

No. S277487

**IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner and Respondent,

v.

TONY HARDIN,

Defendant and Petitioner.

Second Appellate District, Division Seven, Case No. B315434
Los Angeles County Superior Court, Case No. A893110
The Honorable Juan Carlos Dominguez, Judge

**APPLICATION FOR PERMISSION TO FILE BRIEF OF
AMICUS CURIAE CATHERINE M. GROSSO AND
BRIEF OF AMICUS CURIAE CATHERINE M. GROSSO IN
SUPPORT OF DEFENDANT AND PETITIONER
TONY HARDIN**

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TO: THE HONORABLE PATRICIA GUERRERO, CHIEF
JUSTICE, AND TO THE HONORABLE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE STATE
OF CALIFORNIA:

Pursuant to California Rules of Court, rule 8.520,
Catherine M. Grosso respectfully requests leave of this Court to
file a Brief of Amicus Curiae in Support of Defendant and
Petitioner Tony Hardin.

Catherine M. Grosso is a professor of law at Michigan State
University College of law. Professor Grosso is an applied
empirical legal scholar whose interdisciplinary scholarship
examines the role of race and other extralegal factors in criminal
investigations, trials, and the administration of capital
punishment. She conducted analysis of jury selection and
charging and sentencing decisions. Her work has been published

in law reviews and peer review journals, and has been introduced in legal proceedings.

A primary issue before this Court is whether youthful offenders sentenced to life without parole (“LWOP”) for special circumstance murder are similarly situated to young adult offenders who are convicted of first-degree murder and sentenced to non-LWOP prison terms. Professor Grosso seeks to assist this Court in answering this question by providing her empirical analysis of these two populations. Professor Grosso and her colleagues have published two empirical studies analyzing data drawn from over 27,000 California murder and manslaughter convictions between 1978 and 2002. A central topic in her research has been the extent to which persons convicted of first-degree murder without special circumstances could have been charged and convicted of one or more special circumstances, and she has further refined her analysis to examine youthful offenders. Her findings demonstrate that virtually all offenders convicted of first-degree murder and sentenced to a non-LWOP term could have been charged and convicted of first-degree murder with special circumstances. Thus, by drawing on her unique experience and expertise regarding the application of California’s special circumstance provisions, Professor Grosso’s proposed amicus brief will assist this Court in deciding this case.

For these reasons, Catherine M. Grosso respectfully requests that the Brief of Amicus Curiae submitted concurrently with this application be filed and considered by the Court.

No party or counsel for a party authored the proposed amicus brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the proposed amicus brief. (Cal. Rules of Court, rules 8.200(c)(3), 8.487(e)(5).)

Dated: August 31, 2023

Respectfully submitted,

By: /s/ Michael Laurence
MICHAEL LAURENCE

Attorney for Amicus Curiae
CATHERINE M. GROSSO

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I. Introduction

The primary issue before this Court is whether youthful offenders sentenced to life without parole (“LWOP”) for special circumstance murders are similarly situated to young adult offenders who are convicted of first-degree murder, but sentenced to non-LWOP prison terms. In its Opening Brief, the State of California justifies the disparate treatment between the two categories of offenders by asserting that those sentenced to LWOP are more “culpable” and have committed “the most serious” crimes:

In enacting and preserving that exclusion, the Legislature reasonably could have decided that young adult offenders who have committed the most serious offenses are sufficiently culpable to warrant lifetime incarceration. Perhaps that decision is debatable as a matter of policy. As a constitutional matter, however, the Legislature acted permissibly in excluding young adult offenders convicted of crimes that—in the Legislature’s judgment—are the most serious.

(Opening Br. at 24 [footnote omitted].)

As the Court of Appeal recognized, the question of whether the culpability or seriousness of the crimes committed differentiates the two groups of offenders may be answered empirically: Does a statistical analysis of the two categories of

offenders demonstrate that those sentenced to LWOP have committed more serious offenses?¹

Analyzing data drawn from over 27,000 California murder and manslaughter convictions between 1978 and 2002, Amicus Curiae has conducted such an empirical analysis.² The findings disprove any assertions that those sentenced to LWOP are more “culpable” or have committed the “most serious” first-degree murders. As noted by the Court of Appeal, ninety-five percent of all offenders convicted of first-degree murder could have been charged and convicted of one or more special circumstances and sentenced to LWOP under California law in effect in 2008.³

¹ *People v. Hardin* (2022) 84 Cal. App. 5th 273, 290 (noting that 95% of first-degree murders are eligible for a LWOP sentence).

² Amicus curiae and her colleagues have published two empirical studies using this data. (David Baldus, George Woodworth, Catherine Grosso, Michael Laurence, Jeffrey Fagan, & Richard Newell, *Furman at 45: Constitutional Challenges from California’s Failure to (Again) Narrow Death Eligibility*, 16 J. EMP. LEGAL STUD. 693, (2019) (“Baldus”); Catherine M. Grosso, Jeffrey Fagan, Michael Laurence, David Baldus, George Woodworth, & Richard Newell, *Death by Stereotype: Race, Ethnicity, and California’s Failure to Implement Furman’s Narrowing Requirement*, 66 UCLA L. REV. 1394, 1406 (2019) (“Grosso”).)

³ *People v. Hardin*, 84 Cal. App. 5th at 290; *see also* Baldus, *supra* note 2, at 713 & Table 2. Although the scope and application of the special circumstances contained in Penal Code section 190.2 have been substantially expanded since it was initially adopted 1977, the law in existence in 2008 was selected as the appropriate law to determine eligibility for the study published in 2019 because it contained most of the expansive

When the comparison groups are limited to offenders under age 26, even that inconsequential variance vanishes: *Ninety-eight* percent of youthful offenders (under age 26) convicted of first-degree murder could have been charged and convicted with one or more special circumstances. To the extent that the Legislature premised its disparate treatment of the two categories of youthful offenders in Penal Code section 3051 “on concerns about culpability and the appropriate level of punishment for certain particularly heinous crimes” (Opening Br. at 27), it failed utterly to make such a distinction on any rational basis. Indeed, the two categories of offenders are empirically identical.

II. Analyzing the Application of California Penal Code Section 190.2 Demonstrates that There is Virtually No Difference Between Those Sentenced to LWOP and Those Who are Not.

A. Methodology

Amicus Curiae’s previous peer-reviewed publications contain full details on the development and coding of the database that serves as the analysis presented in this Brief.⁴ The key details of the methodology are submitted here for convenience of the Court.

Amicus curiae and her colleagues examined a universe of 27,453 defendants convicted of first-degree murder, second-degree murder, and voluntary manslaughter, with an offense

provisions at the time that the comprehensive coding was conducted.

⁴ See Baldus, *supra* note 2 at 707-12; Grosso, *supra* note 2, at 1417-25.

date between January 1, 1978, and June 30, 2002. These records were drawn from a database produced by the California Department of Corrections and Rehabilitation. From this universe, a stratified sample of 6.9 percent (1,900/27,453) was selected.

The sample was stratified on three dimensions to produce a more representative sample of the cases than would have been produced by a random sampling method.⁵ The first dimension, the crime of conviction, provides proportionate representation for the first-degree, second-degree, and voluntary manslaughter conviction cases. The second dimension is the population density of the county of prosecution. For the third dimension, the sample was stratified based on the four time periods in the evolution of the California special circumstance statute that were relevant to the study. The result was a random sample of cases consisting of forty-eight strata: three offense categories by four county population density categories by four time periods. For each stratum, the cases were weighted in the sample based on the ratio of the number of cases in the universe and the sample.

The primary source of information on each case was the probation report prepared by the county probation officer with jurisdiction over the case.⁶ Amicus Curiae and her colleagues'

⁵ The previous publications contain more extensive descriptions of the stratification process. Baldus, *supra* note 2, at 707-08; Grosso, *supra* note 2, at 1418-20.

⁶ California law requires the preparation of a probation report for each homicide to assess the appropriateness of probation as a sentencing alternative in the case. (Cal. Penal

previous publications present the coding process in detail.⁷ Each case was carefully examined to determine criminal eligibility under California law. In some cases, the probation report did not provide sufficient information to complete the data coding process, and additional official judicial records were obtained to cure the data insufficiency.⁸ From the information in the probation reports, each defendant's liability for first-degree murder and the factual presence of each special circumstance was assessed under 2008 California law.⁹

Code § 1203.) These reports, routinely relied on by California courts, are subject to examination and correction by both the prosecuting authorities and defendants. (Cal. Penal Code § 1203.01.)

⁷ The previous publications describe the coding process and the methodology used to determine factual eligibility. Baldus, *supra* note 2, at 710-13; Grosso, *supra* note 2, at 1421-23.

⁸ A complete description of the data insufficiency issue and the process by which it was cured is detailed in the first publication. Baldus, *supra* note 2, at 709.

⁹ Eligibility under California law was determined under the “controlling fact finding” rule, which narrowly limits the discretion to override authoritative fact findings of juries and judges in particular cases. The rule holds that, if an authoritative fact finder (judge or jury) with responsibility for finding a defendant liable finds a special circumstance not to be present, that finding is considered to be controlling in the absence of overwhelming evidence of jury nullification. Baldus, *supra* note 2, at 712.

B. The Presence of a Special Circumstance Does Not Rationally Distinguish Between First-Degree Murder Cases Punished by LWOP and First-Degree Murder Cases Punished by a Non-LWOP Sentence.

Amicus Curiae and her colleagues examined rates of special-circumstance eligibility under 2008 California law among all first-degree offenders. In addition, Amicus Curiae supplemented this analysis by examining only those offenders whose crimes were committed when they were under the age of twenty-six years of age. Finally, this analysis was conducted for Los Angeles County cases. Table 1 reports the results.

Table 1: Special Circumstance Eligibility of Persons Convicted of First-Degree Murder

Crime of Conviction	Factual Presence of One or More Special Circumstance Under 2008 Law	95% Confidence Interval	Standard Error of Measurement
All First-Degree Murders	95% (8,238/8,711)	91%, 97%	.0135
First-Degree Murders Committed by Persons Under the Age of 26	98% (4,759/4,853)	95%, 99%	.0001
All Los Angeles County First-Degree Murders	96% (3,300/3,477)	88%, 99%	.0001
Los Angeles County First-Degree Murders Committed by Persons Under the Age of 26	99% (1,959/1,973)	98%, 100%	.0001

As depicted in Table 1, ninety-five percent of persons convicted of first-degree murder could have been charged with and found to have committed the crime with one or more special circumstance allegations true. For persons who committed their crimes while under the age of twenty-six, ninety-eight percent could have been convicted of first-degree murder with one or

more special circumstances and sentenced to LWOP. Limiting the inquiry to Los Angeles County cases presents an even starker picture of the overlap: Ninety-six percent of all first-degree murder convictions could be charged with one or more special circumstances and punished with an LWOP sentence, and ninety-nine percent of first-degree murder cases committed by those under the age of twenty-six could have been so prosecuted and punished.

As these statistics demonstrate, it is fiction to assert that “the California Legislature could rationally rely on an underlying parole-ineligible sentence as a proxy for the seriousness of a crime to identify the class of offenders it wished to exclude from parole consideration. (Opening Br. at 36.) No such proxy exists when virtually *all* of the youthful first-degree offenders who are eligible for parole consideration committed crimes that qualify for sentencing under California’s special circumstances statute. In short, there is no “rational relationship between the disparity of treatment and some legitimate governmental purpose.” (*Heller v. Doe* (1993) 509 U.S. 312, 319-20.)

Moreover, an examination of who is actually sentenced based on a finding that one or more special circumstances was present demonstrates the arbitrariness in the distinction. Despite the widespread application of California special circumstances, as a result of charging and plea bargaining decisions, the percentage of factually-eligible cases that resulted in the finding of the presence of one or more special circumstances is significantly lower. Table 2 depicts the

distribution of first-degree murder cases and factually-eligible cases that resulted in convictions with and without such findings.

Table 2: Special Circumstance Findings Among First-Degree Murder Convictions and Special Circumstance-Eligible Crimes

Crime	No Finding of One or More Special Circumstance	Finding of One or More Special Circumstance
All First-Degree Murder	69% (5,864/8,483)	31% (2,619/8,483)
Special-Circumstance Eligible First-Degree Murder	85% (16,154/18,982)	15% (2,828/18,982)
First-Degree Murder Committed by Persons Under the Age of 26	73% (3,465/4,740)	27% (1,275/4,740)
Special-Circumstance Eligible First-Degree Murder Committed by Persons Under the Age of 26	87% (9,172/10,552)	13% (1,380/10,552)

Thus, despite the expansive scope of California Penal Code section 190.2, the percentage of first-degree murders that actually result in an LWOP (or death) verdict is exceedingly low. Although ninety-five percent of first-degree murder convictions contain elements of one or more special circumstances, only

thirty-one percent resulted in a special-circumstance judgment. Only fifteen percent of those cases in which the person was factually guilty of a first-degree murder with the presence of one or more special circumstances resulted in such a conviction. And an even smaller percentage – thirteen percent – of such cases involving defendants under the age of twenty-six resulted in a first-degree murder conviction subject to an LWOP sentence. The sweeping nature of California statutory construction – in which virtually all first-degree murders could be punished as a special circumstance case – coupled with the relative rarity of those results demonstrates the irrationality of using an LWOP sentence as a bright-line for parole considerations pursuant to Penal Code section 3051.

III. Conclusion

For the reasons forth above, empirical analysis does not support the assertion that disparate treatment of the two categories of youthful offenders for the purposes of Penal Code section 3051 may be justified “on concerns about culpability and the appropriate level of punishment for certain particularly heinous crimes” (Opening Br. at 27). Accordingly, this Court should affirm the judgment of the Court of Appeal.

Dated: August 31, 2023

Respectfully submitted,

By: /s/ Michael Laurence

MICHAEL LAURENCE

Attorney for Amicus Curiae
CATHERINE M. GROSSO

Certificate of Compliance

I certify that the attached Brief of Amicus Curiae Catherine M. Grosso in Support of Defendant and Petitioner Tony Hardin uses a 13 point Century Schoolbook font and contains 1959 words.

August 31, 2023.

/s/ Michael Laurence
MICHAEL LAURENCE

Proof of Service

I, Michael Laurence, declare as follows:

I am employed in the County of San Francisco, State of California, am over the age of eighteen years, and am not a party to this action. My business address is 1770 Post Street, No. 123, San Francisco, CA 94115.

On August 31, 2023, I served the following document:

**APPLICATION FOR PERMISSION TO FILE BRIEF OF
AMICUS CURIAE CATHERINE M. GROSSO AND
BRIEF OF AMICUS CURIAE CATHERINE M. GROSSO IN
SUPPORT OF DEFENDANT AND PETITIONER
TONY HARDIN**

On August 31, 2023, I caused the above-identified document to be electronically served on all parties and the California Supreme Court via TrueFiling, which will submit a separate proof of service.

In addition, on August 31, 2023, I caused to be mailed a true copy of the above-identified document to the following:

The Honorable Juan Carlos Dominguez
Los Angeles County Superior Court
Pomona Courthouse South
400 Civic Center Plaza, Department H
Pomona, CA 91766

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 31, 2023.

/s/ Michael Laurence
MICHAEL LAURENCE

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v.
HARDIN**

Case Number: **S277487**

Lower Court Case Number: **B315434**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **mllaurence@mllaurence.org**
3. I served by email a copy of the following document(s) indicated below:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/31/2023

Date

/s/Michael Laurence

Signature

Laurence, Michael (121854)

Last Name, First Name (PNum)

Law Office of Michael Laurence

Law Firm