstance consists of a planned and intentional killing perpetrated by means of kidnapping or residential arson, i.e. burning the victims to death. Because of the concern over "pushing the envelope", it is important to consider whether these types of killings are a viable basis for death eligibility. As noted above, staff in its research has found no jurisdiction outside of California that has adopted the Green-Weidert rule as to kidnapping and arson.

As to kidnapping, almost every jurisdiction has a statute that makes the intentional killing of a murder victim by means of kidnapping death eligible. To date, staff has found no statute struck down on Godfrey grounds which made a defendant death eligible based on a planned killing committed by means of kidnapping.

As but one example, the Ohio Supreme Court has routinely upheld death sentences where the sole qualifying factor was that the defendant kidnaped the victim solely to intentionally kill him or her and actually did so. State v. Ballew, 667 N.E.2d 369, 375 (Ohio 1996) (cases cited); State v. Joseph, 653 N.E.2d 285, 296 (Ohio 1996) (cases cited); State v. Simko, 644 N.E.2d 345 (Ohio 1994)

(cases cited). The rationale for upholding death sentences in those situations is that kidnapping a person to intentionally kill him or her is just as heinous a means of committing an intentional murder by poison or torture.

Likewise, as to arson, the United States Supreme Court has repeatedly held that an intentional murder committed by torturing, dismembering or mutilating or burning the victim to death is a valid basis for imposition of the death penalty. Walton v. Arizona, 497 U.S. 639, 654-656 (1990); Maynard v. Cartwright, 486 U.S. 356, 364-365 (1988).

13) Lying in Wait Change.

a) History. Any murder perpetrated by means of lying in wait is first-degree murder and is also a special circumstance when the defendant intentionally kills the victim while lying in wait.

b) Issue. In both People v. Morales, (1989) 48 Cal.3d 527, 557, and People v. Edelbacher, (1989) 47 Cal.3d 983, 1023, the Supreme Court as a constitutional matter held that an intentional killing by means of lying in wait was a valid basis to impose the death penalty.

Noting that intentional killings committed by ambush have always been particularly heinous, the Supreme Court specifically held in Edelbacher that a first-degree murder committed by means of lying in wait where the murder is committed with an intent to kill in of itself is a valid basis alone for the death sentence being imposed.

The language in the "lying in wait" special circumstance is narrower than the "lying in wait" form of first-degree murder. Therefore, in Domino v. Superior Court, (1982) 129 Cal.App.3d. 1000, 1019, the Court of Appeal interpreted the "while lying in wait" special circumstance to require the murder to be committed during the time the person was lying in wait, whereas "by means of lying in wait" under Penal Code Section 189 has in general been interpreted to require the killing to follow closely after the periods of watching and waiting to take the victim by surprise or ambush. The Domino view has been accepted by the Supreme Court.

The current distinction between the category of first-degree murder and the special circumstance has caused substantial confusion, particularly in the area of jury instructions.

c) This bill. This bill changes the language in the "lying in wait" special circumstance to conform with Penal Code Section 189 language defining first-degree murder.

14) Related Issue of Perceived Disparity in the Implementation of the Death Penalty: the recent Pennsylvania study. Within the last two week, Professors David Baldus and George Woodworth of the University of Iowa conducted a review of all homicide cases prosecuted by the Philadelphia County District Attorney's office in Pennsylvania. That study reviewed a 10-year period from 1983 to 1993 and concluded from an analysis of 667 murders that of 520 African American defendants, 95 received the death penalty (18%), while of 147 non-African defendants, 19 were sentenced to die (13%). The conclusion of the study - hotly debated - was that it was more likely that if the victim of a murder was Caucasian and the

defendant was African American, the defendant would receive the death sentence.

There is no question that Philadelphia County juries hand down a large number of death sentences in large part for the reasons referred to in Comment 15. In fact, one judge in Philadelphia, the Honorable Alfred F. Sabo, Judge of the Court of Common Pleas in and for the County of Philadelphia, has sentenced more persons to death than every other judge outside of Philadelphia County combined.

It should be added that until recently, Pennsylvania has had intercase "proportionality review" which included all relevant data. The value of this type of review was questioned in Hartman, "Proportionality Review: Critiquing Pennsylvania's Comparative Proportionality Review in Capitol Cases". 52 U.Pitt.L.Rev. 871 (1991)).

15) Pennsylvania has a Different Sentencing Scheme than California.

a) Overview. Pennsylvania's capitol punishment structure is different from California in that it has a large potential number of cases that can become capitol cases. In order for a defendant to be convicted of first-degree murder in Pennsylvania, he or she must have acted with the intent to kill the victim whether as an accomplice or the actual killer. Smith v. Horn, 120 F.3d 400, 410 (3rd.Cir. 1997); Com. v. Huffman, 638 A.2d 961, 962-964 (Pa. 1994).

Numerous first-degree murder convictions and resulting death sentences in Pennsylvania have been set aside either on direct or collateral attack in felony murder cases because of the failure to emphasize the fact that an intent to kill on the part of each participant is required. Smith, supra., Huffman, supra., Com. v. Grier, 638 A.2d 965 (Pa. 1994) (Companion case to Huffman).

While an intentional killing is required to be death eligible, the following aggravating circumstances exist that do not exist in California: (i) the offender has a prior conviction for voluntary manslaughter; (ii) the defendant has a "significant history" of prior convictions for crimes of violence; and (iii) the defendant killed the victim while committing any felony not included within the homicide.

b) The Pennsylvania sentencing scheme. Pennsylvania essentially has a mandatory death penalty law in that if the defendant is found guilty of first-degree murder with an aggravating factor, unless there is mitigating evidence, the sentence of death must be imposed. This was upheld by the United States Supreme Court in Blyestone v. Pennsylvania, 494 U.S. 299, 302-304 (1990).

As to the sentencing for murder in Pennsylvania, there are three degrees as follows:

i. First-degree murder which is an intentional killing of the victim. 18 Pa.Con.Stat. 2502(a). This is punishable by life imprisonment without parole, though the governor may commute a sentence. 18 Pa.Cons.Stat. 1103(a). Com. v. Yount, 615 A.2d 1316 (Pa.Super. 1992), appeal den. 631 A.2d 1007 (Pa. 1993).

ii. Murder in the second degree consists of a killing perpetrated

by the defendant or by an accomplice in the commission or attempted commission of robbery, rape, involuntary deviate sexual intercourse by force or fear of force, kidnapping, arson, or burglary. 18 Pa.Cons.Stat. 2502(b). The sentence for murder in the second degree is life imprisonment without parole as well, although the Governor may commute this sentence. 18 Pa.Cons.Stat. 1103(b). Castle v. Commonwealth of Pennsylvania Board of Probation and Parole, 554 A.2d 625 (Pa.Comonwealth.Ct. 1989), appeal den. 567 A.2d 653 (Pa. 1989).

iii. Murder in the third degree is common law depraved indifference to human life murder. 18 Pa.Cons.Stat. 2502(c). This was originally treated as a felony of the first degree with a maximum term of 20 years in prison with the court setting forth minimum and maximum terms. After a defendant served the minimum term set by the court, the defendant was eligible for parole. In 1995, the maximum term for murder in the third degree was increased to 40 years.

c) Observation as to extensive use of "aggravating factor" of significant history of prior convictions for crimes of violence. There are numerous Pennsylvania cases where the sole aggravating factor was that the defendant had a significant prior history of crimes of violence.

This is present in so many cases because until the late 1980's Pennsylvania practiced indeterminate sentencing with what could best be characterized as a "revolving door" policy in the incarceration and release of prisoners, in large part because of a lack of sufficient prison capacity.

In particular, defendants would plead down in murder cases to murder in the third degree to avoid a life sentence and would receive a sentence typically of 5 to 10 years with parole eligibility after five years. These individuals would be released and kill again.

d) Recent statutory changes enacted since 1995 that may reduce death sentences in Pennsylvania. Beginning in the mid-1980's, sentencing policies in Pennsylvania were toughened in two respects. First, sentencing guidelines were adopted which had the effect of increasing minimum sentences for violent offenders. In addition, mandatory add-ons were imposed for offense where weapons were used.

However, until 1995, Pennsylvania had not strengthened its parole system to a level to assure proper monitoring of offenders. In 1995, at a Special Session, the Pennsylvania Legislature passed and Governor Ridge signed into law a comprehensive violent crime control program. This consisted primarily of six policy changes:

i. Dramatically increased sentences were imposed for crimes of violence committed with guns.

ii. Sentences were doubled for persons who committed crimes of violence had prior convictions for crimes of violence.

iii. The parole system was made much more accountable with no life or death sentences subject to commutation without the unanimous prior approval of the Pennsylvania Board of Pardons and Parole.

iv. The number of state prison cells was increased dramatically.

v. Sentences for third-degree murder (used principally as a case management system) was increased from a statutory maximum of 20 years to a statutory maximum of 40 years.

vi. Mandatory procedures were put in place to assure that death warrants were expeditiously issued after a sentence of death was affirmed by the Pennsylvania Supreme Court. This may eliminate some of the "over kill" factoring done by juries.

The last change was the outgrowth of Governor Casey's practice of "sitting on" death warrants. Under Pennsylvania law, no person can be executed until a governor's death warrant is issued.

In Morganelli, as District Attorney vs. Casey & Singel, 646 A.2d 744 (Pa.Com.Ct. 1994), the Northumberland County District Attorney brought a mandamus action against Governor Casey to compel him to issue death warrants against Martin Appel and Josoph Henry whose death sentences were affirmed three years earlier by the Pennsylvania Supreme Court. In late 1994, the Court did, so holding that the Governor had a mandatory duty to promptly issue death warrants.

Since the enactment of these changes, and the changes since the late 1980's, the number of inmates - who are primarily violent offenders, has increased from 20,000 inmates to 35,000 inmates.

In sum, Pennsylvania has eliminated the "revolving door." Most of the cases where the aggravating factor is significant history of prior convictions for crimes of violence should decrease over time as the pool of these persons will be in state penal facilities and not returned to society.

e) The most controversial and protracted Pennsylvania death case does not involve African-Americans. The most controversial Pennsylvania death case is arguably Commonwealth v. Michael Travaglia, 467 A.2d 288 (Pa. 1983) and Commonwealth v. John Lesko, 467 A.2d 288 (Pa. 1983).

In 1980, Lesko and Travaglia intentionally killed Officer Leonard Miller of the City of Appollo Police Department located in Allegeheny County. Officer Miller was killed in an ambush Lesko and Travaglia lured him into. Officer Miller was parked in his cruiser outside a Stop-n-Go convenience store. There had been a rash of armed robberies of these convenience stores in Allegheny County and the surrounding counties of Beaver, Indiana and Westmoreland.

The Miller murder case became quite sensational in western Pennsylvania. In fact, the trial was conducted on a change of venue to Westmoreland County. The jury was selected from a jury pool of residents of Berks County which is in southeastern Pennsylvania.

The Miller murder case has dragged on for 18 years with an on going dispute between the Pennsylvania state courts and the United States circuit and District court over the use of a guilty plea by Lesko and Travaglia in a related murder as an aggravating factor in the sentencing phase of the Miller case. See: Com. v. Travaglia, 661

A.2d 352, 362-364 (Pa. 1995) and Lesko v. Lehman, 1992 U.S.Dist. Lexis 1123 (W.D.Pa. 1992). Earlier this month, the Pennsylvania Supreme Court upheld Lesko's death sentence after a second penalty hearing mandated by the federal courts.

The dispute in Lesko and Travaglia over the use of the related murder conviction resulted in the adoption in 1989 of a special court rule to mandate that prior to or at the time of arraignment, the Commonwealth had to give written notice to the defendant that it was seeking the death penalty and alleging with specificity the basis for the relevant aggravating factor. Pa.R.Crim.Pro. 352. Failure to comply with Rule 352 is automatic grounds for reversal of a death sentence in Pennsylvania. Com. v. Williams, 650 A.2d 420 (Pa. 1994).

f) Staff legal research. Death sentences in Pennsylvania - like in California - are subject to automatic review by the Pennsylvania Supreme Court. A synopsis of decisions by the Pennsylvania Supreme Court in capitol Pennsylvania Supreme Court to determine if the death penalty was in fact being applied in a manner that exceed California's is available from the Committee and has been provided to the sponsor.

The results of that research indicated that the majority of death cases emanated from Philadelphia County. Philadelphia has a very high violent crime rate - one that far exceeds Pittsburgh. As such, Philadelphia juries tend to take a much more "hard-line approach" to imposition of the death penalty - particularly where the defendant is a violent career offender - probably because of a concern that at a later date the defendant might be released back into the community - particularly working class neighborhoods.

While life without parole is mandatory as the minimum sentence in all aggravated first-degree murder cases under Pennsylvania law, it would appear that Philadelphia juries - until the recent changes referred to in Comment 15(c) - did not want to take any chances with the release of murderers. However, almost of the death sentences were imposed on defendants who would receive death sentences in most jurisdictions in this country.

16) California Comparison.

a) Overview. California does not have inter-case proportionality review as this is not constitutionally required. Pulley v. Harris, 465 U.S. 37, 51-54 (1984). Rather, special circumstances determine death eligibility.

To date, the only execution in the state under the post-Gregg statute where the offender and the victims were of different races involved cases where the offender was Caucasian and at least one of the victims was a racial minority. (People v. Bonin, (1988) 48 Cal.3d 659 (So-called "Freeway Killer" - 10 victims, all of whom were under 18, at least 3 Latino); People v. Williams, (1988) 44 Cal.3d 883: Defendant convicted under 1977 death penalty law in Merced County of intentional killings of two Latino males and a Latina. There were numerous special circumstances consisting of: (i) multiple murder; (ii) robbery-murder; (iii) kidnap murder; and (iv) rape-murder. Williams is characterized as a "hate crime".)

In Los Angeles County the District Attorney's office is seeking the death penalty in a number of cases where the offender was Caucasian and the victims were racial minorities.

b) Regional disparities: Adcox. Rather than being racial, any disparities in California tend to be regional. This fact was noted in People v. Adcox, (1988) 47 Cal.3d 207, the defendant (who was Caucasian) was convicted in Tuolumne County of first-degree murder with a firearm. The defendant was concurrently convicted of robbery with a gun and auto theft, and robbery-based special circumstances and sentenced to death. The jury found that the murder was intentional and premeditated

Adcox and two accomplices decide to kill a fisherman to take his car. The victim was intentionally killed by by ambush ("lying in wait"), and they took the victim's wallet and car. The vehicle was ultimately dumped in a canal. The defendant was apprehended because of an immunity agreement with his girlfriend. While 25 at the time of the crime, Adcox had a history of engaging in violent behavior.

In affirming the death sentence, the Supreme Court again held that inter-case proportionality review was not required. Adcox also argued that his sentence should be reduced to LWOP given the sentences given to his accomplices arguing that the Court had that power pursuant to Penal Code Sections 1181(7) and 1260.

While noting it did have the power pursuant to the above-cited code sections to reduce the sentence of death to LWOP, the Court refused on a 6-to-1 vote to do so. The Supreme Court noted that the defendant had intentionally and with premeditation killed an unwitting victim taken by ambush in order to commit a calculated and planned robbery. In other words, Adcox had committed an "execution style" robbery.

Justice Brousard concurred in the affirmance of the death sentence. He was troubled by the regional disparities as it appeared that Adcox was not the typical death case the Supreme Court had reviewed up to that time. He noted that because capitol cases are far more expensive to try than ordinary murder trials, prosecutors in urban areas where most murders occur have a very extensive screening process such that there are 58 applications of the death penalty law.

c) Observation as to application of felony murder special circumstances. In reviewing most of the death penalty cases before the Supreme Court, while there are cases of serial killers, torture murderers, and persons who murder for financial gain, there is no question that most special circumstance cases are felony murders, i.e. killing a person during a robbery or sexual assault or a kidnapping.

Given the costs involved, in most counties the death penalty is not sought in felony murder cases unless there are either multiple special circumstances involved, the defendant has an extensive prior criminal record of violence, or it was an intentional "execution style" felony murder. This narrowing is particularly true in San Francisco and other Bay Area counties as it is very difficult to obtain a death sentence in those counties.

In almost all felony murder cases - save where there is a plea bargain

or an issue of sufficiency of evidence to be held to a special circumstance as an aider and abettor theory, most felony murder cases are prosecuted as LWOP cases. This is true throughout California.

Another factor which may reduce the number of special circumstances cases in the future is the "10-20-life" law. In most murders, gun are used. As such, if a defendant use a gun in a murder, the real sentence is now life with a minimum calendar term of 50 years before parole eligibility is reached. As a 50-year calendar term is really LWOP, the number of special circumstance cases may drop.

17) Means of Reducing Disparities in Other Jurisdictions.

a) The New York experience. In 1995, New York State restored the death penalty and did so by creating a first-degree murder statute which functions as a special circumstance. The state statute required an intentional killing couple with other factors. The felony murder criteria was limited to aggravated forms of kidnapping, sexual assaults, and armed robbery.

As part of that statute, the following protections were inserted:

i. The New York Court of Appeals was required to conduct inter-case proportionality review.

ii. A centralized data base was created requiring case disposition on every case where a defendant was indicted for first-degree murder.

iii. Jurors must be questioned individually outside the presence of other jurors as to racial bias.

iv. Continuing legal education paid for at state expense was mandated for prosecutors and defense counsel conducting capitol cases.

However, even with the protections in New York State law, regional disparities can exist if a prosecutor adopts a blanket policy of refusing to seek the death penalty. This has occurred in Bronx County where District Attorney Robert Johnson has stated that as a matter of conscience he will refuse to seek the death penalty in any first-degree murder case.

Johnson's announcement that he would never seek the death penalty caused Governor Pataki to exercise his powers under the New York Constitution to supersede Johnson in any case wherein it appeared to be a first-degree murder case. The effect of a "supersede order" under New York law is that the New York State Attorney general appoints a special assistant Attorney General to prosecute that case.

In superseding Johnson, Governor Pataki stated that he was acting to assure that the death penalty statute in New York state was enforced uniformly to avoid constitutional challenges. The Governor's action was upheld by the New York Court of Appeals. Johnson v. Pataki, 691 N.E.2d 1002 (N.Y. 1997).

To date, only one death sentence has been rendered in New York. That

one case involved a Kings County (Brooklyn) jury composed primarily of racial minorities which sentenced an African American, who was a former prison guard, to death for intentionally killing three African Americans during an armed robbery of an illegal "after hours" social club.

There are approximately 18 other pending capitol cases in New York State. In one case, the Monroe County (Rochester area) District Attorney is seeking the death sentence against a Caucasian defendant who is charged with the sexual assault-hate crime murders of three African American females.

b) Federal system. Pursuant to the federal death penalty statute, Attorney General Reno has indicated that she has the final say over whether the Government will seek the death penalty in each case.

c) Delaware. In Delaware, all criminal cases are prosecuted by the State Attorney General's office. This, together with the fact that it is a small and compact state consisting of 3 counties has reduced some of the concerns over disparities. However, even with one charging agency and inter-case proportionality review, there are allegations that in Delaware the death penalty is not uniformly imposed with the two rural counties more death prone than the Wilmington area.

19) Conclusion as to Removing Disparities. While staff has researched and searched for means to reduce disparities, it is staff's conclusion that there is simply no "magic bullet" for doing so as long as a defendant has a right to be tried in a county where the homicide occurred. No matter the size of the state, jury pools by county will differ in attitudes concerning the application of the death penalty. So long as that occurs, there is simply no way to eliminate disparities.

20) Opposition.

a) The California Public Defenders Association is opposed to this bill because it "would eliminate the requirement that a felony murder be based on an independent felony. This would create a major change in the law and would contravene numerous California Supreme court cases dating back thirty years."

b) The American Civil Liberties Union opposes the "death penalty under all circumstances as a violation of the Constitution because it denies equal protection of the laws, is cruel and unusual punishment, and removes guarantees of due process of law. The death penalty offers society no greater protection than the alternative of life imprisonment without the possibility of parole. The American Bar Association has recently called for a moratorium on the imposition of the death penalty because of the arbitrary and discriminatory nature in which it is applied.

"SB 1878 would expand the death penalty cases where the defendant kidnaps or commits arson with the intent to kill the victim. This bill would convert many murder cases into death eligible cases. It is an arbitrary extension of the death penalty to apply it to those situations where the defendant intends to kill and 'moves' the victim and not apply it in cases where the defendant simply kills the victim. As it stands, defendants are subject to the death penalty

where death results from a kidnapping or an arson. There is no need for further expansion of the statute."

REGISTERED SUPPORT/OPPOSITION:

Support

Ventura County District Attorneys Association (sponsor)
California District Attorneys Association
Association for Los Angeles Deputy Sheriffs, Inc.

Opposition

American Civil Liberties Union
Catholic Center for Restorative Justice
Friends Committee on Legislation of California
California Catholic Conference
California Attorneys for Criminal Justice

Analysis prepared by: Judith M. Garvey / apubs / (916) 319-3744

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JOINT COMMITTEES
JOINT COMMITTEE ON FAIRS ALLOCATION AND CLASSIFICATION

JOINT COMMITTEE ON LEGISLATIVE AUDIT

JOINT COMMITTEE ON RULES

# California State Senate

STATE SENATOR
QUENTIN L. KOPP
EIGHTH SENATORIAL DISTRICT
REPRESENTING SAN FRANCISCO AND SAN MATEO COUNTIES

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BUDGET AND FISCAL REVIEW
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SUBCOMMITTEES
BUDGET SUBCOMMITTEE NO. 2 ON RESOURCES, ENVIRONMENTAL PROTECTION, JUDICIARY AND TRANSPORTATION - CHAIRMAN
FINANCE SUBCOMMITTEE ON CALIFORNIA-EUROPEAN TRADE DEVELOPMENT - CHAIRMAN
SUBCOMMITTEE ON THE AMERICAS

July 20, 1998

Honorable Gray Davis
Lieutenant Governor
State of California
State Capitol, Room 1114
Sacramento, CA 95814

RE: Request for Support of SB 1878 (Kopp)

Dear Lt. Governor Davis:

I write to request your support of an important legislative matter affecting California's death penalty law. I introduced SB 1878 for purposes of two carefully written amendments (not additions) to California's death penalty law. Ventura County District Attorney Mike Bradbury is the sponsor of the bill. The measure has the broad based support of law enforcement, including the California District Attorneys Association, the California Attorney General, the California State Sheriffs and the California Police Chiefs' Associations. The bill's two basic components, which are summarized in detail in the enclosed memorandum, are as follows:

- First, SB 1878 would limit the application of the California Supreme Court's decision in *People v. Green* (1980) 27 Cal 3d. 1. In *Green*, the court held that a defendant convicted of a special circumstance murder while engaged in one of the 12 enumerated felonies cannot be sentenced under California's death penalty law if the underlying felony was committed for the purpose of facilitating the murder. SB 1878 would provide that a kidnapping or arson committed for the purpose of killing the victim would fulfill the requirements for a special circumstance.

- Second, under SB 1878, a murder committed by lying in wait would constitute a special circumstance, whether or not it was committed immediately upon the killer confronting the victim or subsequently (such as kidnapping and transporting the victim to a more secluded place and killing the victim there).

Both of the changes remove arbitrariness from our death penalty law. For example, under existing case law a defendant who, with the intent only to destroy property, sets fire to a building that results in the death of an occupant would be subject to the death penalty. A defendant who sets fire to a building with the more aggravated intent to kill the occupant would, however, not be subject to the death penalty. Similarly, a defendant who "lies in wait" for his victim and immediately kills the victim upon arrival would be subject to the death penalty. A defendant who "lies in wait," captures his victim and forces the person to another secluded location to commit the murder would, however, not be subject to the death penalty. SB 1878 corrects both of those illogical holdings and thereby ensures that the death penalty is applied to the most serious murders.

Based on our research, the changes will have a significant effect on only about two cases a year statewide. SB 1878 already was passed by the Senate on a vote of 24 - 4 and was recently approved by the Assembly Public Safety Committee on a vote of 7 - 1. It is currently scheduled for hearing before the Assembly Appropriations Committee on July 29, 1998.

Your support of this measure is important. I'd like you to express written support of the measure before it is heard in the Assembly Appropriations Committee. Should you have any questions concerning this measure, please notify me. Additionally, Chief Deputy District Attorney Gregory Totten (805-654-3217) and Senior Deputy District Attorney Peter Kossoris (805-654-2510) are also available to speak with any member of your staff concerning SB 1878. Thank you for your time and attention.

Yours truly,

QUENTIN L. KOPP

QLK:dp

cc: Greg Totten, Esq.
Peter Kossoris, Esq.

Enclosure

Date of Hearing: July 29, 1998

ASSEMBLY COMMITTEE ON APPROPRIATIONS
Carole Migden, Chairwoman

SB 1878 (Kopp) - As Amended: 7/16/98

Policy Committee: Public Safety Vote: 7 - 1

Urgency: Yes State Mandated Local Program: Yes Reimbursable: No

SUMMARY

This bill broadens the applicability of special circumstances murder regarding lying in wait, kidnaping and arson, for purposes of expanding the death penalty and life without possibility of parole (LWOP). Specifically, this bill:

1. Specifies that to be sentenced under arson or kidnaping special circumstances where the defendant intended to kill the victim, the prosecutor must only prove the elements of the specific felony alleged, even if the felony was committed solely for the purpose of the murder.

2. Provides that the special circumstance for lying in wait be amended to provide that the defendant intentionally killed the victim "by means of" instead of "while" lying in wait.

3. States the Legislature's intent, as to kidnaping and arson special circumstances, to create a statutory exception to the "independent purpose doctrine" established in case law.

4. Provides that this measure be placed on the November 1998 ballot if there is a supplemental ballot including other measures, or on the first statewide election in 2000 if there is no 1998 supplemental ballot.

FISCAL EFFECT

1. Unknown significant annual state trial court costs for more costly trials. For example, Death Penalty Focus of California, based on a study of L.A. cases, found that the average total cost of a death penalty trial was $1.9 million, compared with $600,000 for a non-capital murder trial. Of the $1.3 million differential, $424,000 represents court costs covered by state trial court funding. Given that 1,400 persons were admitted to state prison in 1997 for murder, if only 1 percent (14) were affected by this bill, annual state costs could be $6 million.

2. Unknown significant out-year state and local costs for executions, which can cost $1 million per execution more than the cost of LWOP over the period of the inmate's life.

   Several studies indicate that the post-trial cost of execution - appeals, motions, investigators and other specialized processes - may exceed $1

- continued -

million. A 1988 study review by the Sacramento Bee estimated that the cost per execution in California was $15 million, compared to the $900,000 40-year cost of LWOP.

3. Unknown significant out-year GF costs for increased state incarceration to the extent more murderers receive LWOP than 25-to-life (murder 1 without special circumstances) or 15-to-life (murder 2). Assuming 14 new cases, based on #1, above, costs would be about $300,000 per year beginning in about 20 years, increasing annually to about $3 million per year within another decade. (Precise estimates are not possible as indeterminate sentenced lifers serve disparate terms.)

4. State ballot costs of about $200,000, based on the Secretary of State's estimate of $50,000 per ballot page.

BACKGROUND

1. Current law provides that murder is the unlawful killing of a human or fetus with malice aforethought. Murder is classified as either first or second-degree. First-degree murder is committed by means of destructive devices, explosives, knowing use of armor-piercing bullets, lying in wait, torture, or any willful, deliberate, and premeditated killing, or murders committed during the commission of a list of enumerated felonies (felony-murder). All other kinds of murder are second-degree.

   The penalty for first-degree murder without special circumstances is 25-years-to-life. The penalty for first-degree murder is death or LWOP when one or more of 31 enumerated special circumstances are found true.

2. Rationale. According to the author, "This measure seeks to correct two separate problems with the law of special circumstances in capital murder cases that are the result of court decisions. The proposed changes are modest and do not seek to add another special circumstance or dramatically expand California's death penalty law. Instead, they simply seek to ensure it applies to the most serious crimes committed."

3. Kidnaping and arson provisions. The effect of the independent felonious purpose doctrine in arson and kidnaping cases is that if a defendant intending to kill a victim either burns down a residence to kill the victim, or abducts or kidnaps to kill, there is no special circumstance. If the defendant kidnaps the victim and subsequently decides to kill, that is a special circumstance, as is burning a residence to collect the insurance and killing a person in the process.

   The bill makes premeditated killings committed by means of abduction or arson special circumstance murders.

4. Lying in wait. The language for the "intentionally killed the victim while lying in wait" special circumstance is narrower than the "lying in wait" requirement that constitutes first-degree murder. Therefore, in Domino v. Superior Court the Court of Appeal interpreted the "lying in wait" special

- continued -

circumstance to require the murder to be committed during the time the person was lying in wait, whereas the "lying in wait" requirement for first-degree murder has been interpreted to include a killing that follows closely after periods of watching and waiting to take the victim by surprise or ambush. The Domino interpretation has been accepted by the Supreme Court.

5. Common practice. Most special circumstances cases are felony murders - killing a person during a robbery, a sexual assault, or a kidnaping. Due to cost, many counties do not seek the death penalty in felony murder cases absent extenuating circumstances. Most felony murder cases are prosecuted as LWOP cases.

6. When are special circumstances no longer special? According to death penalty pponents, and even some supporters, if special circumstances are expanded, they become less special and more likely to spark a legal challenge.

   According to the Public Safety Committee analysis, "As is the case with any additional special circumstance - which this bill creates - there is a legitimate concern that this new addition is the one that invalidates the death penalty."

7. Opposition. The CA Public Defenders Association, CA Attorneys for Criminal Justice, the ACLU, the Catholic Conference and the Friends Committee oppose this bill on the basis that the death penalty offers society no more protection than LWOP. Opponents note the American Bar Association has called for a moratorium on the death penalty because of the arbitrary and discriminatory way it is applied.

   The Public Defenders Association contend this bill "creates a major change in the law and would contravene numerous California Supreme Court cases dating back 30 years."

   According to the ACLU, "This bill would convert many murder cases into death eligible cases. It is an arbitrary extension of the death penalty to apply it to those situations where the defendant intends to kill and 'moves' the victim and not apply it in cases where the defendant simply kills the victim. As it stands, defendants are subject to the death penalty where death results from a kidnaping or an arson. There is no need for further expansion of the statute."

Geoff Long
(916) 319-2081
AAPPRO

ASSEMBLY THIRD READING
AB 1574 (Corbett)
As Introduced February 26, 1999
2/3 vote

PUBLIC SAFETY 6-1 APPROPRIATIONS 21-0

| | | | |
|---|---|---|---|
| Ayes: | Honda, Cunneen, Battin, Keeley, Oller, Romero | Ayes: | Migden, Brewer, Ashburn, Battin, Cedillo, Davis, Pescetti, Hertzberg, Kuehl, Maldonado, Papan, Romero, Runner, Shelley, Steinberg, Thomson, Wesson, Wiggins, Zettel, Aroner |
| Nays: | Washington | | |

SUMMARY : Classifies as first-degree murder any murder committed in the perpetration of, or attempt to perpetrate, torture.

EXISTING LAW :

1)Provides that all murder which is perpetrated by means of torture is murder of the first degree.

2)Excludes "torture murder" from the list of homicides statutorily designated as "felony murders."

3)Provides a special circumstance authorizing imposition of the death penalty if the first-degree murder was intentional and involved the infliction of torture.

4)Defines the crime of "torture" as "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in [the Penal Code] upon the person of another, is guilty of torture."

FISCAL EFFECT : According to the Assembly Appropriations Committee analysis, this bill has annual costs for increased state incarceration, likely in excess of $200,000.



http://info.sen.ca.gov/pub/99-00/bill/asm/ab_1551-1600/ab_1574_cfa_19990529_225801_asm_floor.html

In 1997-98, 659 persons were admitted to state prison for second-degree murder; there is no data to determine how many cases involved torture. If, however, one-half of 1% involved torture, received 25-to-life rather than 15-to-life, and served an additional five years after 20 years, annual costs would be about $350,000 in about 25 years.

COMMENTS : According to the author, "Currently there are three definitions of 'torture' murder:

1)'Torture' special circumstances murder, requiring premeditation and deliberation, an intent to kill, and in intent to cause 'prolonged pain;'

2)'Torture' first degree murder, requiring premeditation and deliberation and an intent to cause 'prolonged pain,' but no intent to kill; and,

3)'Torture' second degree felony murder, no intent to kill, no premeditation and deliberation and no intent to cause 'prolonged pain' required.

"This proposal would add Penal Code Section 206 - Torture to the list of crimes for first degree murder. This would mean that when a person is killed during the perpetration of the crime of 'torture' pursuant to PC 206, the crime is first _ degree murder in all cases. Second degree torture felony murder will be eliminated; and the current requirements of premeditation and deliberation and an intent to cause prolonged pain for first degree torture murder will also be eliminated. However, the distinction between torture special circumstance murder and first degree torture felony murder will continue to be that the killing was intentional."

Please see the policy committee analysis for a more comprehensive discussion of this bill.

Analysis Prepared by : Harry Dorfman / PUB. S. / (916) 319-3744

FN: 0001079

Date of Hearing: April 13, 1999
Chief Counsel: Harry M. Dorfman

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Mike Honda, Chair

AB 1574 (Corbett) - As Introduced: February 26, 1999

SUMMARY : Classifies as first-degree murder any murder committed in the perpetration of, or attempt to perpetrate, torture as defined in Penal Code Section 206.

EXISTING LAW :

1)Provides that all murder which is perpetrated by means of torture is murder of the first degree. (Penal Code Section 189.)

2)Excludes "torture murder" from the list of homicides statutorily designated as "felony murders." (Penal Code Section 189.)

3)Provides that all other kinds of murders are of the second degree. (Penal Code Section 189.)

4)Provides a special circumstance authorizing imposition of the death penalty if the first-degree murder was intentional and involved the infliction of torture. (Penal Code Section 190.2(a)(18).)

5)Defines the crime of "torture" as "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture." (Penal Code Section 206.)

FISCAL EFFECT : Unknown

COMMENTS :

1)Author's Statement. "Currently there are three definitions of 'torture' murder:

a) Penal Code Section 190.2(18) 'torture' special



http://info.sen.ca.gov/pub/99-00/bill/asm/ab_1551-1600/ab_1574_cfa_19990412_121435_asm_comm.html

circumstances murder, requiring premeditation and deliberation, an intent to kill, and in intent to cause 'prolonged pain;'

b) Penal Code Section 189 'torture' first degree murder, requiring premeditation and deliberation and an intent to cause 'prolonged pain,' but no intent to kill; and

c) Penal Code Section 206 'torture' second degree felony murder, no intent to kill, no premeditation and deliberation and no intent to cause 'prolonged pain' required.

"This proposal would add PC 206 - Torture to the list of crimes for first degree murder. This would mean that when a person is killed during the perpetration of the crime of 'torture' pursuant to PC 206, the crime is _first_ degree murder in all cases. _Second_ degree torture felony murder will be eliminated; and the current requirements of _premeditation and deliberation and an intent to cause prolonged pain_ for first degree torture murder will also be eliminated. However, the distinction between torture special circumstance murder and first degree torture felony murder will continue to be that the killing was intentional."

2)With this Bill, Death Resulting from Torture Qualifies for the "Felony Murder Rule." At first glance, the Penal Code specifies that torture murder is first-degree murder. One might therefore question the significance of this bill's proposal. In fact, this bill would effect a substantive change in the Penal Code's classification of "torture murder." This bill proposes to add "torture" to the list of underlying felonies which trigger the application of the so-called "Felony Murder Rule." This bill would significantly affect the way a prosecutor would go about charging a defendant who had murdered while torturing the victim.

The Felony Murder Rule classifies as a first-degree murder any killing which occurs during the commission or attempted commission of one of the specified target felonies, even if the killing was unintentional or accidental. [ _People v. Patterson_ , (1989) 49 Cal.3d 615, 620; _Pepole v. Sellers_ , 203 Cal.App.3d 1042, 1055.] This legal theory operates to remove the need to prove any malice, or intent to kill, on the part of the defendant. The policy behind the Felony Murder Rule is



to discourage the commission of the inherently dangerous specified felonies because they pose such high risks of death. [ _People v. Smith_ , (1998) 62 Cal.App.4th 1233, 1236-37.] The Felony Murder Rule has withstood repeated arguments that it is unconstitutional. [ _See People v. Hines_ , (1997) 15 Cal.4th 997, 1048-49.]

Currently, in order to prove that a "torture murder" is a first-degree murder, the prosecutor must show beyond a reasonable doubt that the death was caused by torture. [ People v. Hoban , (1985) 176 Cal.App.3d 255, 264.] However, "it is unnecessary in torture-murder to . . . find that the killing itself was 'willful, deliberate, and premeditated.' " [ People v. Wiley , (1976) 18 Cal.3d 162, 173 n.4.] Rather, the Supreme Court has concluded that "murder by means of torture under [Penal Code] section 189 is murder committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain." [ Wiley at p. 173, quoting People v. Steger , (1976) 16 Cal.3d 539, 546.]

One practical effect of this bill will be to remove the need to prove that torturing the victim was willful, deliberate and premeditated pursuant to Wiley and Steger . If the prosecutor can prove beyond a reasonable doubt that the defendant had the specific intent to inflict extreme and prolonged pain and suffering, and that a death occurred as a result of the torture, the defendant will be guilty of first-degree murder.

3)Second-Degree Felony Murder by Torture Will Disappear. Judge-made law in California recognizes an alternative theory of Felony Murder which results in a second-degree murder rather than a first-degree murder conviction. "The second degree Felony Murder doctrine, which is judicially defined, applies only where the underlying felony is 'inherently dangerous to human life.' " [ People v. Smith , (1998) 62 Cal. App.4th 1233, 1237, quoting People v. Burroughs , (1984) 35 Cal.3d 824, 829.] An "inherently dangerous felony" is one that involves a "high probability" of death. [ Smith at p. 1237.] Torture clearly qualifies as an inherently dangerous felony. However, if this bill becomes law, the codification will eliminate second-degree felony murder by torture because if a prosecutor charges felony murder by torture and the jury makes a finding of guilt, the result must be first-degree murder based on the inclusion of torture in Penal Code Section



189's Felony Murder list.

4)Is This Change Necessary? Is It Beneficial? Where a defendant has chosen to torture his victim and the victim dies, the prosecutor - under the current law - may not be able to prove that the defendant willfully, deliberately and with premeditation intended to inflict extreme and prolonged pain on the victim. Does torture belong on the list of felonies which trigger application of the Felony Murder Rule? Yes. The current list of underlying felonies which trigger the application of the Felony Murder Rule includes:

a) Arson,

b) Rape,

c) Carjacking,

d) Robbery,

e) Burglary,

f) Mayhem,

g) Kidnapping,

h) Train wrecking,

i) A Penal Code Section 286 violation (sodomy),

j) A Penal Code Section 288 violation (lewd and lascivious act on a child under 14),

k) A Penal Code Section 288a violation (oral copulation), and

l) A Penal Code Section 289 (penetration of genital or anal opening by a foreign object).

(Penal Code Section 189.)

The extreme invasion of another person inherent in torture will frequently be much more serious than the momentary fright which a robbery victim might feel, particularly where the robbery is a "strong arm" accomplished by nothing more than



the physical advantage of the robber intimidating the victim to give over property. To make another comparison, the pain and suffering resulting from torture will usually exceed the fright a burglary victim feels, even if the victim is present at the time of the burglary. As with the robbery victim, the burglary victim will recover his or her emotional balance relatively quickly in contrast to the victim of torture. The very nature of torture justifies putting it on the felony murder list.

5)Arguments in Opposition. The California Attorneys for Criminal Justice states, "Penal Code Section 189 already provides that murder perpetrated by means of torture is first degree murder. Additionally, because torture is already a separate felony under Penal Code section 206, any attempt to perpetrate torture in which the victim dies, even where there was no intent to kill, would be first degree murder under the felony murder rule. There appears to be no need for this bill."

REGISTERED SUPPORT / OPPOSITION :

Support

California Peace Officers' Association
California Police Chiefs' Association
Doris Tate Crime Victims Bureau

Opposition

California Attorneys for Criminal Justice
California Public Defenders Association
California State Sheriffs' Association

Analysis Prepared by : Harry Dorfman / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 1999
Chief Counsel: Harry M. Dorfman

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Mike Honda, Chair

AB 3 (Ashburn) - As Introduced: December 7, 1999

SUMMARY : Expands the "special circumstances" list to authorize imposition of the death penalty where the victim was under age 14, and the defendant knew or should have known that the victim was under age 14.

EXISTING LAW

1)Provides that murder is the unlawful killing of a human being, or a fetus, with malice aforethought. (Penal Code Section 187.)

2)Provides that malice aforethought may be express or implied. Malice aforethought is express when the perpetrator manifests a deliberate intention to take the life of another human. Malice aforethought is implied when there was "no considerable provocation" for the killing, or when the circumstances surrounding the killing show "an abandoned and malignant heart." (Penal Code Section 188.)

3)Classifies murder according to degrees, either first degree or second degree. (Penal Code Section 189.)

4)Provides that first-degree murder includes murders perpetrated by:

a) Means of destructive device or explosive;

b) Knowing use of ammunition designed primarily to penetrate metal or armor;

c) Poison;

d) Lying in wait;

e) Torture;

f) Any kind of willful, deliberate, and premeditated



http://info.sen.ca.gov/pub/99-00/bill/asm/ab_0001-0050/ab_3_cfa_19990412_121023_asm_comm.html

killing;

g) Discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death; and

h) Any murder committed in the perpetration of, or attempt to perpetrate:

i) Arson;

ii) Rape;

iii) Carjacking;

iv) Robbery;

v) Burglary;

vi) Mayhem;

vii) Kidnapping;

viii) Train wrecking;

ix) Sodomy;

x) Lewd or lascivious acts on a child under age 14;

xi) Oral copulation; and,

xii) Penetration of genital or anal openings with a foreign object. (Penal Code Section 189.)

5)Provides that second-degree murders include all murders not enumerated as first degree. (Penal Code Section 189.)

6)Specifies that first-degree murder without "special circumstances" (Penal Code Section 190.2) is punishable in the state prison for a term of 25-years-to-life. (Penal Code Section 190.)

7)Specifies that first-degree murder with "special circumstances" (Penal Code Section 190.2) is punishable by death, or in the state prison for life without the possibility



of parole. (Penal Code Section 190.)

8)Limits imposition of the death penalty to those first-degree murder cases where the trial jury finds true at least one "special circumstance." Currently, the Penal Code lists 21 separate categories of "special circumstances":

a) The murder was intentional and carried out for financial gain;

b) The defendant was convicted previously of first- or second-degree murder;

c) The defendant, in the present proceeding, has been convicted of more than one offense of first- or second-degree murder;

d) The murder was committed by means of a destructive device planted, hidden or concealed in any place, area, dwelling, building or structure;

e) The murder was committed to avoid arrest or make an escape;

f) The murder was committed by means of a destructive device that the defendant mailed or delivered, or attempted to mail or deliver;

g) The victim was a peace officer who was intentionally killed while performing his/her duties and the defendant knew or should have known that; or the peace officer/former peace officer was intentionally killed in retaliation for performing his/her duties;

h) The victim was a federal law enforcement officer who was intentionally killed (the same as Item (g) above);

i) The victim was a firefighter who was intentionally killed while performing his/her duties;

j) The victim was a witness to a crime and was intentionally killed to prevent his/her testimony, or killed in retaliation for testifying;

k) The victim was a local, state or federal prosecutor



murdered in retaliation for, or to prevent the performance of, official duties;

l) The victim was a local, state, or federal judge murdered in retaliation for, or to prevent the performance of, official duties;

m) The victim was an elected or appointed official of local, state or federal government murdered in retaliation for, or to prevent the performance of, official duties;

n) The murder was especially heinous, atrocious, or cruel, "manifesting exceptional depravity." The preceding words mean "a conscienceless or pitiless crime that is

unnecessarily torturous;"

o) The defendant intentionally killed the victim while lying in wait;

p) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin; and,

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

i) Robbery;

ii) Kidnapping;

iii) Rape;

iv) Sodomy;

v) Performance of a lewd or lascivious act on a child under age 14;

vi) Oral copulation;

vii) Burglary;

viii) Arson;



ix) Train wrecking;

x) Mayhem;

xi) Rape by instrument;

xii) Carjacking;

xiii) Torture;

xiv) Poison;

xv) The victim was a local, state or federal juror murdered in retaliation for, or to prevent the performance of his/her official duties; and,

xvi) The murder was perpetrated by discharging a firearm from a vehicle. (Penal Code Section 190.2.)

9)Requires three separate findings at the trial in order to qualify for the death penalty: (a) guilty of first degree

murder, (b) a finding that at least one of the charged "special circumstances" is true, and (c) the jury's determination that death is appropriate rather than life in prison without the possibility of parole (LWOP). The first two findings occur when the jury deliberates at the close of the "guilt phase." (Penal Code Sections 190.1 and 190.4) The penalty determination takes place during the "penalty phase." (Penal Code Section 190.3) If the jury fixes the penalty at death, the judge still retains the power to reject the jury's penalty verdict and impose LWOP. (Penal Code Section 190.4(e))

FISCAL EFFECT : Unknown

COMMENTS :

1)Author's Statement. "The murder of a child is a valid special circumstance. For those most vulnerable, our children, it is surprising that many child murderers are not eligible for life in prison without parole. Even more surprising is that taking the life of the child is not a special circumstance, which allows the death penalty as a consequence.

"Current law (Penal Code Section 190.2) does not sufficiently



provide for the protection of our children and does not provide an avenue to justice for murdered children and their surviving parents/siblings. Present law actually places a higher value on politicians, judges, district attorneys and jurors than it does on children. If one of these adults is murdered, their status makes the killer automatically eligible for life without parole or the death penalty. While these people are certainly worthy of protection, don't our children deserve the same justice?

"AB 3 will set things right by making the murder of any child who is under 14 years of age punishable by death or life in prison without the possibility of parole. We have a responsibility to protect our children, those least able to protect themselves. It is imperative that we apply the greatest possible punishment to those who prey on them. Our first duty is to care for those who cannot protect themselves and that means our children. There is absolutely no excuse for taking a child's life and those who do should suffer the most severe penalty we can give them.

In the words of the California Union of Safety Employees, '?A society can be judged by how it values its children. By recognizing that one of the vilest acts a person can commit is the murder of a child, this bill reaffirms our commitment to the protection of the most vulnerable among us.' "

2)Adding More Special Circumstances Raises Constitutional

Concerns. Because the death penalty represents the sovereign's greatest exercise of punitive power, the courts take all necessary steps to make certain that it is applied only to the most serious offenses. The Constitution does not permit the application of the death penalty to crimes chosen without sufficient reason; put another way, any statutory scheme authorizing capital punishment must demonstrate a meaningful basis for distinguishing between those who receive death and those who do not. The United States Supreme Court has said that "[a] capital sentencing scheme must?provide a 'meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not.' " Gregg v. Georgia , (1976) 428 U.S. 153, quoting Furman v. Georgia , (1972) 408 U.S. 238, 313. At some point, the courts will likely announce that the "special circumstances" list contains too many crimes and sweeps too broadly, striking it down on constitutional grounds and the Legislature will be



required to rewrite the special circumstances law to return it to a judicially acceptable dimension.

3)Similar Laws in Other States. According to material provided by the author, "At least 11 other states have provisions in their capital punishment statutes providing a punishment of death or life in prison without parole for the killing of an individual under a certain age: Alabama, Colorado, Florida, Indiana, Louisiana, Ohio, Pennsylvania, Illinois, Mississippi, Oklahoma and Wyoming. Most of these states use 12 years of age. Although, Alabama uses 14 years and Wyoming uses 16 years."

4)Current Special Circumstances Law Protects Children. Existing law permits imposing the death penalty in a number of situations where children are likely to be murder victims. If the murder was especially heinous, atrocious or cruel, "manifesting exceptional depravity," the defendant is eligible for death pursuant to Penal Code Section 190.2(a)(14). If the defendant intentionally killed the victim while lying in wait, the defendant is death eligible pursuant to Penal Code Section 190.2(a)(15). If the victim was intentionally killed because of his or her race, color, religion, nationality or country of origin, the defendant is death eligible pursuant to Penal Code Section 190.2(a)(16). If the defendant had previously been convicted of first- or second-degree murder, the defendant is death eligible pursuant to Penal Code Section 190.2(a)(2).

If the killing occurs during the commission of a specified felony, the defendant is eligible for death, even if the defendant did not have the intent to kill the victim. This feature of special circumstances law is known as "felony murder special circumstances." Once the prosecutor establishes that the defendant had the specific intent to commit the underlying felony offense and that the death

occurred as part of the felony offense, the defendant's intent to kill is irrelevant. As one court has explained, "[u]nder the felony-murder rule, defendant is strictly liable for his killing of [the victim] committed in the attempt to perpetrate a robbery and this is true whether the killing was unintentional, accidental or wholly unforeseeable. [citations omitted] The same is true as to the felony-murder special circumstance." People v. Parnell , (1993) 16 Cal.App.4th 862, 874. The California Supreme Court has clearly held that "when the defendant is the actual killer, intent to kill is not an



element of?the felony-murder special circumstance?." People v. Dennis , (1998) 17 Cal.4th 468, 516.

The felonies which trigger special circumstances and which are likely to involve a child victim are kidnapping, sodomy, performance of a lewd or lascivious act on a child under age 14, oral copulation, burglary, arson, rape, rape by instrument, torture, and the murder was perpetrated by discharging a gun from a car. If a defendant commits one of these underlying felonies and a child under age 14 dies, the defendant is eligible for the death penalty without showing any intent to kill.

5)Mistake of Fact Regarding the Victim's Age. One criticism of this bill is drawing the line at age 14. The American Civil Liberties Union argues, "For example a person could receive the death penalty for intentionally killing a child who is 13 years and 11 months old while the special circumstances would not apply to the intentional killing of a child 14 years and 1 day old. We do not perceive a sufficiently compelling justification for the state to protect children under 14 any more so than children over 14." The legislative process necessarily involves making distinctions; some people will be subjected to the law's prescriptions while other will fall outside the law's prescriptions. Why make 18 the age of majority rather than 19? Or 21?

6)Constitutionality of Establishing a Victim Category Based on Age Alone. So long as the Legislature chooses a class of victims not arbitrary and capricious and provides a meaningful basis for distinguishing between the few cases in which death is imposed and the many cases in which death is not imposed, the courts will uphold the legislative choice. This bill protects all children under 14 years, not just certain children. (For example, the Legislature would act arbitrarily and capriciously if it chose to protect only children under age 14 who had brown eyes or lived in urban areas as opposed to rural areas.) The Legislature has previously demonstrated a concern for children of this age [e.g. Penal Code Sections 271, 271a, 288(a), 288(b)], and a court would most likely determine that society has a compelling interest in protecting those children as a group. Nor does such a law protecting

children fail because there is no comparable law protecting senior citizens. Such an argument requires the Legislature to craft a law for every identifiable category of citizens before



any law could be made effective; the Constitution does not require so much.

7)Arguments in Support.

a) The County of Orange Sheriff-Coroner Department states, "Child victims and their families should be provided equal justice under our laws and the persons who have perpetrated the crimes against them should receive just punishment. . . . "

b) The Monterey County Sheriff-Corner-Public Administrator states, "Working in Law Enforcement and being out on the street for the past 28 years, I have seen all too often the murderers of young children though punished, not to the degree I feel they should have been, or plea bargained down to a few years in jail. It is simply a travesty of justice to allow this to happen and to continue to allow our Courts to make these kinds of decisions."

8)Arguments in Opposition. The California Attorneys for Criminal Justice state, "By focusing solely on the age of the victim, this special circumstance will expand application of the death penalty to less aggravated murders because aggravated offenses involving a victim under age 14 would already qualify under an existing special circumstance. The recent case of Matthew Cecchi, the 9-year-old boy murdered in Oceanside is a case-in-point. The defendant in that case is already facing the death penalty as a result of a lying-in-wait special circumstance allegation.

"In states where this special circumstance has been applied, for example in Alabama, this has resulted in a dramatic increase in the number of teenagers facing the death penalty. Most often, where victims are very young, their killers are also very young. The death penalty has even less deterrent effect on this group than on older offenders and, because of their young age, they are considerably more susceptible to redemption than older offenders. This special circumstance will also result in the death penalty being applied in cases of domestic violence where the parents were, in an overwhelming number of cases, themselves abused as children?."

9)Related Legislation. SB 31 (Peace), pending before the Senate Public Safety Committee.

10)Prior Legislation. SB 1799 (Calderon), of the 1997-98 Legislative Session, was placed on the Assembly Appropriations Suspense File; AB 490 (Ashburn), of the 1997-98 Legislative Session, was held without recommendation in Senate Appropriations Committee; SB 1878 (Kopp), Chapter 629, Statutes of 1998; SB 1079 (Calderon), of the 1997-98 Legislative Session, failed in Senate Public Safety Committee; AB 1538 (Havice), of the 1997-98 Legislative Session, was never heard by the Senate Public Safety Committee; and AB 1741 (Bordonaro), of the 1995-96 Legislative Session, failed passage in Senate Committee on Criminal Procedure.

REGISTERED SUPPORT/OPPOSITION :

Support

Doris Tate Crime Victims Bureau
Grandparents as Parents, Inc.
City of Poway
California District Attorney's Association
Los Angeles County Sheriff's Department
California State Sheriffs' Association
California Union of Safety Employees
City of San Diego
San Bernardino County Office of the Sheriff
Kern County Sheriff-Coroner
Monterey County Sheriff-Coroner
Orange County Sheriff-Coroner

Opposition

American Civil Liberties Union
California Attorneys for Criminal Justice
California Public Defenders Association
One Private Citizen

Analysis Prepared by : Harry Dorfman / PUB. S. / (916) 319-3744

Date of Hearing: April 13, 1999
Counsel: Bruce E. Chan

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Mike Honda, Chair

AB 625 (Olberg) - As Amended: April 7, 1999

SUMMARY : Provides a person sentenced to death may give up his or her right to an automatic appeal to the California Supreme Court if the trial court determines that the waiver is made knowingly, intelligently, and voluntarily. Specifically, this bill:

1)Provides a person sentenced to death may give up his or her right to an automatic appeal to the California Supreme Court if the trial court determines that the waiver is made knowingly, intelligently, and voluntarily.

2)Provides that if a person changes his or her mind after waiving his or her right to appeal, a hearing must take place where the court must determine whether the person may re-institute his or her right to an automatic appeal.

EXISTING LAW :

1)Provides that defendants may appeal their convictions pursuant to the rules adopted by the Judicial Council. (Penal Code Section 1239(a).)

2)Provides that when a judgment of death is entered, an appeal is automatic, without requiring any action by either the defendant or his or her counsel. (Penal Code Section 1239(b).)

3)Provides that an appeal to the Supreme Court stays the execution of a death judgment. (Penal Code Section 1243.)

4)Provides that a death penalty defendant's trial attorney, whether retained or court appointed, continues to represent the client until appellate counsel is appointed. (Penal Code Sections 1239(b) and 1240.1.)

FISCAL EFFECT : Unknown



http://info.sen.ca.gov/pub/99-00/bill/asm/ab_0601-0650/ab_625_cfa_19990414_110422_asm_comm.html

COMMENTS :

1)Author's Statement: According to the author, AB 625 is needed "to expedite the appeals process for death penalty cases."

2)Penal Code Section 1239 Was Enacted After A Mistaken Execution : In 1935, condemned inmate Rush Griffin was executed because the warden did not realize that the defendant's appeal was pending. Griffin's lawyer had filed a notice of appeal in superior court but the Supreme Court was not notified until three days after the execution. The strong public reaction to that occurrence precipitated the immediate legislative response in Penal Code Section 1239(b). Today, there is no possibility of confusion or inadvertence. Procedurally, a defendant cannot be executed unless and until his or her death judgment has been affirmed by the California Supreme Court.

1)Automatic Appeals In Death Penalty Cases Has Been The Law For The Past 64 Years: Penal Code Section 1239(b) provides that an appeal of a sentence of death is "automatically taken" to the California Supreme Court. As explained in People v. Stanworth (1969) 71 Cal.2d 820, 833, the statute "imposes a duty upon this court 'to make an examination of the complete record of the proceedings had in the trial court, to the end that it be ascertained whether defendant was given a fair trial.' . . . We cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him."

1)Automatic Appeals Ensure the Reliability of Death Judgements: Current procedure ensures that no person is executed in California without full review of the appeal of his or her death judgment by the California Supreme Court. The criminal justice system has an independent, and overriding, interest in ensuring that any death sentence imposed and carried out is found legally valid. As the New Jersey Supreme Court recently observed, "The public has an interest in the reliability and integrity of a death sentence decision that transcends the preferences of individual defendants." State v. Martini , 144 N.J. 603, 605, 677 A.2d 1106, 1107 (1996). The justice system is not intended to permit a criminal defendant to choose his or her own sentence, particularly where the sentence amounts to state-assisted suicide. See Commonwealth v. McKenna (1978)



476 Pa. 428, 441, 383 A.2d 174, 181. Since 1935, the reversals on appeal by the California Supreme Court are evidence of the safeguard of mandatory review.

2)Current Law Has Protected the California Death Penalty Statute from Constitutional Challenges: Current statute has served to protect the constitutionality of California death penalty

statutory scheme. The existence of an automatic appeal from a judgment of death was an important component of the United States Supreme Court's decision to uphold the constitutionality of the death penalty. [See _Gregg v. Georgia_ (1976) 428 U.S. 153, 198 ("As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for an automatic appeal of all death sentences to the State's Supreme Court.").] In _Pulley v. Harris_ (1984) 465 U.S. 37, 53, the Supreme Court specifically pointed to the existence of an automatic appeal as one component supporting the constitutionality of California's death penalty. [See also Justice Stevens' concurring opinion, _Pulley v. Harris_ , 465 U.S. at 55, suggesting that some form of meaningful appellate review is constitutionally required, and _Parker v. Dugger_ (1991) 498 U.S. 308, 321 ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.")]

3)37 Of 38 States That Impose the Death Penalty Provide for Non-Waivable Review: This bill represents a minority position regarding the appeal of death judgments. 38 states have death penalty statutes; 37 of those provide for non-waivable review of death judgments. [See Note, "Voluntary Executions," 50 Stan. L. Rev. 1897 (1998).]

4)Permitting Waiver Of The Automatic Appeal Raises Questions About The Constitutionality Of California's Death Penalty Statute: It should be noted that many legal observers believe California is already close to having an unconstitutional death penalty law. California's statute is so broad that a high percentage of all first-degree murders are death eligible, thereby eliminating the narrowing function that its special circumstances are supposed to provide. [See Shatz and Rivkind, "The California Death Penalty Scheme: Requiem for Furman," 72 N.Y.U.L. Rev. 1283 (1997).] California has no proportionality review. (See _Pulley v. Harris_ , _supra_ .) California permits unintentional killings to be death



eligible, making it only one of seven states that permit execution without any finding of criminal intent with respect to the homicide itself. [See _Hopkins v. Reeves_ (1998) 524 U.S. 88, ___, 141 L.Ed.2d 76, 87 (indicating that the mens rea requirement must be satisfied at some point in the proceedings); see also Shatz and Rivkind, _supra_ , at 1319, n. 201.] California has no clear error rule permitting a reviewing court to reach issues despite a lack of objection in the trial court. Removing a true automatic appeal may render California's death penalty scheme unconstitutional.

5)How Will Trial Courts Determine if A Defendant's Waiver Was Valid: It would be extremely difficult to establish that the defendant's waiver was made knowingly, intelligently, and

voluntarily. The time of being sentenced to death can be a moment of extraordinary stress. The fact that the waiver occurs at such a moment calls into question the voluntary nature of the waiver.

Beyond that, the trial court must explain to the defendant the full ramifications of his or her waiver in order for the defendant's waiver be made knowingly and intelligently and entails explaining not only the appellate rights the defendant is relinquishing but also the related rights of federal review which are compromised due to the defendant failing to exhaust state remedies. An appellate attorney familiar with state and federal law will have to advise the defendant. Trial counsel would have a conflict of interest playing such a role as trial counsel could not inform the defendant about the prospects of a claim of ineffective assistance of counsel on either succeeding appeal or habeas corpus. Will the defendant have an attorney qualified to advise the defendant of the full consequences of this decision? Will the defendant understand those consequences? Under such circumstances, it is doubtful whether a waiver will withstand later scrutiny.

6)Defendants Will Change Their Minds - Prompting More Litigation And Not Accomplishing The Stated Purpose Of This Bill: The Judicial Council of California states, "?the bill is intended to expedite the appeals process for death penalty cases. The Judicial Council believes the bill would have the opposite effect.

"While a defendant may on occasion indicate a desire to bypass all appeal processes, there is a significant likelihood that,



due to the gravity and finality of the judgment of death, the defendant will at some point change his or her mind. The council is concerned about two possible results of such a change of heart. First, it would be tremendously more difficult to prepare the necessary trial records weeks or months after the entry of the judgment of death. Second, defendants would likely engage in far more writ procedures on grounds that the waiver was in fact not made knowingly, intelligently, or voluntarily.

"The measure, therefore, would create more problems than it would solve, and could lead to greater delays in the death penalty process than exist today."

7)A Waiver Of Appeals May Result In Hearings Regarding Mental Competency: If the defendant does attempt to waive his or her appeal, that action will likely precipitate a hearing on the defendant's mental competency. As the Supreme Court observed in Whitmore v. Arkansas (1990) 495 U.S. 149, 165, "Although we are not here faced with the question whether a hearing on mental competency is required by the United States

Constitution whenever a capital defendant desires to terminate further proceedings, such a hearing will obviously bear on whether the defendant is able to proceed on his behalf." In addition, attorneys and other interested parties may intervene and challenge the defendant's competency.

REGISTERED SUPPORT / OPPOSITION :

Support

California Police Chiefs Association
California Police Officers Association
California State Sheriffs' Association
Doris Tate Crime Victims Bureau

Opposition

American Civil Liberties Union
Attorney General's Office
California Attorneys for Criminal Justice
California Judges Association
California Public Defenders Association
Judicial Council of California
Law Offices of Cristina Yu



The California Appellate Project

Analysis Prepared by : Bruce E. Chan / PUB. S. / (916) 319-3744

| SENATE RULES COMMITTEE | AB 1574 |
|---|---|
| Office of Senate Floor Analyses | |
| 1020 N Street, Suite 524 | |
| (916) 445-6614 Fax: (916) | |
| 327-4478 | |

THIRD READING

Bill No: AB 1574
Author: Corbett (D)
Amended: As introduced
Vote: 27

SENATE PUBLIC SAFETY COMMITTEE : 4-0, 7/13/99
AYES: Vasconcellos, McPherson, Polanco, Rainey
NOT VOTING: Burton, Johnston

SENATE APPROPRIATIONS COMMITTEE : 9-1, 9/1/99
AYES: Bowen, Escutia, Johnson, Karnette, Kelley, Leslie, McPherson, Mountjoy, Perata
NOES: Johnston
NOT VOTING: Alpert, Burton, Vasconcellos

ASSEMBLY FLOOR : 74-3, 5/27/99 - See last page for vote

SUBJECT : First degree murder: torture

SOURCE : Los Angeles District Attorney's Office

DIGEST : This bill would expand the felony murder rule to include torture and thereby provide that a murder, which occurs when a person had the intent to torture, but no premeditation to kill, is first degree murder.

ANALYSIS : Existing law provides that every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury upon the person of another, is guilty of

CONTINUED



http://info.sen.ca.gov/pub/99-00/bill/asm/ab_1551-1600/ab_1574_cfa_19990902_132615_sen_floor.html

torture. The crime of torture does not require any proof that the victim suffered pain.

Existing law provides that the penalty for a defendant found guilty of murder in the first degree, where one or more special circumstance has been charged and found to be true, shall be by death or confinement in state prison for a term of life without the possibility of parole. Torture is one of the special circumstances.

Existing law provides that a premeditated murder perpetrated by means of torture is murder in the first degree.

Existing law provides that any murder that is perpetrated by specified means, including arson, rape, carjacking, robbery, burglary, mayhem and kidnapping or by any other kind of willful, deliberate premeditated killing is murder in the first degree. All other kinds of murder are murder in the second degree.

This bill adds any murder committed during torture to the list of specified murders that constitute first degree felony murder.

Murder

Under existing law, murder is the unlawful killing of a human being with malice aforethought. Without malice, an unlawful killing is manslaughter. Murder is classified as either first degree or second degree. First degree murders are murders committed by means of destructive devices, explosives, knowing use of armor piercing bullets, lying in wait, torture, or any other kind of willful, deliberate and premeditated killing, or murders committed during the commission of a list of enumerated felonies (felony-murder) which requires no premeditation or deliberation. All other murders are second degree murders (i.e., no premeditation or deliberation).

Murder in the first degree is punishable by imprisonment for 25 years to life unless specified "special circumstances" are charged and found to be true, then the punishment is either death or life imprisonment without the



possibility of parole.

The list of special circumstances include: murder for financial gain; the defendant was previously convicted of murder; the defendant has been convicted of more than one murder in the current proceeding; murder committed by means of a destructive device concealed in a building; murder committed to avoid a lawful arrest; the victim was a peace

officer, federal law enforcement officer, firefighter, witness to a crime, prosecutor, judge, elected official in retaliation for or to prevent the victim from carrying out his/her duties; the murder was intentional and involved torture; the victim was killed because of their color, race, nationality, religion or country of origin; the felony was committed during the commission or attempted commission of specified felonies; the victim was poisoned.

Under existing law if a victim is murdered while being tortured:

--And a jury finds that there was intent to kill then the defendant would be guilty of first degree murder and, if a special circumstance of torture was charged, the defendant would be subject to the death penalty or life without parole.

--And a jury finds that the murder was premeditated then a defendant is guilty of first degree murder and subject to 25 to life.

--And a jury finds that the murder was neither intentional nor premeditated then the defendant is guilty of second degree murder and subject to 15 to life.

This bill expands the felony murder rule by adding "torture" to the list of felonies, which constitute first degree felony murder. Thus, if a victim dies while being tortured, even if there was no intent to kill and no premeditation or deliberation to kill then the defendant is guilty of first degree murder.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes



Fiscal Impact (in thousands)

| Major Provisions | 19999-2000 | |
|---|---|---|
| 2000-01 | 2001-02 | Fund |
| Incarceration | Unknown increased costs, in excess of $150 annually for incarceration in state prison | potentiallyGeneral |

SUPPORT: (Verified 7/13/99) (per Senate Public Safety Committee analysis) (unable to re-verify at time of writing)

California State Sheriffs' Association

Doris Tate Crime Victims Bureau
California Peace Officers' Association
California Police Chiefs' Association

OPPOSITION : (Verified 7/13/99) (per Senate Public Safety Committee analysis) (unable to re-verify at time of writing)

California Public Defenders Association

ARGUMENTS IN SUPPORT : According to the Los Angeles District Attorney's Office, "it is estimated that the Los Angeles District Attorney's Office handles 20 torture murder cases per year. These cases have involved victims who have been set afire or victims who have been abused or mutilated by sexual deviates. Many cases involve child victims who have been abused repeatedly over a long period of time.

"Murder in perpetration of robbery, rape, burglary or other similar crimes is automatically first degree felony murder. However, a person who kills in the perpetration of the crime of torture can only be convicted of second degree felony murder.

"Recently, a miscarriage of justice occurred in People v. Cauchi , when the jury convicted the defendant of



torturing a four year old to death, but nevertheless found that there was no "premeditation or deliberation" and returned a verdict of second not first degree murder.

"This bill corrects the above anomaly and ensures that when a murder occurs during a crime which meets the statutory definition of "torture," that society imposes upon the perpetrator the same penalty which current law applies to murder in perpetration of robbery, rape or burglary."

ARGUMENTS IN OPPOSITION : California Public Defenders Association "opposes this bill primarily because it is unnecessary. Murder perpetrated by means of torture is already first degree murder under current law.

Moreover, all felony murders require the commission of an independent felony. In contrast is the means by which the death is accomplished, not an independent felony that someone happens to be committing at the time of killing. This bill would create immense confusion and result in a huge amount of litigation in an attempt to reconcile these mutually exclusive concepts."

ASSEMBLY FLOOR :
AYES: Aanestad, Ackerman, Alquist, Ashburn, Baldwin,
Bates, Battin, Baugh, Brewer, Briggs, Calderon, Campbell,
Cardenas, Cardoza, Cedillo, Corbett, Correa, Cox,
Cunneen, Davis, Dickerson, Ducheny, Dutra, Firebaugh,
Florez, Frusetta, Gallegos, Granlund, Havice, Hertzberg,
Honda, House, Jackson, Kaloogian, Keeley, Knox, Kuehl,
Leach, Lempert, Leonard, Longville, Lowenthal, Machado,
Maddox, Maldonado, Margett, McClintock, Nakano, Olberg,
Oller, Robert Pacheco, Rod Pacheco, Papan, Pescetti,
Reyes, Romero, Runner, Scott, Shelley, Soto, Steinberg,
Strickland, Strom-Martin, Thompson, Thomson, Torlakson,
Vincent, Wayne, Wesson, Wiggins, Wildman, Wright, Zettel,
Villaraigosa
NOES: Aroner, Migden, Washington
NOT VOTING: Bock, Floyd, Mazzoni

RJG:sl 9/2/99 Senate Floor Analyses



SUPPORT/OPPOSITION: SEE ABOVE

**** END ****

# Full Text

**Record: 1074**

**Proposition #** **18**

**Title** **Murder: Special Circumstances.**

**Year/Election** **2000** primary

**Proposition type** Legislative Initiative Amendment

**Popular vote** Yes: 5,112,109 (72.6%); No: 1,935,113 (27.4%)

**Pass/Fail** Pass

**Summary**

**Official Title and Summary Prepared by the Attorney General**

**MURDER: SPECIAL CIRCUMSTANCES. LEGISLATIVE INITIATIVE AMENDMENT.**

. Amends provisions of Penal Code section 190 defining the special circumstances where first degree murder is punishable by either death or life imprisonment without the possibility of parole. Provides that a special circumstance exists for killings committed "by means of lying in wait" rather than "while lying in wait." Provides that a special circumstance exists where murder is committed while the defendant was involved in acts of kidnapping or arson, even if it is proved that the defendant had a specific intent to kill, and the kidnapping or arson was committed to facilitate murder.

**Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:**

. Unknown, probably minor, additional state costs.

**Analysis**

**Analysis by the Legislative Analyst**

**Background**

First degree murder is generally defined as murder that is intentional or deliberate or that takes place during certain other crimes. It is generally punishable by a sentence of 25 years to life imprisonment with the possibility of release from prison on parole. However, a conviction for first degree murder results in a sentence of death or life imprisonment *without* the possibility of parole if the prosecutor charges and the court finds that one or more "special circumstances" specified in state law apply to the crime.

One such special circumstance involves cases in which the murderer intentionally killed the victim "while lying in wait." The courts have generally interpreted this provision to mean that, in order to qualify as a special circumstance, a murder must

have occurred immediately upon a confrontation between the murderer and the victim. The courts have generally interpreted this provision to rule out a finding of a special circumstance if the defendant waited for the victim, captured the victim, transported the victim to another location, and then committed the murder.

A special circumstance can also be charged and found if one of a list of specific felonies, including arson and kidnapping, occurred during the commission of a first degree murder. However, the courts have determined that a special circumstance can be found in such a case only when the criminal's primary goal was to commit arson or kidnapping and only later a murder was committed to further the arson or kidnapping. The courts determined that a special circumstance could not be found in a case in which the criminal's primary goal was to kill rather than to commit arson or kidnapping.

**Proposal**

This measure amends state law so that a case of first degree murder is eligible for a finding of a special circumstance if the murderer intentionally killed the victim "by means of lying in wait." In so doing, this measure replaces the current language establishing a special circumstance for murders committed "while lying in wait." This change would permit the finding of a special circumstance not only in a case in which a murder occurred immediately upon a confrontation between the murderer and the victim, but also in a case in which the murderer waited for the victim, captured the victim, transported the victim to another location, and then committed the murder.

This measure also amends state law so that a case of first degree murder is eligible for a finding of a special circumstance if arson or kidnapping was committed to further the murder scheme.

As a result of these two changes in state law, additional first degree murderers would be subject to punishment by death or by life imprisonment without the possibility of parole, instead of a maximum prison sentence of 25 years to life.

**Fiscal Effect**

This measure would increase state costs primarily as a result of longer prison terms for the murderers who would receive a life sentence without the possibility of parole. Also, there would be increased state costs for appeals of additional death sentences, which are automatically subject to appeal to the California Supreme Court. The magnitude of these costs is unknown, but is probably minor, because relatively few offenders are likely to be affected by this measure.

**For** **Argument in Favor of Proposition 18**

Proposition 18 corrects two odd decisions by the Rose Bird Supreme Court. In 1980, and again in 1985, that court turned our voter-enacted death penalty law on its head. In the first case, the court ruled that an estranged husband who arranged the kidnapping of his wife in order to kill her was not subject to the death penalty or even life imprisonment without parole because the kidnapping was committed solely to murder her rather than to commit a less serious crime! In the second case, the court mandated that a criminal who kidnapped and killed a witness to prevent him from testifying was not subject to the death penalty or life without parole.

Under these hapless decisions:

. A murderer who deliberately kidnaps his victim to kill him and then takes the victim to a remote location and kills him would *not* be subject to the death penalty or life imprisonment without the possibility of parole (even though it would be applicable if the kidnapping was committed for some lesser purpose).

. A murderer who sets fire to a building with a premeditated plan to kill someone inside would *not* be subject to the death penalty or a sentence of life imprisonment without parole (even though it would be applicable if committed only for arson to destroy property that results in an unintended death).

Proposition 18 provides voters the chance to correct such unjust, illogical remnants of the Rose Bird court and restore logic, fairness, and justice to our death penalty laws. It grants juries the option of rendering verdicts of death or life imprisonment without parole to those who:

. Kidnap for an express premeditated purpose to murder;

Lie in wait for their victims, then seize and take them to a more secluded spot to murder them;

. Commit arson for the purpose of killing a person inside the building.

It defies reason to exclude such aggravated murders from our death penalty or life imprisonment law. Proposition 18 eliminates unequal treatment from court-imposed law. It restores equal justice for murder victims' families, for law enforcement officers who each day confront criminals and even murderers and for all Californians. Voting "yes" on Proposition 18 ensures a rational standard for capital punishment and life imprisonment and protects the honesty and integrity of the law in our state.

**FOR(au)** HON. GEORGE DEUKMEJIAN |t Former Governor of California

**FOR(au)** HON. MICHAEL D. BRADBURY |t District Attorney of Ventura County

**FOR(au)** MRS. QUENTIN L. (MARA) KOPP |t Retired Social Worker

**Rebuttal** **Rebuttal to Argument in Favor of Proposition 18**

What good does it do us to pass Proposition 18, extend capital punishment? We owe it to ourselves to put aside prejudices, assess facts.

Nobody's been able to demonstrate statistically that capital punishment deters murders or saves lives. States and nations without capital punishment have lower murder rates.

Instead, research demonstrates it costs $2 million more per case to prosecute a murderer through to the death penalty than if the defendant serves for life without possibility of parole.

Why don't we get smart, save that money, invest in efforts which could reduce the murder rate, especially against persons in law enforcement?

We appreciate our fellow humans who choose careers wherein they put their lives on the line to assure our public safety. And we'd provide them more safety if we devoted the money capital punishment costs to research to prevent future murderers.

Capital punishment gives us no way to learn about the root causes of murderous conduct. As we grow to recognize that violence is learned behavior, it's evident we can learn more about their lives, ferret out the root causes of their murders, if these folks are alive. Hopefully, in due time, through sufficient study, we'll learn enough so future children won't grow up so disturbed within themselves, so dangerous to the rest of us!

Let's save money, devote it to preventing violence, especially murder. Be smart, join us in voting NO, defeat Proposition 18.

**Rebuttal(au)** Azim Khamisa |t Founder, Tariq Khamisa Foundation

**Rebuttal(au)** Wilson Riles, Jr. |t Executive Director, American Friends Service Committee of Northern California

**Against** **Argument Against Proposition 18**

As a taxpayer, you are being asked to enlarge the death penalty. You deserve clear proof that this proposed change would improve public safety and the quality of justice. That proof is lacking.

*Public safety* would not be improved by this proposition.

Under existing law, the homicide rate in California has fallen steadily and dramatically since 1991. Yet we still have not matched the success of the states that use no death penalty. Massachusetts, for example, is an urban state with no deatb penalty and a homicide rate one-third of California's. In fact, states that have no death penalty usually suffer fewer murders in proportion to their population than states that expend resources on capital punishment. Enlarging the death penalty would not make our streets more safe.

It costs California taxpayers $2 million over and above the cost of life imprisonment each time a murderer is sent to Death Row. We should be asking some hard questions. Isn't it better to invest tbis money in after-school programs for youth? Shouldn't schools be funded to train all of their personnel in conflict resolution programs that have been proven effective, and why are only a small fraction of schools able to train parents in these programs? Enlarging the death penalty would not enable us to spend our public safety tax dollars more wisely.

The *quality of justice* would not be improved by this proposition.

Adjusting the scope of punishment can never compensate for the barm caused by murder. Any murder is deplorable. The community and family members suffer whenever a life is deliberately cut short, regardless of whether arson, kidnaping, or lying-in-wait is involved. In fact, it trivializes the vast majority of cases to imagine there is any link between the circumstances of a killing, the type of retribution imposed, and the agony of friends and family of the victim. There is no evidence that communities and families of murder victims in California are better able to recover from their loss due to the existence of a death penalty than communities and families in

Massachusetts heal in the absence of a death penalty. Enlarging the death penalty would not improve justice for communities and families of victims.

The law already allows capital punishment in more homicide cases than prosecutors pursue as death penalty matters. And in cases where they do urge a death sentence, jurors often refuse to recommend it. As a result, most death-eligible cases are resolved by plea bargains. To the extent this proposition would expand the number of death-eligible cases, lawyers would expend extra taxpayer dollars on the plea-bargain process. Added litigation would be of no real assistance to the families of victims, nor to the community.

This proposition will not improve public safety or the quality of justice. Vote NO.

**Against(au)** Most Reverend Sylvester D. Ryan |t President, California Catholic Conference

**Against(au)** Mike Farrell |t President, M J & E Productions, Inc.

**Against(au)** Senator Patrick Johnston |t Chair, Senate Appropriations Committee

**Rebut Against**

**Rebuttal to Argument Against Proposition 18**

Opposition arguments center almost entirely on philosophical objections to the death penalty but miss the point of this measure, which was approved for the ballot (since it amends an initiative) by huge nonpartisan votes in the Legislature (Senate 28-6, Assembly 66-2) to correct bizarre Rose Bird court decisions.

*Reasons for Proposition 18*

Under Rose Bird court decisions:

Criminals who kidnap someone to rob them, then kill them as an afterthought or who set fire to a building to destroy property are subject to the death penalty or life imprisonment without parole, *at a jury's discretion;*

Criminals who, however, kidnap someone to murder them or set fire to a building to murder the occupants and do kill them are *not* subject to a death sentence or life imprisonment without parole. This simply isn't right.

*Nonpartisan Support*

Crime victims and law enforcement strongly support Proposition 18. Introduced for the ballot by former Independent State Senator Quentin Kopp, it has been publicly endorsed and/or voted for by Crime Victims United of California, Democratic Governor Gray Davis, Attorney General Bill Lockyer, former Republican Governors George Deukmejian and Pete Wilson, Democratic Lt. Governor Cruz Bustamante, Speaker Antonio Villaraigosa and Republican Senator Richard Rainey, among others.

Opposition arguments almost seem to trivialize murder cases. Their statements ring hollow with actual family and friends of murder victims. For example, training school personnel in "conflict resolution," while commendable, doesn't cure injustices in current murder law. Proposition 18 does. Please vote "yes".

**Rebut Against-au** Honorable George Deukmejian |t Former Governor of the State of California

**Rebut Against-au** Honorable Michael D. Bradbury |t District Attorney of Ventura County

**Rebut Against-au** Mrs. Harriet Salarno |t Chair, Crime Victims United of California

**Text of Prop.**

**Proposition 18: Text of Proposed Law**

This law proposed by Senate Bill 1878 of the 1997-98 Regular Session (Chapter 629, Statutes of 1998) is submitted to the people in accordance with the provisions of Section 10 of Article II of the California Constitution.

This proposed law amends a section of the Penal Code; 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**

SEC. 2. Section 190.2 of the Penal Code is amended to read:

190.2. (a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

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

(2) The defendant was convicted previously of murder in 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 murder in the first or second degree.

(3) The defendant, in this proceeding, has 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 or her act or acts would create a great risk of death to one or more human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting 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 caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10,

830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

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

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

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(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 or any other state, or of a federal prosecutor's office, and the murder was intentionally 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 this or any other state, and the murder was intentionally 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, or of any local or state government of this or any other state, 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 used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim ~~while~~ *by means of* lying in wait.

(16) The victim was intentionally killed because of his or her 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:

(A) Robbery in violation of Section 211 or 212.5.

(B) Kidnapping in violation of Section 207, 209, or 209.5.

(C) Rape in violation of Section 261.

(D) Sodomy in violation of Section 286.

(E) 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.

(F) Oral copulation in violation of Section 288a.

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

(H) Arson in violation of subdivision (b) of Section 451.

(I) Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

(L) Carjacking, as defined in Section 215.

(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

(18) The murder was intentional and involved the infliction of torture.

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

(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.

(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

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

BILL NUMBER: SB 1878 CHAPTERED
BILL TEXT

CHAPTER 629
FILED WITH SECRETARY OF STATE SEPTEMBER 21, 1998
APPROVED BY GOVERNOR SEPTEMBER 19, 1998
PASSED THE SENATE AUGUST 30, 1998
PASSED THE ASSEMBLY AUGUST 27, 1998
AMENDED IN ASSEMBLY AUGUST 24, 1998
AMENDED IN ASSEMBLY JULY 16, 1998
AMENDED IN ASSEMBLY JUNE 25, 1998
AMENDED IN SENATE MAY 20, 1998
AMENDED IN SENATE APRIL 28, 1998

INTRODUCED BY Senator Kopp
(Principal coauthor: Senator Schiff)

FEBRUARY 19, 1998

An act to amend Section 190.2 of the Penal Code, relating to murder.

LEGISLATIVE COUNSEL'S DIGEST

SB 1878, Kopp. Murder: special circumstances.

(1) Existing law, as amended by initiative statute, provides that the penalty for a defendant found guilty of murder in the first degree shall be death, or confinement in the state prison for a term of life without the possibility of parole, where one or more special circumstances have been charged and found to be true. In this connection, existing law provides that a first degree murder committed while lying in wait, and a murder committed in the commission of specified felonies, including kidnapping and arson, are special circumstances for sentencing purposes.

This bill would redefine lying in wait to instead provide that a defendant who intentionally kills a victim by means of lying in wait is subject to these provisions. The bill would also provide that a defendant who is shown to have committed the elements of kidnapping or arson in connection with a murder, is subject to these provisions if there is specific intent to kill, notwithstanding the fact that the kidnapping or arson was committed primarily or solely for the purpose of facilitating the murder.

(2) The bill would state that the Legislature's intent in enacting these provisions is to create a statutory exception to the "independent purpose" doctrine, as established by specified cases.

(3) The bill would provide that it shall become effective only when submitted to, and approved by, the voters of California.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. It is the intent of the Legislature in enacting subparagraph (M) of paragraph (17) of subdivision (a) of Section 190.2 to create a statutory exception to the "independent purpose" requirement of People v. Weidert (1985) 39 Cal. 3d 836 and People v. Green (1980) 27 Cal. 3d 1, for the special circumstances of kidnapping and arson, when specific intent to kill is proven.

SEC. 2. Section 190.2 of the Penal Code is amended to read:

190.2. (a) The penalty for a defendant who is found guilty of

murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

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

(2) The defendant was convicted previously of murder in 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 murder in the first or second degree.

(3) The defendant, in this proceeding, has 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 or her act or acts would create a great risk of death to one or more human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting 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 caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

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

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

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(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 or any other state, or of a federal prosecutor's office, and the murder was intentionally 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 this or any other state, and the murder was intentionally 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, or of any local or state government of this or any other state, 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 used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.

(15) The defendant intentionally killed the victim by means of lying in wait.

(16) The victim was intentionally killed because of his or her 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:

(A) Robbery in violation of Section 211 or 212.5.

(B) Kidnapping in violation of Section 207, 209, or 209.5.

(C) Rape in violation of Section 261.

(D) Sodomy in violation of Section 286.

(E) 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.

(F) Oral copulation in violation of Section 288a.

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

(H) Arson in violation of subdivision (b) of Section 451.

(I) Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

(L) Carjacking, as defined in Section 215.

(M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.

(18) The murder was intentional and involved the infliction of torture.

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

(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the

special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.

(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

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

SEC. 3. Section 1 of this act affects an initiative statute and shall become effective only when submitted to, and approved by, the voters of California, pursuant to subdivision (c) of Section 10 of Article II of the California Constitution.

# Full Text

**Record: 1071**

**Proposition #** 21
**Title** Juvenile Crime.
**Year/Election** 2000 primary
**Proposition type** Initiative Statue
**Popular vote** Yes: 4,491,166 (62.1%); No: 2,742,148 (37.9%)
**Pass/Fail** Pass

**Summary**

**Official Title and Summary Prepared by the Attorney General**

**JUVENILE CRIME. INITIATIVE STATUTE.**

. Increases punishment for gang-related felonies; death penalty for gang-related murder; indeterminate life sentences for home- invasion robbery, carjacking, witness intimidation and drive-by shootings; and creates crime of recruiting for gang activities; and authorizes wiretapping for gang activities.

. Requires adult trial for juveniles 14 or older charged with murder or specified sex offenses.

. Eliminates informal probation for juveniles committing felonies.

. Requires registration for gang related offenses.

. Designates additional crimes as violent and serious felonies, thereby making offenders subject to longer sentences.

**Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:**

. State costs: Ongoing annual costs of more than $330 million. One-time costs of about $750 million.

. Local costs: Potential ongoing annual costs of tens of millions of dollars to more than $100 million. Potential one- time costs in the range of $200 million to $300 million.

**Analysis**

**Analysis by the Legislative Analyst**

**Overview**

This measure makes various changes to laws specifically related to the treatment of juvenile offenders. In addition, it changes laws for juveniles and adults who are gang-related offenders, and those who commit violent and serious crimes. Specifically, it:

. Requires more juvenile offenders to be tried in adult court.

. Requires that certain juvenile offenders be held in local or state correctional facilities.

. Changes the types of probation available for juvenile felons.

. Reduces confidentiality protections for juvenile offenders.

. Increases penalties for gang-related crimes and requires convicted gang members to register with local law enforcement agencies.

. Increases criminal penalties for certain serious and violent offenses.

The most significant changes and their fiscal effects are discussed below.

**Prosecution of Juveniles in Adult Court**

***Background.*** Currently, a minor 14 years of age or older can be tried as an adult for certain offenses. Generally, in order for this to occur, the prosecutor must file a petition with the juvenile court asking the court to transfer the juvenile to adult court for prosecution. The juvenile court then holds a hearing to determine whether the minor should be transferred. However, if an offender is 14 years of age or older, has previously committed a felony, and is accused of committing one of a specified list of violent crimes, then that offender must be prosecuted in adult court.

***Proposal.*** This measure changes the procedures under which juveniles are transferred from juvenile court to adult court. Juveniles 14 years of age or older charged with committing certain types of murder or a serious sex offense generally would no longer be eligible for juvenile court and would have to be tried in adult court. In addition, prosecutors would be allowed to directly file charges against juvenile offenders in adult court under a variety of circumstances without first obtaining permission of the juvenile court.

***Fiscal Effect.*** The fiscal effect of these changes is unknown and would depend primarily on the extent to which prosecutors use their new discretion to increase the number of juveniles transferred from juvenile to adult court. If they elect to transfer only the cases that they currently ask the juvenile court to transfer, then the fiscal impact on counties and the state could likely be some small savings because the courts currently grant most of the requests of the prosecutors. However, if prosecutors use their new discretion to expand the use of adult courts for juvenile offenders, the combined costs to counties and the state could be significant. Specifically, the annual operating costs to counties to house these offenders before their adult court disposition could be tens of millions of dollars to more than $100 million annually, with one-time construction costs of $200 million to $300 million.

**Juvenile Incarceration and Detention**

***Background.*** Under existing law, probation departments generally can decide whether a juvenile arrested for a crime can be released or should be detained in juvenile hall pending action by the court. These determinations generally are based on whether there is space in the juvenile hall and the severity of the crime. The main exception concerns offenses involving the personal use or possession of a firearm, in which case the offender must be detained until he or she can be brought before a judge. Most juveniles detained in juvenile halls for a long time are awaiting court action for very serious or violent offenses.

If, after a hearing, a court declares a juvenile offender a delinquent (similar to a conviction in adult court), the court in consultation with the probation department, will decide where to place the juvenile. Generally, those options range from probation within the community to placement in a county juvenile detention facility or placement with the California Youth Authority (CYA).

For juveniles tried as adults, the adult criminal court can generally, depending on the circumstances, commit the juvenile to the jurisdiction of either the CYA or the California Department of Corrections (CDC). In addition, juvenile offenders convicted in adult court who were *not* transferred there by the juvenile court can petition the adult court to be returned to juvenile court for a juvenile court sanction, such as probation or commitment to a local juvenile detention facility.

Because current law prohibits housing juveniles with adult inmates or detainees, any juvenile housed in an adult jail or prison must be kept separate from the adults. As a result, most juveniles--even those who have been tried in adult court or are awaiting action by the court--are housed in a juvenile facility such as the juvenile hall or the CYA until they reach the age of 18.

***Proposal.*** Under this measure probation departments would no longer have the discretion to determine if juveniles arrested for any one of more than 30 specific serious or violent crimes should be released or detained until they can be brought before a judge. Rather, such detention would be required under this measure. In addition, the measure requires the juvenile court to commit certain offenders declared delinquent by the court to a secure facility (such as a juvenile hall, ranch or camp, or CYA). It also requires that any juvenile 16 years of age or older who is convicted in adult court must be sentenced to CDC instead of CYA.

***Fiscal Effect.*** Because this measure requires that certain juvenile offenders be detained in a secure facility, it would result in unknown, potentially significant, costs to counties.

Requiring juveniles convicted in adult court to be sentenced to CDC would probably result in some net state savings because it is cheaper to house a person in CDC than in CYA.

A number of research studies indicate that juveniles who receive an adult court sanction tend to commit more crimes and return to prison more often than juveniles who are sent to juvenile facilities. Thus, this provision may result in unknown future costs to

the state and local criminal justice systems.

**Changes in Juvenile Probation**

***Background.*** Statewide there are more than 100,000 juvenile offenders annually on probation. Most are on "formal" probation, while the remainder are on "informal" probation. Under formal probation, a juvenile has been found by a court to be a delinquent, while under informal probation there has been no such finding. In most informal probation cases, no court hearing has been held because the probation department can directly impose this type of sanction. If the juvenile successfully completes the informal probation, he or she will have no record of a juvenile crime.

***Proposal.*** This measure generally prohibits the use of informal probation for any juvenile offender who commits a felony. Instead, it requires that these offenders appear in court, but allows the court to impose a newly created sanction called "deferred entry of judgment." Like informal probation, this sanction would result in the dismissal of charges if an offender successfully completes the term of probation.

***Fiscal Effect.*** On a statewide basis the fiscal effect of these changes is not likely to be significant. In those counties where a large portion of the informal probation caseload is made up of felony offenders, there would be some increased costs for both the state and the county to handle an increased number of court proceedings for these offenders. In addition, county probation departments would face some unknown, but probably minor, costs to enforce the deferred entry of judgment sanction.

**Juvenile Record Confidentiality and Criminal History**

***Background.*** Current law protects the confidentiality of criminal record information on juvenile offenders. However, such protections are more limited for juvenile felons and those juveniles charged with serious felonies.

***Proposal.*** This measure reduces confidentiality protections for juvenile suspects and offenders by:

. Barring the sealing or destruction of a juvenile offense record for any minor 14 years of age or older who has committed a serious or violent offense, instead of requiring them to wait six years from when the crime was committed as provided under current law.

. Allowing law enforcement agencies the discretion to disclose the name of a juvenile charged with a serious felony at the time of arrest, instead of requiring them to wait until a charge has been filed as under current law.

. Providing law enforcement agencies with the discretion to release the name of a juvenile suspect alleged to have committed a violent offense whenever release of the information would assist in apprehending the minor and protecting public safety, instead of requiring a court order as under current law.

In addition, this measure requires the California Department of Justice (DOJ) to maintain complete records of the criminal histories for all juvenile felons, not just those

who have committed serious or violent felonies.

***Fiscal Effect.*** These provisions would result in some savings to counties for not having to seal the records of certain juvenile offenders. There would also be unknown, but probably minor, costs to state and local governments to report the complete criminal histories for juvenile felons to DOJ, and to the state for DOJ to maintain the new information.

**Gang Provisions**

***Background.*** Current law generally defines "gangs" as any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of certain crimes. Under current law, anyone convicted of a gang-related crime can receive an extra prison term of one, two, or three years.

***Proposal.*** This measure increases the extra prison terms for gang-related crimes to two, three, or four years, unless they are serious or violent crimes in which case the new extra prison terms would be five and ten years, respectively. In addition, this measure adds gang-related murder to the list of "special circumstances" that make offenders eligible for the death penalty. It also makes it easier to prosecute crimes related to gang recruitment, expands the law on conspiracy to include gang-related activities, allows wider use of "wiretaps" against known or suspected gang members, and requires anyone convicted of a gang-related offense to register with local law enforcement agencies.

***Fiscal Effect.*** The extra prison sentences added by the measure would result in some offenders spending more time in state prison, thus increasing costs to the state for operating and constructing prisons. The CDC estimates the measure would result in ongoing annual costs of about $30 million and one- time construction costs totaling about $70 million by 2025 to house these offenders for longer periods.

Local law enforcement agencies would incur unknown annual costs to implement and enforce the gang registration provisions.

**Serious and Violent Felony Offenses**

***Background.*** Under current law, anyone convicted of a serious or violent offense is subject to a longer prison sentence, restrictive bail and probation rules, and certain prohibitions on plea bargaining. The "Three Strikes and You're Out" law provides longer prison sentences for new offenses committed by persons previously convicted of a violent or serious offense. In addition, persons convicted of violent offenses must serve at least 85 percent of their sentence before they can be released (most offenders must serve at least 50 percent of their sentence).

***Proposal.*** This measure revises the lists of specific crimes defined as serious or violent offenses, thus making most of them subject to the longer sentence provisions of existing law related to serious and violent offenses. In addition, these crimes would count as "strikes" under the Three Strikes law.

***Fiscal Effect.*** This measure's provision adding new serious and violent felonies,

combined with placing the new offenses under the Three Strikes law, will result in some offenders spending longer periods of time in state prison, thereby increasing the costs of operating and constructing prisons. The CDC estimates that the measure would result in ongoing annual state costs of about $300 million and one-time construction costs totaling about $675 million in the long term. The measure could also result in unknown, but potentially significant, costs to local governments to detain these offenders pending trial, and to prosecute them.

These additional costs may be offset somewhat for the state and local governments by potential savings if these longer sentences result in fewer crimes being committed.

**Summary of Fiscal Effects**

***State.*** We estimate that this measure would result in ongoing annual costs to the state of more than $330 million and one-time costs totaling about $750 million in the long term.

***Local.*** We estimate that this measure could result in ongoing annual costs to local governments of tens of millions of dollars to more than $100 million, and one-time costs of $200 million to $300 million.

A summary of the fiscal effects of the measure is shown in Figure 1.

**Figure 1**

**Proposition 21**

**Summary of Fiscal Effects of Major Provisions**

Fiscal Effect

State Local

**Prosecution of Juveniles in Adult Court**

*Changes procedures for transferring juveniles to adult court, thereby increasing the number of such transfers.* Unknown court costs for additional cases in adult court. Unknown, potentially ranges from small savings to annual costs of more than $100 million and one-time costs of $200 million to $300 million.

**Juvenile Incarceration and Detention**

*Requires secure detention or placement of certain juvenile offenders, as well as commitment to state prison for juveniles 16 years of age and older convicted in adult court.* Unknown, some net savings for less costly commitments. Unknown, potentially significant costs.

**Changes in Probation**

- *Changes the types of probation available for juvenile felons.* Some court costs to formally handle more juvenile offenders. Potential costs in some counties, but not significant on a statewide basis.

**Juvenile Record Confidentiality and Criminal History**

*Reduces confidentiality protections for juvenile offenders and requires the California Department of Justice to maintain criminal history records on all juvenile felons.* Minor costs to report and compile criminal histories. Minor savings due to elimination of procedural requirements.

**Gang Provisions**

*Increases penalities for gang-related crimes and requires gang members to register with local law enforcement agencies.* Annual cost of about $30 million and one-time costs of about $70 million. Unknown costs for gang member registry.

**Violent and Serious Felony Offenses**

*Adds crimes to the serious and violent felony lists, thereby making offenders subject to longer prison sentences.* Annual costs of about $300 million and one-time costs of about $675 million. Unknown, potentially significant costs to detain additional offenders pending trial and to prosecute them.

**For** **Argument in Favor of Proposition 21**

As a parent, Maggie Elvey refused to believe teenagers were capable of extreme violence, until a 15 year-old and an accomplice bludgeoned her husband to death with a steel pipe. Ross Elvey is gone forever, but his KILLER WILL BE FREE ON HIS 25TH BIRTHDAY, WITHOUT A CRIMINAL RECORD. Her husband's killer will be released in three years, but she will spend the rest of her life in fear that he will make good on his threats to her. Frighteningly, Maggie's tragedy because of the current juvenile justice system could be repeated today.

Proposition 21--the Gang Violence and Juvenile Crime Prevention Act--will toughen the law to safeguard you and your family.

Despite great strides made recently in the war against adult crime, California Department of Justice records indicate *violent juvenile crime arrests--murders, rapes, robberies, attempted murders and aggravated assaults--rose an astounding 60.6% between 1983 and 1998.* The FBI estimates the California juvenile population will increase by more than 33% over the next fifteen years, leading to predictions of a juvenile crime wave.

*Although we strongly support preventive mentoring and education, the law must be strengthened to require serious consequences, protecting you from the most violent juvenile criminals and gang offenders.*

Proposition 21:

. Prescribes LIFE IMPRISONMENT FOR GANG MEMBERS convicted of

HOME-INVASION ROBBERIES, CARJACKINGS OR DRIVE-BY SHOOTINGS.

. Makes ASSAULT WITH A FIREARM AGAINST POLICE, SCHOOL EMPLOYEES OR FIREFIGHTERS a serious felony.

. STRENGTHENS ANTI-GANG LAWS making violent gang-related felonies "strikes" under the Three Strikes law.

. Requires ADULT TRIAL FOR juveniles 14 or older charged with MURDER OR VIOLENT SEX OFFENSES.

. Requires GANG MEMBERS CONVICTED OF GANG FELONIES TO REGISTER WITH LOCAL LAW ENFORCEMENT.

*Proposition 21 doesn't incarcerate kids for minor offenses-- it protects Californians from violent criminals who have no respect for human life.*

Ask yourself, if a violent gang member believes the worst punishment he might receive for a gang-ordered murder is incarceration at the California Youth Authority until age 25, will that stop him from taking a life? Of course not, and THAT'S WHY CALIFORNIA POLICE OFFICERS AND PROSECUTORS OVERWHELMINGLY ENDORSE PROPOSITION 21.

Proposition 21 ends the "slap on the wrist" of current law by imposing real consequences for GANG MEMBERS, RAPISTS AND MURDERERS who cannot be reached through prevention or education.

Californians must send a clear message that violent juvenile criminals will be held accountable for their actions and that the punishment will fit the crime. YOUTH SHOULD NOT BE AN EXCUSE FOR MURDER, RAPE OR ANY VIOLENT ACT--BUT IT IS UNDER CALIFORNIA'S DANGEROUSLY LENIENT EXISTING LAW.

We represent the California District Attorneys Association, California State Sheriffs Association, California Police Chiefs Association, crime victims, business leaders, educators and over 650,000 law-abiding citizens that placed Proposition 21 on the ballot.

Our quality of life depends on making California as safe as possible. Let's give all kids every opportunity to succeed and protect our families against the most dangerous few.

Please vote YES on PROPOSITION 21.

**FOR(au)** Maggie Elvey |t Assistant Director, Crime Victims United

**FOR(au)** Grover Trask |t President, California District Attorneys Association

**FOR(au)** Chief Richard Tefank |t President, California Police Chiefs Association

**Rebuttal** **Rebuttal to Argument in Favor of Proposition 21**

Proponents have GROSSLY MISREPRESENTED HOW THE LAW WORKS.

The 15 year old in the Elvey case was sentenced in 1993. The next year lawmakers lowered the age for adult court to 14. UNDER CURRENT LAW, MINORS 14 AND OLDER CHARGED WITH MURDER ARE NORMALLY TRIED AS ADULTS. UPON CONVICTION, THESE MINORS RECEIVE THE ADULT SENTENCE UP TO LIFE IMPRISONMENT WITHOUT PAROLE. The proponents should know better, and they probably do. *They are using scare tactics to sell a massive legal overhaul, filled with self-interest items, and loaded with HUNDREDS OF MILLIONS OF DOLLARS IN COSTS that could raise your taxes.*

PRESIDING JUDGE James Milliken (San Diego Juvenile Court) says: "I can already send 14 year olds with violent offenses to adult court. Proposition 21 would let prosecutors move kids like mentally impaired children to adult court where they don't belong, *without judicial review.* These important decisions must be reviewed by an impartial judge."

Proposition 21 is NOT LIMITED TO VIOLENT CRIME. It turns low- level vandalism into a felony. It requires gang offenders with misdemeanors (like stealing candy) to serve six months in jail. SHERIFF Mike Hennessey (S.F.) says, "I support tough laws against gangs and crime, but Proposition 21 is the WRONG APPROACH."

Join the respected professional, citizen and victim organizations AGAINST PROPOSITION 21--including Marc Klaas/KlaasKids Foundation, California Chief Probation Officers, California Council of Churches, League of Women Voters, California Catholic Conference, Children's Defense Fund, California State PTA and California Tax Reform Association. Vote NO on 21.

**Rebuttal(au)** ALLEN BREED |t Former Director, California Youth Authority

**Rebuttal(au)** LARRY PRICE |t Chief Probation Officer, Fresno County

**Rebuttal(au)** FATHER GREGORY BOYLE |t Member, California State Commission on Juvenile Justice, Crime and Delinquency Prevention

**Against** **Argument Against Proposition 21**

PROPOSITION 21 CARRIES A HUGE PRICE TAG--YOU WILL PAY FOR IT.

Proposition 21 creates a long list of new crimes and penalties for children and adults. Because of Proposition 21, California will need more jails and prisons. YOUR TAXES MAY HAVE TO BE RAISED TO PAY FOR PROPOSITION 21. California's Legislative Analyst reports that Proposition 21 will cost local governments *"tens of millions of dollars"* and state government *"hundreds of millions"* of dollars *each year.* The Department of Corrections estimates that Proposition 21 will require a capital outlay of nearly $1,000,000,000 (*one billion dollars* ) for prison expansion. We already have the nation's biggest prison system. Californians have other needs-- like better schools, health care and transportation--that will be sacrificed so that you can pay the huge Proposition 21 price tag.

PROPOSITION 21 WILL PUT KIDS IN STATE PRISONS.

Proposition 21 will send a new wave of 16 and 17 year olds to state prison. In prison, without the treatment and education available in the juvenile system, they will be confined in institutions housing adult criminals. What will these young people learn

in state prison--how to be better criminals? Our nation has a tragic record of sexual and physical assault on children who are jailed with adults.

CALIFORNIA ALREADY HAS TOUGH LAWS AGAINST GANGS AND YOUTH CRIME.

California law already allows children and gang members as young as 14 to be tried and sentenced as adults. California already has the nation's highest youth incarceration rate-- more than twice the national average! Police, prosecutors and judges have strong tools under current law to prosecute and punish gang members who commit violent crimes.

PROPOSITION 21 WILL HARM CURRENT EFFORTS TO PREVENT GANG AND SCHOOL VIOLENCE.

Proposition 21 does nothing to build safer schools or communities. It will not stop tragedies like the Colorado school shooting, and it will not keep kids from joining gangs. But, Proposition 21 will capture your tax dollars and take them away from current efforts to stop violence before it happens. Last year, the current Governor and the Legislature approved programs to prevent youth violence--like after-school programs that keep kids off the streets. Proposition 21 threatens the survival of these programs.

DON'T RISK HIGHER TAXES FOR A HIGH-PRICED ANTI-YOUTH PACKAGE WE DON'T NEED.

Proposition 21 was drafted over two years ago by former Governor Pete Wilson. It is an extreme measure that will result in more incarceration of children and minority youth. We don't need it. California's tough anti-crime laws are already working to reduce crime and violence. Since 1990, California's felony arrest rate for juveniles has dropped 30% and arrests of juveniles for homicide have plummeted 50%. Proposition 21 asks you to spend billions of future tax dollars for penalties and prisons that are extra baggage. DON'T THROW AWAY MONEY WE NEED FOR BETTER SCHOOLS, BETTER ROADS AND BETTER HEALTH CARE. DON'T RISK HIGHER TAXES FOR OUT-DATED REFORMS. VOTE NO ON PROPOSITION 21.

**Against(au)** LAVONNE McBROOM |t President, California State PTA

**Against(au)** Gail Dryden |t President, League of Women Voters of California

**Against(au)** Raymond Wingerd |t President, Chief Probation Officers of California

**Rebut Against**

**Rebuttal to Argument Against Proposition 21**

DON'T BE DECEIVED BY THE ARGUMENTS AGAINST PROPOSITION 21. It doesn't lock up kids for minor offenses, place minors in contact with adult inmates, or raise your taxes! It's not about typical teenagers who make stupid mistakes; these kids can be reached through mentoring, prevention and rehabilitation.

Proposition 21 protects you and your family by holding juveniles and gang members *accountable for violent crime.* It's necessary because violent *juvenile* crime has increased *more than 60% over the last 15 years.* We must be clear: YOUTH IS NO EXCUSE FOR RAPE AND MURDER.

While prevention programs are important, by themselves they don't deter hardened gang members from committing rape and murder. Proposition 21 ensures appropriate punishment for juveniles convicted of these vicious offenses.

DON'T BE MISLED: *State law prohibits placing juveniles in contact with adult inmates and offers juveniles educational programs.* Proposition 21 doesn't change this!

DON'T BE DECEIVED: In 1994, the same *special interests* that today oppose Proposition 21 claimed the "Three Strikes" law would raise your taxes and cost billions, without reducing crime. *Wrong!* According to the California Department of Justice, "Three Strikes" has SAVED TAXPAYERS BILLIONS while DRAMATICALLY REDUCING ADULT CRIME. *Furthermore, the two largest tax cuts in California history have occurred since "Three Strikes" passed overwhelmingly.*

Law enforcement officials throughout California witness daily the tragic consequences of violent juvenile crime. That's why they agree Proposition 21 is vital to protecting California communities.

Vote to *reduce violent juvenile and gang related crime.* Please vote yes on 21.

**Rebut Against-au** Sheriff Hal Barker |t President, California Peace Officers Association

**Rebut Against-au** Elaine Bush |t Former Director, California Mentor Initiative

**Rebut Against-au** Collene Campbell (Thompson) |t Founder, Memory of Victims Everywhere

**Text of Prop.** **Proposition 21: Text of Proposed Law**

This initiative measure is submitted to the people in accordance with the provisions of Section 8 of Article II of the California Constitution.

This initiative measure amends, repeals, and adds sections to the Penal Code and the Welfare and Institutions 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. SHORT TITLE.

This act shall be known, and may be cited, as the Gang Violence and Juvenile Crime Prevention Act of 1998.

SEC. 2. FINDINGS AND DECLARATIONS.

The people find and declare each of the following:

(a) While overall crime is declining, juvenile crime has become a larger and more ominous threat. The United States Department of Justice reported in 1996 that juvenile arrests for serious crimes grew by 46 percent from 1983 to 1992, while murders

committed by juveniles more than doubled. According to the California Department of Justice, the rate at which juveniles were arrested for violent offenses rose 54 percent between 1986 and 1995.

(b) Criminal street gangs and gang-related violence pose a significant threat to public safety and the health of many of our communities. Criminal street gangs have become more violent, bolder, and better organized in recent years. Some gangs, like the Los Angeles-based 18th Street Gang and the Mexican Mafia are properly analyzed as organized crime groups, rather than as mere street gangs. A 1996 series in the Los Angeles Times chronicled the serious negative impact the 18th Street Gang has had on neighborhoods where it is active.

(c) Vigorous enforcement and the adoption of more meaningful criminal sanctions, including the voter-approved "Three Strikes" law, Proposition 184, has resulted in a substantial and consistent four year

decline in overall crime. Violent juvenile crime has proven most resistant to this positive trend.

(d) The problem of youth and gang violence will, without active intervention, increase, because the juvenile population is projected to grow substantially by the next decade. According to the California Department of Finance, the number of juveniles in the crime-prone ages between 12 and 17, until recently long stagnant, is expected to rise 36 percent between 1997 and 2007 (an increase of more than one million juveniles). Although illegal drug use among high school seniors had declined significantly during the 1980s, it began rising in 1992. Juvenile arrest rates for weapons-law violations increased 103 percent between 1985 and 1994, while juvenile killings with firearms quadrupled between 1984 and 1994. Handguns were used in two-thirds of the youth homicides involving guns over a 15-year span. In 1994, 82 percent of juvenile murderers used guns. The number of juvenile homicide offenders in 1994 was approximately 2,800, nearly triple the number in 1984. In addition, juveniles tend to murder strangers at disproportionate rates. A murderer is more likely to be 17 years old than any other age, at the time that the offense was committed.

(e) In 1995, California's adult arrest rate was 2,245 per 100,000 adults, while the juvenile arrest rate among 10 to 17- year-olds was 2,430 per 100,000 juveniles.

(f) Data regarding violent juvenile offenders must be available to the adult criminal justice system if recidivism by criminals is to be addressed adequately.

(g) Holding juvenile proceedings in secret denies victims of crime the opportunity to attend and be heard at such proceedings, helps juvenile offenders to avoid accountability for their actions, and shields juvenile proceedings from public scrutiny and accountability.

(h) Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang- related felonies should result in severe penalties. Life without the possibility of parole or death should be available for murderers who kill as part of any gang-related activity.

(i) The rehabilitative/treatment juvenile court philosophy was adopted at a time when most juvenile crime consisted of petty offenses. The juvenile justice system is not well-equipped to adequately protect the public from violent and repeat serious juvenile offenders.

(j) Juvenile court resources are spent disproportionately on violent offenders with little chance to be rehabilitated. If California is going to avoid the predicted wave of juvenile crime in the next decade, greater resources, attention, and accountability must be focused on less serious offenders, such as burglars, car thieves, and first time non-violent felons who have potential for rehabilitation. This act must form part of a comprehensive juvenile justice reform package which incorporates major commitments to already commenced "at-risk" youth early intervention programs and expanded informal juvenile court alternatives for low-level offenders. These efforts, which emphasize rehabilitative protocols over incarceration, must be expanded as well under the provisions of this act, which requires first time, non-violent juvenile felons to appear in court, admit guilt for their offenses, and be held accountable, but also be given a non-custodial opportunity to demonstrate through good conduct and compliance with a court-monitored treatment and supervision program that the record of the juvenile's offense should justly be expunged.

(k) Dramatic changes are needed in the way we treat juvenile criminals, criminal street gangs, and the confidentiality of the juvenile records of violent offenders if we are to avoid the predicted, unprecedented surge in juvenile and gang violence. Californians deserve to live without fear of violent crime and to enjoy safe neighborhoods, parks, and schools. This act addresses each of these issues with the goal of creating a safer California, for ourselves and our children, in the Twenty-First Century.

SEC. 3. Section 182.5 is added to the Penal Code, to read:

*182.5. Notwithstanding subdivisions (a) or (b) of Section 182, any person who actively participates in any criminal street gang, as defined in subdivision (f) of Section 186.22, with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, as defined in subdivision (e) of Section 186.22, and who willfully promotes, furthers, assists, or benefits from any felonious criminal conduct by members of that gang is guilty of conspiracy to commit that felony and may be punished as specified in subdivision (a) of Section 182.*

SEC. 4. Section 186.22 of the Penal Code is amended to read:

186.22. (a) Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years.

(b) (1) Except as provided in paragraph (4) *and (5)*, any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and

consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of ~~one, two, or three~~ *two, three, or four* years at the court's discretion, *except that if the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years .*

(2) If the underlying felony described in paragraph (1) is committed on the grounds of, or within 1,000 feet of, a public or private elementary, vocational, junior high, or high school, during hours in which the facility is open for classes or school-related programs or when minors are using the facility ~~, the additional term shall be two, three, or four years, at the court's discretion~~ *that fact shall be a circumstance in aggravation of the crime in imposing a term under paragraph (1) .*

(3) The court shall order the imposition of the middle term of the sentence enhancement, unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its choice of sentencing enhancements on the record at the time of the sentencing.

*(4) Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of:*

(A) The term determined by the court pursuant to Section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, or any period prescribed by Section 3046, if the felony is any of the offenses enumerated in subparagraphs (B) or (C) of this paragraph.

(B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55.

*(C) Imprisonment in the state prison for seven years, if the felony is extortion, as defined in Section 519; or threats to victims and witnesses, as defined in Section 136.1.*

~~(4)~~ *(5) Except as provided in paragraph (4),* ~~Any~~ *any* person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life, shall not be paroled until a minimum of 15 calendar years have been served.

~~(5) Any person convicted under this section, who is also convicted of a felony violation of Section 136.1, which violation is accompanied by a credible threat of violence or death made to the victim or witness to a violent felony, as defined in subdivision (c) of Section 667.5, shall receive, in addition to the penalties provided in paragraph (1) or (2) of this subdivision, an additional consecutive penalty of three years~~

~~imprisonment. The penalty under this paragraph shall only be imposed if the credible threat of violence or death was made to prevent or dissuade the witness or victim from attending or giving testimony at any trial for a violent felony, as defined in subdivision (c) of Section 667.5. For purposes of this paragraph, the following terms have the following meanings:~~

(A) "Credible threat" means a threat made with the intent and apparent ability to carry out the threat so as to cause the target of the threat to reasonably fear for his or her safety or the safety of a third person.

(B) "Threat of violence" means a threat to commit a violent felony, as defined in subdivision (c) of Section 667.5.

(c) If the court grants probation or suspends the execution of sentence imposed upon the defendant for a violation of subdivision (a), or in cases involving a true finding of the enhancement enumerated in subdivision (b), the court shall require that the defendant serve a minimum of 180 days in a county jail as a condition thereof.

~~(d) Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition.~~

*(d) Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in county jail.*

(e) As used in this chapter, "pattern of criminal gang activity" means the commission of, attempted commission of, *conspiracy to commit,* or solicitation of, sustained juvenile petition for, or conviction of two or more of the following offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of those offenses occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons:

(1) Assault with a deadly weapon or by means of force likely to produce great bodily injury, as defined in Section 245.

(2) Robbery, as defined in Chapter 4 (commencing with Section 211) of Title 8 of Part 1.

(3) Unlawful homicide or manslaughter, as defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1.

(4) The sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances as defined in Sections 11054, 11055, 11056, 11057, and 11058 of the Health and Safety Code.

(5) Shooting at an inhabited dwelling or occupied motor vehicle, as defined in Section 246.

(6) Discharging or permitting the discharge of a firearm from a motor vehicle, as defined in subdivisions (a) and (b) of Section 12034.

(7) Arson, as defined in Chapter 1 (commencing with Section 450) of Title 13.

(8) The intimidation of witnesses and victims, as defined in Section 136.1.

(9) Grand theft, as defined in *subdivisions (a) or (c) of* Section 487~~, when the value of the money, labor, or real or personal property taken exceeds ten thousand dollars ($10,000)~~ .

(10) Grand theft of any *firearm,* vehicle, trailer, or vessel ~~, as described in Section 487h~~ .

(11) Burglary, as defined in Section 459.

(12) Rape, as defined in Section 261.

(13) Looting, as defined in Section 463.

(14) Moneylaundering, as defined in Section 186.10.

(15) Kidnapping, as defined in Section 207.

(16) Mayhem, as defined in Section 203.

(17) Aggravated mayhem, as defined in Section 205.

(18) Torture, as defined in Section 206.

(19) Felony extortion, as defined in Sections 518 and 520.

(20) Felony vandalism, as defined in paragraph (1) of subdivision (b) of Section 594.

(21) Carjacking, as defined in Section 215.

(22) The sale, delivery, or transfer of a firearm, as defined in Section 12072.

(23) Possession of a pistol, revolver, or other firearm capable of being concealed upon the person in violation of paragraph (1) of subdivision (a) of Section 12101.

*(24) Threats to commit crimes resulting in death or great bodily injury, as defined in Section 422.*

(25) Theft and unlawful taking or driving of a vehicle, as defined in Section 10851 of the Vehicle Code.

(f) As used in this chapter, "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to ~~(23)~~ *(25)* , inclusive, of subdivision (e), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

*(g) Notwithstanding any other law, the court may strike the additional punishment for the enhancements provided in this section or refuse to impose the minimum jail sentence for misdemeanors in an unusual case where the interests of justice would best be served, if the court specifies on the record and enters into the minutes the circumstances indicating that the interests of justice would best be served by that disposition. (h) Notwithstanding any other provision of law, for each person committed to the Youth Authority for a conviction pursuant to subdivision (a) or (b) of this section, the offense shall be deemed one for which the state shall pay the rate of 100 percent of the per capita institutional cost of the Department of Youth Authority, pursuant to Section 912.5 of the Welfare and Institutions Code.*

(i) In order to secure a conviction, or sustain a juvenile petition, pursuant to subdivision (a), it is not necessary for the prosecution to prove that the person devotes all, or a substantial part of his or her time or efforts to the criminal street gang, nor is it necessary to prove that the person is a member of the criminal street gang. Active participation in the criminal street gang is all that is required.

SEC. 5. Section 186.26 of the Penal Code is repealed.

~~186.26. (a) Any adult who utilizes physical violence to coerce, induce, or solicit another person who is under 18 years of age to actively participate in any criminal street gang, as defined in subdivision (f) of Section 186.22, the members of which engage in a pattern of criminal gang activity, as defined in subdivision (e) of Section 186.22, shall be punished by imprisonment in the state prison for one, two, or three years.~~

(b) Any adult who threatens a minor with physical violence on two or more separate occasions within any 30-day period with the intent to coerce, induce, or solicit the minor to actively participate in a criminal street gang, as defined in subdivision (f) of Section 186.22, the members of which engage in a pattern of criminal gang activity, as defined in subdivision (e) of Section 186.22, shall be punished by imprisonment in the state prison for one, two, or three years or in a county jail for up to one year.

(c) A minor who is 16 years of age or older who commits an offense described in subdivision (a) or (b) is guilty of a misdemeanor.

(d) Nothing in this section shall be construed to limit prosecution under any other provision of the law.

(e) No person shall be convicted of violating this section based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person, that the defendant had the apparent ability to carry out the threat, and that physical harm was imminently likely to occur.

SEC. 6. Section 186.26 is added to the Penal Code, to read:

*186.26. (a) Any person who solicits or recruits another to actively participate in a criminal street gang, as defined in subdivision (f) of Section 186.22, with the intent that the person solicited or recruited participate in a pattern of criminal street gang activity, as defined in subdivision (e) of Section 186.22, or with the intent that the person solicited or recruited promote, further, or assist in any felonious conduct by members of the criminal street gang, shall be punished by imprisonment in the state prison for 16 months, or two or three years.*

(b) Any person who threatens another person with physical violence on two or more separate occasions within any 30-day period with the intent to coerce, induce, or solicit any person to actively participate in a criminal street gang, as defined in subdivision (f) of Section 186.22, shall be punished by imprisonment in the state prison for two, three, or four years.

(c) Any person who uses physical violence to coerce, induce, or solicit another person to actively participate in any criminal street gang, as defined in subdivision (f) of Section 186.22, or to prevent the person from leaving a criminal street gang, shall be punished by imprisonment in the state prison for three, four or five years.

(d) If the person solicited, recruited, coerced, or threatened pursuant to subdivision (a), (b), or (c) is a minor, an additional term of three years shall be imposed in addition and consecutive to the penalty prescribed for a violation of any of these subdivisions.

(e) Nothing in this section shall be construed to limit prosecution under any other provision of law.

SEC. 7. Section 186.30 is added to the Penal Code, to read:

*186.30. (a) Any person described in subdivision (b) shall register with the chief of police of the city in which he or she resides, or the sheriff of the county if he or she resides in an unincorporated area, within 10 days of release from custody or within 10 days of his or her arrival in any city, county, or city and county to reside there, whichever occurs first.*

(b) Subdivision (a) shall apply to any person convicted in a criminal court or who has had a petition sustained in a juvenile court in this state for any of the following offenses:

(1) Subdivision (a) of Section 186.22.

(2) Any crime where the enhancement specified in subdivision (b) of Section 186.22 is found to be true.

(3) Any crime that the court finds is gang related at the time of sentencing or disposition.

SEC. 8. Section 186.31 is added to the Penal Code, to read:

*186.31. At the time of sentencing in adult court, or at the time of the dispositional hearing in the juvenile court, the court shall inform any person subject to Section 186.30 of his or her duty to register pursuant to that section. This advisement shall be noted in the court minute order. The court clerk shall send a copy of the minute order to the law enforcement agency with jurisdiction for the last known address of the person subject to registration under Section 186.30. The parole officer or the probation officer assigned to that person shall verify that he or she has complied with the registration requirements of Section 186.30.*

SEC. 9. Section 186.32 is added to the Penal Code, to read:

*186.32. (a) The registration required by Section 186.30 shall consist of the following:*

(1) Juvenile registration shall include the following:

(A) The juvenile shall appear at the law enforcement agency with a parent or guardian.

(B) The law enforcement agency shall serve the juvenile and the parent with a California Street Terrorism Enforcement and Prevention Act notification which shall include, where applicable, that the juvenile belongs to a gang whose members engage in or have engaged in a pattern of criminal gang activity as described in subdivision (e) of Section 186.22.

(C) A written statement signed by the juvenile, giving any information that may be required by the law enforcement agency, shall be submitted to the law enforcement agency.

(D) The fingerprints and current photograph of the juvenile shall be submitted to the law enforcement agency.

(2) Adult registration shall include the following:

(A) The adult shall appear at the law enforcement agency.

(B) The law enforcement agency shall serve the adult with a California Street Terrorism Enforcement and Prevention Act notification which shall include, where applicable, that the adult belongs to a gang whose members engage in or have engaged in a pattern of criminal gang activity as described in subdivision (e) of Section 186.22.

(C) A written statement, signed by the adult, giving any information that may be

required by the law enforcement agency, shall be submitted to the law enforcement agency.

(D) The fingerprints and current photograph of the adult shall be submitted to the law enforcement agency.

(b) Within 10 days of changing his or her residence address, any person subject to Section 186.30 shall inform, in writing, the law enforcement agency with whom he or she last registered of his or her new address. If his or her new residence address is located within the jurisdiction of a law enforcement agency other than the agency where he or she last registered, he or she shall register with the new law enforcement agency, in writing, within 10 days of the change of residence.

(c) All registration requirements set forth in this article shall terminate five years after the last imposition of a registration requirement pursuant to Section 186.30.

(d) The statements, photographs and fingerprints required under this section shall not be open to inspection by any person other than a regularly employed peace or other law enforcement officer.

(e) Nothing in this section or Section 186.30 or 186.31 shall preclude a court in its discretion from imposing the registration requirements as set forth in those sections in a gang-related crime.

SEC. 10. Section 186.33 is added to the Penal Code, to read:

*186.33. (a) Any person required to register pursuant to Section 186.30 who knowingly violates any of its provisions is guilty of a misdemeanor.*

(b) (1) Any person who knowingly fails to register pursuant to Section 186.30 and is subsequently convicted of, or any person for whom a petition is subsequently sustained for a violation of, any of the offenses specified in Section 186.30, shall be punished by an additional term of imprisonment in the state prison for 16 months, or 2, or 3 years. The court shall order imposition of the middle term unless there are circumstances in aggravation or mitigation. The court shall state its reasons for the enhancement choice on the record at the time of sentencing.

(2) The existence of any fact bringing a person under this subdivision shall be alleged in the information, indictment, or petition, and be either admitted by the defendant or minor in open court, or found to be true or not true by the trier of fact.

SEC. 11. Section 190.2 of the Penal Code is amended to read:

190.2. (a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

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

(2) The defendant was convicted previously of murder in 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 murder in the first or second degree.

(3) The defendant, in this proceeding, has 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 or her act or acts would create a great risk of death to one or more human beings.

(5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting 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 caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings.

(7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties.

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

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

(10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

(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 or any other state, or of a federal prosecutor's office, and the murder was intentionally 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 this or any other state, and the murder was intentionally 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, or of any local or state government of this or any other state, 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 used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that 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 or her 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:

(A) Robbery in violation of Section 211 or 212.5.

(B) Kidnapping in violation of Section 207, 209, or 209.5.

(C) Rape in violation of Section 261.

(D) Sodomy in violation of Section 286.

(E) 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.

(F) Oral copulation in violation of Section 288a.

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

(H) Arson in violation of subdivision (b) of Section 451.

(I) Train wrecking in violation of Section 219.

(J) Mayhem in violation of Section 203.

(K) Rape by instrument in violation of Section 289.

(L) Carjacking, as defined in Section 215.

(18) The murder was intentional and involved the infliction of torture.

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

(20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties.

(21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code.

(22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang.

(b) Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found to be true under Section 190.4, need not have had any intent to kill at the time of the commission of the offense which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.

(c) Every person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.

(d) Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true under Section 190.4.

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

SEC. 12. Section 594 of the Penal Code, as amended by Section 1.5 of Chapter 853 of the Statutes of 1998, is amended to read:

594. (a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:

(1) Defaces with graffiti or other inscribed material.

(2) Damages.

(3) Destroys.

Whenever a person violates this subdivision with respect to real property, vehicles, signs, fixtures, *furnishings,* or ~~furnishings~~ *property* belonging to any public entity, as defined by Section 811.2 of the Government Code, or the federal government, it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property.

(b) (1) If the amount of defacement, damage, or destruction is ~~fifty thousand dollars ($50,000)~~ *four hundred dollars ($400)* or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than *ten thousand dollars ($10,000), or if the amount of defacement, damage, or destruction is ten thousand dollars ($10,000) or more, by a fine of not more than* fifty thousand dollars ($50,000), or by both that fine and imprisonment.

(2) ~~If the amount of defacement, damage, or destruction is five thousand dollars ($5,000) or more but less than fifty thousand dollars ($50,000), vandalism is punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or by both that fine and imprisonment.~~

(3) If the amount of defacement, damage, or destruction is four hundred dollars ($400) or more but less than five thousand dollars ($5,000), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of five thousand dollars ($5,000), or by both that fine and imprisonment.

(4) (A) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), vandalism is punishable by imprisonment in a county jail~~for not more than six months~~ *not exceeding one year*, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(B) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), and the defendant has been previously convicted of vandalism or affixing graffiti or other inscribed material under Section 594, 594.3, 594.4, 640.5, 640.6, or 640.7, vandalism is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than five thousand dollars ($5,000), or by both that fine and imprisonment.

(c) (1) Upon conviction of any person under this section for acts of vandalism consisting of defacing property with graffiti or other inscribed materials, the court may, in addition to any punishment imposed under subdivision (b), order the defendant to clean up, repair, or replace the damaged property himself or herself, or, if the

jurisdiction has adopted a graffiti abatement program, order the defendant, and his or her parents or guardians if the defendant is a minor, to keep the damaged property or another specified property in the community free of graffiti for up to one year. Participation of a parent or guardian is not required under this subdivision if the court deems this participation to be detrimental to the defendant, or if the parent or guardian is a single parent who must care for young children.

(2) Any city, county, or city and county may enact an ordinance that provides for all of the following:

(A) That upon conviction of any person pursuant to this section for acts of vandalism, the court may, in addition to any punishment imposed under subdivision (b), provided that the court determines that the defendant has the ability to pay any law enforcement costs not exceeding two hundred fifty dollars ($250), order the defendant to pay all or part of the costs not to exceed two hundred fifty dollars ($250) incurred by a law enforcement agency in identifying and apprehending the defendant. The law enforcement agency shall provide evidence of, and bear the burden of establishing, the reasonable costs that it incurred in identifying and apprehending the defendant.

(B) The law enforcement costs authorized to be paid pursuant to this subdivision are in addition to any other costs incurred or recovered by the law enforcement agency, and payment of these costs does not in any way limit, preclude, or restrict any other right, remedy, or action otherwise available to the law enforcement agency.

(d) If a minor is personally unable to pay a fine levied for acts prohibited by this section, the parent of that minor shall be liable for payment of the fine. A court may waive payment of the fine, or any part thereof, by the parent upon a finding of good cause.

(e) As used in this section, the term "graffiti or other inscribed material" includes any unauthorized inscription, word, figure, mark, or design, that is written, marked, etched, scratched, drawn, or painted on real or personal property.

(f) As used in this section, "graffiti abatement program" means a program adopted by a city, county, or city and county by resolution or ordinance that provides for the administration and financing of graffiti removal, community education on the prevention of graffiti, and enforcement of graffiti laws.

(g) The court may order any person ordered to perform community service or graffiti removal pursuant to paragraph (1) of subdivision (c) to undergo counseling.

(h) No amount paid by a defendant in satisfaction of a criminal matter shall be applied in satisfaction of the law enforcement costs that may be imposed pursuant to this section until all outstanding base fines, state and local penalty assessments, restitution orders, and restitution fines have been paid.

(i) This section shall remain in effect until January 1, 2002, and as of that date is repealed, unless a later enacted statute that is enacted before January 1, 2002, deletes or extends that date.

SEC. 12.5. Section 594 of the Penal Code, as added by Section 1.6 of Chapter 853 of the Statutes of 1998, is amended to read:

594. (a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:

(1) Defaces with graffiti or other inscribed material.

(2) Damages.

(3) Destroys.

Whenever a person violates this subdivision with respect to real property, vehicles, signs, fixtures, *furnishings,* or ~~furnishings~~ *property* belonging to any public entity, as defined by Section 811.2 of the Government Code, or the federal government, it shall be a permissive inference that the person neither owned the property nor had the permission of the owner to deface, damage, or destroy the property.

(b) (1) If the amount of defacement, damage, or destruction is ~~fifty thousand dollars ($50,000)~~ *four hundred dollars ($400)* or more, vandalism is punishable by imprisonment in the state prison or in a county jail not exceeding one year, or by a fine of not more than *ten thousand dollars ($10,000), or if the amount of defacement, damage, or destruction is ten thousand dollars ($10,000) or more, by a fine of not more than* fifty thousand dollars ($50,000), or by both that fine and imprisonment.

(2) ~~If the amount of defacement, damage, or destruction is five thousand dollars ($5,000) or more but less than fifty thousand dollars ($50,000), vandalism is punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine of not more than ten thousand dollars ($10,000), or by both that fine and imprisonment.~~

(3) If the amount of defacement, damage, or destruction is four hundred dollars ($400) or more but less than five thousand dollars ($5,000), vandalism is punishable by imprisonment in a county jail not exceeding one year, or by a fine of five thousand dollars ($5,000), or by both that fine and imprisonment.

(4) (A) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), vandalism is punishable by imprisonment in a county jail ~~for not more than six months~~ *not exceeding one year*, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment.

(B) If the amount of defacement, damage, or destruction is less than four hundred dollars ($400), and the defendant has been previously convicted of vandalism or affixing graffiti or other inscribed material under Section 594, 594.3, 594.4, 640.5, 640.6, or 640.7, vandalism is punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than five thousand dollars ($5,000), or by both that fine and imprisonment.

(c) Upon conviction of any person under this section for acts of vandalism

consisting of defacing property with graffiti or other inscribed materials, the court may, in addition to any punishment imposed under subdivision (b), order the defendant to clean up, repair, or replace the damaged property himself or herself, or, if the jurisdiction has adopted a graffiti abatement program, order the defendant, and his or her parents or guardians if the defendant is a minor, to keep the damaged property or another specified property in the community free of graffiti for up to one year. Participation of a parent or guardian is not required under this subdivision if the court deems this participation to be detrimental to the defendant, or if the parent or guardian is a single parent who must care for young children.

(d) If a minor is personally unable to pay a fine levied for acts prohibited by this section, the parent of that minor shall be liable for payment of the fine. A court may waive payment of the fine, or any part thereof, by the parent upon a finding of good cause.

(e) As used in this section, the term "graffiti or other inscribed material" includes any unauthorized inscription, word, figure, mark, or design , that is written, marked, etched, scratched, drawn, or painted on real or personal property.

(f) As used in this section, "graffiti abatement program" means a program adopted by a city, county, or city and county by resolution or ordinance that provides for the administration and financing of graffiti removal, community education on the prevention of graffiti, and enforcement of graffiti laws.

(g) The court may order any person ordered to perform community service or graffiti removal pursuant to paragraph (1) of subdivision (c) to undergo counseling.

(h) This section shall become operative on January 1, 2002.

SEC. 13. Section 629.52 of the Penal Code is amended to read:

629.52. Upon application made under Section 629.50, the judge may enter an ex parte order, as requested or modified, authorizing interception of wire, electronic digital pager, or electronic cellular telephone communications *initially intercepted* within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines, on the basis of the facts submitted by the applicant, all of the following:

(a) There is probable cause to believe that an individual is committing, has committed, or is about to commit, one of the following offenses:

(1) Importation, possession for sale, transportation, manufacture, or sale of controlled substances in violation of Section 11351, 11351.5, 11352, *11370.6,* 11378, 11378.5, 11379, 11379.5, or 11379.6 of the Health and Safety Code with respect to a substance containing heroin, cocaine, PCP, methamphetamine, or their analogs where the substance exceeds 10 gallons by liquid volume or three pounds of solid substance by weight.

(2) Murder, solicitation to commit murder, the commission of a crime involving the bombing of public or private property, or aggravated kidnapping, as specified in Section 209.

(3) *Any felony violation of Section 186.22.*

*(4)* Conspiracy to commit any of the above-mentioned crimes.

(b) There is probable cause to believe that particular communications concerning the illegal activities will be obtained through that interception, including, but not limited to, communications that may be utilized for locating or rescuing a kidnap victim.

(c) There is probable cause to believe that the facilities from which, or the place where, the wire, electronic digital pager, or electronic cellular telephone communications are to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by the person whose communications are to be intercepted.

(d) Normal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous.

SEC. 14. Section 667.1 is added to the Penal Code, to read:

*667.1. Notwithstanding subdivision (h) of Section 667, for all offenses committed on or after the effective date of this act, all references to existing statutes in subdivisions (c) to (g), inclusive, of Section 667, are to those statutes as they existed on the effective date of this act, including amendments made to those statutes by this act.*

SEC. 15. Section 667.5 of the Penal Code is amended to read:

667.5. Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows:

(a) Where one of the new offenses is one of the violent felonies specified in subdivision (c), in addition *to* and consecutive to any other prison terms therefor, the court shall impose a three-year term for each prior separate prison term served by the defendant where the prior offense was one of the violent felonies specified in subdivision (c). However, no additional term shall be imposed under this subdivision for any prison term served prior to a period of 10 years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

(b) Except where subdivision (a) applies, where the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony; provided that no additional term shall be imposed under this subdivision for any prison term served prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction.

(c) For the purpose of this section, "violent felony" ~~means~~ *shall mean* any of the following:

(1) Murder or voluntary manslaughter.

(2) Mayhem.

(3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.

(4) Sodomy by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(5) Oral copulation by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(6) Lewd acts on a child under the age of 14 years as defined in Section 288.

(7) Any felony punishable by death or imprisonment in the state prison for life.

(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7 or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5, ~~12022.53,~~ or 12022.55.

(9) Any robbery ~~perpetrated in an inhabited dwelling house, vessel, as defined in Section 21 of the Harbors and Navigation Code, which is inhabited and designed for habitation, an inhabited floating home as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, an inhabited trailer coach, as defined in the Vehicle Code, or in the inhabited portion of any other building, wherein it is charged and proved that the defendant personally used a deadly or dangerous weapon, as provided in subdivision (b) of Section 12022, in the commission of that robbery~~.

(10) Arson, in violation of subdivision (a) *or (b)* of Section 451.

(11) The offense defined in subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(12) Attempted murder.

(13) A violation of Section 12308 , *12309, or 12310.*

(14) Kidnapping , ~~in violation of subdivision (b) of Section 207.~~

(15) ~~Kidnapping, as punished in subdivision (b) of Section 208~~ *Assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220.*

(16) Continuous sexual abuse of a child, in violation of Section 288.5.

(17) Carjacking, as defined in subdivision (a) of Section 215 , ~~if it is charged and proved that the defendant personally used a dangerous or deadly weapon as provided in subdivision (b) of Section 12022 in the commission of the carjacking.~~

~~(18) Any robbery of the first degree punishable pursuant to subparagraph (A) of paragraph (1) of subdivision (a) of Section 213.~~

(19) *(18)* A violation of Section 264.1.

*(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22 of the Penal Code.*

(20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22 of the Penal Code.

(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.

(22) Any violation of Section 12022.53.

The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person.

(d) For the purposes of this section, the defendant shall be deemed to remain in prison custody for an offense until the official discharge from custody or until release on parole, whichever first occurs, including any time during which the defendant remains subject to reimprisonment for escape from custody or is reimprisoned on revocation of parole. The additional penalties provided for prior prison terms shall not be imposed unless they are charged and admitted or found true in the action for the new offense.

(e) The additional penalties provided for prior prison terms shall not be imposed for any felony for which the defendant did not serve a prior separate term in state prison.

(f) A prior conviction of a felony shall include a conviction in another jurisdiction for an offense which, if committed in California, is punishable by imprisonment in the state prison if the defendant served one year or more in prison for the offense in the other jurisdiction. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense which includes all of the elements of the particular felony as defined under California law if the defendant served one year or more in prison for the offense in the other jurisdiction.

(g) A prior separate prison term for the purposes of this section shall mean a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes, including any reimprisonment on revocation of parole which is not accompanied by a new commitment to prison, and including any reimprisonment after an escape from incarceration.

(h) Serving a prison term includes any confinement time in any state prison or federal penal institution as punishment for commission of an offense, including confinement in a hospital or other institution or facility credited as service of prison

time in the jurisdiction of the confinement.

(i) For the purposes of this section, a commitment to the State Department of Mental Health as a mentally disordered sex offender following a conviction of a felony, which commitment exceeds one year in duration, shall be deemed a prior prison term.

(j) For the purposes of this section, when a person subject to the custody, control, and discipline of the Director of Corrections is incarcerated at a facility operated by the Department of the Youth Authority, that incarceration shall be deemed to be a term served in state prison.

(k) Notwithstanding subdivisions (d) and (g) or any other provision of law, where one of the new offenses is committed while the defendant is temporarily removed from prison pursuant to Section 2690 or while the defendant is transferred to a community facility pursuant to Section 3416, 6253, or 6263, or while the defendant is on furlough pursuant to Section 6254, the defendant shall be subject to the full enhancements provided for in this section.

This subdivision shall not apply when a full, separate, and consecutive term is imposed pursuant to any other provision of law.

SEC. 16. Section 1170.125 is added to the Penal Code, to read:

*1170.125. Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994 General Election, for all offenses committed on or after the effective date of this act, all references to existing statutes in Section 1170.12 are to those statutes as they existed on the effective date of this act, including amendments made to those statutes by this act.*

SEC. 17. Section 1192.7 of the Penal Code is amended to read:

1192.7. (a) Plea bargaining in any case in which the indictment or information charges any serious felony, any felony in which it is alleged that a firearm was personally used by the defendant, or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence.

(b) As used in this section "plea bargaining" means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

(c) As used in this section, "serious felony" means any of the following:

(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and

unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under the age of 14 years; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any ~~other~~ felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing *bodily injury,* great bodily injury , or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) *any* burglary *of the first degree* ~~of an inhabited dwelling house, or trailer coach as defined by the Vehicle Code, or inhabited portion of any other building~~; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin, cocaine, phencyclidine (PCP), or any methamphetamine- related drug, as described in paragraph (2) of subdivision (d) of Section 11055 of the Health and Safety Code, or any of the precursors of methamphetamines, as described in subparagraph (A) of paragraph (1) of subdivision (f) of Section 11055 or subdivision (a) of Section 11100 of the Health and Safety Code; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; *(28) any felony offense, which would also constitute a felony violation of Section 186.22; (29) assault with the intent to commit mayhem, rape, sodomy, or oral copulation, in violation of Section 220; (30) throwing acid or flammable substances, in violation of Section 244; (31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter, in violation of Section 245; (32) assault with a deadly weapon against a public transit employee, custodial officer, or school employee, in violation of Sections 245.2, 245.3, or 245.5; (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft, in violation of Section 246; (34) commission of rape or penetration by a foreign object in concert with another person, in violation of Section 264.1; (35) continuous sexual abuse of a child, in violation of Section 288.5; (36) shooting from a vehicle, in violation of subdivision (c) or (d) of Section 12034; (37) intimidation of victims or witnesses, in violation of Section 136.1; (38) terrorist threats, in violation Section 422; (39)* any attempt to commit a crime listed in this subdivision other than an assault; *(40) any violation of Section 12022.53;* and ~~(20)~~ *(41)* any conspiracy to commit an offense described in ~~paragraph (24) as it applies to Section 11370.4 of the Health and Safety Code where the defendant conspirator was substantially involved in the planning, direction, or financing of the underlying offense~~ *this subdivision.*

(d) As used in this section, "bank robbery" means to take or attempt to take, by force or violence, or by intimidation from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association.

As used in this subdivision, the following terms have the following meanings:

(1) "Bank" means any member of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(2) "Savings and loan association" means any federal savings and loan association and any "insured institution" as defined in Section 401 of the National Housing Act, as amended, and any federal credit union as defined in Section 2 of the Federal Credit Union Act.

(3) "Credit union" means any federal credit union and any state-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union administration.

(c) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

SEC. 18. Section 602 of the Welfare and Institutions Code is amended to read:

602. ~~Any~~ *(a) Except as provided in subdivision (b), any* person who is under the age of 18 years when he *or she* violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

*(b) Any person who is alleged, when he or she was 14 years of age or older, to have committed one of the following offenses shall be prosecuted under the general law in a court of criminal jurisdiction:*

(1) Murder, as described in Section 187 of the Penal Code, if one of the circumstances enumerated in subdivision (a) of Section 190.2 of the Penal Code is alleged by the prosecutor, and the prosecutor alleges that the minor personally killed the victim.

(2) The following sex offenses, if the prosecutor alleges that the minor personally committed the offense, and if the prosecutor alleges one of the circumstances enumerated in the One Strike law, subdivisions (d) or (e) of Section 667.61 of the Penal Code, applies:

(A) Rape, as described in paragraph (2) of subdivision (a) of Section 261 of the Penal Code.

(B) Spousal rape, as described in paragraph (1) of subdivision (a) of Section 262 of the Penal Code.

(C) Forcible sex offenses in concert with another, as described in Section 264.1 of

the Penal Code.

(D) Forcible lewd and lascivious acts on a child under the age of 14 years, as described in subdivision (b) of Section 288 of the Penal Code.

(E) Forcible penetration by foreign object, as described in subdivision (a) of Section 289 of the Penal Code.

(F) Sodomy or oral copulation in violation of Section 286 or 288a of the Penal Code, by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person.

(G) Lewd and lascivious acts on a child under the age of 14 years, as defined in subdivision (a) of Section 288, unless the defendant qualifies for probation under subdivision (c) of Section 1203.066 of the Penal Code.

SEC. 19. Section 602.5 is added to the Welfare and Institutions Code, to read:

*602.5. The juvenile court shall report the complete criminal history of any minor found to be a person adjudged to be a ward of the court under Section 602 because of the commission of any felony offense to the Department of Justice. The Department of Justice shall retain this information and make it available in the same manner as information gathered pursuant to Chapter 2 (commencing with Section 13100) of Title 3 of Part 4 of the Penal Code.*

SEC. 20. Section 625.3 of the Welfare and Institutions Code is amended to read:

625.3. Notwithstanding Section 625, a minor who is 14 years of age or older and who is taken into custody by a peace officer for the personal use of a firearm in the commission or attempted commission of a felony *or any offense listed in subdivision (b) of Section 707* shall not be released until that minor is brought before a judicial officer.

SEC. 21. Section 629 of the Welfare and Institutions Code is amended to read:

629. *(a)* As a condition for the release of such minor, the probation officer may require such minor or his parent, guardian, or relative, or both, to sign a written promise that either or both of them will appear before the probation officer at the juvenile hall or other suitable place designated by the probation officer at a specified time.

*(b) A minor who is 14 years of age or older who is taken into custody by a peace officer for the commission or attempted commission of a felony offense shall not be released until the minor, his or her parent, guardian, or relative or both, have signed the written promise described in subdivision (a), or has been given an order to appear in the juvenile court at a date certain.*

SEC. 22. Section 654.3 of the Welfare and Institutions Code is amended to read:

654.3. No minor shall be eligible for the program of supervision set forth in Section 654 or 654.2 in the following cases, except in an unusual case where the interests of justice would best be served and the court specifies on the record the reasons for its

decision:

(a) A petition alleges that the minor has violated an offense listed in subdivision (b) ~~or (c) or paragraph (2) of subdivision (d)~~ of Section 707.

(b) A petition alleges that the minor has sold or possessed for sale a controlled substance as defined in Chapter 2 (commencing with Section 11053) of Division 10 of the Health and Safety Code.

(c) A petition alleges that the minor has violated Section 11350 or 11377 of the Health and Safety Code where the violation takes place at a public or private elementary, vocational, junior high school, or high school, or a violation of Section 245.5, 626.9, or 626.10 of the Penal Code.

(d) A petition alleges that the minor has violated Section 186.22 of the Penal Code.

(e) The minor has previously participated in a program of supervision pursuant to Section 654.

(f) The minor has previously been adjudged a ward of the court pursuant to Section 602.

(g) A petition alleges that the minor has violated an offense in which the restitution owed to the victim exceeds one thousand dollars ($1,000). For purposes of this subdivision, the definition of "victim" in paragraph (1) of subdivision (a) of Section 730.6 and "restitution" in subdivision (h) of Section 730.6 shall apply.

*(h) The minor is alleged to have committed a felony offense when the minor was at least 14 years of age. Except in unusual cases where the court determines the interest of justice would best be served by a proceeding pursuant to Section 654 or 654.2, a petition alleging that a minor who is 14 years of age or over has committed a felony offense shall proceed under Article 20.5 (commencing with Section 790) or Article 17 (commencing with Section 675).*

SEC. 23. Section 660 of the Welfare and Institutions Code is amended to read:

660. (a) Except as provided in subdivision (b), if the minor is detained, the clerk of the juvenile court shall cause the notice and copy of the petition to be served on all persons required to receive that notice and copy of the petition pursuant to subdivision (e) of Section 656 and Section 658, either personally or by certified mail with request for return receipt, as soon as possible after filing of the petition and at least five days prior to the time set for hearing, unless the hearing is set less than five days from the filing of the petition, in which case, the notice and copy of the petition shall be served at least 24 hours prior to the time set for hearing.

(b) If the minor is detained, and all persons entitled to notice pursuant to subdivision (e) of Section 656 and Section 658 were present at the detention hearing, the clerk of the juvenile court shall cause the notice and copy of the petition to be served on all persons required to receive the notice and copy of the petition, either personally or by first-class mail, as soon as possible after the filing of the petition and at least five days

prior to the time set for hearing, unless the hearing is set less than five days from the filing of the petition, in which case the notice and copy of the petition shall be served at least 24 hours prior to the time set for the hearing.

(c) If the minor is not detained, the clerk of the juvenile court shall cause the notice and copy of the petition to be served on all persons required to receive the notice and copy of the petition, either personally or by first-class mail, at least 10 days prior to the time set for hearing. If that person is known to reside outside of the county, the clerk of the juvenile court shall mail the notice and copy of the petition, by first-class mail, to that person, as soon as possible after the filing of the petition and at least 10 days before the time set for hearing. Failure to respond to the notice shall in no way result in arrest or detention. In the instance of failure to appear after notice by first-class mail, the court shall direct that the notice and copy of the petition is to be personally served on all persons required to receive the notice and a copy of the petition. However, if the whereabouts of the minor are unknown, ~~upon a showing that all reasonable efforts to locate the minor have failed or that the minor has willfully evaded service of process,~~ personal service of the notice and a copy of the petition is not required and a warrant for the arrest of the minor may be issued pursuant to Section 663. Personal service of the notice and copy of the petition outside of the county at least 10 days before the time set for hearing is equivalent to service by first-class mail. Service may be waived by any person by a voluntary appearance entered in the minutes of the court or by a written waiver of service filed with the clerk of the court at or prior to the hearing.

(d) For purposes of this section, service on the minor's attorney shall constitute service on the minor's parent or legal guardian.

SEC. 24. Section 663 of the Welfare and Institutions Code is amended to read:

663. (a) Whenever a petition has been filed in the juvenile court alleging that a minor comes within the provisions of Section 601 or 602 *of this code* and praying for a hearing thereon, or whenever any subsequent petition has been filed praying for a hearing in the matter of the minor, a warrant of arrest may be issued immediately for the minor upon a showing that any one of the following conditions are satisfied:

(1) It appears to the court that the conduct and behavior of the minor may endanger the health, person, welfare, or property of himself or herself, or others, or that the circumstances of his or her home environment may endanger the health, person, welfare, or property of the minor.

(2) It appears to the court that either personal service upon the minor has been unsuccessful, or the whereabouts of the minor are unknown ~~, and all reasonable efforts to locate and personally serve the minor have failed.~~

(3) It appears to the court that the minor has willfully evaded service of process.

(b) Nothing in this section shall be construed to limit the right of parents or guardians to receive the notice and a copy of the petition pursuant to Section 660.

SEC. 25. Section 676 of the Welfare and Institutions Code is amended to read:

676. (a) Unless requested by the minor concerning whom the petition has been filed and any parent or guardian present, the public shall not be admitted to a juvenile court hearing. Nothing in this section shall preclude the attendance of up to two family members of a prosecuting witness for the support of that witness, as authorized by Section 868.5 of the Penal Code. The judge or referee may nevertheless admit those persons he or she deems to have a direct and legitimate interest in the particular case or the work of the court. However, except as provided in subdivision (b), members of the public shall be admitted, on the same basis as they may be admitted to trials in a court of criminal jurisdiction, to hearings concerning petitions filed pursuant to Section 602 alleging that a minor is a person described in Section 602 by reason of the violation of any one of the following offenses:

(1) Murder.

(2) Arson of an inhabited building.

(3) Robbery while armed with a dangerous or deadly weapon.

(4) Rape with force or violence or threat of great bodily harm.

(5) Sodomy by force, violence, duress, menace, or threat of great bodily harm.

(6) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.

(7) Any offense specified in subdivision (a) of Section 289 of the Penal Code.

(8) Kidnapping for ransom.

(9) Kidnapping for purpose of robbery.

(10) Kidnapping with bodily harm.

(11) Assault with intent to murder or attempted murder.

(12) Assault with a firearm or destructive device.

(13) Assault by any means of force likely to produce great bodily injury.

(14) Discharge of a firearm into an inhabited dwelling or occupied building.

(15) Any offense described in Section 1203.09 of the Penal Code.

(16) Any offense described in Section 12022.5 *or 12022.53* of the Penal Code.

(17) Any felony offense in which a minor personally used a weapon listed in subdivision (a) of Section 12020 of the Penal Code.

(18) Burglary of an inhabited dwelling house or trailer coach, as defined in Section

635 of the Vehicle Code, or the inhabited portion of any other building, if the minor previously has been adjudged a ward of the court by reason of the commission of any offense listed in this section, including an offense listed in this paragraph.

(19) Any felony offense described in Section 136.1 or 137 of the Penal Code.

(20) Any offense as specified in Sections 11351, 11351.5, 11352, 11378, 11378.5, 11379, and 11379.5 of the Health and Safety Code.

(21) Criminal street gang activity which constitutes a felony pursuant to Section 186.22 of the Penal Code.

(22) Manslaughter as specified in Section 192 of the Penal Code.

(23) Driveby shooting or discharge of a weapon from or at a motor vehicle as specified in Sections 246, 247, and 12034 of the Penal Code.

(24) Any crime committed with an assault weapon, as defined in Section 12276 of the Penal Code, including possession of an assault weapon as specified in subdivision (b) of Section 12280 of the Penal Code.

(25) Carjacking, while armed with a dangerous or deadly weapon.

(26) Kidnapping, in violation of Section 209.5 of the Penal Code.

(27) Torture, as described in Sections 206 and 206.1 of the Penal Code.

(28) Aggravated mayhem, in violation of Section 205 of the Penal Code.

(b) Where the petition filed alleges that the minor is a person described in Section 602 by reason of the commission of rape with force or violence or great bodily harm; sodomy by force, violence, duress, menace, or threat of great bodily harm; oral copulation by force, violence, duress, menace, or threat of great bodily harm; or any offense specified in Section 289 of the Penal Code, members of the public shall not be admitted to the hearing in either of the following instances:

(1) Upon a motion for a closed hearing by the district attorney, who shall make the motion if so requested by the victim.

(2) During the victim's testimony, if, at the time of the offense the victim was under 16 years of age.

(c) The name of a minor found to have committed one of the offenses listed in subdivision (a) shall not be confidential, unless the court, for good cause, so orders. *As used in this subdivision, "good cause" shall be limited to protecting the personal safety of the minor, a victim, or a member of the public .The court shall make a written finding, on the record, explaining why good cause exists to make the name of the minor confidential.*

(d) Notwithstanding Sections 827 and 828 and subject to subdivisions (e) and (f),

when a petition is sustained for any offense listed in subdivision (a), the charging petition, the minutes of the proceeding, and the orders of adjudication and disposition of the court that are contained in the court file shall be available for public inspection. Nothing in this subdivision shall be construed to authorize public access to any other documents in the court file.

(e) The probation officer or any party may petition the juvenile court to prohibit disclosure to the public of any file or record. The juvenile court shall prohibit the disclosure if it appears that the harm to the minor, victims, witnesses, or public from the public disclosure outweighs the benefit of public knowledge. *However, the court shall not prohibit disclosure for the benefit of the minor unless the court makes a written finding that the reason for the prohibition is to protect the safety of the minor.*

(f) Nothing in this section shall be applied to limit the disclosure of information as otherwise provided for by law.

*(g) The juvenile court shall for each day that the court is in session, post in a conspicuous place which is accessible to the general public, a written list of hearings that are open to the general public pursuant to this section, the location of those hearings, and the time when the hearings will be held.*

SEC. 26. Section 707 of the Welfare and Institutions Code is amended to read:

707. (a) *(1)* In any case in which a minor is alleged to be a person described in Section 602*(a)* by reason of the violation, when he or she was 16 years of age or older, of any criminal statute or ordinance except those listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit, the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria:

(1) The degree of criminal sophistication exhibited by the minor.

(2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(3) The minor's previous delinquent history.

(4) Success of previous attempts by the juvenile court to rehabilitate the minor.

(5) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.

A determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one or a combination of the factors set forth

above, which shall be recited in the order of unfitness. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing, and no plea which may already have been entered shall constitute evidence at the hearing.

*(2) This paragraph shall apply to a minor alleged to be a person described in Section 602 by reason of the violation, when he or she has attained the age of 16 years, of any felony offense when the minor has been declared to be a ward of the court pursuant to Section 602 on one or more prior occasions if both of the following apply:*

(A) The minor has previously been found to have committed two or more felony offenses.

(B) The offenses upon which the prior petition or petitions were based were committed when the minor had attained the age of 14 years.

Upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence that the petitioner or the minor may wish to submit, the minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law unless the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria:

(A) The degree of criminal sophistication exhibited by the minor.

(B) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(C) The minor's previous delinquent history.

(D) Success of previous attempts by the juvenile court to rehabilitate the minor.

(E) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.

A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and findings therefor recited in the order as to each of the above criteria that the minor is fit and proper under each and every one of the above criteria. In making a finding of fitness, the court may consider extenuating and mitigating circumstances in evaluating each of the above criteria. In any case in which the hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may already have been entered shall constitute evidence at the hearing. If the minor is found to be a fit and proper subject to be dealt with under the juvenile court law pursuant to this subdivision, the minor shall be committed to placement in a juvenile hall, ranch camp,

forestry camp, boot camp, or secure juvenile home pursuant to Section 730, or in any institution operated by the Youth Authority.

(3) If, pursuant to this subdivision, the minor is found to be not a fit and proper subject for juvenile court treatment and is tried in a court of criminal jurisdiction and found guilty by the trier of fact, the judge may commit the minor to the Youth Authority in lieu of sentencing the minor to the state prison, unless the limitations specified in Section 1732.6 apply.

(b) Subdivision (c) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of one of the following offenses:

(1) Murder.

(2) Arson, as provided in subdivision (a) or (b) of Section 451 of the Penal Code.

(3) Robbery ~~while armed with a dangerous or deadly weapon~~.

(4) Rape with force or violence or threat of great bodily harm.

(5) Sodomy by force, violence, duress, menace, or threat of great bodily harm.

(6) Lewd or lascivious act as provided in subdivision (b) of Section 288 of the Penal Code.

(7) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.

(8) Any offense specified in subdivision (a) of Section 289 of the Penal Code.

(9) Kidnapping for ransom.

(10) Kidnapping for purpose of robbery.

(11) Kidnapping with bodily harm.

(12) Attempted murder.

(13) Assault with a firearm or destructive device.

(14) Assault by any means of force likely to produce great bodily injury.

(15) Discharge of a firearm into an inhabited or occupied building.

(16) Any offense described in Section 1203.09 of the Penal Code.

(17) Any offense described in Section 12022.5 *or 12022.53* of the Penal Code.

(18) Any felony offense in which the minor personally used a weapon listed in subdivision (a) of Section 12020 of the Penal Code.

(19) Any felony offense described in Section 136.1 or 137 of the Penal Code.

(20) Manufacturing, compounding, or selling one-half ounce or more of any salt or solution of a controlled substance specified in subdivision (e) of Section 11055 of the Health and Safety Code.

(21) Any violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code, which would also constitute a felony violation of subdivision (b) of Section 186.22 of the Penal Code.

(22) Escape, by the use of force or violence, from any county juvenile hall, home, ranch, camp, or forestry camp in violation of subdivision (b) of Section 871 where great bodily injury is intentionally inflicted upon an employee of the juvenile facility during the commission of the escape.

(23) Torture as described in Sections 206 and 206.1 of the Penal Code.

(24) Aggravated mayhem, as described in Section 205 of the Penal Code.

(25) Carjacking, as described in Section 215 of the Penal Code, while armed with a dangerous or deadly weapon.

(26) Kidnapping, as punishable in subdivision (d) of Section 208 of the Penal Code.

(27) Kidnapping, as punishable in Section 209.5 of the Penal Code.

(28) The offense described in subdivision (c) of Section 12034 of the Penal Code.

(29) The offense described in Section 12308 of the Penal Code.

*(30) Voluntary manslaughter, as described in subdivision (a) of Section 192 of the Penal Code.*

(c) With regard to a minor alleged to be a person described in Section 602 by reason of the violation, when he or she was ~~16~~ *14* years of age or older, of any of the offenses listed in subdivision (b), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit the minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law unless the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation of each of the following criteria:

(1) The degree of criminal sophistication exhibited by the minor.

(2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(3) The minor's previous delinquent history.

(4) Success of previous attempts by the juvenile court to rehabilitate the minor.

(5) The circumstances and gravity of the offenses alleged in the petition to have been committed by the minor.

A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and findings therefor recited in the order as to each of the above criteria that the minor is fit and proper under each and every one of the above criteria. In making a finding of fitness, the court may consider extenuating or mitigating circumstances in evaluating each of the above criteria. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may already have been entered shall constitute evidence at the hearing. *If, pursuant to this subdivision, the minor is found to be not a fit and proper subject for juvenile court treatment and is tried in a court of criminal jurisdiction and found guilty by the trier of fact, the judge may commit the minor to the Youth Authority in lieu of sentencing the minor to the state prison, unless the limitations specified in Section 1732.6 apply.*

~~(d) (1) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she had attained the age of 14 years but had not attained the age of 16 years, of any of the offenses set forth in paragraph (2), upon motion of the petitioner made prior to the attachment of jeopardy the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence that the petitioner or the minor may wish to submit, the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court, based upon an evaluation of the following criteria:~~

(A) The degree of criminal sophistication exhibited by the minor.

(B) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(C) The minor's previous delinquent history.

(D) Success of previous attempts by the juvenile court to rehabilitate the minor.

(E) The circumstances and gravity of the offense alleged in the petition to have been committed by the minor.

A determination that the minor is not a fit and proper subject to be dealt with under the juvenile court law may be based on any one or a combination of the factors set forth above, which shall be recited in the order of unfitness. In any case in which the hearing has been noticed pursuant to this subdivision, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing, and no plea which may already have been entered shall constitute evidence at the hearing.

(2) Paragraph (1) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she had attained the age of 14 years but had not attained the age of 16 years, of one of the following offenses:

(A) Murder.

(B) Robbery in which the minor personally used a firearm.

(C) Rape with force or violence or threat of great bodily harm.

(D) Sodomy by force, violence, duress, menace, or threat of great bodily harm.

(E) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.

(F) The offense specified in subdivision (a) of Section 289 of the Penal Code.

(G) Kidnapping for ransom.

(H) Kidnapping for purpose of robbery.

(I) Kidnapping with bodily harm.

(J) Kidnapping, as punishable in subdivision (d) of Section 208 of the Penal Code.

(K) The offense described in subdivision (c) of Section 12034 of the Penal Code, in which the minor personally used a firearm.

(L) Personally discharging a firearm into an inhabited or occupied building.

(M) Manufacturing, compounding, or selling one-half ounce or more of any salt or solution of a controlled substance specified in subdivision (e) of Section 11055 of the Health and Safety Code.

(N) Escape, by the use of force or violence, from any county juvenile hall, home, ranch, camp, or forestry camp in violation of subdivision (b) of Section 871 where great bodily injury is intentionally inflicted upon an employee of the juvenile facility during the commission of the escape.

(O) Torture, as described in Section 206 of the Penal Code.

(P) Aggravated mayhem, as described in Section 205 of the Penal Code.

(Q) Assault with a firearm in which the minor personally used the firearm.

(R) Attempted murder.

(S) Rape in which the minor personally used a firearm.

(T) Burglary in which the minor personally used a firearm.

(U) Kidnapping in which the minor personally used a firearm.

(V) The offense described in Section 12308 of the Penal Code.

(W) Kidnapping, in violation of Section 209.5 of the Penal Code.

(X) Carjacking, in which the minor personally used a firearm.

(e) This subdivision shall apply to a minor alleged to be a person described in Section 602 by reason of the violation, when he or she had attained the age of 14 years but had not attained the age of 16 years, of the offense of murder in which it is alleged in the petition that one of the following exists:

(1) In the case of murder in the first or second degree, the minor personally killed the victim.

(2) In the case of murder in the first or second degree, the minor, acting with the intent to kill the victim, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted any person to kill the victim.

(3) In the case of murder in the first degree, while not the actual killer, the minor, acting with reckless indifference to human life and as a major participant in a felony enumerated in paragraph (17) of subdivision (a) of Section 190.2, or an attempt to commit that felony, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission or attempted commission of that felony and the commission or attempted commission of that felony or the immediate flight therefrom resulted in the death of the victim.

Upon motion of the petitioner made prior to the attachment of jeopardy, the court shall cause the probation officer to investigate and submit a report on the behavioral patterns and social history of the minor being considered for a determination of unfitness. Following submission and consideration of the report, and of any other relevant evidence which the petitioner or the minor may wish to submit, the minor shall be presumed to be not a fit and proper subject to be dealt with under the juvenile court law unless the juvenile court concludes, based upon evidence, which evidence may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based upon an evaluation of each of the following criteria:

(A) The degree of criminal sophistication exhibited by the minor.

(B) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.

(C) The minor's previous delinquent history.

(D) Success of previous attempts by the juvenile court to rehabilitate the minor.

(E) The circumstances and gravity of the offenses alleged in the petition to have been committed by the minor.

A determination that the minor is a fit and proper subject to be dealt with under the juvenile court law shall be based on a finding of amenability after consideration of the criteria set forth above, and findings therefor recited in the order as to each of the above criteria that the minor is fit and proper under each and every one of the above criteria. In making a finding of fitness, the court may consider extenuating or mitigating circumstances in evaluating each of the above criteria. In any case in which a hearing has been noticed pursuant to this section, the court shall postpone the taking of a plea to the petition until the conclusion of the fitness hearing and no plea which may already have been entered shall constitute evidence at the hearing.

*(d) (1) Except as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading in a court of criminal jurisdiction against any minor 16 years of age or older who is accused of committing an offense enumerated in subdivision (b).*

(2) Except as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading against a minor 14 years of age or older in a court of criminal jurisdiction in any case in which any one or more of the following circumstances apply:

(A) The minor is alleged to have committed an offense which if committed by an adult would be punishable by death or imprisonment in the state prison for life.

(B) The minor is alleged to have personally used a firearm during the commission or attempted commission of a felony, as described in

Section 12022.5 of the Penal Code.

(C) The minor is alleged to have committed an offense listed in subdivision (b) in which any one or more of the following circumstances apply:

(i) The minor has previously been found to be a person described in Section 602 by reason of the commission of an offense listed in subdivision (b).

(ii) The offense was committed for the benefit of, at the direction of, or in association with any criminal street gang, as defined in subdivision (f) of Section 186.22 of the Penal Code, with the specific intent to promote, further, or assist in any criminal conduct by gang members.

(iii) The offense was committed for the purpose of intimidating or interfering with

any other person's free exercise or enjoyment of any right secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because the minor perceives that the other person has one or more of those characteristics, as described in Title 11.6 (commencing with Section 422.6) of Part 1 of the Penal Code.

(iv) The victim of the offense was 65 years of age or older, or blind, deaf, quadriplegic, paraplegic, developmentally disabled, or confined to a wheelchair, and that disability was known or reasonably should have been known to the minor at the time of the commission of the offense.

(3) Except as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading in a court of criminal jurisdiction against any minor 16 years of age or older who is accused of committing one of the following offenses, if the minor has previously been found to be a person described in Section 602 by reason of the violation of any felony offense, when he or she was 14 years of age or older:

(A) Any felony offense in which it is alleged that the victim of the offense was 65 years of age or older, or blind, deaf, quadriplegic, paraplegic, developmentally disabled, or confined to a wheelchair, and that disability was known or reasonably should have been known to the minor at the time of the commission of the offense;

(B) Any felony offense committed for the purposes of intimidating or interfering with any other person's free exercise or enjoyment of any right secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States and because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because the minor perceived that the other person had one or more of those characteristics, as described in Title 11.6 (commencing with Section 422.6) of Part 1 of the Penal Code; or

(C) The offense was committed for the benefit of, at the direction of, or in association with any criminal street gang as prohibited by Section 186.22 of the Penal Code..

(4) In any case in which the district attorney or other appropriate prosecuting officer has filed an accusatory pleading against a minor in a court of criminal jurisdiction pursuant to the provisions of this subdivision, the case shall then proceed according to the laws applicable to a criminal case. In conjunction with the preliminary hearing as provided for in Section 738 of the Penal Code, the magistrate shall make a finding that reasonable cause exists to believe that the minor comes within the provisions of this subdivision. If reasonable cause is not established, the criminal court shall transfer the case to the juvenile court having jurisdiction over the matter.

(5) For any offense for which the prosecutor may file the accusatory pleading in a court of criminal jurisdiction pursuant to this subdivision, but elects instead to file a petition in the juvenile court, if the minor is subsequently found to be a person described in subdivision (a) of Section 602, the minor shall be committed to placement in a juvenile hall, ranch camp, forestry camp, boot camp, or secure juvenile home pursuant

to Section 730, or in any institution operated by the Youth Authority.

(6) If, pursuant to this subdivision, the minor is found to be not a fit and proper subject for juvenile court treatment and is tried in a court of criminal jurisdiction and found guilty by the trier of fact, the judge may commit the minor to the Youth Authority in lieu of sentencing the minor to the state prison, unless the limitations specified in Section 1732.6 apply.

~~(f)~~ *(e)* Any report submitted by a probation officer pursuant to this section regarding the behavioral patterns and social history of the minor being considered for a determination of unfitness shall include any written or oral statement offered by the victim, the victim's parent or guardian if the victim is a minor, or if the victim has died, the victim's next of kin, as authorized by subdivision (b) of Section 656.2. Victims' statements shall be considered by the court to the extent they are relevant to the court's determination of unfitness.

SEC. 27. Section 777 of the Welfare and Institutions Code is amended to read:

777. An order changing or modifying a previous order by removing a minor from the physical custody of a parent, guardian, relative, or friend and directing placement in a foster home, or commitment to a private institution or commitment to a county institution, or an order changing or modifying a previous order by directing commitment to the Youth Authority shall be made only after noticed hearing upon a ~~supplemental petition~~ .

(a) The ~~supplemental petition shall be filed~~ *notice shall be made* as follows:

(1) By the probation officer where a minor has been declared a ward of the court or a probationer under Section 601 in the original matter and shall contain a concise statement of facts sufficient to support the conclusion that the ~~previous disposition has not been effective in the rehabilitation or protection of the~~ minor *has violated an order of the court* .

(2) By the probation officer or the prosecuting attorney ~~, after consulting with the probation officer,~~ if the minor is a court ward or probationer under Section 602 in the original matter and the ~~supplemental petition~~ *notice* alleges a violation of a condition of probation not amounting to a crime. The ~~petition~~ *notice* shall contain a concise statement of facts sufficient to support ~~the~~ *this* conclusion ~~that the previous disposition has not been effective in the rehabilitation or protection of the minor. The petition shall be filed by the prosecuting attorney, after consulting with the probation officer, if a minor has been declared a ward or probationer under Section 602 in the original matter and the petition alleges a violation of a condition of probation amounting to a crime. The petition shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the minor~~.

(3) Where the probation officer is the petitioner pursuant to paragraph (2), ~~if~~ prior to the attachment of jeopardy at the time of the jurisdictional hearing ~~it appears to the prosecuting attorney that the minor is not a person described by subdivision (a) or that the supplemental petition was not properly charged,~~ the prosecuting attorney may make

a motion to dismiss the ~~supplemental petition~~ *notice* and may request that the matter be referred to the probation officer for whatever action the prosecuting or probation officer may deem appropriate.

~~(b) Notwithstanding the provisions of subdivision (a), if the petition alleges a violation of a condition of probation and is for the commitment of a minor to a county juvenile institution for a period of 30 days or less, or for a less restrictive disposition, it is not necessary to allege and prove that the previous disposition has not been effective in the rehabilitation or protection of the minor. However, before any period of commitment in excess of 15 days is ordered, the court shall determine and consider the effect that an extended commitment period would have on the minor's schooling, including possible loss of credits, and on any current employment of the minor. In order to make such a commitment the court must, however, find that the commitment is in the best interest of the minor. The provisions of this subdivision may not be utilized more than twice during the time the minor is a ward of the court.~~

(c) (b) Upon the filing of ~~a supplemental petition~~ *such notice* , the clerk of the juvenile court shall immediately set the same for hearing within 30 days, and the probation officer shall cause notice of it to be served upon the persons and in the manner prescribed by Sections 658 and 660.

*(c) The facts alleged in the notice shall be established by a preponderance of the evidence at a hearing to change, modify, or set aside a previous order. The court may admit and consider reliable hearsay evidence at the hearing to the same extent that such evidence would be admissible in an adult probation revocation hearing, pursuant to the decision in People v. Brown, 215 Cal.App.3d (1989) and any other relevant provision of law.*

(d) An order for the detention of the minor pending adjudication of the ~~petition~~ *alleged violation* may be made only after a hearing is conducted pursuant to Article 15 (commencing with Section 625) of this chapter.

~~(e) The filing of a supplemental petition and the hearing thereon shall not be required for the commitment of a minor to a county institution for a period of 30 days or less pursuant to an original or a previous order imposing a specified time in custody and staying the enforcement of the order subject to subsequent violation of a condition or conditions of probation, provided that in order to make the commitment, the court finds at a hearing that the minor has violated a condition of probation.~~

SEC. 28. Section 781 of the Welfare and Institutions Code is amended to read:

781. (a) In any case in which a petition has been filed with a juvenile court to commence proceedings to adjudge a person a ward of the court, in any case in which a person is cited to appear before a probation officer or is taken before a probation officer pursuant to Section 626, or in any case in which a minor is taken before any officer of a law enforcement agency, the person or the county probation officer may, five years or more after the jurisdiction of the juvenile court has terminated as to the person, or, in a case in which no petition is filed, five years or more after the person was cited to appear before a probation officer or was taken before a probation officer pursuant to Section 626 or was taken before any officer of a law enforcement agency, or, in any case, at any

time after the person has reached the age of 18 years, petition the court for sealing of the records, including records of arrest, relating to the person's case, in the custody of the juvenile court and probation officer and any other agencies, including law enforcement agencies, and public officials as the petitioner alleges, in his or her petition, to have custody of the records. The court shall notify the district attorney of the county and the county probation officer, if he or she is not the petitioner, and the district attorney or probation officer or any of their deputies or any other person having relevant evidence may testify at the hearing on the petition. If, after hearing, the court finds that since the termination of jurisdiction or action pursuant to Section 626, as the case may be, he or she has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained to the satisfaction of the court, it shall order all records, papers, and exhibits in the person's case in the custody of the juvenile court sealed, including the juvenile court record, minute book entries, and entries on dockets, and any other records relating to the case in the custody of the other agencies and officials as are named in the order. In any case in which a ward of the juvenile court is subject to the registration requirements set forth in Section 290 of the Penal Code, a court, in ordering the sealing of the juvenile records of the person, also shall provide in the order that the person is relieved from the registration requirement and for the destruction of all registration information in the custody of the Department of Justice and other agencies and officials. Notwithstanding any other provision of law, the court shall not order the person's records sealed in any case in which the person has been found by the juvenile court to have committed an offense listed in subdivision (b)~~, paragraph (2) of subdivision (d), or subdivision (c)~~ of Section 707 ~~until at least six years have elapsed since commission of the offense listed in subdivision (b), paragraph (2) of subdivision (d), or subdivision (c) of Section 707~~ *when he or she had attained 14 years of age or older.* Once the court has ordered the person's records sealed, the proceedings in the case shall be deemed never to have occurred, and the person may properly reply accordingly to any inquiry about the events, the records of which are ordered sealed. The court shall send a copy of the order to each agency and official named therein, directing the agency to seal its records and stating the date thereafter to destroy the sealed records. Each such agency and official shall seal the records in its custody as directed by the order, shall advise the court of its compliance, and thereupon shall seal the copy of the court's order for sealing of records that it, he, or she received. The person who is the subject of records sealed pursuant to this section may petition the superior court to permit inspection of the records by persons named in the petition, and the superior court may so order. Otherwise, except as provided in subdivision (b), the records shall not be open to inspection.

(b) In any action or proceeding based upon defamation, a court, upon a showing of good cause, may order any records sealed under this section to be opened and admitted into evidence. The records shall be confidential and shall be available for inspection only by the court, jury, parties, counsel for the parties, and any other person who is authorized by the court to inspect them. Upon the judgment in the action or proceeding becoming final, the court shall order the records sealed.

(c) (1) Subdivision (a) does not apply to Department of Motor Vehicle records of any convictions for offenses under the Vehicle Code or any local ordinance relating to the operation, stopping and standing, or parking of a vehicle where the record of any such conviction would be a public record under Section 1808 of the Vehicle Code. However, if a court orders a case record containing any such conviction to be sealed

under this section, and if the Department of Motor Vehicles maintains a public record of such a conviction, the court shall notify the Department of Motor Vehicles of the sealing and the department shall advise the court of its receipt of the notice.

Notwithstanding any other provision of law, subsequent to the notification, the Department of Motor Vehicles shall allow access to its record of convictions only to the subject of the record and to insurers which have been granted requestor code numbers by the department. Any insurer to which such a record of conviction is disclosed, when such a conviction record has otherwise been sealed under this section, shall be given notice of the sealing when the record is disclosed to the insurer. The insurer may use the information contained in the record for purposes of determining eligibility for insurance and insurance rates for the subject of the record, and the information shall not be used for any other purpose nor shall it be disclosed by an insurer to any person or party not having access to the record.

(2) This subdivision shall not be construed as preventing the sealing of any record which is maintained by any agency or party other than the Department of Motor Vehicles.

(3) This subdivision shall not be construed as affecting the procedures or authority of the Department of Motor Vehicles for purging department records.

(d) Unless for good cause the court determines that the juvenile court record shall be retained, the court shall order the destruction of a person's juvenile court records that are sealed pursuant to this section as follows: five years after the record was ordered sealed, if the person who is the subject of the record was alleged or adjudged to be a person described by Section 601; or when the person who is the subject of the record reaches the age of 38 if the person was alleged or adjudged to be a person described by Section 602, *except that if the subject of the record was found to be a person described in Section 602 because of the commission of an offense listed in subdivision (b), of Section 707, when he or she was 14 years of age or older, the record shall not be destroyed.* Any other agency in possession of sealed records may destroy its records five years after the record was ordered sealed.

(e) This section shall not permit the sealing of a person's juvenile court records for an offense where the person is convicted of that offense in a criminal court pursuant to the provisions of Section 707.1. This subdivision is declaratory of existing law.

SEC. 29. Article 20.5 (commencing with Section 790) is added to Chapter 2 of Part 1 of Division 2 of the Welfare and Institutions Code, to read:

*Article 20.5. Deferred Entry of Judgment*

790. (a) Notwithstanding Sections 654, 654.2, or any other provision of law, this article shall apply whenever a case is before the juvenile court for a determination of whether a minor is a person described in Section 602 because of the commission of a felony offense, if all of the following circumstances apply:

(1) The minor has not previously been declared to be a ward of the court for the commission of a felony offense.

(2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707.

(3) The minor has not previously been committed to the custody of the Youth Authority.

(4) The minor's record does not indicate that probation has ever been revoked without being completed.

(5) The minor is at least 14 years of age at the time of the hearing.

(6) The minor is eligible for probation pursuant to Section 1203.06 of the Penal Code.

(b) The prosecuting attorney shall review his or her file to determine whether or not paragraphs (1) to (6), inclusive, of subdivision (a) apply. Upon the agreement of the prosecuting attorney, the public defender or the minor's private defense attorney, and the presiding judge of the juvenile court or a judge designated by the presiding judge to the application of this article, this procedure shall be completed as soon as possible after the initial filing of the petition. If the prosecuting attorney, the defense attorney, and the juvenile court judge do not agree, the case shall proceed according to Article 17 (commencing with Section 675). If the minor is found eligible for deferred entry of judgment, the prosecuting attorney shall file a declaration in writing with the court or state for the record the grounds upon which the determination is based, and shall make this information available to the minor and his or her attorney. Under this procedure, the court may set the hearing for deferred entry of judgment at the initial appearance under Section 657.

791. (a) The prosecuting attorney's written notification to the minor shall also include all of the following:

(1) A full description of the procedures for deferred entry of judgment.

(2) A general explanation of the roles and authorities of the probation department, the prosecuting attorney, the program, and the court in that process.

(3) A clear statement that, in lieu of jurisdictional and disposition hearings, the court may grant a deferred entry of judgment with respect to any offense charged in the petition, provided that the minor admits each allegation contained in the petition and waives time for the pronouncement of judgment, and that upon the successful completion of the terms of probation, as defined in Section 794, the positive recommendation of the probation department, and the motion of the prosecuting attorney, but no sooner that 12 months and no later than 36 months from the date of the minor's referral to the program, the court shall dismiss the charge or charges against the minor.

(4) A clear statement that upon any failure of the minor to comply with the terms of probation, including the rules of any program the minor is directed to attend, or any circumstances specified in Section 793, the prosecuting attorney or the probation department, or the court on its own, may make a motion to the court for entry of

judgment and the court shall render a finding that the minor is a ward of the court pursuant to Section 602 for the offenses specified in the original petition and shall schedule a dispositional hearing.

(5) An explanation of record retention and disposition resulting from participation in the deferred entry of judgment program and the minor's rights relative to answering questions about his or her arrest and deferred entry of judgment following successful completion of the program.

(6) A statement that if the minor fails to comply with the terms of the program and judgment is entered, the offense may serve as a basis for a finding of unfitness pursuant to subdivision (d) of Section 707, if the minor commits two subsequent felony offenses.

(b) If the minor consents and waives his or her right to a speedy jurisdictional hearing, the court may refer the case to the probation department or the court may summarily grant deferred entry of judgment if the minor admits the charges in the petition and waives time for the pronouncement of judgment. When directed by the court, the probation department shall make an investigation and take into consideration the defendant's age, maturity, educational background, family relationships, demonstrable motivation, treatment history, if any, and other mitigating and aggravating factors in determining whether the minor is a person who would be benefited by education, treatment, or rehabilitation. The probation department shall also determine which programs would accept the minor. The probation department shall report its findings and recommendations to the court. The court shall make the final determination regarding education, treatment, and rehabilitation of the minor.

(c) A minor's admission of the charges contained in the petition pursuant to this chapter shall not constitute a finding that a petition has been sustained for any purpose, unless a judgment is entered pursuant to subdivision (b) of Section 793.

792. The judge shall issue a citation directing any custodial parent, guardian, or foster parent of the minor to appear at the time and place set for the hearing, and directing any person having custody or control of the minor concerning whom the petition has been filed to bring the minor with him or her. The notice shall in addition state that a parent, guardian, or foster parent may be required to participate in a counseling or education program with the minor concerning whom the petition has been filed. The notice shall explain the provisions of Section 170.6 of the Code of Civil Procedure. Personal service shall be made at least 24 hours before the time stated for the appearance.

793. (a) If it appears to the prosecuting attorney, the court, or the probation department that the minor is not performing satisfactorily in the assigned program or is not complying with the terms of the minor's probation, or that the minor is not benefiting from education, treatment, or rehabilitation, the court shall lift the deferred entry of judgment and schedule a dispositional hearing. If after accepting deferred entry of judgment and during the period in which deferred entry of judgment was granted, the minor is convicted of, or declared to be a person described in Section 602 for the commission of, any felony offense or of any two misdemeanor offenses committed on separate occasions, the judge shall enter judgment and schedule a dispositional hearing. If the minor is convicted of, or found to be a person described in Section 602, because

of the commission of one misdemeanor offense, or multiple misdemeanor offenses committed during a single occasion, the court may enter judgment and schedule a dispositional hearing.

(b) If the judgment previously deferred is imposed and a dispositional hearing scheduled pursuant to subdivision (a), the juvenile court shall report the complete criminal history of the minor to the Department of Justice, pursuant to Section 602.5.

(c) If the minor has performed satisfactorily during the period in which deferred entry of judgment was granted, at the end of that period the charge or charges in the wardship petition shall be dismissed and the arrest upon which the judgment was deferred shall be deemed never to have occurred and any records in the possession of the juvenile court shall be sealed, except that the prosecuting attorney and the probation department of any county shall have access to these records after they are sealed for the limited purpose of determining whether a minor is eligible for deferred entry of judgment pursuant to Section 790.

794. When a minor is permitted to participate in a deferred entry of judgment procedure, the judge shall impose, as a condition of probation, the requirement that the minor be subject to warrantless searches of his or her person, residence, or property under his or her control, upon the request of a probation officer or peace officer. The court shall also consider whether imposing random drug or alcohol testing, or both, including urinalysis, would be an appropriate condition of probation. The judge shall also, when appropriate, require the minor to periodically establish compliance with curfew and school attendance requirements. The court may, in consultation with the probation department, impose any other term of probation authorized by this code that the judge believes would assist in the education, treatment, and rehabilitation of the minor and the prevention of criminal activity. The minor may also be required to pay restitution to the victim or victims pursuant to the provisions of this code.

795. The county probation officer or a person designated by the county probation officer shall serve in each county as the program administrator for juveniles granted deferred entry of judgment and shall be responsible for developing, supervising, and monitoring treatment programs and otherwise overseeing the placement and supervision of minors granted probation pursuant to the provisions of this chapter.

SEC. 30. Section 827.1 of the Welfare and Institutions Code, as added by Chapter 422 of the Statutes of 1996, is amended and renumbered to read:

~~827.1.~~ *827.2. (a)* Notwithstanding Section 827 or any other provision of law, written notice that a minor has been found by a court of competent jurisdiction to have committed any felony pursuant to Section 602 shall be provided by the court within seven days to the sheriff of the county in which the offense was committed and to the sheriff of the county in which the minor resides. Written notice shall include only that information regarding the felony offense found to have been committed by the minor and the disposition of the minor's case. If at any time thereafter the court modifies the disposition of the minor's case, it shall also notify the sheriff as provided above. The sheriff may disseminate the information to other law enforcement personnel upon request, provided that he or she reasonably believes that the release of this information is generally relevant to the prevention or control of juvenile crime.

*(b)* Any information received pursuant to this section shall be received in confidence for the limited law enforcement purpose for which it was provided and shall not be further disseminated except as provided in this section. An intentional violation of the confidentiality provisions of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500).

*(c) Notwithstanding subdivision (a) or (b), a law enforcement agency may disclose to the public or to any interested person the information received pursuant to subdivision (a) regarding a minor 14 years of age or older who was found by the court to have committed any felony enumerated in subdivision (b) of Section 707. The law enforcement agency shall not release this information if the court for good cause, with a written statement of reasons, so orders.*

SEC. 31. Section 827.5 of the Welfare and Institutions Code is amended to read:

827.5. Notwithstanding any other provision of law except Sections 389 and 781 of this code and Section 1203.45 of the Penal Code, a law enforcement agency may disclose the name of any minor 14 years of age or older taken into custody for the commission of any serious felony, as defined in subdivision (c) of Section 1192.7 of the Penal Code, and the offenses allegedly committed, upon the request of interested persons,~~if a hearing has commenced that is based upon a petition that alleges that the minor is a person within the description of Section 602~~ *following the minor's arrest for that offense.*

SEC. 32. Section 827.6 of the Welfare and Institutions Code is amended to read:

827.6. ~~(a) Notwithstanding any other provision of law, the presiding judge of the juvenile court may authorize a law enforcement agency to disclose only the name and other information necessary to identify a minor who is lawfully sought for arrest as a suspect in the commission of any felony listed in subdivision (b) of Section 707 where the disclosure is imperative for the apprehension of the minor. The court order shall be solely for the limited purpose of enabling law enforcement to apprehend the minor, and shall contain the exact nature of the data to be released. In determining whether to authorize the release of information pursuant to this section, the court shall balance the confidentiality interests of the minor under this chapter, the due diligence of law enforcement to apprehend the minor prior to the filing of a petition for disclosure, and public safety interests raised by the facts of the minor's case.~~

(b) When seeking an order of disclosure pursuant to this section, in addition to any other information requested by the presiding judge, a law enforcement agency shall submit to the court a verified declaration and any supporting exhibits indicating the probable cause for the lawful arrest of the minor, efforts to locate the minor, including, but not limited to, persons contacted, surveillance activity, search efforts, and any other pertinent information, all evidence regarding why the order is critical, including a minor's danger to himself or herself, the minor's danger to others, the minor's flight risk, and any other information indicating the urgency for the court order.

*A law enforcement agency may release the name, description, and the alleged offense of any minor alleged to have committed a violent offense, as defined in subdivision (c) of Section 667.5 of the Penal Code, and against whom an arrest warrant*

*is outstanding, if the release of this information would assist in the apprehension of the minor or the protection of public safety. Neither the agency nor the city, county, or city and county in which the agency is located shall be liable for civil damages resulting from release of this information.*

SEC. 33. Section 828.01 of the Welfare and Institutions Code is repealed.

~~828.01. (a) Notwithstanding any other provision of law, a law enforcement agency may release the name of, and any descriptive information about, a minor, 14 years of age or older, and the offenses allegedly committed by that minor, if there is an outstanding warrant for the arrest of that minor for an offense described in paragraph (1) of subdivision (c) of Section 707. Any releases made pursuant to this section shall be reported to the presiding judge of the juvenile court.~~

(b) This section shall remain in effect only until January 1, 2000, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2000, deletes or extends that date.

SEC. 34. Section 1732.6 of the Welfare and Institutions Code is amended to read:

1732.6. *(a)* No minor shall be committed to the Youth Authority when he or she is convicted in a criminal action for an offense described in Section 667.5 or subdivision (c) of Section 1192.7 of the Penal Code and is sentenced to incarceration for life, an indeterminate period to life, or a determinate period of years such that the maximum number of years of potential confinement when added to the minor's age would exceed 25 years. ~~In~~ *Except as specified in subdivision (b), in* all other cases in which the minor has been convicted in a criminal action, the court shall retain discretion to sentence the minor to the Department of Corrections or to commit the minor to the Youth Authority.

*(b) No minor shall be committed to the Youth Authority when he or she is convicted in a criminal action for:*

(1) An offense described in subdivision (b) of Section 602, or

(2) An offense described in paragraphs (1), (2), or (3) of subdivision (d) of Section 707, if the circumstances enumerated in those paragraphs are found to be true by the trier of fact.

(3) An offense described in subdivision (b) of Section 707, if the minor had attained the age of 16 years of age or older at the time of commission of the offense.

*(c)* Notwithstanding any other provision of law, no person under the age of 16 years shall be housed in any facility under the jurisdiction of the Department of Corrections.

SEC. 35. INTENT. In enacting Section 4 of this initiative, adding subdivision (i) to Section 186.22 of the Penal Code, it is the intent of the people to reaffirm the reasoning contained in footnote 4 of In re Lincoln J., 223 Cal.App.3d 322 (1990) and to disapprove of the reasoning contained in People v. Green, 227 Cal.App.3d 693 (1991) (holding that proof that "the person must devote all, or a substantial part of his or her efforts to the criminal street gang" is necessary in order to secure a conviction under subdivision (a) of

Section 186.22 of the Penal Code).

SEC. 36. INTENT. In enacting Section 11 of this initiative (amending Section 190.2 of the Penal Code to add intentional gang-related murders to the list of special circumstances, permitting imposition of the death penalty or life without the possibility of parole for this offense), it is not the intent of the people to abrogate Section 190.5 of the Penal Code. The people of the State of California reaffirm and declare that it is the policy of this state that the death penalty may not be imposed upon any person who was under the age of 18 years at the time of the commission of the crime.

SEC. 37. INTENT. It is the intent of the people of the State of California in enacting this measure that if any provision in this act conflicts with another section of law which provides for a greater penalty or longer period of imprisonment that the latter provision shall apply, pursuant to Section 654 of the Penal Code.

SEC. 38. SEVERABILITY. If any provision of this act, or part thereof, is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected, but shall remain in full force and effect, and to this end the provisions of this act are severable.

SEC. 39. AMENDMENT. The provisions of this measure shall not be amended by the Legislature except by a statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, or by a statute that becomes effective only when approved by the voters.

SENATE COMMITTEE ON Public Safety
Senator Bruce McPherson, Chair A
2001-2002 Regular Session B

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AB 1838 (Hertzberg) 8
As Amended March 7, 2002
Hearing date: June 18, 2002
Penal Code (URGENCY)
JM:br

WEAPONS OF MASS DESTRUCTION - ADDITIONAL CRIMES AND PENALTIES

HISTORY

Source: Los Angeles County District Attorney

Prior Legislation: AB 140 (Hertzberg-Alarcon) - Ch. 573, Stats. 1999

Support: Riverside Sheriff's Association; Association for Los Angeles Deputy Sheriffs; Los Angeles Police Protective League; Peace Officers Research Association of California; California State Sheriffs' Association; California Highway Patrol; Attorney General; California District Attorneys Association (co-sponsor)

Opposition:American Civil Liberties Union (unless amended to be consistent with SB 1287 (Alarcon))

[NOTE: THIS ANALYSIS REFLECTS AMENDMENTS DISCUSSED AMONG THE SPONSOR, COMMITTEE STAFF, AND REPRESENTATIVES OF THE AUTHOR'S OFFICE. THESE AMENDMENTS WILL CONFORM THIS BILL TO SB 1287 (ALARCON) AS TO THE SECTIONS SHARED BY THE TWO BILLS.]

KEY ISSUES

(More)



http://info.sen.ca.gov/pub/01-02/bill/asm/ab_1801-1850/ab_1838_cfa_20020618_141005_sen_comm.html

SHOULD ANY MURDER COMMITTED THROUGH USE OF A WMD BE DEFINED AS FIRST DEGREE?

SHOULD A CONVICTION FOR USE OF A WEAPON OF MASS DESTRUCTION (WMD) BE CLASSIFIED AS A SERIOUS AND A VIOLENT FELONY?

(CONTINUED)

SHOULD THE DEFINITION OF A WEAPON OF MASS DESTRUCTION (WMD) INCLUDE RESTRICTED BIOLOGICAL AGENTS, AIRCRAFT, VESSELS OR SPECIFIED VEHICLES WHEN USED AS DESTRUCTIVE WEAPONS?

SHOULD "USED DESTRUCTIVE WEAPON" BE DEFINED TO MEAN USED WITH INTENT TO CAUSE WIDESPREAD GREAT BODILY INJURY (GBI) OR DEATH BY A FIRE OR EXPLOSION, RELEASE OF CHEMICAL, BIOLOGICAL, NUCLEAR OR RADIOACTIVE AGENT?

SHOULD THE CRIME OF USE OF A WMD AGAINST ANIMALS OR CROPS BE AMENDED TO INCLUDE SEED AND SEED STOCK?

SHOULD PENALTIES FOR UNLAWFUL POSSESSION, DEVELOPMENT, TRANSFER, ETC. OF A WMD BE RAISED FROM 3, 6 OR 9 YEARS IN PRISON, TO 4, 8, OR 12 YEARS?

SHOULD THE CRIME OF USE OF A WMD TO DAMAGE OR DISRUPT THE FOOD OR WATER SUPPLY BE EXTENDED TO COVER A "SOURCE OF DRINKING WATER" AND PENALTIES RAISED FROM 4, 8, OR 12 YEARS IN PRISON, TO 5, 8 OR 12 YEARS?

SHOULD THE CRIME OF POSSESSING ANY RESTRICTED BIOLOGICAL AGENT BE EXTENDED TO A MICROORGANISM, VIRUS, INFECTIOUS SUBSTANCE, OR BIOLOGICAL PRODUCT THAT HAS THE SAME, OR SUBSTANTIALLY SIMILAR, CHARACTERISTICS TO RESTRICTED AGENTS UNDER EXISTING LAW (PEN. CODE 11418.5), SUCH AS ANTHRAX, EBOLA, PLAGUE, SMALLPOX, BOTULINUM TOXINS, ETC?

SHOULD THE LEGISLATURE CREATE A NEW "WOBBLER" - DRAWN FROM THE CRIME

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OF PLACING A FACSIMILE BOMB - FOR SENDING OR PLACING A FALSE OR FACSIMILE WMD THAT CAUSES SUSTAINED FEAR, AND SHOULD SUCH A CRIME BE

A MISDEMEANOR IN THE ABSENCE OF SUSTAINED FEAR?

SHOULD CHANGES BE MADE IN DEFINITIONS IN AND ELEMENTS OF CRIMES RELATED TO MAKING CREDIBLE THREAT TO USE A WMD AND THE CRIME CREATED BY THIS BILL OF PLACING OR SENDING A FACSIMILE WMD - TO EVACUATION OF A RESIDENCE, SCHOOL OR BUSINESS, IN ADDITION TO THE EXISTING REFERENCE TO ISOLATION OR QUARANTINE?

PURPOSE

The purposes of this bill are to (1) define use of a WMD as a serious and violent felony; (2) define murder by use of a WMD as first degree murder; (3) require a sentence of life without parole (LWOP) for use of a WMD in a form that may cause widespread death or injury and that causes death or great bodily injury to any person; (4) expand the definitions concerning weapons of mass destruction (WMD), particularly as concerns water and food supplies; (5) increase penalties for use of a WMD; (6) expand the crime of possessing restricted biological agents and infectious substances; (7) expand and clarify the crime of making a credible threat to use a WMD; and (8) create the crime of making a false WMD report or placing a facsimile WMD - a crime similar to an existing law concerning false bombs.

Homicide and Related Provisions

Existing law defines murder as the unlawful killing of a human being with malice aforethought. (Pen. Code 187.) Malice is express "when there is manifested a deliberate intentionally" . . . to kill another person. Malice is implied when the killing resulted from an intentional act; the natural consequences of the act are dangerous to human life; and the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. (People v. Dellinger (1989) 49 Cal.3d 1212, 1222.)

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Existing law provides that all murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape,

carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or torture, specified sex offenses or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree. (Penal Code 189.)

Existing law provides that murder in the first degree (deliberate and premeditated murder) is punished by death or life in prison without possibility of parole where special circumstances are shown. Otherwise, first degree murder is punished by a prison sentence of 25 years to life. Murder in the second degree is generally punished by a term of 15 years to life in state prison or by a term of life without parole if the defendant has previously been convicted of murder or the murder of a peace officer. (Pen. Code 190, 190.05, 190.2.)

Existing law includes a lengthy list of special circumstances applicable to first-degree murder. These factors include law enforcement or firefighter victim, multiple victims, crime witness victim, victim was juror, judge, prosecutor, government official, lying in wait, delivery of destructive device, financial gain, race, nationality, etc. of victim. (Pen. Code 190.2.)

This bill defines any murder perpetrated by means of a WMD as first degree murder.

This bill provides that use of a WMD in a form that may cause widespread great bodily injury and death, and which does cause great bodily injury or death, shall be punished by imprisonment in the state prison for life without the possibility of parole.

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Serious and Violent Felonies

Existing law defines specified felonies as serious or violent, with various consequences flowing from such a definition or designation. The list of serious felonies is set out Penal Code section 1192.7; violent felonies are found in Penal Code section 667.5, subdivision (c).

? Any serious or violent felony, as defined on March 8, 2002 - the effective date of Proposition 21 of the March 2000 Primary Election - constitute qualifying prior convictions

under the Three Strikes law. Felonies defined as serious or violent past that date will not constitute prior strikes unless and until the applicable provisions from Proposition 21 are amended.

? Enhancement of 5 years in serious felony sentence for every prior serious felony conviction. (Pen. Code 667, subd. (a).)

? Enhancement of 3 years in violent felony sentence for each prior violent felony conviction. (Pen. Code 667.5, subd. (a).)

? Inmates convicted of violent felonies may earn no more than 15% sentencing credit to reduce their prison terms.

? Plea bargaining is limited for serious felonies to cases in which the prosecution may be unable to obtain or present sufficient evidence or where the bargain would not change the sentence the defendant would otherwise receive. (Pen. Code 1192.7, subds (a)-(b).)

? The serious and violent felony lists set forth in Penal Code sections 1192.7 and 667.5 is employed in a number of other code sections. The following examples illustrate the use of this list for multiple purposes:

Prohibition from employment by a public or private

(More)



elementary or high school
Prohibition from employment by any school district
Increased scrutiny in restraining orders
Denial of specified teaching credentials
Limitation of probation in certain cases
Limitation of the application of Proposition 36 in certain cases
Specified distributions of bail forfeitures
Limitations on psychiatric placements
Restrictions on bail and non-bail release
Parole restrictions
Restrictions on placement of children in dependency cases
5-year enhancements in current serious felony sentence for each prior
3-year enhancement in current violent felony sentence for each prior

Sentence credits limited to 15% for inmates convicted of violent crimes

This bill adds offenses involving the use of a WMD to the list of serious and violent crimes.

Weapons of Mass Destruction - Definitions

Existing law defines "weapon of mass destruction" (WMD) to include chemical warfare agents, weaponized biological warfare or biological agents, nuclear agents, radiological agents, or the intentional release of industrial agents as a weapon. The law defines each category of weapon thus:

Chemical warfare agents include Tabun, Sarin, Soman, Choking Agents, Phosgene and Diphosgene, Blood Agents, Hydrogen Cyanide, Cyanogen Chloride, Arsine, and Blister Agents.
Weaponized Biological agents include weaponized pathogens such as bacteria, viruses, yeasts, fungi and rickettsia.
Nuclear or radiological agents include any improvised nuclear device (IND), radiological dispersal device (RDD), or any simple radiological dispersal device (SRDD).
The intentional release of industrial agents is use of a WMD

(More)



if committed with intent to harm and the use of such agent risks death, illness or serious injury, or endangers environment. (Pen. Code 11419.)

Existing law defines weaponization as "the deliberate processing, preparation packaging or synthesis of any substance for use as a weapon or munition. 'Weaponized agents' are those agents or substances prepared for dissemination through any explosive, thermal, pneumatic, or mechanical means." (Pen. Code 11417.)

This bill expands the definition of WMD to include additional biological agents and an aircraft, vessel or vehicle (as defined in Veh. Code 34500) used as a weapon. Vehicle Code section 34500 generally describes large commercial vehicles.

This bill - as suggested to be amended and as set out in SB 1287 (Alarcon) which passed this Committee in April - defines "used as a destructive weapon" as the use with the intent of causing widespread death or bodily injury by a fire or explosion, or release of a chemical, biological, nuclear or radioactive agent.

Use of a WMD - Definitions and Penalties

Existing law provides that a person who uses against another person a weapon of mass destruction (WMD) in a form that could cause widespread disabling injury or illness shall be punished by life in prison. (Pen. Code 11418.)

Existing law provides that a person who uses a weapon of mass destruction (WMD) in a form that could cause widespread damage to, or disruption of, the water or food supply is guilty of a felony and shall be imprisoned for 4, 8, or 12 years and/or fined up to $100,000. (Pen. Code 11418.)

Existing law provides that any person who uses a weapon of mass destruction in a form that may cause widespread and significant damage to public natural resources, including coastal waterways and beaches, public parkland, surface waters, ground water, and wildlife, is guilty of a felony and shall be punished by

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imprisonment in the state prison for 3, 4, or 6 years. (Pen. Code 11418.)

Existing law provides that a person who uses recombinant technology to create new or more virulent pathogens for the purposes specified in this section (to use against humans, crops, etc.) is guilty of an alternate felony/misdemeanor, punishable by up to one year in the county jail, or for 3, 6 or 9 years in state prison and/or a fine of up to $250,000. (Pen. Code 11418.)

Existing law provides that any person who unlawfully possesses, develops, acquires, etc., any WMD, is guilty of a felony punishable in state prison for 3, 6, or 9 years. These penalties are 4, 8, or 12 years in state prison if the defendant has been previously convicted of crimes such as the following: Ethnic/religious hate-type crimes, such as terrorizing with Nazi symbols, cross burning, arson of a health facility, bookstore or property owned by a person of a targeted race/ethnicity; exploding or attempting to explode a destructive device or explosive in specified locations with the intent to terrorize; paramilitary organizations practicing with weapons, or training another in explosives or destructive devices; and various other explosives device crimes. (Pen. Code 11411, 11412, 11413, 11460, 12303.1, 12303.2 and 12303.3.) (Pen. Code 11418.)

Existing law provides that a person or entity possessing any "restricted biological agent" (designated, particularly dangerous agents such as Ebola, anthrax, botulism, lassa fever virus, equine encephalitis, smallpox, etc.) shall be punished by imprisonment for 4, 8 or 12 years, and/or a full fine of $250,000. (Pen. Code 11419.)

Existing law excludes the use of otherwise prohibited items by universities, research institutions, individuals, or hospitals registered with the Centers for Disease Control and Prevention utilizing the substances for prophylactic, protective or peaceful purposes. (Pen. Code 11419.)

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This bill - as suggested to be amended and as set out in SB 1287 (Alarcon) which passed this Committee in April - defines "used as a destructive weapon" as the use with the intent of causing widespread death or bodily injury by a fire or explosion, or release of chemical, biological, nuclear or radioactive agent.

This bill makes use of a WMD in a form that may cause widespread death or injury, and that actually causes death or injury to any person, punishable by life in prison without parole.

This bill increases penalties for possessing, developing, or manufacturing a WMD from 3, 6, or 9 years in state prison, to 4, 8, or 12 years.

This bill increases penalties for specified repeat WMD offenses from 4, 8, or 12 years in state prison, to 5, 10, or 15 years, and adds prior convictions for WMD crimes to the list of crimes that qualify as repeat offenses.

This bill increases penalties for using a WMD that causes widespread damage to or disruption of the food supply or drinking water from 4, 8, or 12 years in state prison, to 5, 8, or 12 years, and includes disruption of or damage to a "source of drinking water" to this crime.

This bill increases penalties for using biological advances to create new pathogens or more virulent forms of existing pathogens for a WMD, from a wobbler, punishable by one year in county jail, or 3, 6, or 9 years in state prison and/or a fine of up to $250,000, to a straight felony punishable by 4, 8, or 12 years in state prison and a $250,000 fine.

WMD Threats and Hoaxes

Existing law provides that a person who falsely makes a bomb report to police, fire officials, the media, transportation agents, etc. is guilty of an alternate felony-misdemeanor, punishable by up to one year in the county jail or in the state prison for 16 months, 2 years or 3 years. (Pen. Code 148.1.)

(More)



Existing law provides that any person who sends, gives or places a false or facsimile bomb, with intent to cause fear, is guilty of an alternate felony-misdemeanor, punishable by up to one year in the county jail or in the state prison for 16 months, 2 years or 3 years. (Pen. Code 148.1.)

Existing law provides that any person who makes a credible threat to cause great bodily injury or death to the person to whom the threat was made, or a member of the threatened person's immediate family, is guilty of an alternate felony/misdemeanor, punishable by up to one year in the county jail or in the state prison for 16 months, 2 years or 3 years. (Pen. Code 422.)

Existing law provides that a person who makes a credible threat to use a WMD such that threatened victims must undergo decontamination or isolation shall be imprisoned for 3, 4, or 6 years and/or fined up to $250,000. (Pen. Code 11418.5.)

This bill creates a new crime to send or place a facsimile of a WMD to a person or place with the intent to cause fear, punishable by up to 1 year in county jail, or 16 months, 2, or 3 years in state prison, and a fine of up to $250,000. (It is suggested that this provision be amended to conform to SB 1287 by making the sending of a facsimile WMD with intent to cause fear a misdemeanor. The crime would be an alternate felony-misdemeanor if victim(s) experience "sustained fear.")

This bill expands the application of the crime of making an unequivocal, credible and immediate threat to use a WMD. The bill does so by not defining 'sustained fear' to mean the following: Evacuation of any building by any occupant, evacuation of a school by any student or employee, evacuation of a home by any resident/occupant, any decontamination, isolation or quarantine effort, or any other action taken in direct response to the threat to use a WMD. (It is suggested that this provision be amended to require "sustained fear" as defined otherwise in the bill. This amendment would conform

this provision to the equivalent provision in SB 1287 (Alarcon). SB 1287 passed this Committee in April, 2002.)

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COMMENTS

1. Need for This Bill

According to the author:

> Current law penalizes any persons (with specified exceptions) who possess, develops, manufactures, produces, transfers, acquires or attains any weapon of mass destruction. It also penalizes any person who uses or threatens to use a weapon of mass destruction against another person, an animal, the food or water supply, crops or public natural resources. It is also a crime to maliciously possess or to expose any person to a false or facsimile bomb whether verbally, in writing or electronically. Current law states that a conspiracy to commit a crime involving using a weapon of mass destruction is punishable equal to actual commission of the crime.
>
> This bill will penalize the use of a weapon of mass destruction against major infrastructure, landmarks, or economic activity. It penalizes this type of threat that causes widespread fear, business closures, or transportation disruption. Under specified circumstances it makes it a crime to possess or to expose any other person to a facsimile weapon of mass destruction. In addition, this bill specifies a minimum penalty for conspiracy to commit these crimes.

2. Related Legislation

A number of Senate terrorism bills within the jurisdiction of this Committee are pending in the Legislature. These include SB 1267 (Battin) - which was amended and passed Assembly Public Safety on June 11, 2000; SB 1287 (Alarcon) - set for hearing on June 25, 2002 in Assembly Public Safety; and SB 1686 (Margett) - which failed in Senate Public Safety on April 30, 2002, with reconsideration granted. SB 1267 would require defendants in hoax cases to pay the costs of emergency response. SB 1686

(More)



would create a new crime and sentencing scheme, based on the gang statutes, for terrorism related crimes. SB 1287 was amended in this Committee to include many of the provisions of this bill, with relatively minor drafting differences, but without the murder, serious felony and violent felony provisions. It is suggested that this bill be amended to be consistent with SB 1287, at least in the provisions shared by the two bills. Discussions with the author's office and the sponsor indicate that the author will likely accept the suggestions of Committee staff.

3. Pressing Concerns for Meeting the Threat of Terrorism

Testimony before the Committee on Anti-Terrorism Policy at a March 11, 2002, hearing arguably established that the most pressing needs for California in preparing for the threat of terrorism is the expansion of the public health system, additional training for first-responders and coordination of communication and intelligence among various police and other public safety entities.

4. Prior Legislation Creating the Act Amended by This Bill and SB 1287 (Alarcon)

In 1999, Senator Alarcon and Assembly Member Hertzberg carried individual bills creating the California law specifically defining weapons of mass destruction. The bills were combined in the Senate Public Safety Committee as AB 140 - Ch. 573, Stats. 1999. The bill was tombstoned the "Hertzberg-Alarcon California Prevention of Terrorism Act."

In this session (2001-2002) Mr. Hertzberg and Senator Alarcon have introduced this bill (AB 1838) and SB 1287 respectively to amend the Hertzberg-Alarcon Act and to make related changes.

5. First-Degree Murder Provisions

Most of the provisions in AB 1838 amend existing sections in the Hertzberg-Alarcon Prevention of Terrorism Act. However,

(More)

defining murder committed by use of a WMD as first-degree murder and defining use of a WMD as a serious and violent felony (Comment # 8) are new provisions not found in the Act.

The most common form of first-degree murder is deliberate and premeditated murder. However, a murder committed by means of a destructive device is first-degree murder. It appears that the rationale for defining murder by means of a WMD is that a destructive device and a WMD are very similar. Further, it may be argued that because a WMD is defined as a weapon that may cause widespread death or destruction, murder by use of a WMD is a more serious crime than murder by a destructive device.

The most important consequence of designating a murder as murder in the first-degree is that such crimes may be punished by the death penalty if the prosecutor proves specified special circumstances. The list of special circumstances is long. It is very likely that defendants convicted of murders by means of a WMD would be eligible for the death penalty in many, if not most, cases. For example, a murder committed because of the victim's race, nationality, religion, etc. constitutes special circumstances murder.

SHOULD MURDER BY USE OF A WMD BE DEFINED AS MURDER IN THE FIRST-DEGREE?

SHOULD A MURDER PERPETRATED BY USE OF A WMD BE PUNISHABLE BY THE DEATH PENALTY IF SPECIAL CIRCUMSTANCES ARE PROVED?

6. Life without Parole for Use of WMD Causing Death or GBI

In existing law using a WMD in a form that may cause widespread death, illness or injury is punishable by life in prison, which includes a minimum term before parole eligibility of 7 years. This bill requires a punishment of life in prison without the possibility of parole where a defendant is convicted of the use of a WMD in a form that may be widely lethal or injurious if any person actually suffers great bodily injury or death. Under California law, the penalty of life in prison without parole is, with rare exceptions, reserved for murder committed with special

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circumstances. Such crimes are generally also eligible for the death penalty.

? Crimes Carrying Penalty of Life Without Parole

First-degree murder with special circumstances
Explosion of destructive device causing death
Infliction of gbi by person with 3 prison terms for violent crimes
Treason/interference with national defense causing death or gbi
Kidnapping for ransom where victim suffers death/gbi (or intentionally subjected thereto)
Train wrecking (intentional)

Life without parole as a punishment for train wrecking, interference with national defense and kidnapping for ransom may be rather anachronistic in California law. These crimes may have arisen from particular events or circumstances and have been seldom charged. For example, the penalty of life without parole for kidnapping for ransom in which the victim suffers death or great bodily injury developed as a result of the infamous kidnapping of aviator Charles Lindbergh's baby. Many states throughout the county passed similar laws in response to public outcry. The penalty of life without parole for hindering the national defense so as to cause injury or death was created during World War II and the early Cold War. (People v. Gordon (1944) 62 Cal.App.2d 268; Mil. & Vet. Code 1670 - enacted 1951.) States across the county passed forms of a "Model Sabotage Act," in a response to World War II dangers that was similar to the response to the recent attack on the World Trade Center.

The issue of whether such a penalty is appropriate for the use of a WMD turns on whether or not the crime is defined so as to apply to truly serious conduct, such as committed by terrorists. It appears that no appellate decisions have interpreted phrases such as "used in a form that may cause widespread great bodily injury or death."

(More)



It should be noted that "great bodily injury" is defined rather broadly in California law. Great bodily injury is any injury

that is not trivial or transitory. It can be an injury requiring sutures, a broken limb, etc. Arguably, this concern is balanced by the fact that the bill requires that the WMD be used in a form that may cause widespread great bodily injury or death. Thus, where a WMD is used in such particularly dangerous form, although actual injuries are relatively limited, the result is merely fortuitous. Such a defendant's culpability is equivalent to a person who does cause much more damage.

SHOULD USE OF A WMD IN A FORM THAT COULD CAUSE GBI OR DEATH AND THAT ACTUALLY RESULTS IN GBI OR DEATH BE TREATED AS SERIOUSLY AS PREMEDITATED MURDER WITH SPECIAL CIRCUMSTANCES?

IS GREAT BODILY INJURY SUFFERED BY AT LEAST ONE VICTIM SUFFICIENT HARM TO JUSTIFY A TERM OF LWOP FOR USE OF A WMD IN A FORM THAT MAY CAUSE WIDESPREAD DEATH OR GBI?

SHOULD THE LWOP PROVISION BE LIMITED TO CASES WHERE A VICTIM DIES, NOT WHERE A PERSON SUFFERS GBI?

7. Use and Possession of WMD (Other than LWOP-eligible Convictions)

a. Used as a Destructive Weapon - Defined

AB 1838 includes the following new definition so as to expand the law concerning WMDs: "'Used as a destructive weapon' means to use with the intent of causing a fire or explosion, a release of chemical, biological, or nuclear or radioactive agent that may cause widespread great bodily injury or death." According to discussions with the sponsor of AB 1838 - the Los Angeles County District Attorney - this definition is designed to conduct similar or equivalent to the attack on the World Trade Center. Under this definition, a WMD is defined by the harm intended or caused through use of the weapon, rather than by listing specific targets.

The parallel provision in SB 1287 (Alarcon) was amended to

(More)



define "used as a destructive weapon" as used "with the intent of causing widespread great bodily injury or death by causing a fire, explosion, or the release of a chemical biological or radioactive agent." It is suggested and proposed that AB 1838 be amended to conform to this provision in SB 1287. This amendment would define the crime in terms of the defendant's mens rea (criminal intent) and not possibly fortuitous or

accidental consequences of less egregious intent.

b. Use of Aircraft, Vessels or Vehicles as WMDs

This bill extends the WMD use crimes to an aircraft, vessel or vehicle, as described in Vehicle Code section 34500. This Vehicle Code section describes trucks designed to haul freight, as well as busses, trailers and other commercial vehicles. A specified mode of transportation becomes a WMD when "used as a destructive weapon." As noted above in "a" it is suggested that this provision to be amended to provide that the defendant's intent would be to cause widespread death or great bodily injury by means of a fire, explosion, etc.

c. Penalty Increases for Use of a WMD

AB 1838 increases prison terms for certain WMD use crimes, such as use of a WMD with specified prior convictions. Further, while current law makes use of a WMD in a form that may cause widespread disruption of the food or water supply a 4, 8 or 12-year felony, AB 1838 specifies that affected water supplies are "source [s] of drinking water" as defined in Health and Safety Code section 25249.11. AB 1838 expands the crime of using a WMD against the food supply, crops or animals to include "seed used seed stock . . ." (AB 1838, as amended 3/07/02, p. 12, lines 28-35.)

AB 1838, as proposed to be amended in Committee, would expand the crime of possessing a restricted biological agent (a 4, 8, or 12-year felony) to include agents that have similar or identical properties to those set out in existing law. This will allow prosecution in cases where a person possesses a

(More)



particularly dangerous substance that is not specifically included in the law. This will avoid the necessity of constantly amending the governing law as variations on existing restricted biological agents are developed.

Note : As the bill was amended on March 7, 2000, the provision concerning new forms of restricted biological agents arguably covers relatively innocuous material, including common cold viruses, household weed killers, cleaning products, etc. Discussions with the sponsor and the author's office have confirmed that this provision will be limited as described in the paragraph above (and so as to conform to SB 1287

(Alarcon).

d. Suggested Amendment to Penal Code Section 11418, subd. (d)

The bill currently provides that a person who uses recombinant technology or other biological advance to create new or more virulent pathogens "for the purposes specified in this section" shall be subject to a prison term of 4, 8 or 12 years. However, section 11418 includes different forms and levels of prohibited use. It is suggested that subdivision (b) or Penal Code section 11418 (p. 13, lines 1-6) be amended to distinguish between use of a WMD against persons and other circumstances. Punishment for development of new pathogens for use other than against persons - such as food and water supply disruption, should be consistent with the penalties for actual use. With this amendment, the prison triad for developing new pathogens other than for use against persons would be would be 3, 6 and 9 years. The fines for development of new pathogens would remain above those for use, as those persons with ability to develop new pathogens may have more financial resources than persons who might use a WMD. SB 1287 (Alarcon) was amended in this manner and amendment of this bill would make these bills consistent.

8. Threats to Use WMD and WMD Hoaxes

AB 1838 creates a crime for sending or placing a facsimile WMD

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with the intent to cause fear. This new crime is an alternate felony-misdemeanor, with a very large fine of $250,000. This crime closely tracks an existing crime for false or facsimile bomb threats found in Penal Code section 148.1. From discussions with the sponsor of AB 1838, it appears that the new WMD hoax crime was modeled on the bomb threats statute because police and prosecutors are familiar with the existing crime. Further, it was believed that since the conduct in both crimes is similar, the penalties should be similar.

This provision in SB 1287 was amended to provide that the crime can be a wobbler where sustained fear, as defined, is produced by the crime. In other cases, the crime would be a misdemeanor. It is suggested that AB 1838 be amended to conform to SB 1287 in this regard.

AB 1838 also amends an existing WMD threat crime in Penal Code

section 11418.5. The existing threat crime was drawn from Penal Code section 422, which defines an alternate felony-misdemeanor for credible threats to kill or cause great bodily injury. Section 422 is applied for crimes similar to stalking and harassment.

AB 1838 amends the WMD credible threat crime to provide that a "statement" conveying a threat may be any form of communication, including conduct, as described in Evidence Code section 225. Existing law defines a credible threat to use a WMD as producing sustained fear and which results in an isolation or decontamination effort. The sponsor has stated that such a definition is too limited.

AB 1838 defines a credible threat to use a WMD as one producing "sustained fear." A separate subdivision defines sustained fear to include, but not be limited to, evacuation, isolation or decontamination. As proposed and suggested to be amended in Committee, the bill would be amended to remove an arguably overbroad reference to "any other action taken in direct response to the threat . . ." This is how the parallel provision in SB 1287 (Alarcon) reads.

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9. This Bill Defines Use of a WMD as a Serious or Violent Felony for Purposes Other than Defining Strikes

This bill expands the serious and violent felony lists to include any crime involving the use of a WMD, as defined in Penal Code section 11418, subdivisions (b)-(c). Pursuant to the enactment of Proposition 21 in the March 2000 Primary Election, only serious and violent felonies so defined or classified on March 8, 2000 constitute prior qualifying offenses under the Three Strikes law. (Pen. Code 667.1 and 1170.125.)

However, defining a crime as serious or violent has numerous consequences other than a Three Strikes sentence. The major criminal law consequences are these: Prison credit limit of 15%; sentence enhancement of 5 years in current case for each prior serious felony conviction, and 3 years in current case for each prior violent felony conviction, restrictions on plea bargaining and pre-trial release restrictions. Numerous employment restrictions apply to those with such felony convictions. See "Serious and Violent Felonies" section "Existing law" section above for more examples.

10. By Creating a New Felony for Facsimile WMDs, and by Eliminating a Misdemeanor for Developing Pathogens for WMD Use, the Bill Increases the Reach of the Three Strikes Law

This bill creates an alternate felony-misdemeanor ("wobbler") for sending/placing a facsimile or false WMD with the intent to cause sustained fear. The new felony for WMD hoaxes is drawn from a parallel crime covering bomb hoaxes. The creation of this new felony for WMD hoaxes, as is the case with any new felony, expands the reach of the Three Strikes law. Since the enactment of the Three Strikes law in 1994, a majority of the members of this Committee has been reluctant to create new felonies for conduct that does not involve violence.

Arguably, however, the fear from and response to a facsimile nuclear device, anthrax, ebola, etc., is equivalent to the harm

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from violent conduct. This may be particularly true in light of the terrorist attacks in September 2001. Persons exposed to facsimile WMDs often must undergo invasive medical care or prophylactic treatment with antibiotics such as CIPRO that cause harmful and debilitating side effects.

Further, the bill eliminates the misdemeanor option in existing law for developing new or more virulent pathogens for use as WMDs. Arguably, this change is consistent with the laws concerning WMDs and the policy of this Committee. Inherent in the definition of a WMD is that such a weapon may cause widespread death or injury. Use of a WMD is clearly violent conduct. A person who develops new and more virulent forms of pathogens for use as WMDs is arguably as culpable as a person who uses such weapons. In some cases, a new pathogen can be so dangerous that its development for use as a WMD is more dangerous than actual use of a less destructive device.

Three Strikes Law Summary

Under the Three Strikes law, a defendant with two prior serious or violent felonies must receive a term of at least 25 years to life in the sentence for the commission of any new felony, including identity theft (an alternate felony/misdemeanor). Where the defendant has a single prior serious or violent felony, he or she shall receive a doubled term in the sentence imposed upon conviction of any new felony.

Alternate Felony-Misdemeanors and Three Strikes

Where a defendant has been convicted of an alternate felony misdemeanor that has been charged and prosecuted by the District Attorney as a felony, the sentencing court has the discretion to deem the offense to be a misdemeanor pursuant to the decision of the Court in People v. Superior Court (Alvarez) (1996) 14 Cal.4th 968 and Penal Code section 17, subdivision (b), unless the court's action is arbitrary and contrary to substantial justice.

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Judicial Discretion to Dismiss a Strike is Limited

Where a defendant has been convicted of a straight felony, or where the court has declined to deem a wobbler to be a misdemeanor, the court's ability to ameliorate the severity of the Three Strikes law is much more limited. A court has discretion to dismiss one or more prior "strikes," but only where the defendant's record and the current conviction establish that the defendant should be treated as though he or she does not fall under the terms of the Three Strikes law. (People v. Superior Court (Romero) (1996) 13 Cal.4th 497-530-531; People v. Williams (1998) 17 Cal.4th 198.)

SHOULD THE LEGISLATURE CREATE A NEW WOBBLER - THEREBY EXPANDING THE THREE STRIKES LAW - FOR SENDING OR PLACING A FACSIMILE OR FALSE WMD WITH INTENT TO CAUSE SUSTAINED FEAR, SUCH AS BY CAUSING EVACUATIONS AND DECONTAMINATION?

SHOULD THE LEGISLATURE ELIMINATE THE MISDEMEANOR OPTION FOR DEVELOPING NEW OR MORE VIRULENT FORMS OF PATHOGENS FOR USE AS WMDs?

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11. Representative Federal Terrorism Provisions Complementary to California WMD Laws

The California law on WMDs was created in 1999 through AB 140 (Hertzberg-Alarcon) - Ch. 573, Stats. 1999. California WMD law was drawn from federal law. Some definitions are different in California law, but the state and federal schemes are largely consistent. Federal law does also include definitions of terrorism and mass transportation vehicles that inform the issues raised by this bill.

a. Federal Law Defining Terrorism

Federal law, including recent amendments from the "Patriot Act," defines "international terrorism" and "domestic terrorism" thus:

? Acts that "involve violent acts or acts dangerous to human life that are a violation of laws of the United States or any State . . ."

? And the acts are intended to do one or more of the following:

Intimidate or coerce a civilian population
Influence government policy by intimidation or coercion
Affect the conduct of a government by mass destruction, assassination, or kidnapping

International terrorism "occurs primarily outside the territorial jurisdiction of the United States, or transcend national boundaries . . ." Domestic terrorism occurs "primarily within the territorial jurisdiction of the United States." (18 U.S.C. 2331.)

b. Federal Law on Mass Transportation and Terrorism

Mass transportation means transportation by a conveyance that

(More)



provides regular and continuing general or special transportation to the publi and sightseeing transportation. (18 U.S.C. 1993(c)(6); 49 U.S.C. 5302(a)(7).)

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