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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff / Respondent,	)	No. S095868
	)	
vs.	)	
	)	
DAVID SCOTT DANIELS,	)	
	)	
Defendant / Appellant.	)	
	)	

REQUEST AND PROPOSED ORDER TO TAKE JUDICIAL NOTICE

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Appellant David Scott Daniels, by counsel, hereby respectfully requests that this Court take judicial notice of the legislative history of Senate Bill 155, which became California's death penalty statute in 1977. Appellant makes this request pursuant to Evidence Code sections 452 and 459, and Rules 8.520(g) and 8.252(a) of the California Rules of Court. Pursuant to Rule 8.252(a), a copy of the legislative history is attached

herein as Exhibit A and a proposed order is enclosed herewith.

This motion is also supported by the attached declaration of counsel.

DATED: April 5, 2012

Respectfully submitted,

Gail R. Weinheimer

GAIL R. WEINHEIMER
Attorney for Appellant

DECLARATION OF GAIL R. WEINHEIMER IN SUPPORT OF MOTION TO TAKE JUDICIAL NOTICE

I, Gail R. Weinheimer, declare:

1. I am the senior deputy state public defender assigned to represent Mr. Daniels in his automatic direct appeal. On January 4, 2012, Appellant's Opening Brief (AOB) was filed in this Court.

2. Argument V of the AOB argues that Mr. Daniels was denied a proper hearing on his motion for modification of his death verdict pursuant to California Penal Code section 190.4, subdivision (e). Because Mr. Daniels did not receive a jury trial in this capital case, he was denied the independent review of the death verdict that section 190.4, subdivision (e) guarantees to all capital defendants. Mr. Daniel argues that the denial of his right to an independent review of his death verdict violated the United States and California Constitutions, as well as the California death penalty statute. (See AOB, Argument V.)

3. In the course of making this argument, Mr. Daniels asserts that the California Legislature intended to provide independent review of death verdicts at the trial court level for all defendants, even those tried by a judge. (See AOB, Argument V.B.2.) Mr. Daniels cites in this argument the legislative history of Senate Bill 155, which became California's death penalty statute in 1977. The legislative history was compiled by the California Appellate Project (hereafter, CAP), and was downloaded from CAP's password-protected website. A complete copy of the legislative history is attached to this

motion.

4. The legislative history of the California Legislature is the kind of material that this Court often takes judicial notice of pursuant to Evidence Code section 452. (See, e.g., *People v. Massie* (1998) 19 Cal.4th 550, 566, fn. 4 ["At defendant's request, we take judicial notice of legislative history relating to the 1935 amendment to [California Penal Code] section 1239(b); [and] of legislative history relating to the passage in 1965 of [California Penal Code] section 1237.5 . . . . The materials are appropriate subjects of judicial notice"]; *Planning & Conservation League v. Department of Water Resources* (1998) 17 Cal.4th 264, 271, fn. 4 [taking judicial notice of legislative history]; *People v. Eubanks* (1996) 14 Cal.4th 580, 591, fn. 3 [same].) Accordingly, the legislative history of Senate Bill 155 should be judicially noticed by this Court.

5. I have provided a copy of the legislative history and a proposed order to this Court as required by Rule 8.252(a) of the California Rules of Court. I have also provided a copy of the legislative history to respondent through the means and address set forth in the attached certificate of service.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 5th day of April, 2012, at San Francisco, California.

Gail R. Weinheimer

GAIL R. WEINHEIMER

EXHIBIT A

AMENDMENT ANALYSIS
OF
SENATE BILL 155

INTRODUCED VERSION
THROUGH
EIGHTH VERSION

SENATE BILL 155

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Section 190.3

Feb. 17

EXPANDS CRIMES FOR WHICH DEATH MAY BE IMPOSED

Amends SB 155 to include Section 219 of the Penal Code, train derailing, as an offense for which a penalty hearing will be convened to determine whether the defendant will be sentenced to death or life imprisonment without parole. This provision is inconsistent, however, with the remainder of the bill because as introduced SB 155 expressly amended §219 to provide that the severest sentence that could be imposed was life imprisonment without parole. On April 13, §219 was also amended so as to allow death to be a possible sentence for train derailing. The remainder of the amendment is grammatical and does not have a substantive effect on the law.

Mar. 10

LIMITS EVIDENCE OF AGGRAVATION TO CONVICTIONS FOR VIOLENT FELONY OFFENSES

The original draft of SB 155 allowed the trier of fact in a penalty hearing to consider the defendant's "prior criminal activity." The March 10th amendment restricts the trier of fact's consideration to the defendant's prior felony convictions for crimes of violence against a person.

PRECLUDES EVIDENCE OF MISDEMEANORS OR NON-VIOLENT FELONIES FROM BEING CONSIDERED WHEN EVALUATING DEFENDANT'S CHARACTER AND BACKGROUND

This amendment assures the defendant that an analysis of his "character, background," and "history" will not include the introduction of evidence regarding prior criminal activity that did not result in a felony conviction for a violent crime. The amendment strengthens the amendment beginning on line 15 by precluding the prosecution from introducing evidence of misdemeanors and non-violent felonies under the guise of aiding the trier of fact in an evaluation of defendant's character and background.

DELETES THE REQUIREMENT THAT MITIGATION BE PROVED BY A PREPONDERANCE OF EVIDENCE

As introduced, SB 155 required the defendant to prove mitigating circumstances by a preponderance of evidence. The March 10 amendment deletes this requirement and allows the trier of fact to impose a sentence of life imprisonment without parole if it finds that the mitigating circumstances are sufficiently substantial to call for leniency. This is a much easier burden for the defendant to meet.

AMENDMENT ANALYSIS
Section 190.3

Mar. 10

LIMITS EVIDENCE OF AGGRAVATION TO CONVICTIONS FOR VIOLENT FELONY OFFENSES

The same result as in the amendment beginning on line 15. Note that the words of the provision "against the person of another" may act to effectively exclude such crimes as arson of an uninhabited building.

Mar. 24

ALLOWS CONSIDERATION OF PRIOR "SIGNIFICANT CRIMINAL ACTIVITY"

This provision alters the amendment offered on March 10, when consideration of defendant's prior criminal activity was limited to his past felony convictions for violent crimes. The March 24 amendment allows the trier of fact in a penalty hearing to consider evidence of defendant's "significant prior criminal activity." Under this provision a conviction is apparently not necessary; thus the sentencing authority could consider past arrests as well as past convictions for any "significant" misconduct. The word "significant" is never defined. This amendment would probably result in different standards being applied in like cases. For example, assault may be considered significant by one court but insignificant by another court. The same evidence is at stake both times, but a different result is achieved.

SAME EFFECT AS AMENDMENT BEGINNING LINE 15

April 13

NO SUBSTANTIVE EFFECT

ALLOWS CONSIDERATION OF OFFENSES INVOLVING VIOLENCE

This is the third time this provision has been amended. This particular amendment attempts to compromise the differences between those who want to let evidence of virtually any criminal activity be considered in the penalty hearing, and those who wish to restrict consideration to prior felony convictions for crimes of violence. The April 13th amendment allows the trier of fact to consider any offense involving the threat or use of violence whether or not a conviction resulted.

SAME EFFECT AS AMENDMENT BEGINNING ON LINE 15

AMENDMENT ANALYSIS
Section 190.3

April 28

STREAMLINES LANGUAGE. NO SUBSTANTIVE EFFECT.

FURTHER DELINEATES TASKS OF TRIER OF FACT IN PENALTY HEARING

The April 28th ~~amendment to this section~~ adds the word "other," apparently to focus the trier of facts attention on defendant's prior criminal activity other than that for which he is currently on trial. This provision consequently emphasizes that the trier of fact should not only (1) consider the circumstances of the crime for which defendant stands presently convicted, but also (2) consider defendant's prior criminal activity.

PROHIBITS CONSIDERATION OF NON-VIOLENT OFFENSES. REQUIRES THAT THE DEFENDANT RECEIVE NOTICE OF EVIDENCE TO BE USED IN AGGRAVATION PRIOR TO TRIAL.

This amendment first deletes lines 18 through 23. It replaces these lines with a prohibition against consideration of criminal activity that did not involve the threat or use of force or violence. Significantly, the new amendment expressly states that an offense can be considered even though a conviction for that offense was never obtained. The provision also prohibits the prosecution from introducing evidence of aggravation at the penalty hearing unless the defendant receives notice prior to trial that such evidence will be so used. This amendment was apparently submitted by the author of the bill himself. Unfortunately no reason for the addition was forthcoming either through his office or from the Committee on Criminal Justice.

INSTRUCTS TRIER OF FACT AS TO CIRCUMSTANCES TO BE CONSIDERED AT SENTENCING HEARING. REQUIRES TRIER OF FACT TO ~~BASE DECISION~~ AS TO SENTENCE UPON FACTS PRESENTED AT PENALTY HEARING.

In the original draft of SB 155 evidence concerning the nature and circumstances of the present offense could be presented at the penalty hearing by either the People or the defendant. However, the list of items that the trier of fact was to take into account did not include the nature of the present offense. The April 28th amendment rectifies this deficiency by including, as subdivision (a) the ability of the trier of fact to consider the circumstances of the present crime in determining the penalty to be imposed. Subdivisions (b), (c), (d), (e), (f), (g), (h), and (i) have been given new subdivision letters but otherwise remain unchanged. The amendment does, however, add (j), allows the defendant to introduce any other evidence of extenuation though not previously listed. (Continued next pg.)

AMENDMENT ANALYSIS
Section 190.3

April 28

26 (cont.) The amendment, beginning on line 58 also replaces the provision that was deleted on lines 18 through 23. In the original draft of the bill the trier of fact need only consider the evidence. The amended provision requires the trier of fact not only to consider and take into account the evidence, but also to be guided by the evidence in coming to a decision about sentence. This protects the defendant from the caprice of a jury who hears substantial evidence of mitigation but due to prejudice refuses to base the sentence upon the evidence presented.

May 9

18G PROHIBITS CONSIDERATION OF PAST OFFENSES FOR WHICH DEFENDANT HAS BEEN ACQUITTED

The May 9th amendment to this section precludes the prosecution from introducing as an aggravating circumstance evidence that the defendant was arrested but later acquitted for an offense. This amendment unfortunately goes only part way in ameliorating the prior section's infirmities. It is still conceivable that the prosecution could introduce evidence that the defendant was arrested for a crime even though the charges were later dropped or the defendant pled guilty to a lesser offense.

18R REQUIRES DEFENDANT TO RECEIVE NOTICE OF ALL EVIDENCE IN AGGRAVATION TO BE INTRODUCED AT PENALTY HEARING

This amendment apparently was designed to plug up a loophole whereby the prosecution could introduce evidence of aggravating circumstances without notifying the defendant because such evidence was never "proved" by the People. By substituting "introduced" for "proved" the amendment forces the prosecution to notify the defendant of all the evidence to be presented at the hearing, not just that evidence to be "proved."

62 STREAMLINES LANGUAGE. NO APPARENT SUBSTANTIVE EFFECT

SECTION 190.1

April 28

4 As introduced SB 155 mandated a trifurcated proceeding. The defendant's guilt was first adjudged. If he was found guilty, his sanity under 1026 was then determined. If he was found sane, the verity of any alleged special circumstances was determined in a separate proceeding. If any of the charged special circumstances was found to exist, then a separate penalty hearing was to be convened to determine sentence.

The April 28 amendment restructures the trial procedure by providing for a bifurcated hearing in which the trier of fact ascertains defendant's guilt or innocence at the same time special circumstances are evaluated. This ill-considered amendment was probably the result of a criticism addressed to the original version of the bill by the Senate Committee on the Judiciary, whose report on SB 155 noted that Gregg expressed a preference for a bifurcated procedure (See Appendix). By requiring that the determination of special circumstances occur in the same hearing as the adjudication of guilt the April 28 amendment postpones a determination of sanity under PC 1026 until after the law may have automatically imposed a sentence. See 9 Pacific Law Journal, January 1978 pp. 446-447 (Appendix).

Section 190.4(c) requires the same jury that adjudges guilt or innocence to determine sanity. However the April 28 amendment to Section 190.1 complicates this since now there is an intervening special circumstance hearing between determination of guilt and sanity. It is conceivable that to meet the mandates of 190.4 a jury that determines guilt but who could not agree on special circumstances and hence was dismissed would have to be reimpaneled after another jury evaluated special circumstances in order to evaluate sanity.

May 9

10 This amendment merely clarifies ehat procedure is to be followed when the special circumstance alleged is a prior murder. There is, apparently no substantive difference between the original version of the bill and the bill as amended.

SENATE BILL
155

INTRODUCED VERSION
January 19, 1977

SENATE BILL No. 155

Introduced by Senator Deukmejian (Principal Coauthors: Senator Beverly and Assemblyman McAlister)
(Coauthors: Senators Briggs, Campbell, Cusanovich, Johnson, Nejedly, Nimmo, Presley, Richardson, Russell, and Stull; Assemblymen Perino, Antonovich, Boatwright, Chappie, Cline, Collier, Cordova, Craven, Cullen, Duffy, Ellis, Hayden, Imbrecht, Lancaster, Lanterman, Lewis, Nestande, Robinson, Statham, Stirling, Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray)

January 19, 1977

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 155, as introduced, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of mitigating circumstances.

This bill would make such a mitigating circumstances provision in the law, as to certain crimes formerly subject only to the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole in other cases.

The bill would take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-

Corrected 1-20-77

mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating ~~Sections~~ *Section* 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death ~~of, or great bodily injury to,~~ *of* any person, he is punishable by death or imprisonment in the state prison for ~~life, at the discretion of the jury trying the case, or at the discretion of the court where a jury does not try the case.~~ *life without possibility of parole. The penalty shall be determined pursuant to the provisions of Penal Code Sections 190.3 and 190.4. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.*

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000), or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this ~~State~~ *state* consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by

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persons owing allegiance to the ~~State.~~ *state.* The punishment of treason shall be ~~death.~~ *death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Penal Code Sections 190.3 and 190.4.*

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by ~~death.~~ *death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Penal Code Sections 190.3 and 190.4.*

SEC. 4. Section 190 of the Penal Code is repealed.

~~190. Every person guilty of murder in the first degree shall suffer death if any one or more of the special circumstances enumerated in Section 190.2 have been charged and found to be true in the manner provided in Section 190.1. Every person otherwise guilty of murder in the first degree shall suffer confinement in the state prison for life, unless he or she is guilty of murder in the first degree which is perpetuated by means of torture with the intent to kill, in which case he or she shall suffer confinement in the state prison without the possibility of parole. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years.~~

SEC. 5. Section 190 is added to the Penal Code, to read:

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

SEC. 6. Section 190.1 of the Penal Code is repealed.

~~190.1. In any case in which the death penalty is to be imposed as the penalty for an offense only upon the finding of the truth of the special circumstances~~

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enumerated in Section 190.2, the guilt or innocence of the person charged shall first be determined without a finding as to penalty. In any such case the person charged shall be represented by counsel. If such a person has been found guilty of such an offense, and has been found sane on any plea of not guilty by reason of insanity, and any one or more of the special circumstances enumerated in Section 190.2 have been charged, there shall be further proceedings on the issue of the special circumstances charged. In any such proceedings the person shall be represented by counsel. The determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented. In each case of a reasonable doubt whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of a crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of the defendant's counsel, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant with the consent of his counsel. If the defendant was convicted by a jury, the trier of fact shall be the same jury unless, for good cause shown, the court discharges that jury, in which case a new jury shall be drawn to determine the issue of whether or not any of the special circumstances charged are true or not true.

If the trier of fact finds, as to any person convicted of any offense under Section 190 requiring further proceedings that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, the defendant shall suffer the penalty of death, and neither the finding that any of the remaining special

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~~circumstances charged is not true, not if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prohibit the imposition of such penalty.~~

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

SEC. 7. Section 190.1 is added to the Penal Code, to read:

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

(a) The defendant's guilt shall first be determined without a finding as to special circumstances or penalty.

(b) If the defendant is found guilty, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, and one or more special circumstances as enumerated in Section 190.2 have been charged, there shall thereupon be further proceedings on the question of the truth of the charged special circumstance or circumstances. Such proceedings shall be conducted in accordance with the provisions of Section 190.4.

(c) If any charged special circumstance is found to be true, there shall thereupon be further proceedings on the question of penalty. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and

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190.4.

SEC. 8. Section 190.2 of the Penal Code is repealed.

~~190.2. The penalty for a person found guilty of first-degree murder shall be death in any case in which the trier of fact pursuant to the further proceedings provided for in Section 190.1 makes a special finding that:~~

~~(a) The murder was intentional and was carried out pursuant to an agreement with the defendant. "An agreement," as used in this subdivision, means an agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim.~~

~~(b) The defendant personally committed the act which caused the death of the victim and any of the following additional circumstances exist:~~

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

~~(2) The murder was willful, deliberate and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.~~

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

~~(i) Robbery, in violation of Section 211.~~

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

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

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~~Section 261.~~

~~(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14, in violation of Section 288.~~

~~(v) Burglary, in violation of subdivision (1) of Section 460, of an inhabited dwelling housing entered by the defendant with an intent to commit grand or petit larceny or rape.~~

~~(4) The defendant has in this or in any prior proceeding been convicted of more than one offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder of the first or second degree.~~

SEC. 9. Section 190.2 is added to the Penal Code, to read:

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

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

(b) The defendant was personally present during the commission of the act or acts causing death, and directly committed or physically aided in such act or acts and any of the following additional circumstances exists:

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

(2) The murder was willful, deliberate, and

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premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

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

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or Section 209;

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

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

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

(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture.

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

SEC. 10. Section 190.3 of the Penal Code is repealed.

~~190.3. (a) Notwithstanding any other provisions of law, the death penalty shall not be imposed upon any person who was under the age of 18 years 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) Except when the trier of facts finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37 or 128, the death~~

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~~penalty shall not be imposed upon any person who is a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts.~~

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found, in a proceeding under Section 190.4, to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating Penal Code Section 37, Penal Code Section 128, Penal Code Section 4500, Penal Code Section 12310, or Military and Veterans Code Section 1672, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by either the people or the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, and the defendant's prior criminal activity, character, background, history, mental condition and physical condition.

The penalty shall be death unless the trier of fact, after consideration of all the evidence, finds by a preponderance of the evidence that there are mitigating circumstances sufficiently substantial to call for leniency, in which case the penalty shall be life imprisonment without possibility of parole.

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

(a) The presence or absence of prior criminal activity by the defendant.

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

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

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

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

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

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

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

SEC. 12. Section 190.4 is added to the Penal Code, to read:

190.4. (a) When special circumstances as enumerated in Section 190.2 are alleged, and the defendant has been found guilty of first degree murder, there shall be a hearing on the issue of the special circumstances. At the hearing the determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented.

Either party may present such additional evidence as they deem necessary and is relevant to the question of whether or not there exist special circumstances.

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

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

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was convicted by a plea of guilty the trier of fact shall be a jury ~~unless a jury is waived~~ by the defendant and by the people.

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

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

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

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and shall order a new jury impaneled to determine the penalty. If such jury is unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and

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impose a punishment of confinement in state prison for life without possibility of parole.

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

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

SEC. 13. Section 190.5 is added to the Penal Code, 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 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Penal Code Section 37, 128, 4500, or 12310; or a violation of subdivision (a) of Military and Veterans Code Section 1672, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts.

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of

sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of sentencing. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. The failure of the Supreme Court to comply with the requirements of this section shall in no way preclude imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof ~~shall suffer death in cases in which any person subjected to any such act suffers death, or~~ shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers *death or* bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or

other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with ~~death in cases in which any person subjected to any such act suffers death as a proximate result thereof, or~~ imprisonment in the state prison for life without possibility of parole in cases where any person suffers *death or* bodily harm as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death or bodily harm as a proximate result thereof.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. ~~No plea of guilty to a capital offense which does not require the further proceedings provided for in Section 190.1 shall be received from a defendant.~~ No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared

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without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. *The people of the State of California have a right to a speedy trial.* The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings. No continuance of a criminal trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. *No continuance shall be granted in a capital case except where extraordinary and compelling circumstances require a continuance. Facts supporting these circumstances must be stated for the record and the court in granting a continuance must direct that the clerk's minutes reflect the facts requiring a continuance.* Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this ~~State~~ *state* and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the facts proved

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which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open Court; ~~nor~~ *nor, except as provided in Sections 190.3 and 190.4,* can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. *(a)* Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of ~~another, other than another inmate,~~ *another* with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with ~~death;~~ *death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4;* however, in cases in which the person subjected to such assault does not die within a year and

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a day after such assault as a proximate result thereof, ~~or the person so assaulted is another inmate,~~ the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by death or imprisonment in the state prison for ~~life.~~ *life without possibility of parole.* The ~~punishment~~ *penalty* shall be determined ~~in the manner provided for in Section 190.1.~~ *pursuant to the provisions of Sections 190.3 and 190.4. If no death occurs then such person shall be punished by imprisonment in the state prison for life without possibility of parole.*

SEC. 23. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provisions or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, and as a result thereof, a

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defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude.

SEC. 25. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

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SENATE BILL
155

FIRST AMENDED VERSION
FEBRUARY 17, 1977

AMENDED IN SENATE FEBRUARY 17, 1977

SENATE BILL No. 155

Introduced by Senator Deukmejian (Principal Coauthors: Senator Beverly and Assemblyman McAlister)

(Coauthors: Senators Briggs, ~~Campbell,~~ *Campbell, Dennis Carpenter,* Cusanovich, Johnson, Nejedly, Nimmo, Presley, ~~Richardson,~~ *Richardson, Robbins,* Russell, and Stull; Assemblymen Perino, Antonovich, Boatwright, Chappie, *Chimbole,* Cline, Collier, Cordova, Craven, Cullen, Duffy, ~~Ellis,~~ *Ellis, Hallett,* Hayden, Imbrecht, Lancaster, Lanterman, Lewis, Nestande, Robinson, Statham, ~~Stirling,~~ *Stirling, Suitt,* Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray)

January 19, 1977

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 155, as amended, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of mitigating circumstances.

This bill would make such a mitigating circumstances provision in the law, as to certain crimes formerly subject only to the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole

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in other cases.

The bill would take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of ~~Penal Code~~ Sections 190.3 and ~~190.1.~~ *190.4 of the Penal Code.* If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000), or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid

and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to ~~Penal Code~~ Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to ~~Penal Code~~ Sections 190.3 and 190.4.

SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

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

SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

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

(a) The defendant's guilt shall first be determined without a finding as to special circumstances or penalty.

(b) If the defendant is found guilty, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, and one or more special circumstances as enumerated in Section 190.2 have been charged, there shall thereupon be further proceedings on the question of the truth of the charged special circumstance or circumstances. Such proceedings shall be conducted in accordance with the provisions of Section 190.4.

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(c) If any charged special circumstance is found to be true, there shall thereupon be further proceedings on the question of penalty. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

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

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

(b) The defendant was personally present during the commission of the act or acts causing death, and directly committed or physically aided in such act or acts and any of the following additional circumstances exists:

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

(2) The murder was willful, deliberate, and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

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

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or Section 209;

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

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

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

(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture.

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

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found, in a proceeding under Section 190.4, to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating ~~Penal Code Section 37, Penal Code Section 128, Penal Code Section 1500, Penal Code Section 12310, or Military and Veterans Code Section 1672,~~ *Section 37, 128, 219, 4500, or 12310 of this code, or subdivision (a) of Section 1672 of the Military and Veterans Code,* the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by either the people or the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and

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circumstances of the present offense, and the defendant's prior criminal activity, character, background, history, mental condition and physical condition.

The penalty shall be death unless the trier of fact, after consideration of all the evidence, finds by a preponderance of the evidence that there are mitigating circumstances sufficiently substantial to call for leniency, in which case the penalty shall be life imprisonment without possibility of parole.

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

(a) The presence or absence of prior criminal activity by the defendant.

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

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

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

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

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

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

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

SEC. 12. Section 190.4 is added to the Penal Code, to read:

190.4. (a) When special circumstances as enumerated in Section 190.2 are alleged, and the defendant has been found guilty of first degree murder, there shall be a hearing on the issue of the special circumstances. At the

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hearing the determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented.

Either party may present such additional evidence as they deem necessary and is relevant to the question of whether or not there exist special circumstances.

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

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

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

In any case in which the defendant has been found guilty by a jury, and the same or another jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth

of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose a punishment of confinement in state prison for life.

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

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

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

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

SEC. 13. Section 190.5 is added to the Penal Code, 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 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of ~~Penal Code Section 37, 128, 4500, or 12310, or a violation of subdivision (a) of Military and Veterans Code Section 1672,~~ *Section 37, 128, 219, 4500, or 12310 of this code, or a violation of subdivision (a) of Section 1672 of the Military and Veterans Code,* the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts.

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of ~~sentencing.~~ *certification of the entire record by the sentencing court.* In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. The failure of the Supreme Court to comply with the requirements of this section shall in no way preclude imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with

intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with imprisonment in the state prison for life without possibility of parole in cases where any person suffers death or bodily harm as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death or bodily harm as a proximate result thereof.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the

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maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. The people of the State of California have a right to a speedy trial. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings. No continuance of a criminal trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. No continuance shall be granted in a capital case except where extraordinary and compelling

circumstances require a continuance. Facts supporting these circumstances must be stated for the record and the court in granting a continuance must direct that the clerk's minutes reflect the facts requiring a continuance. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this state and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open Court; nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the

defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4. If no death occurs then such person shall be punished by imprisonment in the state prison for life without possibility of parole.

SEC. 23. If any word, phrase, clause, or sentence in any

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

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment *, such life imprisonment shall be* without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude..

If any, word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result thereof, a defendant who has been sentenced to life imprisonment without the possibility of parole under the provisions of this act will instead be sentenced to life imprisonment with the possibility of parole, such person shall not be eligible for parole until he has served 20 years in the state prison.

SEC. 25. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in

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existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

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SENATE BILL
155

SECOND AMENDED
VERSION
MARCH 1, 1977

AMENDED IN SENATE MARCH 1, 1977

AMENDED IN SENATE FEBRUARY 17, 1977

SENATE BILL No. 155

Introduced by Senator Deukmejian (Principal Coauthors: Senator Beverly and Assemblyman McAlister)

(Coauthors: Senators Briggs, Campbell, Dennis Carpenter, Cusanovich, Johnson, Nejedly, Nimmo, Presley, Richardson, Robbins, Russell, and Stull; Assemblymen Perino, Antonovich, Boatwright, Chappie, Chimbole, Cline, Collier, Cordova, Craven, Cullen, Duffy, Ellis, Hallett, Hayden, Imbrecht, Lancaster, Lanterman, Lewis, Nestande, Robinson, Statham, Stirling, Suitt, Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray)

January 19, 1977

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 155, as amended, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of mitigating circumstances.

This bill would make such a mitigating circumstances provision in the law, as to certain crimes formerly subject only to

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the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole in other cases.

The bill would take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 of the Penal Code. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000), or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

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

SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

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

(a) The defendant's guilt shall first be determined without a finding as to special circumstances or penalty.

(b) If the defendant is found guilty, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, and one or more special circumstances as enumerated in Section 190.2 have been charged, there shall thereupon be further proceedings on the question of the truth of the charged special circumstance or

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circumstances. Such proceedings shall be conducted in accordance with the provisions of Section 190.4.

(c) If any charged special circumstance is found to be true, there shall thereupon be further proceedings on the question of penalty. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

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

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

(b) The defendant was personally present during the commission of the act or acts causing death, and ~~directly committed or physically aided in such act or acts~~ *intentionally physically aided or committed such act or acts causing death* and any of the following additional circumstances exists:

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

(2) The murder was willful, deliberate, and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

(3) The murder was willful, deliberate, and premeditated and was committed during the commission

or attempted commission of any of the following crimes:

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or Section 209;

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

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

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

(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture.

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

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found, in a proceeding under Section 190.4, to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating Section 37, 128, 219, 4500, or 12310 of this code, or subdivision (a) of Section 1672 of the Military and Veterans Code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by either the people or the defendant as to any matter relevant to

aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, and the defendant's prior criminal activity, character, background, history, mental condition and physical condition.

The penalty shall be death unless the trier of fact, after consideration of all the evidence, finds by a preponderance of the evidence that there are mitigating circumstances sufficiently substantial to call for leniency, in which case the penalty shall be life imprisonment without possibility of parole.

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

(a) The presence or absence of prior criminal activity by the defendant.

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

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

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

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

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

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

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

SEC. 12. Section 190.4 is added to the Penal Code, to read:

190.4. (a) When special circumstances as enumerated in Section 190.2 are alleged, and the defendant has been

found guilty of first degree murder, there shall be a hearing on the issue of the special circumstances. At the hearing the determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented.

Either party may present such additional evidence as they deem necessary and is relevant to the question of whether or not there exist special circumstances.

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

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

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

In any case in which the defendant has been found guilty by a jury, and the same or another jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to

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

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

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

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

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

SEC. 13. Section 190.5 is added to the Penal Code, 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 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37, 128, 219, 4500, or 12310 of this code, or a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts.

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. The failure of the Supreme Court to comply with the requirements of this section shall in no way preclude imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with

intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with imprisonment in the state prison for life without possibility of parole in cases where any person suffers death or bodily harm as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death or bodily harm as a proximate result thereof.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the

maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. The people of the State of California have a right to a speedy trial. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings. No continuance of a criminal trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. No continuance shall be granted in a capital case except where extraordinary and compelling

circumstances require a continuance. Facts supporting these circumstances must be stated for the record and the court in granting a continuance must direct that the clerk's minutes reflect the facts requiring a continuance. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this state and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open Court; nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crim committed only amounts to manslaughter, or that the

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defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4. If no death occurs then such person shall be punished by imprisonment in the state prison for life without possibility of parole.

SEC. 23. If any word, phrase, clause, or sentence in any

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

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment, such life imprisonment shall be without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude.

If any, word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result thereof, a defendant who has been sentenced to life imprisonment without the possibility of parole under the provisions of this act will instead be sentenced to life imprisonment with the possibility of parole, such person shall not be eligible for parole until he has served 20 years in the state prison.

SEC. 25. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in

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existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

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SENATE BILL
155

THIRD AMENDED VERSION
MARCH 10, 1977

AMENDED IN SENATE MARCH 10, 1977

AMENDED IN SENATE MARCH 1, 1977

AMENDED IN SENATE FEBRUARY 17, 1977

SENATE BILL No. 155

Introduced by Senator Deukmejian (Principal Coauthors: Senator Beverly and Assemblyman McAlister)

(Coauthors: Senators Briggs, Campbell, Dennis Carpenter, Cusanovich, Johnson, Nejedly, Nimmo, Presley, Richardson, Robbins, Russell, ~~and Stull;~~ *Song, Stull, and Wilson; Assemblymen Perino, Antonovich, Boatwright, Chappie, Chimbole,* Cline, Collier, Cordova, Craven, Cullen, Duffy, Ellis, Hallett, Hayden, Imbrecht, Lancaster, Lanterman, Lewis, Nestande, Robinson, Statham, Stirling, Suitt, Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray)

January 19, 1977

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 155, as amended, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of mitigating circumstances.

This bill would make such a mitigating circumstances provi-

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sion in the law, as to certain crimes formerly subject only to the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole in other cases.

This bill would also define the proof necessary to prove murder involving the infliction of torture to require proof of intent to inflict extreme and prolonged pain, and would define the proof necessary to prove that the defendant aided or committed an act causing death to require proof that the defendant's conduct was an assault or battery or involved an order, advice, encouragement, initiation, or provocation of the killing.

The bill would take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 of the Penal Code. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000), or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by

the United States to any other nation in connection with that nation's defense, the minimum punishment shall be imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

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SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

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

SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

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

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(a) The defendant's guilt shall first be determined without a finding as to special circumstances or penalty.

(b) If the defendant is found guilty, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, and one or more special circumstances as enumerated in Section 190.2 have been charged, there shall thereupon be further proceedings on the question of the truth of the charged special circumstance or circumstances. Such proceedings shall be conducted in accordance with the provisions of Section 190.4.

(c) If any charged special circumstance is found to be true, there shall thereupon be further proceedings on the question of penalty. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

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

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

(b) The defendant was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

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

was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate, and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

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

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or Section 209;

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

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

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

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

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

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

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orders, advises, encourages, initiates or provokes the actual killing of the victim.

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found, in a proceeding under Section 190.4, to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating Section 37, 128, 219, 4500, or 12310 of this code, or subdivision (a) of Section 1672 of the Military and Veterans Code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by either the people or the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, ~~and the defendant's prior criminal activity;~~ *any prior convictions of the defendant for felonies involving the use or threat of force or violence against the person of another, and the defendant's* character, background, history, mental condition and physical condition. *However, no evidence shall be admitted regarding prior criminal activity by the defendant which did not result in a conviction for a felony involving the use or threat of force or violence against the person of another.*

The penalty shall be death unless the trier of fact, after ~~consideration of all the evidence, finds by a preponderance of the evidence that there are mitigating~~ *consideration of all the evidence, finds that there are mitigating* circumstances sufficiently substantial to call for leniency, in which case the penalty shall be life imprisonment without possibility of parole.

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

(a) The presence or absence of ~~prior criminal activity by the defendant.~~ *prior convictions of the defendant for felonies involving the use or threat of force or violence*

against the person of another.

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

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

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

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

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

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

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

SEC. 12. Section 190.4 is added to the Penal Code, to read:

190.4. (a) When special circumstances as enumerated in Section 190.2 are alleged, and the defendant has been found guilty of first degree murder, there shall be a hearing on the issue of the special circumstances. At the hearing the determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented.

Either party may present such additional evidence as they deem necessary and is relevant to the question of whether or not there exist special circumstances.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted

commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial at conviction of a crime.

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

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

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

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

defendant and the people.

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

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

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

SEC. 13. Section 190.5 is added to the Penal Code, 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 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37, 128, 219, 4500, or 12310 of this code, or a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, the death penalty shall not be imposed upon any person who was

a principal in the commission of a capital offense unless he was personally present during the commission of the ~~act or acts causing death, and directly committed or physically aided in the commission of such act or acts.~~ *act or acts causing death, and intentionally physically aided or committed such act or acts causing death.*

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

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. The failure of the Supreme Court to comply with the requirements of this section shall in no way preclude imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction

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thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with imprisonment in the state prison for life without possibility of parole in cases where any person suffers death or bodily harm as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death or bodily harm as a proximate result thereof.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for

which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. The people of the State of California have a right to a speedy trial. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings. No continuance of a criminal trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. No continuance shall be granted in a capital case except where extraordinary and compelling circumstances require a continuance. Facts supporting these circumstances must be stated for the record and the court in granting a continuance must direct that the clerk's minutes reflect the facts requiring a continuance. Provided, that upon a showing that the attorney of record

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at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this state and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open ~~Court;~~ *court;* nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

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4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4. If no death occurs then such person shall be punished by imprisonment in the state prison for life without possibility of parole.

SEC. 23. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other

section, provisions or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment, such life imprisonment shall be without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude.

If ~~any,~~ *any* word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result thereof, a defendant who has been sentenced to life imprisonment without the possibility of parole under the provisions of this act will instead be sentenced to life imprisonment with the possibility of parole, such person shall not be eligible for parole until he has served 20 years in the state prison.

SEC. 25. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

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SENATE BILL
155

FOURTH AMENDED
VERSION
MARCH 24, 1977

AMENDED IN SENATE MARCH 24, 1977

AMENDED IN SENATE MARCH 10, 1977

AMENDED IN SENATE MARCH 1, 1977

AMENDED IN SENATE FEBRUARY 17, 1977

SENATE BILL No. 155

Introduced by Senator Deukmejian (Principal Coauthors: Senator Beverly and Assemblyman McAlister)

(Coauthors: Senators Briggs, Campbell, Dennis Carpenter, Cusanovich, Johnson, Nejedly, Nimmo, Presley, Richardson, Robbins, Russell, Song, Stull, and Wilson; Assemblymen Perino, Antonovich, Boatwright, Chappie, Chimbole, Cline, Collier, Cordova, Craven, Cullen, Duffy, Ellis, Hallett, Hayden, Imbrecht, Lancaster, Lanterman, Lewis, Nestande, Robinson, Statham, Stirling, Suitt, Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray)

January 19, 1977

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018; 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 155, as amended, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of miti-

gating circumstances.

This bill would make such a mitigating circumstances provision in the law, as to certain crimes formerly subject only to the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole in other cases.

This bill would also define the proof necessary to prove murder involving the infliction of torture to require proof of intent to inflict extreme and prolonged pain, and would define the proof necessary to prove that the defendant aided or committed an act causing death to require proof that the defendant's conduct was an assault or battery or involved an order, advice, encouragement, initiation, or provocation of the killing.

The bill would take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 of the Penal Code. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000), or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state

for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

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

SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

190.1. A case in which the death penalty may be

imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The defendant's guilt shall first be determined without a finding as to special circumstances or penalty.

(b) If the defendant is found guilty, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, and one or more special circumstances as enumerated in Section 190.2 have been charged, there shall thereupon be further proceedings on the question of the truth of the charged special circumstance or circumstances. Such proceedings shall be conducted in accordance with the provisions of Section 190.4.

(c) If any charged special circumstance is found to be true, there shall thereupon be further proceedings on the question of penalty. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

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

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

(b) The defendant was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

(1) The victim is a peace officer as defined in Section 830.1, subdivision (a), (b), (d), or (e) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance

of his duty was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate, and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

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

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or Section 209;

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

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

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

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

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

(c) For the purposes of subdivision (b), the defendant shall be deemed to have intentionally physically aided in the act or acts causing death only if it is proved beyond

a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, advises, encourages, initiates or provokes the actual killing of the victim.

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found, in a proceeding under Section 190.4, to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating Section 37, 128, 219, 4500, or 12310 of this code, or subdivision (a) of Section 1672 of the Military and Veterans Code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by either the people or the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, any ~~prior convictions of the defendant for felonies involving the use or threat of force or violence against the person of another;~~ *significant prior criminal activity by the defendant,* and the defendant's character, background, history, mental condition and physical condition. However, no evidence shall be admitted regarding prior criminal activity by the defendant which did not result in a conviction for a felony involving the use or threat of force or violence against the person of another.

The penalty shall be death unless the trier of fact, after consideration of all the evidence, finds that there are mitigating circumstances sufficiently substantial to call for leniency, in which case the penalty shall be life imprisonment without possibility of parole.

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

(a) The presence or absence of ~~prior convictions of the defendant for felonies involving the use or threat of force~~

~~or violence against the person of another.~~ *significant prior criminal activity by the defendant.*

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

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

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

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

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

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

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

SEC. 12. Section 190.4 is added to the Penal Code, to read:

190.4. (a) When special circumstances as enumerated in Section 190.2 are alleged, and the defendant has been found guilty of first degree murder, there shall be a hearing on the issue of the special circumstances. At the hearing the determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented.

Either party may present such additional evidence as they deem necessary and is relevant to the question of whether or not there exist special circumstances.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance

requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial at conviction of a crime.

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

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

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

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

trier of fact shall be a jury unless a jury is waived by the defendant and the people.

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

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

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

SEC. 13. Section 190.5 is added to the Penal Code, 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 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of Section 37, 128, 219, 4500, or 12310 of this code, or a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, the death

penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death.

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

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. The failure of the Supreme Court to comply with the requirements of this section shall in no way preclude imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state

prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with imprisonment in the state prison for life without possibility of parole in cases where any person suffers death or bodily harm as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death or bodily harm as a proximate result thereof.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life

imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. The people of the State of California have a right to a speedy trial. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings. No continuance of a criminal trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. No continuance shall be granted in a capital case except where extraordinary and compelling circumstances require a continuance. Facts supporting these circumstances must be stated for the record and the court in granting a continuance must direct that the clerk's minutes reflect the facts requiring a continuance. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the

superior court is a Member of the Legislature of this state and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

4500. Every person undergoing a life sentence in a state

prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4. If no death occurs then such person shall be punished by imprisonment in the state prison for life without possibility of parole.

SEC. 23. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provisions or application of this act, which can be

given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment, such life imprisonment shall be without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude.

If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result thereof, a defendant who has been sentenced to life imprisonment without the possibility of parole under the provisions of this act will instead be sentenced to life imprisonment with the possibility of parole, such person shall not be eligible for parole until he has served 20 years in the state prison.

SEC. 25. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

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SENATE BILL
155

FIFTH AMENDED VERSION
APRIL 13, 1977

AMENDED IN ASSEMBLY APRIL 13, 1977

AMENDED IN SENATE MARCH 24, 1977

AMENDED IN SENATE MARCH 10, 1977

AMENDED IN SENATE MARCH 1, 1977

AMENDED IN SENATE FEBRUARY 17, 1977

SENATE BILL No. 155

Introduced by Senator Deukmejian (Principal Coauthors: Senator Beverly and Assemblyman McAlister)

(Coauthors: Senators Briggs, Campbell, Dennis Carpenter, Cusanovich, Johnson, Nejedly, Nimmo, Presley, Richardson, Robbins, Russell, Song, Stull, and Wilson; Assemblymen Perino, Antonovich, Boatwright, Chappie, Chimbole, Cline, Collier, Cordova, Craven, Cullen, Duffy, Ellis, Hallett, Hayden, Imbrecht, Lancaster, Lanterman, Lewis, Nestande, Robinson, Statham, Stirling, Suitt, Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray)

January 19, 1977

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 155, as amended, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of mitigating circumstances.

This bill would make such a mitigating circumstances provision in the law, as to certain crimes formerly subject only to the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole in other cases.

This bill would also define the proof necessary to prove murder involving the infliction of torture to require proof of intent to inflict extreme and prolonged pain, and would define the proof necessary to prove that the defendant aided or committed an act causing death to require proof that the defendant's conduct was an assault or battery or involved an order, advice, encouragement, initiation, or provocation of the killing.

The bill would take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 of the Penal Code. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable

by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000), or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

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

prison for five, six, or seven years.

SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

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

(a) The defendant's guilt shall first be determined without a finding as to special circumstances or penalty.

(b) If the defendant is found guilty, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, and one or more special circumstances as enumerated in Section 190.2 have been charged, there shall thereupon be further proceedings on the question of the truth of the charged special circumstance or circumstances. Such proceedings shall be conducted in accordance with the provisions of Section 190.4.

(c) If any charged special circumstance is found to be true, there shall thereupon be further proceedings on the question of penalty. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

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

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

(b) The defendant was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death and any of the following additional

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circumstances exists:

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

(2) The murder was willful, deliberate, and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding.

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

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or ~~Section~~ 209;

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

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

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

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

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

murder shall be deemed to be murder in the first or second degree.

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

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found, in a proceeding under Section 190.4, to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating ~~Section 37, 128, 219, 4500, or 12310 of this code, or subdivision (a) of Section 1672 of the Military and Veterans Code,~~ *subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 219, 4500, or 12310 of this code,* the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by either the people or the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, ~~any significant prior criminal activity by the defendant, and the defendant's character, background, history, mental condition and physical condition. However, no evidence shall be admitted regarding prior criminal activity by the defendant which did not result in a conviction for a felony involving the use or threat of force or violence against the person of another.~~ *the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and*

physical condition.

The penalty shall be death unless the trier of fact, after consideration of all the evidence, finds that there are mitigating circumstances sufficiently substantial to call for leniency, in which case the penalty shall be life imprisonment without possibility of parole.

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

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

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

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

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

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

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

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

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

SEC. 12. Section 190.4 is added to the Penal Code, to read:

190.4. (a) When special circumstances as enumerated in Section 190.2 are alleged, and the defendant has been found guilty of first degree murder, there shall be a hearing on the issue of the special circumstances. At the

hearing the determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented.

Either party may present such additional evidence as they deem necessary and is relevant to the question of whether or not there exist special circumstances.

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

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

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

In any case in which the defendant has been found guilty by a jury, and the same or another jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth

of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose a punishment of confinement in state prison for life.

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

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

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

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

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the

defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision 7 of Section 1181.

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

The denial of the application may be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application may be reviewed on the people's appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.

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

SEC. 13. Section 190.5 is added to the Penal Code, 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 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of ~~Section 37, 128, 219,~~ *subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128,* 4500, or ~~12310 of this code, or a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, the death~~ *12310 of this code, the death* penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death.

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

actual killing of the victim.

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. The failure of the Supreme Court to comply with the requirements of this section shall in no way preclude imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

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219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with *death or* imprisonment in the state prison for life without possibility of parole in cases where any person suffers death ~~or bodily harm~~ as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death ~~or bodily harm~~ as a proximate result thereof. *The penalty shall be determined pursuant to Sections 190.3 and 190.4.*

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then only if the defendant has expressly stated in open court to the court that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may,

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and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. The people of the State of California have a right to a speedy trial. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings. No continuance of a criminal trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. No continuance shall be granted in a capital case except where extraordinary and compelling circumstances require a continuance. Facts supporting these circumstances must be stated for the record and the court in granting a continuance must direct that the clerk's minutes reflect the facts requiring a continuance. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this state and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the facts proved

which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate

result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4. If no death occurs then such person shall be punished by imprisonment in the state prison for life without possibility of parole.

SEC. 23. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provisions or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life

imprisonment, such life imprisonment shall be without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude.

If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result thereof, a defendant who has been sentenced to life imprisonment without the possibility of parole under the provisions of this act will instead be sentenced to life imprisonment with the possibility of parole, such person shall not be eligible for parole until he has served 20 years in the state prison.

SEC. 25. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

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SENATE BILL
155

SIXTH AMENDED VERSION
APRIL 28, 1977

AMENDED IN ASSEMBLY APRIL 28, 1977

AMENDED IN ASSEMBLY APRIL 13, 1977

AMENDED IN SENATE MARCH 24, 1977

AMENDED IN SENATE MARCH 10, 1977

AMENDED IN SENATE MARCH 1, 1977

AMENDED IN SENATE FEBRUARY 17, 1977

SENATE BILL No. 155

Introduced by Senator Deukmejian
(Principal Coauthors: Senator Beverly and Assemblyman McAlister)
(Coauthors: Senators Briggs, Campbell, Dennis Carpenter, Cusanovich, Johnson, Nejedly, Nimmo, Presley, Richardson, Robbins, Russell, Song, Stull, and Wilson; Assemblymen Perino, Antonovich, Boatwright, Chappie, Chimbole, Cline, Collier, Cordova, Craven, Cullen, Duffy, Ellis, Hallett, Hayden, Imbrecht, Lancaster, Lanterman, Lewis, Nestande, Robinson, Statham, Stirling, Suitt, Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray)

January 19, 1977

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 155, as amended, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of mitigating circumstances.

This bill would make such a mitigating circumstances provision in the law, as to certain crimes formerly subject only to the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole in other cases.

This bill would also define the proof necessary to prove murder involving the infliction of torture to require proof of intent to inflict extreme and prolonged pain, and would define the proof necessary to prove that the defendant aided or committed an act causing death to require proof that the defendant's conduct was an assault or battery or involved an order, ~~advice, encouragement, initiation, or provocation~~ *initiation, or coercion* of the killing.

The bill would provide that certain of its provisions would become operative only until the operative date of A.B. 513, if later than the operative date of this bill.

The bill would take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 of the Penal Code. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life

imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000), or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be

determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years.

SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

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

~~(a) The defendant's guilt shall first be determined without a finding as to special circumstances or penalty.~~

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

~~(c) If any charged special circumstance is found to be true, there shall thereupon be further proceedings on the question of penalty. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.~~

(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (b) of section 190.2.

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

special circumstance.

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

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

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

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

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

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

~~(2) The murder was willful, deliberate, and premeditated and the victim was a witness to a crime who was intentionally killed for the purpose of~~

~~preventing his testimony in any criminal proceeding.~~
(2) The murder was willful, deliberate, and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.
(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:
(i) Robbery in violation of Section 211;
(ii) Kidnapping in violation of Section 207 or ~~209;~~ *209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.*
(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;
(iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;
(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.
(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.
(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or

second degree.

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

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and ~~found, in a proceeding under Section 190.4,~~ *found* to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 219, 4500, or 12310 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by either the people or the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of *other* criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

~~The penalty shall be death unless the trier of fact, after consideration of all the evidence, finds that there are mitigating circumstances sufficiently substantial to call for leniency, in which case the penalty shall be life imprisonment without possibility of parole.~~

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to

use force or violence. As used in this section, criminal activity does not require a conviction.

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

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

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

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

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

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

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

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

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

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

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and

the existence of any special circumstances found to be true pursuant to Section 190.1.

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

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

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

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

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

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

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

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

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

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or whether there are mitigating circumstances of a sufficiently substantial nature to call for leniency, in which case the penalty shall be life imprisonment without the possibility of parole.

SEC. 12. Section 190.4 is added to the Penal Code, to read:

~~190.1. (a) When special circumstances as enumerated in Section 190.2 are alleged, and the defendant has been found guilty of first degree murder, there shall be a hearing on the issue of the special circumstances. At the hearing the determination of the truth of any or all of the special circumstances charged shall be made by the trier of fact on the evidence presented.~~

~~Either party may present such additional evidence as they deem necessary and is relevant to the question of whether or not there exist special circumstances.~~

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

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

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

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

case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

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

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

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

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, ~~the court shall dismiss the jury and shall order a new jury impaneled to determine the penalty. If such jury is unable to reach a unanimous verdict as to what the~~

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~~penalty shall be,~~ the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole.

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

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

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

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

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

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reviewed on the people's appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.

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

SEC. 13. Section 190.5 is added to the Penal Code, 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 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 4500, or 12310 of this code, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death.

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

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this

time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. ~~The failure of the Supreme Court to comply with the requirements of this section shall in no way preclude~~ *A failure to comply with the time requirements of this section shall not be grounds for precluding the ultimate* imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any

railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with death or imprisonment in the state prison for life without possibility of parole in cases where any person suffers death as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death as a proximate result thereof. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

~~1050. The people of the State of California have a right~~

~~to a speedy trial. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all courts and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings. No continuance of a criminal trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance. No continuance shall be granted in a capital case except where extraordinary and compelling circumstances require a continuance. Facts supporting these circumstances must be stated for the record and the court in granting a continuance must direct that the clerk's minutes reflect the facts requiring a continuance. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this state and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.~~

1050. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the

earliest possible time. To this end the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. It is therefore recognized that the people and the defendant have reciprocal rights and interests in a speedy trial or other disposition, and to that end shall be the duty of all courts and judicial officers and of all counsel, both the prosecution and the defense, to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.

To continue any hearing in a criminal proceeding, including the trial, a written notice must be filed within two court days of the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance. Continuances shall be granted only upon a showing of good cause. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this State and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. A continuance shall be granted only for that period of time shown to be necessary by the evidence considered at the hearing on the motion. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of the this code, the court must

immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the

assault was committed shall be counted as the first day. Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4. If no death occurs then such person shall be punished by imprisonment in the state prison for life without possibility of parole.

SEC. 23. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provisions or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance,is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment, such life imprisonment shall be without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser

magnitude.

If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result thereof, a defendant who has been sentenced to life imprisonment without the possibility of parole under the provisions of this act will instead be sentenced to life imprisonment with the possibility of ~~parole, such person shall not be eligible for parole until he has served 20 years in the state prison.~~ *parole.*

SEC. 25. *If this bill and Assembly Bill 513 are both chaptered, and both amend Section 1050 of the Penal Code, Section 18 of this act shall become operative only if this bill is chaptered and becomes operative before Assembly Bill 513, and in such event Section 18 of this act shall remain operative only until the operative date of Assembly Bill 513.*

SEC. 26. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

SENATE BILL
155

SEVENTH AMENDED
VERSION
MAY 9, 1977

AMENDED IN ASSEMBLY MAY 9, 1977

AMENDED IN ASSEMBLY APRIL 28, 1977

AMENDED IN ASSEMBLY APRIL 13, 1977

AMENDED IN SENATE MARCH 24, 1977

AMENDED IN SENATE MARCH 10, 1977

AMENDED IN SENATE MARCH 1, 1977

AMENDED IN SENATE FEBRUARY 17, 1977

SENATE BILL No. 155

Introduced by Senator Deukmejian
(Principal Coauthors: Senator Beverly and Assemblyman McAlister)
(Coauthors: Senators Briggs, Campbell, Dennis Carpenter, Cusanovich, Johnson, Nejedly, Nimmo, Presley, Richardson, Robbins, Russell, Song, Stull, and Wilson; Assemblymen Perino, Antonovich, Boatwright, Chappie, Chimbole, Cline, Collier, Cordova, Craven, Cullen, Duffy, Ellis, Hallett, Hayden, Imbrecht, Lancaster, Lanterman, Lewis, *McVittie,* Nestande, Robinson, Statham, Stirling, Suitt, Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray)

January 19, 1977

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 155, as amended, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of mitigating circumstances.

This bill would make such a mitigating circumstances provision in the law, as to certain crimes formerly subject only to the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole in other cases.

This bill would also define the proof necessary to prove murder involving the infliction of torture to require proof of intent to inflict extreme and prolonged pain, and would define the proof necessary to prove that the defendant aided or committed an act causing death to require proof that the defendant's conduct was an assault or battery or involved an order, initiation, or coercion of the killing.

The bill would provide that certain of its provisions would become operative only until the operative date of A.B. 513, if later than the operative date of this bill.

The bill would take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 of the Penal Code. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000), or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

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

190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years.

SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

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

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

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

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

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

190.2. The penalty for a defendant found guilty of

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

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

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

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

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

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

(i) Robbery in violation of Section 211;

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

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

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

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

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

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

(6) The murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive.

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

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the

Military and Veterans Code, or Section 37, 128, 219, 4500, or 12310 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by either the people or the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

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

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

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

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

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and

the existence of any special circumstances found to be true pursuant to Section 190.1.

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

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

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

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

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

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

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

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

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

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or ~~whether there are mitigating circumstances of a sufficiently substantial nature to call for leniency, in which case the penalty shall be~~ life imprisonment without the possibility of parole.

SEC. 12. Section 190.4 is added to the Penal Code, to read:

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

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

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

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

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and

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

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

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

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

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

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the

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

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

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

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

SEC. 13. Section 190.5 is added to the Penal Code, 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 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 4500, or 12310 of this code, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed

such act or acts causing death.

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

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. A failure to comply with the time requirements of this section shall not be grounds for precluding the ultimate imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with death or imprisonment in the state prison for life without possibility of parole in cases where any person suffers death as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death as a proximate result thereof. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the

defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. It is therefore recognized that the people and the defendant have reciprocal rights and interests in a speedy trial or other disposition, and to that end shall be the duty of all courts and judicial officers and of all counsel, both the prosecution and the defense, to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.

To continue any hearing in a criminal proceeding, including the trial, a written notice must be filed within two court days of the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance. Continuances shall be granted only upon a showing of good cause. Neither a stipulation between counsel nor the convenience of the parties is in and of

itself a good cause. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this State and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. A continuance shall be granted only for that period of time shown to be necessary by the evidence considered at the hearing on the motion. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to

read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

~~Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault.~~

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault and was not on parole.

SEC. 22. Section 12310 of the Penal Code is amended to read:

~~12310. Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4. If no death occurs then such person shall be punished by imprisonment in the state prison for life without~~

~~possibility of parole.~~

12310. (a) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes the death of any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life without the possibility of parole.

(b) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life.

SEC. 23. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provisions or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment, such life imprisonment shall be without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude.

If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result thereof, a defendant who has been sentenced to life imprisonment without the possibility of parole under the provisions of

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this act will instead be sentenced to life imprisonment with the possibility of parole.

SEC. 25. If this bill and Assembly Bill 513 are both chaptered, and both amend Section 1050 of the Penal Code, Section 18 of this act shall become operative only if this bill is chaptered and becomes operative before Assembly Bill 513, and in such event Section 18 of this act shall remain operative only until the operative date of Assembly Bill 513.

SEC. 26. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

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SENATE BILL
155

EIGHTH AMENDED
VERSION
MAY 12, 1977

AMENDED IN ASSEMBLY MAY 12, 1977

AMENDED IN ASSEMBLY MAY 9, 1977

AMENDED IN ASSEMBLY APRIL 28, 1977

AMENDED IN ASSEMBLY APRIL 13, 1977

AMENDED IN SENATE MARCH 24, 1977

AMENDED IN SENATE MARCH 10, 1977

AMENDED IN SENATE MARCH 1, 1977

AMENDED IN SENATE FEBRUARY 17, 1977

SENATE BILL No. 155

Introduced by Senator Deukmejian
(Principal Coauthors: Senator Beverly and Assemblyman McAlister)
(Coauthors: Senators Briggs, Campbell, Dennis Carpenter, Cusanovich, Johnson, Nejedly, Nimmo, Presley, Richardson, Robbins, Russell, Song, Stull, and Wilson; Assemblymen Perino, Antonovich, Boatwright, Chappie, Chimbole, Cline, Collier, Cordova, Craven, Cullen, Duffy, Ellis, Hallett, Hayden, Imbrecht, Lancaster, Lanterman, Lewis, McVittie, Nestande, Robinson, Statham, Stirling, Suitt, Vincent Thomas, William Thomas, Thurman, Norman Waters, and Wray)

January 19, 1977

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

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LEGISLATIVE COUNSEL'S DIGEST

SB 155, as amended, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of mitigating circumstances.

This bill would make such a mitigating circumstances provision in the law, as to certain crimes formerly subject only to the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole in other cases.

This bill would also define the proof necessary to prove murder involving the infliction of torture to require proof of intent to inflict extreme and prolonged pain, and would define the proof necessary to prove that the defendant aided or committed an act causing death to require proof that the defendant's conduct was an assault or battery or involved an order, initiation, or coercion of the killing.

The bill would provide that certain of its provisions would become operative only until the operative date of A.B. 513, if later than the operative date of this bill.

The bill would take effect immediately as an urgency statute.

Vote: ⅔. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 of the Penal Code. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000), or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

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

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190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years.

SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

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

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

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

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

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

190.2. The penalty for a defendant found guilty of

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

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

(b) *The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;*

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

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

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

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

(i) Robbery in violation of Section 211;

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

necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.

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

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

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

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

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

~~(6) The murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive.~~

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

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder

in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, ~~219,~~ ~~4500,~~ ~~or 12310~~ *219 or 4500* of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by ~~either the people or~~ *both the people and* the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

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

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

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

defendant in mitigation.

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

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

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

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

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

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

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

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

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

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

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

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

the possibility of parole.

SEC. 12. Section 190.4 is added to the Penal Code, to read:

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

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

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

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

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special

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

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

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

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

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

the same trier of fact at the subsequent phase.

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

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

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

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

SEC. 13. Section 190.5 is added to the Penal Code, 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 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, ~~4500, or 12310~~ *4500, or subdivision (b) of Section 190.2* of this code, the death penalty shall not be imposed upon

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any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death.

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

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. A failure to comply with the time requirements of this section shall not be grounds for precluding the ultimate imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in

which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with death or imprisonment in the state prison for life without possibility of parole in cases where any person suffers death as a proximate result thereof, or imprisonment in the state prison for life with the possibility of parole, in cases where no person suffers death as a proximate result thereof. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life

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imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. It is therefore recognized that the people and the defendant have reciprocal rights and interests in a speedy trial or other disposition, and to that end shall be the duty of all courts and judicial officers and of all counsel, both the prosecution and the defense, to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.

To continue any hearing in a criminal proceeding, including the trial, a written notice must be filed within two court days of the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the

court for good cause entertains an oral motion for continuance. Continuances shall be granted only upon a showing of good cause. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this State and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled to a reasonable continuance not to exceed 30 days. A continuance shall be granted only for that period of time shown to be necessary by the evidence considered at the hearing on the motion. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the

defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault and was not on parole.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. (a) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes the death of any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life without the possibility of parole.

(b) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life.

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SEC. 23. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provisions or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance,is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment, such life imprisonment shall be without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude.

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

SEC. 25. If this bill and Assembly Bill 513 are both chaptered, and both amend Section 1050 of the Penal Code, Section 18 of this act shall become operative only if this bill is chaptered and becomes operative before Assembly Bill 513, and in such event Section 18 of this act shall remain operative only until the operative date of Assembly Bill 513.

SEC. 26. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or

safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

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SPECIAL HEARING
OF THE
ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE

CONSTITUTIONAL ISSUES RELATIVE TO THE DEATH PENALTY

Sacramento, California
January 24, 1977

Kenneth L. Maddy, Chairman
Terry Goggin, Vice Chairman

California Legislature

Assembly Committee on Criminal Justice

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COMMITTEE SECRETARY

SPECIAL HEARING

January 24, 1977
Room 2170
1:30 P.M.

SUBJECT: CONSTITUTIONAL ISSUES RELATIVE TO THE DEATH PENALTY

Witnesses to be called in a convenient order.

William James	Deputy Attorney General
Paul Halvonik	State Public Defender
Harry B. Sondheim	District Attorney's Office Los Angeles County
Mark E. Overland	Public Defender's Office Los Angeles County
Anthony G. Amsterdam	Law Professor, Stanford University

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE

SPECIAL HEARING

January 24, 1977
Room 2170
1:30 P.M.
State Capitol

CONSTITUTIONAL ISSUES RELATIVE TO THE DEATH PENALTY

CHAIRMAN KEN MADDY: The hearing today was called primarily for this Committee to have a chance to listen to experts in the area of constitutional law, and individuals who have been dealing with the question of the death penalty in California, to discuss the issues that were raised by the United States Supreme Court and State of California Supreme Court decisions of recent time on the question of the death penalty.

I think we have with us an outstanding group of experts who will give us information. It was the intent of the Chairman and Members of the Committee to gain as much information as we can by listening to people to learn at least what we are dealing with in California when we deal with bills that are before us on the question of the death penalty -- the reinstatement of the death penalty.

I will introduce the experts that we have with us. Beginning on my right, Mark E. Overland, Public Defender's Office of Los Angeles County; Mr. Harry B. Sondheim, District Attorney's Office of Los Angeles County; Mr. Paul Halvonik, the State Public Defender; Mr. William James, Deputy Attorney General; and Anthony G. Amsterdam, Law Professor, Stanford University.

We have with us two individuals that are dealing with the

question of the death penalty at the trial level, two that are dealing with it primarily at the appellate level, and Professor Amsterdam who has been involved in cases before the United States Supreme Court and the State Supreme Court on the questions of the death penalty.

Professor, since you hold that rank, perhaps we could ask you to begin by giving us, at least, a brief background on where we have come since the Furman decision and since the Anderson decision in California, and since we attempted to enact a death penalty in California in 1973 in the California Legislature.

PROFESSOR ANTHONY G. AMSTERDAM: Thank you, Mr. Chairman. The history that brings us to the point at which we now are, in the death penalty, briefly, is as follows. In 1972 the California Supreme Court struck down the death penalty statute then on the books as a cruel and/or unusual punishment under the State Constitution. As you all know the State Constitution was subsequently amended by Article I, Section 27, whose purpose was to prevent invalidation of death penalty legislation under the State Constitution. But, of course, it did not and could not prevent the invalidation of such legislation under the federal Constitution, and it is important to note that the statute which was then on the books allowed juries in capital cases to sentence to life or death in their unfettered discretion without guidelines or standards of any sort, and without appellate review. It was subsequently held by the California Supreme Court to be in violation of the federal Constitution, and that is a low visibility holding because it essentially was done in footnotes. The way it came about was after the Supreme Court of California had invalidated the old death penalty under the California Consti-

tution, the United States Supreme Court, 1972, decided the case of Furman vs. Georgia.

That held, specifically, that a statute which gave the jury unfettered discretion without guidelines to sentence convicted defendants for life or death was a cruel and unusual punishment under the federal Constitution. The California Supreme Court had to decide whether the enactment of the initiative measure which ended California constitutional objections to the old death penalty statute obviated federal constitutional objections as well. And, a series of cases held that it did not, that the old California death penalty was bad under the Furman decision of the United States Supreme Court.

Now, as we all know, in 1973 a new death penalty statute was enacted. The new death penalty statute was challenged in the courts. It essentially provided a mandatory death penalty for enumerated offenses. On July 2nd and July 6th of 1976 the Supreme Court of the United States decided six cases. Invalidating the death penalties of three states, North Carolina, Louisiana, and Oklahoma, and holding constitutional the death penalties of three states, Texas, Georgia and Florida. Holding essentially that a death penalty statute is unconstitutional if it is either too discretionary, in the sense that it allows too much leeway for arbitrariness and discrimination in death sentencing, or on the other hand if it is mandatory. The result of those decisions leave a rather narrow channel within which death penalty legislation may be constitutional, and, of course, last December the California Supreme Court applying those July 1976 decisions of the United States Supreme Court invalidated this State's 1973 law.

The bottom line is this -- in the opening paragraph of the Rockwell decision the Supreme Court of California very carefully and explicitly put aside all questions as to cruel and unusual punishment and broader issues of the validity of the death penalty and limited its holding to the application of the July 1976 United States Supreme Court decision.

This Committee is going to face, if it wants to draft a constitutional statute, both the problem of conforming the statute to the standards set forth in the July decision of the United States Supreme Court and also problems that are preserved or hang over, if you will, that were not faced in Rockwell.

I think, Mr. Chairman, it may be useful if I just sketch the outer parameters rather than getting down to specifics and then let matters go forward.

The outer parameters are, I think, number one, any death penalty legislation must have sufficient standards so that juries in imposing the death penalty and courts in reviewing its imposition can guard against arbitrariness and discrimination -- whimsey, freakish fortuity, chance, injustice of that sort in the death sentencing process. An important thing to notice is that the July 1976 decisions do not overrule the 1972 Furman decision. They reaffirm that a death sentencing procedure which does not have standards and guidelines for juries and judges is unconstitutional. Secondly, on the other hand, the statute may not be mandatory. Now, what is therefore required are specific sets of procedures, and also substantive definitions of the crime that meet federal constitutional standards.

Several procedures are important and the Committee ought to consider them. One, the United State Supreme Court has suggested

strongly that a bifurcated sentencing procedure is indispensable. At least as opposed to an unitary procedure. The question of a trifurcated procedure, such as proposed in some bills that have been suggested, is one that, I think, ought to be on the agenda, but rather than address specific issues, now, I simply want to note it because it is very important. A second procedural question has to do with juries who sentence in capital cases. In upholding the constitutionality of the death penalty in July of 1976 the Supreme Court of the United States noted that the reason why the death penalty could not be called cruel and unusual at this point in time is that discretionary death sentencing procedures allowed the evolution of community standards to, in effect, veto capital punishment whenever it becomes unacceptable for particular crimes.

One of the things that the court held was wrong with mandatory death penalties was that juries could not vote their consciences in individual cases and that the death penalty was not conformed to community standards. The function of the jury, then, under the July 1976 death penalty decisions is to reflect the conscience of the community in death sentencing and that suggests a fundamental question as to whether the law of this State need not be changed because it has traditionally allowed the exclusion from juries of any person who has conscientious scruples against the application of the death penalty. It is argued, and I believe it is correctly argued, that any procedure which excludes persons having conscientious scruples against the death penalty from sitting in capital cases so deprives the jury of its function of reconciling the death penalty with evolving standards of decency in the community as to render a statute with such exclu-

sions unconstitutional.

Now, there is legislative precedent, for example, in the State of Maryland, which authorizes persons to sit on capital juries without inquiring as to their conscientious or religious scruples against the death penalty.

My purpose is to be as helpful to the Committee as I can. I have no set piece.

ASSEMBLYMAN KNOX: Professor Amsterdam, several years ago, it was either California's court or somebody said that you may not exclude such people for cause. They can use a preemptive challenge but not a challenge for cause.

AMSTERDAM: No, the decision you are thinking of, Mr. Knox, is the decision in Witherspoon vs. Illinois in which the Supreme Court in 1968 held that exclusion of jurors from capital trials if they had only explored scruples against the death penalty, that is, if they simple said, "Are you against or opposed to it?", was unconstitutional. But, that decision allows the exclusion of jurors who said that their opposition to the death penalty is strong enough that they would refuse to consider it in any case.

ASSEMBLYMAN KNOX: As long as they say they can be fair on the issue of guilt or innocence can they serve on the jury in this State -- can they under that decision?

AMSTERDAM: No, that is not in effect. There are two parts to Witherspoon.

ASSEMBLYMAN KNOX: I carried a bill in 1961 or 1963, I have forgotten which, which would not allow the challenge for cause if somebody had a conscientious feeling about this matter. I have forgotten the wording of the bill now, maybe Mr. Halvonik can recall it.

PAUL HALVONIK: You were going to have separate juries, Jack, for the bifurcation and the trial. But, what Professor Amsterdam is addressing, is the question of whether you can totally "death" qualify a jury at all. The bill you are referring to, I think, would have said that you couldn't "death" qualify a jury that was going to reach the issue of guilt or innocence. And then after they reached that issue then you have a different process in the second portion of the trial.

ASSEMBLYMAN KNOX: O.K. I lost that bill by one vote in the Senate Committee, as I recall. It almost passed. It was during Pat Brown's Administration. Pardon me for interrupting.

AMSTERDAM: The problem is simply not solved by constitutional decisions at the moment. It must be dealt with legislatively. There is no question about that. It is a live and real issue.

ASSEMBLYMAN GOGGIN: Very briefly, if the death penalty verdict is required to be unanimous, and you have one person on there who is conscientiously opposed to the death penalty couldn't it be argued that that in effect is an automatic veto of the death penalty not reflecting community standards?

AMSTERDAM: Well, it depends entirely upon what you provide in the event that the jury hangs, whether you provide for a retrial report on the jury.

ASSEMBLYMAN GOGGIN: What would you suggest? What do you think is fair if you are trying to arrive at a community standard?

AMSTERDAM: I have no hesitation, myself, in suggesting that the veto power is perfectly appropriate. It seems to me that if you cannot get twelve people who will respond, in a particular case, by saying a person's life ought to be extinguished, that

person's life ought not be extinguished. I see no problem, whatsoever, in saying that a veto of that sort should be appropriate.

CHAIRMAN MADDY: Mr. James or Mr. Sondheim, would you like to speak on that issue?

HARRY B. SONDHEIM: Let me start out by saying I don't intend to debate the propriety of having a death penalty, but will start out, really, with the issue of constitutionality and leave it to the Legislature to decide whether it is appropriate to have this penalty in California. I think, as Professor Amsterdam has indicated, the United State Supreme Court has declared certain statutes from certain states to be constitutional which appears to me to lead to the conclusion that at least as far as the federal Constitution is concerned a death penalty statute is constitutional. With regard to the State Constitution, as Professor Amsterdam has indicated, that was left open in the Rockwell case and again seems to me that at least at this time we don't know what the conclusion will be on that issue. Lawyers can debate that. I think we can spend alot of time here. I would suggest, however, that those arguments might be more appropriate for the courts under what might be called the separation of powers. The issue for the Legislature, among other things, it seems to me, is whether it is proper to have the death penalty and then it is up to the courts later on to determine whether or not that is constitutional. I am sure Professor Amsterdam will be there in court on such cases as well as other people.

What I would like to spend my time on today is in terms of the drafting of a bill, what types of issues might be considered and would be of concern to a prosecutor's office. Professor

Amsterdam mentioned the possibility of a bifurcated trial or trifurcated, and he indicated these are to be preferred over unitarian trials. I think that is quite true under the Supreme Court decisions. I would like to consider for a moment the different types of bifurcated or perhaps trifurcated trials that one can have.

In a bifurcated trial you could have guilt and special circumstances and I use special circumstances to indicate those persons whom, or let us say, possible persons upon whom the death penalty might be imposed. You could have the guilt and special circumstances determined in one trial and then the penalty in a separate trial. That is the way it was done in the Texas statute that was under review by the United States Supreme Court.

CHAIRMAN MADDY: Mr. Sondheim, it seemed that in reading Rockwell that there was a discussion about weighing mitigation, aggravation, the special circumstances versus the standards that you establish, if any, in regard to mitigation. If you have a trifurcated or bifurcated situation in which differing triers of fact would have to deal with those problems, how are they going to weigh them?

SONDHEIM: To begin with I would be hopeful that it could be resolved by the same trier of fact, i.e., he would go from one phase of the trial to the next phase using the same trier of fact unless along the way somewhere you end up with an hung jury in which case you have to retry your case in any event.

CHAIRMAN MADDY: Looking at our statutes that we had in 1973 which gave the possibility of having differing triers of the fact -- do you feel that you would have to have the same

trier of fact to meet the standards of the Supreme Court?

SONDHEIM: No.

CHAIRMAN MADDY: When they talk about weighing the two?

SONDHEIM: You don't need the same trier of fact because as I view the different possibilities you start off first, for example, with guilt. And, you can have as part of the guilt phase, if that is the intent of the Legislature, special circumstances determined. Later on you would then have a penalty trial and at that penalty trial you would have the so-called aggravating and mitigating circumstances. But that would be in a separate trial. Now, you could have the penalty issue determined by the same jury or if that jury hung up you could then go to another jury or it may even be a court trial whatever the situation happens to be. Does that answer --

ASSEMBLYMAN ALAN SIEROTY: Professor Amsterdam said there was a narrow channel which has to be met for the Supreme Court test and that unfettered discretion of the jury would not be constitutional. I think what the Chairman is asking is the same question that I have. How can you establish standards with regard to character and mitigating circumstances? Is this not what the Legislature is asked to do by these court decisions? If you are talking about a third phase of this trial are the juries going to be able to decide without any standards just on the basis of their feelings about things -- having heard testimony as to character and mitigating circumstances -- are they going to be able to decide one way or the other without any kind of standards? Are we required to set up standards, and, if so, what kind of standards are envisioned?

SONDHEIM: It seems to me that you can go at this in two

ways. Number one, you can spell it out in terms of the aggravating as well as the mitigating circumstances. That is the way it was done in the Florida statute and that is the way it is in the A.O.I. Model Penal Code. On the other hand you can have undefined standards vis-a-vis the mitigating circumstances so long as you permit the jury to gather evidence and hear evidence, I should say, relating to the crime and the defendant and that is the way it was in the Georgia and Texas statutes.

In Texas they specified that certain types of murders were to be eligible for the death penalty and then they allowed the jury to hear whatever evidence the prosecution and the defense happened to present to the jury relating to the crime itself as well as the background and character of the defendant. That is the way it was in the Georgia statute. So, I think that is an issue that the Legislature has to deal with. It can go either way. As I view the United States Supreme Court decisions either way is correct so long as under whatever method is selected the jury is able to understand and to get information relating to the crime itself and the background and the character of the defendant.

ASSEMBLYMAN SIEROTY: May I ask you, Professor Amsterdam, the same question?

AMSTERDAM: Yes. In responding to it, Mr. Sieroty, I would also like to try to address the Chairman's question as well.

I think there is a very serious question about a trifurcated procedure because what a trifurcated procedure does is to provide that -- first the jury finds aggravating circumstances. Then, only if it finds aggravating circumstances is the defendant eligible for the death penalty. Then, the next stage after that

is to consider mitigating circumstances or as has been suggested, perhaps some additional aggravating circumstances and mitigating circumstances. The problem is that by diffusing the focus from the weighing process in which all of the aggravating are weighed against all of the mitigating. There is a very real question as to whether you would meet the Supreme Court's requirement of weighing. What the United States Supreme Court said in the Texas case was that juries must be free to consider -- true their attention must be focused and guided by standards but they must be free to consider all of the reasons for and all of the reasons against imposition of the death penalty. To take them in bites -- I think that everybody on this Committee knows that if you consider part of an issue and then adjourn for a week and then consider the factors on the other side you get a very different process of weighing than if you put all of the factors into the hopper at the same time.

So, I think there is a very, very serious problem and question with trifurcating the procedure. I think that that therefore, for me, raises the question of what level of definition the Legislature should and can provide in the second stage of a bifurcated procedure which is the one procedure that we know that the Supreme Court of the United States will sustain.

I think this Legislature might very well follow the lead of the Florida statute which the Supreme Court has blessed by providing a limited list of aggravating circumstances. These but only these may be considered. With an open ended list of mitigating circumstances which was the Florida pattern the Supreme Court of the United States seems to have told us that that is the pattern which the Supreme Court will adopt. In fact,

it sustained the Texas statutes specifically because of the fact that the Texas Supreme Court had read into its statute the power to put any mitigating circumstance at all with the jury.

The important thing is that if you vary from the Florida and Georgia models at all you ought to be aware that in the Gregg case the Supreme Court of the United States made very clear and I am quoting from Gregg that "each system for the administration of the death penalty has to be judged on its own . . . procedure". And, if you vary at all from any of the ones that have been enacted you are going to have constitutional problems. Therefore, if you don't use the Florida approach, exactly, you don't use the Georgia approach, exactly, you have got to start from the ground and think through the serious question, "What procedures are necessary to keep the arbitrariness involved in Furman from happening?"

Another one that certainly ought to be on this Committee's agenda -- I don't think any of us have enumerated the moral -- I am not sure of the time which to do that -- but the absence of Supreme Court porportionality in a statute in my judgement, is enough to make it unconstitutional. The United States Supreme Court has remanded to the Arkansas Supreme Court two Arkansas cases under a statute virtually exactly like Georgia's. The only difference was that Arkansas does not have porportionality review in its Supreme Court and Georgia did. So we need not only to talk about the definition of aggravating circumstances and mitigating circumstances at the trial level, we have to provide adequate procedures for review of the trial level decision in an appellate court. This may be where some of your additional controls and safeguards as the United States Supreme Court calls them come into play.

CHAIRMAN MADDY: Mr. Goggin has a question and then I would like Mr. James and Mr. Halvonik to talk about the proposal that essentially has been introduced on behalf of the Attorney General and others. It talks about a trifurcated situation. Perhaps you can address yourself to the same question that has been raised before.

ASSEMBLYMAN GOGGIN: What is proportionality review?

AMSTERDAM: Proportionality review is where an appellate court considers the facts and circumstances of a particular case to determine whether the death penalty is excessive in that case by comparing it with judgements rendered by juries in other cases and saying, is this more or less aggravating than other cases. Is this the kind of case in which juries generally do not give the death penalty. It is distinguished from simple legal review to decide whether there were errors in the sentencing process. And, it is distinguished from an individualized excessiveness review where all the court does is looks at the facts of a particular case and says, "Gee, this is a terrible harsh penalty for this crime." Georgia and Florida Supreme Courts were required by statute and as the United States Supreme Court say it, the Texas Court did not only review penalties in each individual case to determine whether they were excessive on facts but it looked over the pool of cases to see whether the penalty was out of line with penalties applied in similar cases. In other words, what do juries generally do in a felony murder where the defendant is not the trigger man but the wheel man. If the appellate court sees fifty of these cases and only one defendant has been sentenced to death then the court can say, "Gee, that is an excessive penalty." And the United State Supreme Court has indicated that that is a key

safeguard, I think, constitutionally indispensable to prevent arbitrariness in sentencing. That is what proportionality review is. To look to a number of cases and see whether the death penalty in this case is out of proportion to what juries generally do.

WILLIAM JAMES: Thank you, Mr. Chairman. May I just talk about this proportionality for a minute. I think you will find by reviewing the three statutes that were upheld in the United States Supreme Court that only one of them had a built in statutory requirement that the State Supreme Court review the excessiveness or the lack of proportionality in the judgement before the court. Florida provided for an automatic appeal with a full review by its appellate court and Texas, also, provided for an automatic appeal. But, there was no statutory requirement that the Supreme Court view for proportionality the sentence imposed in any particular case. That may be one thing this Committee may want to consider, but I think you have before you at least three statutes that differ in many respects which were all upheld by the United States Supreme Court. The two statutes that were rejected and held unconstitutional were the two in which there was a mandatory death penalty imposed. The Supreme Court in the Gregg case pointed out very carefully that a statute can be drafted and they said carefully drafted -- which provides for a bifurcated trial -- that will permit the sentencing authority be it judge or jury and there is a difference in that one statute required a jury determination, the Florida statute had the judge as the sentencing authority -- provides the sentencing authority with relevant information relating to the imposition of sentence and gives standards on the use of that information. That this would require, of course, is the opportunity for the trier of fact

and the sentencing authority to consider mitigating circumstances and aggravating circumstances and also the circumstances attending the crime and the character and record of the defendant. That is what is required and must be in a constitutional statute. Beside that, as I pointed out, there are marked differences in these three statutes and the United States Supreme Court was looking to see if there was an opportunity by any fashion to afford the defendant an opportunity to present something in mitigation of the ultimate penalty. There was not in the North Carolina case and there was not in the statute of Louisiana. But, there was, at least that is what the United States Supreme Court had found from the interpretation of the Texas statute. The Texas statute didn't mention any list of aggravating circumstances or mitigating circumstances. They provided that if the defendant is found guilty of the capital offense of murder the jury would be required to answer and the state would be required to prove beyond a reasonable doubt the affirmative answer to three questions. And, among these questions was one as to the probability that the defendant would commit acts of criminal violence that would constitute him a continuing threat to society. The Texas statute had been interpreted by their court upon criminal appeals as permitting the introduction of evidence relating to mitigating and aggravating factors and the United States Supreme Court said that this statute as interpreted permitted the consideration by the sentencing authority, in Texas the jury, of these factors. And, the sentences imposed in the Texas case and the statute in Texas was found constitutional.

Now, on trifurcation, if that is what we are referring to, I think, that that would conform with the procedure laid down by

the United States Supreme Court as constitutional taking into consideration the variations in the three statutes that were before the court and that were found constitutional. In California there will be proposed I understand a finding by a jury of the defendant's guilt of murder -- capital crime. But, that would not in itself suffice for the imposition of any capital sentence. It would require first a refining, a narrowing, of the capital offense, a narrowing of the types of murder, first degree murder. That would call for the actual sentencing authority to determine whether there would be life or death as a punishment. And, after a finding beyond a reasonable doubt and the existence of one of these special circumstances, at that point the jury would then be permitted to consider the mitigating factors that might be set forth which would be permitted to be introduced and which would permit the jury to consider the background and record of the defendant.

CHAIRMAN MADDY: Would that be separated into two different hearings? And, if the possibility arose that you would have a separate trier of fact in those latter two hearings would that be able to work under the constitutional dictates? I don't see how one jury could determine special circumstances and consider all of the evidence and after a finding that there are special circumstances, then turn over to some other group to consider mitigation. How do you weigh without reintroducing all of the evidence, again? That is my problem.

JAMES: I think the procedure would contemplate one jury and actually one proceeding divided into the things that we have mentioned. In the event that there would be an hung jury on one of the findings which would require their unanimously agreeing

and being proved beyond a reasonable doubt then you would have to have another jury, probably have to hear the evidence over again. That is the statute that existed before Rockwell, that was the statute as it existed 190.1 before the Anderson decision.

CHAIRMAN MADDY: Do you feel that if there is an hung jury that another jury can be called to decide the same question that was asked the first jury? In some of the statutes, as we read them, that were before the Supreme Court, a hung jury would result in something other than the death penalty. I think there are some of the statutes that say if a jury is hung that the penalty will be something less than death.

JAMES: That is my understanding. But, I think --

CHAIRMAN MADDY: Do you think in California we could have the hung jury concept retained?

JAMES: That is my opinion. I don't know about Mr. Sondheim. Mr. Sondheim do you want to add anything to that?

SONDHEIM: I just want to clarify something on terminology. We speak of bifurcated and trifurcated -- but I think we ought to really talk in terms of the essence of these hearings. Let me just start out by saying as I understand the Texas law, it started out with one hearing at which you determined guilt and then went beyond guilt to determine if there were certain circumstances present which, so to speak, qualified that person for the death penalty. Now, and then it went on to a penalty where you really debated if you want to put it that way by means of argument and evidence what the proper penalty should be for that person.

ASSEMBLYMAN GOGGIN: I really don't understand why -- are we required to have a bifurcated or trifurcated proceeding or can we just keep it all -- really I mean one jury? Do we have

to have two different or three different juries? If so, why?

JAMES: As I read the Gregg opinion they did not put the bifurcated hearing as a constitutional mandate because that would have required probably overruling Crampton vs. Ohio in which they held that there was no constitutional requirement that the jury that determined the guilt as well as the penalty should hear the proceedings separately. I think that actually there could be a situation where they would provide for a unitary hearing. The danger would be that there would be presented at the guilt phase, evidence that would be irrelevant to the question of innocence or guilt. And, evidence that would in many incidences be prejudicial to the defendant. That would create a --

ASSEMBLYMAN GOGGIN: So, Mr. James, you are saying that in your opinion, at least, it is not required by the cases to have two separate or more juries? But, the same jury could decide both the guilt or innocence in the penalty?

JAMES: At the same phase, that's what you mean.

CHAIRMAN MADDY: Mr. Overland.

MARK E. OVERLAND: I would like to add one thing that hasn't been mentioned here. Mr. Chairman, I think you perhaps are operating under a misconception as to what the United States Supreme Court requires. You talk about weighing aggravating versus mitigating circumstances and that is certainly not required.

CHAIRMAN MADDY: I was looking at Rockwell in which they quote at one point the Florida statute which says the trial judge in Florida is directed to weigh eight aggravating factors against seven mitigating factors. Then later on in the same decision they talk about a weighing process. What I want to know is whether or

not we do have someplace in our statute for that weighing process to take place? I am concerned about a possible trifurcated situation in which the same trier of fact would not have the ability to weigh. Maybe you can straighten me out.

OVERLAND: Let me, briefly, talk about the background of that weighing. As you know before the Anderson decision in California, the salient feature of the death penalty statute was that the State was neutral. There was no preference for the death penalty over a penalty for life imprisonment. In other words the jury, no matter what the crime was, no matter what evidence the prosecutor put forth, could in its discretion decide to give the life sentence. Because of the Furman decision the special circumstances statute was enacted which in effect gave the backing of the State to a verdict of death if certain special circumstances were found. But, I think it is very clear, and the United States Supreme Court made it very clear in Gregg vs. Georgia, that even though there is a finding of special circumstances it is constitutional for the jury, even though it has found that special circumstances exist, to decline to impose the death penalty.

So, if you are talking about enacting a statute which goes into weighing aggravating versus mitigating factors you are in effect leaping back into the eighteenth century and going into a statute which is even harsher than the statute that we had here in California. And, it is clear in Gregg vs. Georgia the Supreme Court says, and I am quoting now, "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." So, as a matter of policy, the State could choose that even though special circum-

stances were sufficiently present to enable the jury to find such a verdict the death penalty still may not be imposed. In other words there is a type of discretion which is given to the jury which I suppose is part of the humanizing of the trial and letting the jurors decide to grant an individual defendant mercy in an appropriate case which has a sanction of the United States Supreme Court. So there is really no need to get into the weighing. I think you run into a real can of worms when you are talking about weighing because when you get right down to it, you try to weigh the age of the defendant, which is a mitigating factor according to many of the statutes, against the crime, and there is no possible way of actually weighing. And, I think what you get down to is a gut level decision by the jury anyway. So, I think it is very important to know that death penalty need not be imposed even though specific aggravating circumstances are present. The aggravating circumstances are merely a prerequisite. In other words, if there are no aggravating circumstances the death penalty cannot be imposed. But the converse is not necessarily true. So, I think that is a very important point.

I think with respect to the trifurcated trail that also in effect creates a psychological presumption towards the death penalty. I think as anybody knows who has ever tried a death penalty case -- as far as the guilt or innocence stage is concerned, you start out with the presumption of innocence and you have a defendant sitting beside you who is presumed to be innocent. Once you lose that, that is one strike. Then you go into the penalty phase. In the penalty phase the defendant does not have the presumption of innocence. There is a completely different mood. Anybody who has ever sat through defending

an individual in a case like that can sense that it is completely different than the first stage of the trial.

If you are talking about a third stage, a trifurcated procedure, what you in effect are saying is now you have a defendant that has two strikes on him. At the end the defense attorney is able to argue -- well, remember when I talked to you first when I talked to you about guilt or innocence -- well, you can forget about that. You have already ruled against me on that. When I talk to you about special circumstances, well, you have already ruled against me on that. Now, I want to talk to you about mitigating circumstances. In fact you have pretty well demolished any type of credibility that that individual attorney has on behalf of that defendant. So, I think the more stages you have operate to the detriment of the defendant. And again going back to the original death penalty statute that we had before the Anderson decision it certainly takes away any humanizing influence which a lawyer can have on the jury, that is to let them even in a case where there are aggravating circumstances to let them still decide not to impose the death penalty. Which is constitutionally permissible. So, I think when you are talking about bifurcated or trifurcated procedures you should be well aware of what you are doing in choosing one of the others.

AMSTERDAM: I just have two technical points. Because I disagree with Mr. James on his description of what the United States Supreme Court has held. One in response to Mr. Goggin's question.

I agree that the Supreme Court of the United States did not say that a bifurcated trial was constitutionally required. But,

what it did say was, and I am referring to 96 Supreme Court Reporter at page 2933, that a bifurcated trial -- well, first, those who have studied the question of controlling jury discretion suggest that a bifurcated procedure is the best answer and then over on page 2934, "When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence a bifurcated system is more likely to assure elimination of the constitutional deficiencies identified in Furman."

Now, if you look at the discussion of bifurcated trials in this opinion you will notice that the Supreme Court walks around its earlier Crampton and McGautha decision without even citing it, as though it were a hot potato. Frankly, as an opponent of the death penalty who will, and I will be candid with you, I will challenge anything that emerges in this Legislature. I will tell you that I will be delighted to have you pass a unitary trial procedure. I think the Supreme Court of the United States would knock it out. I admit that it hasn't said so and if you want to be sucked into that vacuum, be my guest. But, the court pretty much laid it on the line that it doesn't like a unitary procedure and I agree that I'm not sure a trifurcated procedure is good either. I think bifurcated is probably where you end up. Now on appellate review I also disagree with Mr. James. If you look at -- and again I would like to refer you to the specific pages of the Supreme Court decision. If you look at Proffitt v. Florida, 96 Supreme Court Reporter, page 2966. The United States Supreme Court describes the Florida procedure. It says, "The Supreme Court of Florida

like its Georgia counterpart considers its function to be in reviewing death sentences to guarantee that the aggravating and mitigating circumstances present in one case will reach a similar result to that reached under similar circumstances in another case." And, then if you look at page 2969 of 96 Supreme Court Reporter you will see that the Florida procedure is described as follows. "Finally, the Florida statute has a provision designed to assure -- that is appellate review -- that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The Florida Supreme Court reviews each death sentence to insure that similar results are reached in similar cases." So, Mr. James, I believe, is not correct. He is correct in saying that the Georgia statute was the only one that required the court to engage in this kind of review but the implication that it was the only procedure of the three that had that kind of review is wrong. The Florida Supreme Court by judicial construction had it as well.

Now, in Texas we are much less clear as to what the form of review in the Texas statute was. However, I know that the Supreme Court of the United States in describing the Texas statute said that the Texas statute provided prompt judicial review of the sentencing decision. In accord with statewide -- the sentencing decision -- not simple the review of the guilt determination -- in accord with statewide jurisdiction as a means to promote the even handed, rational and consistent imposition of death sentences under law. Which again implies a review for proportionality. Again, I think it would be a serious mistake to suspect that you will get a constitutional statute that does not provide for a review by the California

Supreme Court of the proportionality of death sentences imposed in individual cases. Every procedure that the United States Supreme Court has sustained has had it and in Arkanasas we didn't have it -- the Supreme Court of the United States has sent that case back for reconsideration by the Arkansas Supreme Court which had applied Gregg to sustain its statute.

CHAIRMAN MADDY: Mr. Halvonik, how about your thoughts.

PAUL HALVONIK: I think Mr. James answered his own remarks remarkably because it made it seem so comprehensible, and then I notice some confusion on the Committee and then we get into specifics and it doesn't seem all that comprehensible. And, it really isn't. I'm not able to predict very well where that U. S. Supreme Court is going. Professor Amsterdam said they stepped around the McGautha decision. Well, in McGautha they held that the Constituion requires standards or guidelines in order to impose a death penalty. And, in these decisions, in a footnote, they said they are not really overruling that because that was a fourteenth amendment standard's decision and this is an eighth amendment standard's decision. It is a good thing that in their rationalization after the fact that it didn't really kill Mr. McGautha.

But, that is just about where the U. S. Supreme Court is. I wouldn't ignore anything in these decisions that they say they like. They don't seem to be saying that just casually, and each member of that court's confusion about what is important ought to be important to you. You might, with your staff, and as you are reviewing these bills as they come back, look at Mr. Justice White's decision. Because, Justice White as I read him makes it clear that he is not saying any of these

statutes are necessarily constitutional even though he is upholding them. He is saying that in the past the way discretion worked it worked in a way that was totally at odds with the Constitution and that discretion worked to kill certain kinds of people and let other kinds of people off. And, they permitted juries to use standards that were not articulated, but were constitutionally impermissible, resulting in a lot of blacks getting killed, poor people -- that sort of thing. The wealthy people who would lie in wait to kill their wife or might torture their wife to death they weren't getting the death penalty. Something was wrong. One did have the impression then that mandatory death sentences were all there were. Now, the U. S. Supreme Court said no to that and some sort of discretion comes back in. But, White in his opinions says well I haven't seen how this kind of discretion works yet. You know he is going to wait to see where the sun comes up. That is what he is telling you. If you provide a system in which as I suspect you cannot help but provide, one where the sun is going to come up again, Mr. Justice White has told you he is going to reverse his role. If you are trying to fashion a statute consistent with those rather confusing decisions of last July, I think it, well, indiscreet, to ignore any factor that any Justice of that Supreme Court said influenced his final judgement -- that the statute was indeed constitutional.

JAMES: I certainly don't want to leave the impression that I am asking you to accept Professor Amsterdam's invitation to adopt a unitary trial -- a single trial. I merely pointed out that the United States Supreme Court did not say that a bifurcated trial was constitutionally required. It did refer to the three statutes that were before them provided for it. It pointed out

that this was the preferable method. It also pointed out that the American Law Institute under thier Model Penal Code has suggested this as the best procedure. And, I think that a procedure which would provide for three phases would also be constitutional.

I certainly want to stress the fact that there is only one statute here that required -- the statute itself -- that the appellate court hold a proportionality hearing on review. There were two statutes that did not provide for it and in effect the appellate court, the Supreme Court of Florida and the Court of Criminal Appeals did review for the proportionality on the appeal. I think that is something we can consider.

SONDHEIM: To get back to what I was trying to nail down before, namely, instead of using words unitary, bifurcated, trifurcated, I think we ought to consider what they really mean. As far as unitary trail is concerned, while I agree that it was left open I would certainly concur in Professor Amsterdam's view that you are just begging for constitutional problems if you buy that. It is possible, but frankly you create more problems that in my opinion it is worth, because when you get down to what it is worth just consider what you are doing. You have one trial, you are telling a jury now, find out whether this man is guilty, find out whether there are aggravating circumstances and then end up trying to decide penalty. You are opening the door, it seems to me, for all sorts of compromise instead of trying to get a verdict on what each of the issues in the case ought to be. And, then when they are all done, and now they have

decided, for example, after agonizing over it, imposed the death penalty, now you tell them, now you are going to decide whether this man is insane because you still have to take care of the insanity issue. It just wouldn't make any sense to go that way. So, lets get down to what I think perhaps are the two choices in this area -- the bifurcated and trifurcated. I don't like to use those terms because we have to understand what is meant by them. As I view the quote "bifurcated trial" as distinguished from the trifurcated trial, the trifurcated would be most closest to Texas because what happened there was this, and I would like to quote the Supreme Court because I think it is important to understand what it means when you have a bifurcated trial. What you are doing in essence is you are saying, now look, you are guilty or innocent. Then you go ahead and all of these people who are guilty of murder are now possible persons who will be subjected, perhaps, to a penalty trail. But, that is not the way it was in Texas and this is what the Supreme Court said about the Texas system. Because in Texas you went ahead first and you considered the guilt together with whether this person had committed a type of murder which qualified for the special circumstances of Texas. In other words, it narrowed the number of people who would be subjected to the penalty trial and this is what the U. S. Supreme Court said about that. So far as consideration of aggravating circumstances is concerned therefore one principle difference between Texas and the other two states is that the death penalty is an available sentencing option even potentially for a smaller class of murderers in Texas. That is the net result of the trifurcated trial. You are reducing the number

of people who have to go through the penalty phase of the case. That is one consideration that I think you should have. Another consideration is by mixing up a number of these issues you are in effect opening up the door to compromises on all sorts of things and it seems to me in our system we ought to have juries decide yes or no on some of these issues up to the point of penalty. At the time of the penalty I agree with Mr. Overland and that is when you get to this issue of how the penalty should be determined it is difficult at least for me to conceptualize the weighing process that is apparently envisioned both in the Florida statute and in the Model Penal Code. I would suggest one might look at the Georgia statute which -- for that part of the trial -- which in essence says here is the evidence to the jury and tells the jury then to pick the particular penalty and does not say anything about weighing one againt the other because I really -- whenever I think of weighing I think of a scale and like Mr. Overland I have difficulty putting age on the one side and whether it be old or young for that matter -- another factor such as the elements of the crime, the background of the defendant.

CHAIRMAN MADDY: Do you think it is necessary in a statute then to specify the factors of mitigation that a jury must consider?

SONDHEIM: No.

CHAIRMAN MADDY: Or can we just be very broad?

SONDHEIM: I am saying that as one alternative is to specify. That is the way Florida went, and that is the way the Model Penal Code goes. Another possibility is to do what they did in Georgia and Texas and that is to permit the jury to hear all of the circumstances relevant to to penalty and in essence as I think Professor Amsterdam pointed out about Texas, just open it up, let the jury hear the evidence presented and then let the jury choose

without specifying in the statute, these are the only items you can consider.

CHAIRMAN MADDY: In other words you think we probably would be more susceptible to challenge if we try to specify certain factors or if we said not limited to, but consider the following, or however you want to word it?

SONDHEIM: Both are options are available to you. I think it is a matter of policy. I personally know how I would choose, but you know that is your decision not mine. I can just tell you as a lawyer either system is defensible and as I understand it has been upheld by the United States Supreme Court.

CHAIRMAN MADDY: Would others agree? Professor Amsterdam and then Assemblyman Knox.

AMSTERDAM: I disagree that either has been upheld by the Supreme Court. I believe that it is true that you are free to either define mitigating circumstances or to leave them undefined. Provided that you have a broad enough rostrum. That is you couldn't have simply one mitigating circumstance -- the defendant is eighteen years or under. It is pretty clear that wouldn't pass. But, you are free if you have a broad enough range to define or leave them undefined. I do not agree that you are free to leave aggravating circumstances undefined. The Supreme Court has not sustained any statute in which aggravating circumstances were left undefined.

I think that the approach which defines exclusively and exhaustively your aggravating circumstances and then gives a list of mitigating circumstances which however is open ended, these and anything else is most likely to withstand constitutional challenge. That would be my assessment.

CHAIRMAN MADDY: You tend to agree with Mr. Overland then that if a jury wants to grant mercy they can do so for almost any reason?

AMSTERDAM: I would quite agree with everyone else as to the ultimate result that will happen. The jury does sit down and puts this all in a pool. What I really think you are doing is designing a statute for constitutionality more than for effect. The jury is going to do that under any of these procedures. But I think it is more likely to be constitutional --

CHAIRMAN MADDY: That may be what we do anyway.

ASSEMBLYMAN KNOX: I am intrigued with a trial particularly with the open ended list. Because you could get the character of the victim in the evidence, there is no question about that, as well as the character of the accused. You would have ability to ask almost any question on almost any subject and get all of this before the jury in one grand, 'fantasma gloria' of serialized troubles of everybody and then the jury would come up with a simple form of country justice and allow them to live or die or go free or whatever. Is that what is being proposed?

CHAIRMAN MADDY: We were asking the question, Mr. Knox, whether or not it was necessary in terms of drafting a statute whether or not we should specify certain mitigation factors.

ASSEMBLYMAN KNOX: I understand that, but as I understand the answer to that question, that it is being suggested that we either not specify and simple say evidence of mitigation with and/or aggravation which leaves it totally open ended or we are saying, as Professor Amsterdam suggests, that for the guidance of the jury and the court instructions we give a

list of whatever we can think of, but then make it open, just not limited to those items and you can go into anything else if you can convince the judge that on some basis --

CHAIRMAN MADDY: You can correct me if he is wrong, but I think the Professor is saying that the aggravation must be specific, and not open ended. The mitigation can be specific but it also must be open ended at some point. Am I correct, Professor?

AMSTERDAM: That is correct.

ASSEMBLYMAN GOGGIN: And, this takes place after a decision as to guilt or innocense?

ASSEMBLYMAN KNOX: Not necessarily as I understand it. It could be both ways. You could just throw the whole thing, the whole case in front of a jury. Characters of the people involved you know whether or not the defendant had a mother and all of that sort of thing and then all of the evidence of the alleged crime and then the jury kind of goes into a room and figures out what the right thing to do is. That is as I understand what the proposal is.

CHAIRMAN MADDY: Mr. James, please respond to Mr. Knox.

JAMES: Well, I'm not responding to Mr. Knox, Mr. Chairman, I am sort of responding to Professor Amsterdam. I think if you examine the Texas statute you will find that Texas didn't provide for any enumerated aggravating or mitigating circumstances. Texas in effect limited the categories of first degree murder for which the death penalty could be imposed and named five specific capital murder types. And, when the defendant was found guilty of that then you had the second hearing at which the jury had to answer affirmatively these three questions and at that time the Texas court had interpreted at least one of the questions to permit the

introduction of any mitigating factors, any character and background of the defendant that might be relevant to the sentencing authority and the United States Supreme Court upheld that statute.

AMSTERDAM: Technically, I believe that wrong. Again, the question to which Mr. James refers isn't in the aggravating circumstance. The Texas procedure, I think,has been accurately described as one in which the jury first decided both guilt and the aggravating circumstance within one of the categories, so-called capital murder. I think that is right, that is done at one stage. The second stage which is tantamount to a finding og aggravating and mitigating circumstances is that the Texas jury had to answer three questions. Number one, was the act to kill known to the defendant or reasonably should have been known to result in death. Number two, was the defendant in effect a likely recidivist in the demension of violence, that is, was he a continuing danger to the community, and number three, was there provocation. Now that is the aggravating circumstance procedure. Yes, or not to that, is aggravating circumstance. Now, in interpreting those, the Texas court also read in mitigating circumstances, by saying that, well relevant to those considerations, are the defendant's good record, and that sort of thing, but I quite disagree that the court has ever sustained a statute which did not identify aggravating circumstances. So, as to say that out of the total pool of those eligible for the death penalty specific factual findings have to be made, that the person -- within that class is somebody special -- a person is bad, but special, that the case is especially aggravated before the death penalty can be applied. That existed in every procedure the United States Supreme Court has sustained. Every one.

HALVONIK: I agree with what Professor Amsterdam has said but

I also agree that on the mitigation side that is not much of a guideline you get out of Texas. But, I emphasize again that the court seems to be saying let's see how this works, and I don't think that you could assume, that you could adopt a statute necessarily like Texas and get it sustained by the U. S. Supreme Court.

In all of this, one has the impression that there was a lot of log rolling going on and they are not consistent opinions. They seem to say that they like bifurcated trials, they like a reviewing court to be able to compare the cases proportionately, that there has to be an opportunity for the introduction into evidence of mitigating circumstances, there must be some room for discretion and if discretion should once again show that the poor and those in minority groups are discriminated against they are going to knock it down again. It is very hard to tell you precisely what they did, but it is my hope that you are not going pass a statute at all, but if you ignore any of the factors in any of those decisions that they like you are taking a big chance.

SONDHEIM: To answer your question, Mr. Knox, while I can't tell you what the law may be the Supreme Court does envision, it seems to me, the sort of circumstance that you have indicated. In the Texas case they have a footnote in which they say, "This might be construed to allow the jury to consider circumstances which though not sufficient as a defense to the crime itself might nevertheless have enough mitigating force to avoid the death penalty -- a claim for example, that a woman who hired an assassin to kill her husband was driven to it by his continued cruelty to her." We cannot, however, construe that the stuatute, that power is reserved for the Texas courts. It seems to me that the United State Supreme Court had envisioned the possibility

for Texas to have this sort of broad open ended system that you had, I think, alluded to in your question.

ASSEMBLYMAN KNOX: I was sort of intrigued by Mr. Halvonik's thought that I thought he was expressing to us that what is constitutional in Texas may not be constitutional in California. I remember from law school that Texas has the longest cooling off period for manslaughter as I recall of any state in the union. That is, you can shoot somebody with your Colt 45 in the burst of passion, but the provocation may have occured two days earlier or something and you just hadn't cooled off yet. If you shoot the meanest man in town in Texas I guess that can be used as mitigation. Now, maybe we should adopt that for California law, too. I don't know. But, I think if you get into character of the victim then we just finished the Robbins Rape Evidence Act, as I recall several years ago, which makes it very clear you can't go into the character of the victim in rape, but you can for murder. That is kind of interesting. I don't know. The cycle of the law intrigues me.

CHAIRMAN MADDY: That is why you are a Member of this Committee. That interest that you have in this whole subject.

HALVONIK: I just want to respond to the quote Mr. Sondheim put forth. What he quoted led me to the opposite notion that they are waiting to see how Texas glosses it. What Texas is going to say -- is good mitigation or bad. How those courts construe that statute. I don't think that you can magically say, here we are going to take these words and put them in and they are going to work. They seem to be leaving a lot of room to see how those courts in those states develop their standards. I don't see how you can predict it, but one thing I think that you can predict is that you just can't leave it too open ended.

AMSTERDAM: I would like to underline Mr. Halvonik's point, with several observations. Number one, the decisions in the United States Supreme Court in Gregg and Proffitt say very plainly we sustain these statutes on their face. We can't say that on their face they are unconstitutional. The court went out of its way to do that, reserving, I think, the question whether if when they were applied they were not applied fairly and even-handedly and where the pattern built up of arbitrary enforcement the court was leaving it open in the future. The second point I want to make is that the court - although in a strange manner -- reaffirmed this lately, you may have read about it in the newspapers in front of the United States Supreme Court the case Gardner vs. Florida, several months ago, in which Mr. Justice Stewart was widely reported as having said from the bench, and he did indeed, "Well, look, when we sustained this statute we thought that this was an open, fair process. Now we get a case up here in which the defendant appears to have been sentenced to death on the basis of an undisclosed presentencing report. If we are going to get that kind of thing we may just change our votes and have to knock that statute down." What he was saying, I think, was reinforcing Mr. Halvonik's point, that it is one thing to get a statute which will pass muster on its face.

It is another thing to get a statute which will stay constitutional in its application. I think this Committee both wants a statute which will be fairly even-handedly and non-arbitratily administered because the contrary is bad. Discrimination is bad. Whether it is constitutional or not it is bad. And this Committee ought not countenance. Besides that if you have a statute that doesn't have adequate safeguards you run the

risk of even though it is sustained on its face it is going to be knocked out as applied. So, I agree with Mr. Halvonik that all of the safeguards you can built in, judicial review by the trial judge after the jury sentencing of the jury sentencing decision. Appellate review -- I would strongly urge the procedure that the Georgia statute used which was to have reports filed in every case. And, I would have reports filed not in cases in which the death sentence was imposed, but in case it was papered as a capital case. A report filed on the facts and circumstances of that case to be kept in a safe or repository with a judicial conference or eventually filed with the Supreme Court of California so that comparison review by the California Supreme Court would be possible. You do all of those things, you will not only make a statute more fair in its administration, but in the long run increase the chances it will be held constitutional. I am not suggesting for one moment that you have to have such a reporting requirement in order to pass muster on its face. I would bet Mr. James will quickly say that only one of the three states has such a requirement, and I agree, only one did, but I am going to say, also, that the only thing that was done in those three cases was to sustain these statutes on their faces. And, if six months or ten months or two years or three years later a pattern of discriminatory enforcement emerges the Supreme Court has clearly left it open, as Mr. Halvonik says, to strike those statutes down. If you want a constitutional statute I would suggest that the Committee better be very careful about procedures that will prevent arbitrariness in fact and and/in procedures one, judicial review at both levels, trial and appellate level, reporting requirements and that sort of thing are vital if you want to not only get a constitutional statute but keep it constitutional.

GOGGIN: I would like the witnesses to respond on the issue of arbitrariness, capriciousness and discrimination against indigent defendants that if we required in the death penalty bill certain standards for representation of indigents in capital cases whether that would substantially help in dealing with the constitutionality question in those areas. Specifically, for example, requiring that you have an attorney with five years criminal experience, that adequate investigative procedures and people for the defense be supplied to the defendant, and so on. Does that type of standard for representation being in the statute help against the challenge of unconstitutionality?

HALVONIK: I think it is possible that it would affect the result. I certainly think -- I don't think it is probably the province of the Legislature to say somebody has to have so many years of experience or not. I have certainly seen lawyers with a lot of experience I wouldn't want handling my life before a jury and some with a lot less who I would feel a little more secure with. And, I suppose that is ultimately a question really for the bar to decide -- whether it has to be somebody who is certified to that sort of thing. I think as far as making sure that the person who is on trial has resources, adequate investigatory resources and that sort of thing is very important, but I must say that ultimately I think it is a will-'o-the-wisp. The death penalty is always going to be imposed in a discriminatory manner. Because what really goes on in the human mind is a drawing of a line and deciding that somebody is not within the class of humans otherwise they wouldn't be killing them. They are somehow beyond the pale and that means they are going to be sort of out of it, probably physically

repulsive, not too smart, you know, maybe a group that most of us don't belong to, very rarely somebody who has a college degree, not very many articulate people. Not many of us sitting here really are in danger of getting killed by that death penalty, hardly by anything we do, but the way death penalties are ultimately going to work you can't avoid them being discriminatory. That is part of the reason why I hope ultimately what you do is not send a bill out

-- let's let the other states waste their resources on this thing and let's not get back into the slaughter here. Let's pause awhile and look it over and see if in fact what occurs is what in fact it seems to me is predictable that Mr. Justice White as he sits there now and says, let's see how this works. He is going to find out how it works and they are just going to come back to the same result they did before -- knock out those death penalty. And, we would have wasted alot of energy in this State for nothing.

CHAIRMAN MADDY: Does anyone else care to answer Mr. Goggin's question?

AMSTERDAM: Just briefly. I think -- two ways, procedural protections of that sort would improve the constitutionality of the bill. Number one, atmospherically, any court is more sensitive and receptive to a constitutional claim of some poor guy who got shafted in the process of trial. And if you can keep the cases well tried with good lawyering and a good presentation of the defense's case the sympathy reaction that causes a court to knock out a statute is less likely to be effected. Secondly, in a more doctrinal sense, what the Supreme Court of the United States has said is that a defendant has to have an opportunity to present mitigating circumstances. Now, it is true that the context in which they said that is in knocking down statutes

that provided a mandatory death penalty with no mitigating circumstances at all. But a defendant is equally deprived of the opportunity to provide mitigating circumstances if he hasn't had the resources to bring in the evidence of them. And, if for example, a defendant with means could employ a 'shrink' to come in and testify at great length about how he fell on his head when he was a child and how he had a mother and all of these other things and thereby avoid the death penalty. Now, I wouldn't mind if this Committee saw fit to limit the death penalty only to those who did not have a mother. In any event, if you allow a defendant without means adequate resources so that a poor defendant can come in with the same defenses, same opportunity of proving mitigating circumstances I think he goes immediately and directly to the question whether or not the statute allows fair consideration of mitigating circumstances. I think it would increase the likelihood that the bill would be constitutional if you provide adequate means to make a defense. I also think it is desirable because I think if this Committee and this Legislature is going to kill people it darn well ought to give them a fair trial before they do.

CHAIRMAN MADDY: Do any of you think what we have in the Code -- Section 190.2 which is the listing of special circumstances -- any constitutional defects that you can see? Should it be more limited or could it be broader?

ASSEMBLYMAN ALATORRE: Or whether they should have categories at all?

OVERLAND: With respect to that list -- as far as the constitutional question is concerned -- I am sure that that list would be constitutional in as much as it narrows down the categories of eligibile candidates for the death penalty. However, as a

practical matter there are several problems with that list. Three of them come to mind . Number one, the killing of a witness is listed in 190.2. I think that is subject to abuse. I know that in Los Angeles County and in some of the other counties prosecutors have been filing that type of special circumstances. Any killing where the -- any robbery where the individual is killed or any rape -- on the theory that the victim was a witness to the crime itself which the defendant committed, thereby he was a witness to that particular crime and was killed. I think that particular part should be reconsidered and perhaps redrawn on a more narrow basis.

The second one is the multiple murder theory. Traditionally, I think the type of defendant that did not receive the death penalty -- when I say traditionally I mean prior to the enactment of the special circumstances statute was the arson murder. The individual who sets a fire -- twenty or thirty people are killed. That is precisely the type of individual that covered by the multiple murder section. I think certainly it is a little bit incongruent that an individual who places a bomb at the Los Angeles Airport and kills three people is eligible for the death penalty whereas if he places a bomb and kills only one person he is not eligible, which is the effect of that multiple murder -- those two are the ones that come to mind. There is another one -- I made a note here someplace.

SONDHEIM: To follow up with what Mr. Overland has said with regard to the killing of a witness. There is some ambiguity in the law, as a matter of fact, there has been an appellate court decision which was later taken over by the Supreme Court so it isn't the law, but nevertheless, I think perhaps the Committee could have one of its consultants look in this area. I will give

you the name of the case and citation. It is called People vs. Bratton - 54 Cal App.3rd 536. I think that pretty well points out the problem with that particular issue. With regard to the multiple killing, again, this has been the subject of some litigation -- there is a case called People vs. Superior Court (Brodie) in 48 Cal 3rd at 195 that points up that issue. And, there are a couple other aspects of this, and I want to make it clear that what I am suggesting are not constitutional defects, but you might say some clean up legislation is required in this area if you do keep the special circumstances that now exist in the law. Another problem is that in Section 209 you can end up with a death penalty without -- just based on the kidnapping itself and at least I think an overlap between that and 190.2 and that really ought to be clarified. I don't think it was the intent, at least I hope not in my own view, of the Legislature originally to just make it on a 209 that you needed the 190.2, but nevertheless it is there in the law and it ought to be cleaned up. The final thing is again something out of this Bratton case and that is whether or not the prosecution should present evidence at the preliminary hearing of the special circumstances. That isn't really clear from the law and I think that might be an area the Legislature might indicate its intent. I would mention a couple of other things. I think if you are going to work in this area you ought to clean up some of the other possible death penalty sections that are involved. You have those relating to subordination of perjury, treason, killing by a life prisoner and train wrecking - there are a number of other sections that ought to all be integrated, which really wasn't done.

As far as expanding it or contracting it I think there are other questions that you can consider, for example, peace officers

given a certain definition for purposes of the death penalty. It doesn't include other people who otherwise are peace officers. Does that make any sense? These are areas I would suggest you look into.

OVERLAND: The third one I was thinking of was is the murder for hire section. I think there is ambiguity in the statute as to whether or not it applies to the person who does the hiring or the person who is being hired. It has been the subject of some litigation.

JAMES: I agree with Mr. Sondheim in his observations and the citations that he has given to the Committee. Obviously the intent in drafting the special circumstances was to include the most heinous type crimes. If people committed outlandish murders and perhaps you may want to see if there are others that were omitted at the time that this bill was first drafted. The old 190.2 and perhaps such murders which would include torture murders might be included. As Mr. Sondheim said there are other sections that probably should be integrated into a bill that deal with the death penalty. He has mentioned treason, Penal Code Section 37, the perjury that results in the execution of innocent persons, 128, train wrecking, 219. He has mentioned the kidnapping Section 209, and of course 4500 which deals with killing by a life termer of a non inmate. There should be also added 12310 which deals with the firing of an incendiary device, the bombers. Military and Veterans Code Section 1672 has provision regarding the death penalty for someone who is engaged in sabotage. These should be integrated into, perhaps, a comprehensive bill covering this.

HALVONIK: I really think you ought to get that perjury in there that results in the execution of an innocent witness and presupposes you are executing innocent people which I suppose is

probably the truth.

AMSTERDAM: Let me also respond to the Chairman's question and disagree with some of the othersMembers of this eminent panel on whether the enumeration in 190.2 would be constitutional.

I would refine my answer to that by saying I think that the approach taken in ~~190.2, that~~ is the idea of enumerating categories such that if you don't find one of those categories the death penalty may never be imposed. That as it has rightly been pointed out was the Texas approach. I think that general approach is O.K. The problem is that some of the categories are too broad. If you take a look at the opinion of Gregg v. Georgia again I am quoting from 96 Supreme Court Reporter, 2932, the Court rejects the claim that the death penalty is disproportionate for crime, but it says, "We are concerned here only with the imposition of capital punishment, with a crime of murder, and when a life has been taken deliberately by the offender." Now, think of the elements of that. Murder, deliberate killing by the offender. That is no accidental language. I think that is meant to reserve the question of constitutionality -- vicarious liability for example -- the wheel man versus the trigger man. I think it is meant to reserve the question of liability for non deliberate killing. I think you ought to take a real hard look again at 190.2. Because, although, presence at the scene of the crime is required for a number of those 190.2 categories. Intentional killing is not. For example, the multiple murder situation. When a killing need not be deliberate and intentional for the 190.2.

Secondly, you ought to look at the question of -- under 190.2 -- what on earth is meant by the key phrase or passage in there -- the murder was intentional and was carried out --

I'm sorry this is from old 190.2 -- the statute

present during the commission of the act causing death and directly committed or physically aided in such act or acts in any of the following circumstances. That is a key provision because it qualifies most of the rest of the section.

I am not sure that participation in the acts is equivalent to the defendant personally committing the crime or murder deliberately. Now, again, I want to say that the Gregg decision

reserves the question and I think you ought to look very carefully at those provisions. I am not prepared to say they are all constitutional. I think they may not be.

JAMES: I think the court was just zeroing in on the actual facts before them in the Gregg case and in the cases before them they all involve first degree murder in which the defendant had been found guilt of a killing during the perpetration of a felony. And, it is indicated that it was not considering other crimes for which the death penalty may be imposed.

Currently before the United States Supreme Court is a case also from Georgia called Coker vs. Georgia in which the crime is that of rape. Where a person was not deprived of life or the victim was not deprived of life and so they are considering this term -- at least a number of these issues that they left open in Gregg. I think we don't have to concern ourselves with some of the language there. They were merely pointing out that in Gregg this existed. They are not excluding as possibly unconstitutional the imposition of the death penalty for some other crime or under other circumstances.

SIEROTY: Mr. James, do you feel the death penalty in California should be applied for something other than homicide?

JAMES: Well, it hasn't been applied that I know of in recent years. It was applied for 209 kidnapping where there was great bodily injury and no death. At least in three instances. It is provided for in the crime of treason. It has been traditionally and there isn't necessarily a death involved there. And in the statutes, two of them that I have mentioned here, the death penalty was at the discretion of the jury where death resulted or great bodily injury.

HALVONIK: I think, Mr. Sieroty asked if you favored --

JAMES: Oh, my personal view?

SIEROTY: Well, the Attorney General's point of view.

JAMES: I think we are in favor of the bill, one of the bills before the Committee which provides for it in murder cases only where a homicide resulted.

SIEROTY: So the treason provision is no longer necessary, the kidnapping provision --

JAMES: Well, I can't get too exercised. I don't know of any reported instance of a prosecution for treason in this State.

SIEROTY: Do you think we should clean that up at the same time?

JAMES: That would be a consideration --

CHAIRMAN MADDY: I think that the bill that has been introduced by Assemblyman McAlister on our side does attempt to deal with that section if I'm not mistaken. It has just come into print. We will try to get it to Members of the Committee. I want to reserve some of the opinions, Mr. Sieroty, to the day we actually have the bills before us and to deal with the constitutional issues if we

can.

ASSEMBLYMAN GOGGIN: We haven't addressed the issue that concerns me the most which is what sorts of crimes may reasonably be argued to be deterred by the death penalty. Now, clearly -- arguably, at least. A killing of a kidnap victim to prevent that person from testifying, that has been argued to be clearly in the realm of adding some deterrents. Also, the killing of a prison guard by a life termer. I think this Committee has to decide if we are going to impose death what sorts of crimes is it that are going to be effectively deterred by death. Are we going to discuss that at all.

CHAIRMAN MADDY: I think that is the whole argument that we are going to reserve when we actually have the bills. We were discussing whether or not the special circumstances listed in 190.2 --

is sufficiently limited under the decisions to be constitutional rather than

deterrents versus something else --

HALVONIK: I am not going to speak on the deterrents question, I just wanted to say that the example you raised is an interesting one -- why you don't want to have a death penalty for kidnapping because we don't all know what the death penalty might deter. But, we do know if you make it the death penalty for kidnapping you give a lot of incentive to kill the victim. That is problem with making it a death penalty to kidnap.

ASSEMBLYMAN GOGGIN: That is the arguments that I would like to hear.

CHAIRMAN MADDY: No, I thought we would use the expertise of these men to tell us what we could put into a statute. We will

get down to the policy question when we get the bills before us. I am sure most of these men will be back.

ASSEMBLYMAN GOGGIN: Are we going to get witnesses to address that generally as well as specifically?

CHAIRMAN MADDY: We will probably have more witnesses who desire to testify than you and I would like to see.

ASSEMBLYMAN GOGGIN: I guess I know that. Is the Chairman going to have a part in deciding who is going to testify?

CHAIRMAN MADDY: The Chairman is just the Chairman. The author of the bill, Assemblyman McAlister, is in the back of the room, Assemblyman McVittie and Antonovich were here, Assemblyman Cordova. Those are all authors of death penalty legislation. Senator Deukmejian, all authors of bills that are going to be before this Committee. And, I am sure Mr. Halvonik and Professor Amsterdam and Mr. Overland and others who are opposed -- and others I see in the audience that would be opposed to the death penalty will come forth and testify. I don't really have a campaign to bring witnesses before us because we are getting enough without my help. If you have some, bring them forth.

ASSEMBLYMAN NESTANDE: Might I suggest that at the termination of this meeting and as a result of this meeting that the staff prepare a check off list of items that we have discussed here so when we consider a death penalty bill we can see if the elements that have been discussed today are incorporated and how they are incorporated in a bill that may before us.

CHAIRMAN MADDY: We will try to get that staff work done for you. We are not necessarily ready to quit. I know that one or two of the witnesses have to catch planes so we will probably go on for another thirty minutes.

SIEROTY: One of the witnesses made some reference to the special circumstances relating to the killing by a paid killer and the question, I think that was raised, was whether the death penalty could be imposed on both the person who paid and the person who does the killing. Is there a question in the law, in the California statute right now, with regards to that? Will you expand on that a little bit for me, please.

OVERLAND: I don't have the bill before me --

SIEROTY: Are there some cases on this?

OVERLAND: No, there are no cases on it, although I was personally involved in a case that was argued in the Superior Court.

I think if you look, Mr. Sieroty, at 190.2 subdivision (a) it defines a murder for hire and the words there are, "The murder was intentional and was carried out pursuant to an agreement with the defendant." It uses the word defendant. Then the second paragraph says, "An agreement as used in this subdivision means an agreement by the person who committed the murder to accept a valuable consideration." The person who committed the murder there -- the language is different from the language defendant. So, it seems to indicate that the person who committed the murder is not the defendant. Secondly, I think that that subdivision (a) -- is the only instance in 190.2 where the death penalty pursuant to that statute could be imposed on somebody who -- had not personally committed the act that caused the death, which is in subdivision (b). So, it seems to be directed at the hirer, that is, the person who hires somebody else to kill the victim, and is not present at the time of the act which caused the death, was committed, and is not the one who personally committed the act.

SIEROTY: Doesn't subdivision (b) require the defendant to personally commit the act?

OVERLAND: That is right, but subdivision (a) is independent of subdivision (b).

SIEROTY: It doesn't have to be both of those? Either (a) or (b)?

OVERLAND: That is correct.

JAMES: Prior to the Rockwell opinion -- at least the number of cases involving hired killings and each instance that I reviewed the killer and the hirer were both given the death sentence. In fact, in one that arose in Yolo County there was a middle man between the hirer and the actual killer, and all three of them had the death penalty imposed.

OVERLAND: No, I think, Mr. James, that -- I am not familiar with those cases, but the killer may have had the sentence imposed pursuant to subdivision (b) or some other special circumstance other than the circumstance described in subdivision (a).

JAMES: It is my understanding it was not under subdivision (a).

HALVONIK: In any event the State Supreme Court never had an opportunity to pass on it because it was dropped.

CHAIRMAN MADDY: I want to go back to a question that was touched on by Professor Amsterdam in his opening statement. The first paragraph of the Rockwell decision essentially begins by saying that the petition raises none of the issues that were considered by this court in People vs. Anderson related to whether capital punishment violates Article I, Section 17 of the California Constitution and he said, "We do not have before us", including that paragraph, "Whether the question of capital punishment is cruel and unusual punishment per se". Do any of you believe that the Calif-

ornia Supreme Court can invalidate a death penalty statute based upon the California Constitution? In light of Article I, Section 27, which was the Initiative, Proposition 17.

HALVONIK: I believe it. I believe it is very questionable whether Proposition 17 is constitutional, yes.

AMSTERDAM: That is something that kind of predates the Legislature and everybody else. I think it is certainly cause for questioning concern, but I don't think there is anything to be done about it.

CHAIRMAN MADDY: We probably can't, but perhaps some of us on the Committee would like to have your opinion, anyway, just for our own consideration.

JAMES: For one, I am firmly of the opinion that the Proposition was constitutional, and that Article I, Section 27 will meet all of the requirements of the State Constitution. And, I see no impediment as far as the United States Supreme Court is concerned or the United States Constitution. This was something drafted and presented to the people and by Initiative the people amended the Constitution.

ASSEMBLYMAN ALATORRE: That is not answering the question -- because the people voted for something, we have seen things that even the Legislature has voted for that have in fact been unconstitutional. By your statement here that the people voted and knew really what they were voting for, and they knew that they were voting for something that was constitutional is not really true.

JAMES: Well, they amended by their vote the Constitution of the State. That is something different than what the Legislature --

ASSEMBLYMAN ALATORRE: But, does that mean that that is in fact constitutional, whatever they amended?

JAMES: It certainly would govern the basic law of the State. Now, whether it would infringe any provision of the United States Constitution would be determined by the United States Supreme Court.

ASSEMBLYMAN ALATORRE: I am not a lawyer and I stipulate that right from the beginning, but what you are saying is that because it Article and the Initiative was in fact what they voted for and was put into the Constitution makes it constitutional. It may be included in the Constitution but then when it goes to the court it might be a totally different thing.

JAMES: Well, this is, of course, a basic fundamental document upon which our government is formed and it can be amended by the provision in the State Constitution by an Initiative measure and the power in the people to exercise the Initiative. It was exercised back in November of 1972.

ASSEMBLYMAN ALATORRE: Fine, let us stipulate that it was exercised, but that still doesn't make it constitutional.

HALVONIK: Mr. Alatorre, I think you are correct. You can amend the California Constitution different ways and there are certain things that you cannot amend by Initiative, and that is the dispute that revolves around Proposition 17. One of them, whether that was the sort of thing you can amend by Initiative. I think Professor Amsterdam is right. You get very involved in the technicalities of separation of powers and whether a power was taken away from one branch and given to another and if so and if that was done it would be unconstitutional. All of that is what the court did not resolve and what the court said specifically it was not resolving in Rockwell. I think the ultimate

question, whether to say you can -- when you pass -- let's say that you should pass a bill, I hope you don't, but let's say you do, and let's say it can even pass muster before the U. S. Supreme Court. It needn't necessarily pass muster before the State Supreme Court. There still is a State Constitutional issue that submerged there and has been for a number of years and has never yet been addressed by the court.

AMSTERDAM: There are several issues in fact and they are very complicated, including the question, for example, of whether -- Mr. James described particularly -- as voting, the people knowing what they were voting for. One of the very issues presented that Mr. Halvonik refers to is that the Initiative was miscaptioned by the Attorney General. That the petition which was circulated did not even state the California Supreme Court review.

That is one of the major issues in it.

I think this Committee would be getting into a thorn bush if it went into all of those questions, with all due respect, Mr. Chairman, I think it would be relevant and important if the Legislature could do something about them, but I think it is out of --

CHAIRMAN MADDY: It probably falls in the realm of the area that there may be some Members who are like Mr. Halvonik who said that we ought to go slow in California and let the other states battle it out with the United States Supreme Court. There may be some Members who feel that if the State Supreme Court is going to strike down whatever we propose as being unconstitutional because it is cruel and unusual per se or whatever reason they may feel we shouldn't go through the exercise at all.

AMSTERDAM: For that purpose I think it is very important to negate any notion of urgency legislation here, whiffling

this thing through, because it is going to have to undergo attack in the United States Supreme Court, the California Supreme Court. It is going to be a long, long, long process. And, there are very serious grounds for attack under the California Constitution.

CHAIRMAN MADDY: I think to be realistic about the urgency clause, the urgency clause presents the question of whether you need 54 votes or 41 votes and in view of the Governor's statement that he would veto, you may have a political reason for an urgency clause as much as a practical reason for an urgency clause. That is just my own commentary. Others may disagree.

HALVONIK: There is though in relation to that when you vote on the urgency clause the Governor can then veto it even though you have passed it with an urgency clause. It seems to be a valid consideration whether you are really passing something that can take that sort of effect and will move that quickly and whether you are really doing something that can be taken care of quickly. That is supposed to be one of your duties as a Legislature to make the determination that there is that kind of urgency. I think, also, and I just want to suggest that you shouldn't consider the California Constitutional question. I didn't come prepared to discuss them today, but you have all taken oaths to uphold the State and federal Constitutions and I think that at some point surely your own views of what the Constitution is, whether you are a lawyer or not, have to be taken into account when you vote. I would be very happy to return another time if this Committee wants to address the issue of the constitutionality under the State Constitution of any death penalty bill, and also the general question of constitutionality as you might perceive the eighth amendment, because it is your duty to

construe it, too. I think all of those questions are there. I was just under the impression today we weren't going to discuss them that much.

SONDHEIM: Let me just suggest that I am beginning to think we are going to be coming back here to sit before the Legislative Supreme Court and it seems to me that perhaps we can't resolve it here. I have seen the briefs in this case.

HALVONIK: You can resolve it by not passing a bill.

SONDHEIM: That merely says that the courts do not have an opportunity to determine whether it is constitutional. But the question whether it is or isn't constitutional is one rightfully placed in the hands of ~~the courts under our sepa~~ration of powers. That is the role that they will play if and when a bill is enacted. Just on the urgency clause -- we speak of speeding justice and Professor Amsterdam indicates it is going to take a long time, well, if it is done on an urgency basis it goes into effect that much sooner and it is before the State Supreme Court that much earlier.

JAMES: I agree with Mr. Sondheim. I think the urgency clause is important. I think these issues should be solved. This matter was briefed in the first case that was tried under the old death penalty bill and the bill went into effect in January of 1974, the case was tried and judgement entered in June of 1974, the case was briefed during the course of the remainder of the year, and it has not been scheduled for argument before the State Supreme Court. It is a year and a half since the last brief was filed on that case and it was never scheduled for argument. So, I think that if something is done now we will at least precipitate a ruling on these issues that were briefed in that case, the constitutionality of Proposition 17 and the effectiveness of Article I, Section 27.

CHAIRMAN MADDY: We will consider that when we take the bills up.

SONDHEIM: I would like to perhaps just highlight the issues that you might consider without debating them one way or the other. Just to give you what I think are the issues for a draftsman in this area. Some of them have been touched upon, some of them have not.

I think the first thing you ought to consider is how many phases do you want in this particular type of death penalty legislation if there is to be death penalty. We have debated that or discussed it, I should say unitary, bifurcated, trifurcated. That is an issue.

Second issue relates to what types of special circumstances should there be. Should you continue with the present list or should you make some changes.

The third issue it seems to me relates then to the penalty phase. What should / the aggravating and mitigating circumstances be. Should you spell them out or are they to be undefined as they were in Georgia and Texas. Then if you do come to some conclusion on that then how are these factors to be used. Are they to be weighed, which Mr. Overland touched upon earlier, or is the jury basically supposed to be told, now, you have heard the evidence on both sides, come back and make a decision without telling them to weigh one against the other.

Another issue in that regard is the burden of proof. Who has the burden? Shall there be no burden at all as it was in Georgia? Shall the prosecution have a burden? Or, shall the defendant have a certain burden?

Then finally, who should determine the penalty, the judge, the jury or in a sense, both as was done in Florida where the

jury was advisory.

And finally you have the question of review that was mentioned by Professor Amsterdam. You might want to consider whether the trial judge should have the power to review a jury's decision and finally whether an appellate court should have the power to review and compare the particular imposition of the death penalty against other cases, as well.

ASSEMBLYMAN KNOX: Is the method of putting people to death legislative, also? Whether you gas them, hang them, shoot them, or whatever?

SONDHEIM: Yes.

ASSEMBLYMAN KNOX: Well, I think you ought to add that in the list of issues.

SONDHEIM: Yes. I would agree.

HALVONIK: You might want to give the defendant his choice as they do in some other states, for example. My guess is if there were some like boiling in oil, even if somebody came up with the notion that it was a deterrent it probably wouldn't go over very well.

I just want to emphasize again -- I have been trying to remark thoughout that as you analyze these U. S. Supreme Court decisions for those of you whose purpose is to come up with what you hope is a constitutional law -- anything that that U.S. Supreme mentioned that it liked, any justice. If you want to leave that out on the grounds that they were just talking at that point or it wasn't the facts of the case. Well, that will be fine with me because I am going to need some arguments and everyone of those you leave out of the bill is one I am going to have an argument for any client who is on death row and putting an urgency clause on and then leaving those things out

strikes me as really kind of contradictory.

ASSEMBLYMAN MADDY: We took you out of the budget this year.

HALVONIK: But, you haven't taken away my license to practice law.

AMSTERDAM: Mr. Chairman, I would not have spoken at the end except that I am a little worried that by enumerating a list may end up with the idea that that is the comprehensive list and if there is any thrust or notion of that I've got some very definite candidates to add to it.

I think it is also important to consider the question of jury qualification and disqualification. Whether or not persons with conscientious scruples should or should not be excluded. I think it is important to consider not only who decides, but also what kind of relationship there is between the decision maker. Shall we provide, for example, that the jury makes the sentencing in the first instance, but a judge may reverse a jury death sentence and impose a life sentence instead. That was California law for many years. The relationships of the decision makers is very important.

I think that procedures to insure the regularity and to record the regularity procedure in court, the sort of record keeping requirements which I suggest is also definitely to be on the agenda.

And, finally, I think that some of the questions that Mr. Goggin raised about procedures, providing adequate resources, for a defendant, adequate counsel, adequate assistance in making a case on mitigating circumstances and that sort of thing are also vitally important and are on the list.

So, I would not like to see the list that we just got be a closed list. I think that if you are going to have a statute which as I said, not only is constitutional, but stays that way in a sense that it will not end up by being enforced in such a way that the court will strike it down. You have to consider procedural questions in addition to having a statute that looks good. Those procedural questions are important.

CHAIRMAN MADDY: Nothing is closed and I would ask if any of you as we proceed down the road have additional things to add feel free to communicate with the Committee because we are pleased to receive all of your input.

JAMES: Before the benediction could I just add one little statement.

I think we ought to take cognizance of the fact that the United States Supreme Court finally determined the question of the constitutionality of the death penalty under the eighth amendment and held under the circumstances indicated that it was constitutional. And, they said that when the Legislature chooses the penalty to be imposed and that this choice is clothed with a strong presumption in favor of its constitutionality and that a heavy burden lays upon those who would challenge that constitutionality.

HALVONIK: The U. S. Supreme Court didn't finally do anything in this area, I don't think.

ASSEMBLYMAN SIERORY: Mr. Halvonik's comments, I think, leave open or suggest to leave open the fact that the Supreme Court is changing all of the time. As new people come on to the courts we may have new decisions in this area.

I have mentioned this to Professor Amsterdam a little earlier,

but you may recall, Mr. Chairman, and Mr. Knox, when we were in Israel on our study mission one of the things we were looking at was how Israel law and Judaic law treated problems of the death penalty. We find this is an issue which has been with people for more than 5,000 years. I don't know that we can settle it forever either this year. But, the fact is that in ancient Jewish law death penalty was provided for, but according to the historians with whom we spoke, who is also a Justice of the Supreme Court in Israel, in actuality very few people were executed. So apparently they had the same difficulties in those days as we are finding here today. So, I am not sure we are going to be able to resolve this.

CHAIRMAN MADDY: That is our benediction. I want to thank all of our witnesses. We appreciate very much you being here. The Members of the Committee will be provided with all of the information possible. I hope you will have time to read it.

CASES CITED

Coker v. Georgia
75-5444 U.S. Sup. Ct.

Furman v. Georgia
408 U.S. 238 (1972)

Gardner v. Florida
74-6593 U.S. Sup. Ct.

Gregg v. Georgia
44 U.S.L.W. 5230 (July 2, 1976)
49 L. Ed. 2d 859

Jurek v. Texas
44 U.S.L.W. 5262 (July 2, 1976)
49 L. Ed. 2d 929

McGautha v. California -- Crampton v. Ohio
402 U.S. 183 (1971)

Proffitt v. Florida
44 U.S.L.W. 5256 (July 2, 1976)
49 L. Ed. 2d 913

Roberts v. Louisiana
44 U.S. L. W. 5281 (July 2, 1976)
49 L. Ed. 2d 974

Witherspoon v. Illinois
391 U.S. 510 (1968)

Woodson v. North Carolina
44 U.S.L.W. 5267 (July 2, 1976)
49 L. Ed 2d 944

People v. Anderson
6 Cal. 3rd 628 (1972)

People v. Bratton
54 Cal. App. 3rd 536 (1976)

People v. Superior Court (Brodie)
48 Cal. App. 3rd 195 (1975)

Rockwell v. Superior Court of Ventura County, L.A. 30645
Supreme Court of California (Dec. 7, 1976)
18 Cal. 3rd 420 (1976)

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE
ANALYSIS

SB 155 as Amended April 13, 1977
Hearing date
April 20, 1977

Kenneth L. Maddy, Chairman
Terry Goggin, Vice Chairman

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE
Kenneth Maddy, Chairman

State Capitol - Room 2188
445-3268

BILL ANALYSIS

Staff Member MSU

Ways & Means NO

Rev. & Tax. NO

HEARING DATE: April 20, 1977

BILL: S.B. 155 (As Amended April 13, 1977)

AUTHOR: DEUKMEJIAN

SUBJECT: DEATH PENALTY

FURTHER ANALYSIS TO April 11, 1977:

1. adds death penalty for trainwrecking where any person suffers death.

   COMMENT: prior law provided this penalty. Section 190.3 of S.B. 155 as introduced referred to this trainwrecking section (covering cases in which the jury may determine the death penalty). Deleting the death penalty from the original draft of this bill for trainwrecking with death may have been an oversight.

2. changes the standard of a factor in aggravation/mitigation at the penalty phase from "presence or absence of any significant prior criminal activity" to "the presence or absence of criminal activity which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence".

   COMMENT: as amended, there would still be no restriction on the evidence introduced to show the defendant's character to be bad because of any alleged criminal activity. There is no restriction on the use of prior charges in which the defendant may have faced trial and had been acquitted. Misdemeanor assaults and batteries are included.

3. provides for an appeal of the trial court's decision on the motion to reduce the death verdict by the jury to life imprisonment without the possibility of parole. Such power is currently granted in Penal Code Section 1181 (7). The defendant may appeal the court's failure to grant the motion and the prosecution may appeal in cases where the court grants the motion. The court must state its reasons for the ruling.

   COMMENT: this is not proportionality review. It allows the Supreme Court to review the decision to see if there was an abuse of discretion. However, there are no standards on the court for making such a decision.

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE
Kenneth Maddy, Chairman

State Capitol - Room 2188
445-3268

BILL ANALYSIS

Staff Member MSU
Ways & Means NO
Rev. & Tax. NO

HEARING DATE: May 2, 1977

BILL: S.B. 155 (As Amended April 28, 1977)

AUTHOR: DEUKMEJIAN

SUBJECT: PUNISHMENTS - DEATH PENALTY

FURTHER ANALYSIS

S.B. 155 calls for a bifurcated procedure with the special circumstances in the guilt phase (for the special circumstance of a prior murder, there will be an extra hearing for that circumstance alone). The trier of fact must find the defendant guilty of first degree murder before it can consider a finding on the truth of any alleged special circumstances. If there is a finding of guilt and if a special circumstance is found to be true, there will be a hearing on penalty. If special circumstances have been found, the penalty will be death unless there are substantial mitigating circumstances. Then the penalty will be life without parole.

Special Circumstances and Crimes Calling for the Death Penalty

First Degree Murder plus:

1. murder for hire (both hirer and hiree covered)

2. degendant personally present and caused death or aided with the intent to cause the death:

   a. killing of a peace officer (police, sheriff, marshall, constable, plus state police, D.A. investigators, Department of Justice Investigators, University Police). Prison guards are deleted.

   b. killing of a witness of a crime; independent of the crime in which the killing occurs

   c. willful, deliberate and premeditated killing during the commission of robbery, kidnap (except for brief movements), rape, child molestation, burglary.

   d. killing involved torture

   e. first degree murder plus a concurrent or prior first or second degree murder

--MORE--

Sabotage causing death

Treason

Subornation of perjury or perjury causing the wrongful execution of an innocent person

Trainwrecking causing death

Assault by a life prisoner causing death

Death by explosives

Penalty Phase

Only evidence of prior assaultive behavior can be introduced in the area of prior criminality. Notice must be given as to the specific circumstances in aggravation to be proved, unless it is in rebuttal to mitigating evidence. Upon a finding of special circumstances, the death sentence will be presumed.

In addition to the other circumstances enumerated for the jury's consideration, the jury may also consider any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Hung Juries

If the jury cannot reach a unanimous verdict on the issue of penalty, the sentence will be life imprisonment without the possibility of parole.

If the jury hangs on the issue of truth of special circumstances, there will be a new trial on that issue.

Appellate Review

The Supreme Court may review the judges decision on the motion to reduce the sentence of death. The people have the right to seek appellate review of the trial court's reduction of the death sentence and the Supreme Court.

Speedy Appeal

Calls for an opinion of the Supreme Court in 150 days; if not, the court shall state on the record the reasons for the failure to comply with this time limit.

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Limits on Continuances

Penal Code Section 1050 is amended identically to the version of this section that was passed out of this Committee in A.B. 513 (Cordova).

COMMENTS:

1. On page 4, Section 190.1 (a) and (b) provides for a trifurcated procedure in cases of a special circumstance alleging a prior murder, with no procedure specified in cases on a special circumstance alleging a concurrent murder.

2. On page 8, line 6, there is a reference of the "evidence" to be proved. Evidence is proof. Is it meant "circumstance" to be proved?

3. By mandating that the Supreme Court review the granting of the defendant's motion to reduce the death sentence, A.B. 155 leaves no discretion in the Supreme Court in accepting the case. Should this be the legislative policy?

4. Sections 190.3 (page 9, line 32) and 190.4(e) (page 12, line 26) both say "the trier of fact shall consider, take into account, and be guided by ..." Isn't this phrase redundant?

5. Prison guards are deleted from special circumstance peace officer murders. Is this the intent?

6. The recent amendments delete the language (page 11, lines 9 through 13) that a finding that one special circumstance is true and no decision is reached on the others shall preclude the holding of the penalty phase. Is it intended that if the jury finds one special circumstance to be true but hangs on the rest, that there be a new jury and a new trial on the rest of the alleged special circumstances?

SENATE COMMITTEE ON JUDICIARY

Death Penalty
History

SB 155 As Amended
February 17, 1977

:NATE COMMITTEE ON JUDICIARY 1977-78 REGULAR SESSION

SB 155 (Deukmejian) S
As amended February 17 B
Penal Code
(Revised 2/23) 1
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DEATH PENALTY 5

HISTORY

Source: Author

Prior Legislation: None

Support: Attorney General, Calif. D.A.'s & P.O.'s Ass'ns., Calif. Fed. of Republican Women

Opposition: ACLU, Calif. Pub. Def's. Ass'n., Calif. Attorneys for Criminal Justice, Nat'l. Council of Jewish Women

PURPOSE

Existing law provides for the imposition of the death penalty for certain crimes under procedures which have been invalidated by the California Supreme Court (Rockwell v. Superior Court). The Court applied standards articulated by the U.S. Supreme Court in Gregg v. Georgia.

SB 155 eliminates provisions making the death penalty mandatory for certain crimes. It adds procedures whereby the trier of fact may consider any mitigating circumstances surrounding the particular crime and the particular defendant before determining whether the penalty should be death or life imprisonment without the possibility of parole.

The purpose of the bill is to provide a procedure for the imposition of the death penalty which will satisfy those procedural standards apparently required by the United States Supreme Court.

The Department of Justice states that 140 people were convicted of first degree murder in 1972, 220

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in 1973, and 186 in 1974. It has no estimate of the number who would have been subject to the death penalty under the provisions of this bill. 15

COMMENT

1. The position of the United States Supreme Court

The United States Supreme Court shows as much division over capital punishment in Gregg as it did in Furman. In Gregg the Court did decide by a 7 to 2 margin that the death penalty was not cruel and unusual punishment per se. Yet, it also affirmed the Furman holding that a wanton or freakish application of the death penalty would violate the Eighth Amendment.

In Gregg and its companion cases, the Court divides as follows: Justices Marshall and Brennan hold firm that any death penalty statute is unconstitutional. Justice Rehnquist finds that the death penalty is constitutional and that the Eighth Amendment does not include any procedural requirements. Justices Burger and Blackmun hold that the Court has overstepped its proper authority in both Furman and Gregg. Justice White is unwilling to strike down any new state statute, which attempts to apply the Furman decision, until evidence appears that the statute results in an application of the death penalty which is wanton and freakish.

Justices Stewart, Powell and Stevens, the controlling plurality, look to specific procedural requirements in the individual state statutes as determining whether a death penalty statute is acceptable under the Eighth Amendment. The plurality speaks of:

(a) The discretion of the sentencer being controlled by clear and objective

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standards.

(b) Consideration by the trier of fact of both aggravating and mitigating circumstances pertaining to the specific homicide and the specific defendant, and

(c) An appellate review that guards against arbitrary or capricious sentences.

The plurality states that each state law must be examined on an individual basis. Since its tests are procedural, the Court looks to facts rather than legal principles. Even if once approved, a statute could be challenged later on the basis of new facts. For example, such a challenge could prevail on:

(a) A shift in the Court's understanding of the state statute. (Justice Stewart during oral argument in a subsequent Florida death penalty case: "This Court upheld that statute on the representation of the state of Florida and the decisions of its courts that this was an open and above-board processing. This case gets here and it is apparent that it isn't.")

(b) Any change in the language of the statute.

(c) Evidence that the statute resulted in arbitrary, capricious or discriminatory impositions of the death penalty.

A number of death penalty cases are before the United States Supreme Court. The decision in any one of them might significantly change the requirements which state legislatures must meet.

2. <u>The position of the California Supreme Court</u>

The constitutional amendment on the death penalty

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(Art. I, Sec. 27), passed by initiative in 1972, specifically limits itself to the statutes in effect on February 17, 1972. These statutes clearly do not meet the tests of Furman and Gregg. Thus, the California Court may be free to repeat the Anderson decision and hold that a new death penalty statute violates the California Constitution.

(NB: By the time a death penalty case reaches the Bird Court, no more than two of the justices who participated in Anderson will still be on the court.)

Death Penalty Crimes

SB 155 would not change those crimes punishable by death under existing law. They are:

(a) Murder accompanied by one or more of the following special circumstances.

(1) The murder was carried out pursuant to agreement and for a valuable consideration.

(2) The victim was a peace officer.

(3) The victim was a witness to a crime who was intentionally killed to prevent his testimony.

(4) The murder was committed in connection with the following felonies: robbery, kidnapping, infliction of lewd and lascivious acts on a minor under 14 years of age, or first degree burglary.

(5) The victim was tortured.

(6) The defendant was convicted of

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a second murder at the same trial or previously. (Pen. C. Sec. 190.2)

THESE SPECIAL CIRCUMSTANCES SEEM TO PROVIDE THE DETAILED AND OBJECTIVE STANDARDS LIMITING THE DISCRETION OF THE SENTENCER WHICH THE U.S. SUPREME COURT REQUIRES.

(b) Sabotage resulting in death. (Mil. & Vet. C. Sec. 1672)

(c) Treason. (Pen. C. Sec. 37)

(d) Wilful perjury resulting in the execution of an innocent person. (Pen. C. Sec. 128)

(e) Train-wrecking. (Pen. C. Sec. 219)

(f) Malicious use of explosives resulting in death. (Pen. C. Sec. 12310)

(g) Assault by a life prisoner resulting in death. (Pen. C. Sec. 4500)

In (a)(2) through (a)(6), the death penalty would be applied only to a person who was physically present during the murder and who either directly committed or "physically aided" in the commission of the act causing death. In no case would it be imposed on a person under 18 years of age. (Pen. C. Sec. 190.5)

WHAT CONSTITUTES "PHYSICALLY AIDING"?

AT WHAT POINT DOES THE INCLUSION OF THE "PHYSICALLY AIDED" BECOME ARBITRARY OR CAPRICIOUS?

4. Mitigating circumstances

During the penalty hearing phase, the trier of fact is to consider the following:

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(a) The defendant's criminal record, if any.

(b) Whether the defendant acted under the influence of an extreme mental or emotional disturbance.

(c) Whether the victim participated in or consented to defendant's conduct.

(d) Whether the defendant reasonably believed that he was morally justified.

(e) Whether he acted under extreme duress or under the substantial domination of another.

(f) Whether, because of mental disease or intoxication, his ability to understand the criminality of or to control his conduct was impaired.

(g) The defendant's age.

(h) The degree of seriousness of the defendant's participation. (Pen. C. Sec. 190.3)

Defense and prosecution may introduce evidence on the defendant's character and background.

These factors are substantially identical to those in the Florida Penal Code approved by the United States Supreme Court in Gregg.

SHOULD NOT (f) BE AMENDED TO INCLUDE USE OF DRUGS?

5. Appellate review

SB 155 does not empower the California Supreme Court to review a death sentence and determine whether it was imposed under the influence of passion or prejudice or whether the sentence

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is disportionate compared to sentences imposed in similar cases. In Gregg such review was referred to as "important" by 6 of the 9 justices as a means of guarding against the random or arbitrary imposition of the death penalty.

It is not clear whether the U.S. Supreme Court requires some form of "proportionality review". Arguments in favor: (a) The Court speaks with approval in the Gregg case of the proportionality review existing in Georgia and Florida; (b) The Court in Gregg, rejecting the death penalty statutes of North Carolina and Louisiana, cites the lack of adequate appellate review in those states; (c) The Court remanded for further consideration in light of Gregg a death penalty case (Neal v. Arkansas) tried under a statute that appears to comply with every recommendation of Gregg save proportionality review; (d) The Mississippi Supreme Court, in rewriting Mississippi procedures in capital cases, stated that the Gregg cases "clearly require meaningful appellate review" and imposed upon itself the obligation of proportionality review.

Arguments opposed: The Court in the Gregg case approved the Texas statute (Jurek v. Texas) which does not provide for proportionality review. Note, however, that the Court did not directly discuss this point in its decision.

Some opposition to proportionality review is based upon the opponents' belief that certain members of the California Supreme Court would use any excuse to reverse a death sentence.

WOULD NOT THE ODDS OF U.S. SUPREME COURT APPROVAL OF THIS BILL BE IMPROVED WITH THE ADDITION OF PROPORTIONALITY REVIEW?

6. ASIDE FROM CONSTITUTIONAL REQUIREMENTS, WOULD NOT APPELLATE REVIEW OF THE PROPORTIONALITY OF SENTENCES BE GOOD POLICY?

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As Justice White, joined by Justices Burger and and Rehnquist, said in Gregg: "Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly for any given category of crime will be set aside."

WOULD NOT THIS TYPE OF APPELLATE REVIEW BE DESIRABLE AS AN IMPORTANT GUARANTEE OF FAIRNESS?

7. SB 155 procedures

SB 155 establishes a trifurcated procedure: the trial, a special circumstance hearing, and a penalty hearing. However, as indicated in the Digest on pages 11-13, this could expand to a total of six separate hearings: the trial, a sanity hearing, two special circumstance hearings, and two penalty hearings. (Pen. C. Sec. 190.4) In Gregg, the court expresses its preference for a bifurcated hearing, and certainly requires no more than that the penalty determination be separated from the trial.

DOES NOT THIS PROLIFERATION OF HEARINGS CONSUME COURT TIME UNNECESSARILY AND GREATLY INCREASE THE CHANCES FOR REVERSIBLE ERROR?

8. Life imprisonment without possibility of parole

Until now the penalty of life imprisonment without the possibility of parole has been rarely used in California. This bill would make it the alternate punishment for all crimes for which the death penalty is authorized. Should the death penalty provisions be held invalid, all those already sentenced to death would be sentenced instead to life imprison-

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ment without the possibility of parole. Thus, the bill, if enacted, would result in an increasing number of prison inmates incarcerated with no hope of eventual release.

IS IT GOOD POLICY TO CREATE THIS NEW AND EXCEEDINGLY DANGEROUS CATEGORY OF INMATES WITHIN OUR PRISONS?

9. Supreme Court procedures

The bill requires that capital punishment cases, unlike any other type of cases, must have the appeals written, argued, decided and filed within 150 days of certification of the record by the sentencing court.

COULD NOT THIS RESTRICTION RAISE DUE PROCESS AND EQUAL PROTECTION CHALLENGES?

The last sentence of this section states: "The failure of the Supreme Court to comply with the requirements of this section shall in no way preclude imposition of the death penalty." (Pen. C. Sec. 190.6)

MIGHT NOT THIS BE UNDERSTOOD TO MEAN THAT THE DEFENDANT IS SUBJECT TO EXECUTION ON THE 151st DAY EVEN IF THE SUPREME COURT HAS YET TO RULE ON HIS APPEAL?

10. Continuances

Existing law provides that no continuance of a criminal trial shall be granted without a showing that "the ends of justice" require it. This bill provides that in capital cases a continuance shall be granted only where "extraordinary and compelling circumstances require it", and facts supporting these

(More)

circumstances must be stated for the record. "Extraordinary and compelling circumstances" is not defined.

TO THE EXTENT THAT THIS NEW LANGUAGE IMPOSES AN ADDITIONAL BURDEN UPON THE DEFENDANT, COULD IT NOT RAISE QUESTIONS OF DUE PROCESS AND EQUAL PROTECTION?

11. Penalty for sabotage

The bill provides that sabotage resulting in great bodily injury, but not death, is punishable by life imprisonment without possibility of parole. (Mil. & Vet. C. Sec. 1672)

SINCE, UNDER THE BILL, THE PUNISHMENT FOR CERTAIN CATEGORIES OF FIRST DEGREE MURDER IS ONLY LIFE IMPRISONMENT WITH PAROLE, IS NOT THIS PENALTY EXCESSIVE?

12. Penalty for bombing

The bill provides that the penalty for those who wilfully and maliciously use explosives resulting in mayhem or great bodily injury, but not death, is imprisonment for life without possibility of parole. (Pen. C. Sec. 12310)

SINCE THE BILL PROVIDES LIFE WITH PAROLE FOR CERTAIN CATEGORIES OF FIRST DEGREE MURDER, IS NOT THE PENALTY EXCESSIVE?

13. Murder for hire

In its language on murder for hire [Pen. C. Sec. 190.2 (a)] the bill refers to "the person who committed the murder" and the person who provides "a valuable consideration". The language is unclear as to whether only one of the two or both are subject to the death penalty.

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14. The "witness" special circumstance 1 5

One of the special circumstances which authorize the death penalty is the murder of the person "for the purpose of preventing his testimony in any criminal proceeding" [Pen. C. Sec. 190.2 (b)(2)]. The trial court in People v. Bratton (54 Cal. App. 3d 536) held that this provision applied only to situations where the victim was to be a witness in an unrelated case, a decision which was reversed by the court of appeal. 5

SHOULD NOT THE BILL BE AMENDED TO SETTLE THIS QUESTION?

DIGEST

Changes the penalty for sabotage or malicious use of explosives resulting in death from "death or life imprisonment" to "death or life imprisonment without possibility of parole"--following the sentencing procedures of Penal Code Sections 190.3 and 190.4. Adds provision that sabotage or malicious use of explosives resulting in great bodily injury is punishable by life imprisonment without possibility of parole. (Mil. & Vet. C. Sec. 1672; Pen. C. Sec. 12310)

Alters penalties from "death" to "death or life imprisonment without possibility of parole," and requires compliance with sentencing procedures of Penal Code Sections 190.3 and 190.4, for the following offenses:

(a) Treason (Pen. C. Sec. 37).

(b) Wilful perjury resulting in the execution of an innocent person (Pen. C. Sec. 128).

(c) Assault by a life prisoner resulting in death (Pen. C. Sec. 4500).

(More)

Procedure under SB 155

Provides the following procedure for any case in which the death penalty may be imposed:

(a) The defendant is tried on his guilt or innocence without regard to special circumstances or penalty.

(b) If the defendant pleads insanity, he next receives a sanity hearing under Penal Code Section 1026. (Pen. C. Sec. 190.1)

(c) If found sane, and one or more special circumstances (listed in Comment #3) are charged, he has a special circumstances hearing in which new evidence may be introduced by either party. A special circumstance must be proved beyond a reasonable doubt. The trier of fact must make a special finding that each special circumstance charged is either true or not true.

Should the jury be unable to reach a unanimous verdict that one or more special circumstances are true, and should it be equally unable to reach a unanimous verdict that all special circumstances charged are not true, the court shall dismiss the jury and order a new jury for a second special circumstances hearing. If the second jury is unable to reach a unanimous verdict, the court shall impose the punishment of life imprisonment. (Pen. C. Sec. 190.4)

(d) If one or more special circumstances are found to be true, the defendant then receives a penalty hearing. Here again, either party may introduce new evidence.

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The purpose of the hearing is for the trier of fact to set the penalty, and, in so doing, it shall take into account any of the mitigating factors (listed in Comment #5) that are relevant. If the trier of fact finds by a preponderance of the evidence that there are mitigating circumstances sufficiently substantial to call for leniency, the penalty shall be life imprisonment without possibility of parole. (Pen. C. Sec. 190.3)

If the trier of fact is a jury, and it fails to reach a unanimous verdict on the penalty, the court shall dismiss the jury and order a new jury for a second hearing. If that jury is unable to reach a unanimous decision, the court shall impose the penalty of imprisonment without possibility of parole. (Pen. C. Sec. 190.4)

Requires that whenever a death sentence has been imposed, the appeal to the California Supreme Court must be decided and an opinion filed within 150 days of certification of the entire record by the sentencing court. States that the failure of the Supreme Court to meet this deadline shall in no way preclude the imposition of the death penalty. (Pen. C. Sec. 190.6)

Limits the application of the death penalty (except in cases of murder-for-hire, sabotage, treason, bombings, assault by a life prisoner, or wilful perjury leading to the execution of an innocent person) to a person who is physically present during the murder and who either directly committed or physically aided in the commission of the act causing death.

(More)

Prohibits the imposition of the death penalty on any person who is under the age of 18 at the time of the commission of the crime. (Pen. C. Sec. 190.5)

Provides that, if the death penalty provisions of the bill are invalidated, any person sentenced to death will instead be sentenced to life imprisonment without possibility of parole. Provides that, if provisions of the bill requiring life imprisonment without possibility of parole are invalidated, any person sentenced to life without possibility of parole will be ineligible for parole until he has served 20 years in state prison. (Sec. 24, SB 155)

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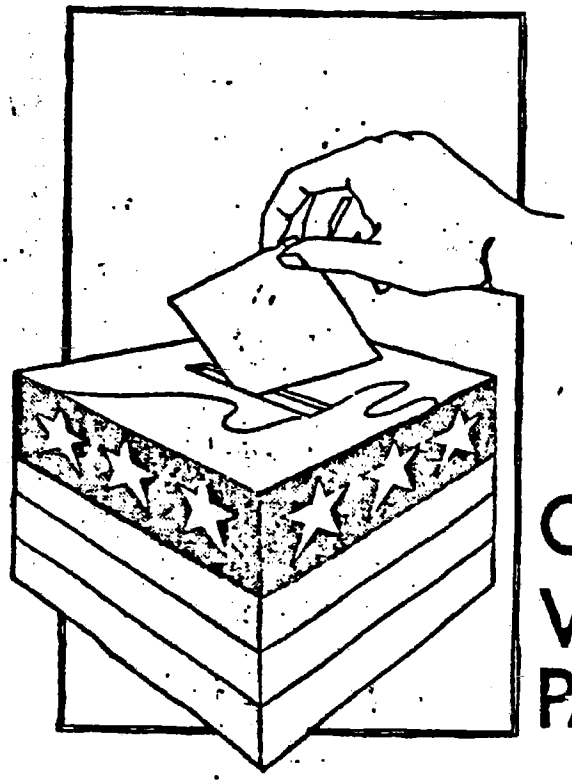
1978 INITIATIVE BALLOT ARGUMENTS

GENERAL ELECTION
November 7, 1978

A10



CALIFORNIA VOTERS PAMPHLET

GENERAL ELECTION NOVEMBER 7, 1978

COMPILED BY MARCH FONG EU · SECRETARY OF STATE

ANALYSES BY WILLIAM G. HAMM · LEGISLATIVE ANALYST

AVISO

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

NOTICE

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

7 Murder. Penalty—Initiative Statute

Official Title and Summary Prepared by the Attorney General

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

Analysis by Legislative Analyst

Background:

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

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

Proposal:

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

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

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

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

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

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

Fiscal Effect:

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

The increase in the prison population would result from:

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

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

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

Text of Proposed Law

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

PROPOSED LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Continued on page 41

7 Murder. Penalty—Initiative Statute

Argument in Favor of Proposition 7

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

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

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

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

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

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

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

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

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

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

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

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

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

DONALD H. HELLER
Attorney at Law
Former Federal Prosecutor

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

Rebuttal to Argument in Favor of Proposition 7

The argument for Proposition 7 is strictly false advertising.

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

But you already know that.

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

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

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

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

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

MAXINE SINGER
President, California Probation, Parole and Correctional Association

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

JOHN FAIRMAN BROWN
Board Member, California Church Council

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Argument Against Proposition 7

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

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

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

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

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

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

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

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

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

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

MAXINE SINGER
President, California Probation, Parole and Correctional Association

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

JOHN FAIRMAN BROWN
Board Member, California Church Council

Rebuttal to Argument Against Proposition 7

ALRIGHT, LET'S TALK ABOUT FALSE ADVERTISING.

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

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

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

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

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

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

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

DONALD H. HELLER
Attorney at Law
Former Federal Prosecutor

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

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

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

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

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

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

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

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

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

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

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

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

(vi) public restrooms;

(vii) jury rooms and juror waiting rooms;

(viii) polling places;

(ix) courtesy vehicles.

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

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

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

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

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

SECTION 2. Severability

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

SECTION 3. Effective Date

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

TEXT OF PROPOSITION 6—*Continued from page 29*

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

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

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

SECTION 4. Severability Clause

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

TEXT OF PROPOSITION 7—*Continued from page 33*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Robbery in violation of Section 211.

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

(iii) Rape in violation of Section 261.

(iv) Sodomy in violation of Section 286.

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

(vi) Oral copulation in violation of Section 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 (1), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), or (19) of subdivision (a) of this section has been charged and specially found under Section 190.4 to be true.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1670 of the Military and~~

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

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

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

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

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

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

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

SENATE COMMITTEE ON JUDICIARY

Death Penalty
History

SB 155 As Amended 2/17/1977
Penal Code

SENATE COMMITTEE ON JUDICIARY 1977-78 REGULAR SESSION

SB 155 (Deukmejian)
As amended February 17
Penal Code

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DEATH PENALTY

HISTORY

Source: Author

Prior Legislation: None

Support: Attorney General, Calif. D.A.'s & P.O.'s Ass'ns., Calif. Fed. of Republican Women

Opposition: ACLU, Calif. Pub. Def's. Ass'n., Calif. Attorneys for Criminal Justice, Nat'l. Council of Jewish Women

PURPOSE

Existing law provides for the imposition of the death penalty for certain crimes under procedures which have been invalidated by the California Supreme Court (Rockwell v. Superior Court). The Court applied standards articulated by the U.S. Supreme Court in Gregg v. Georgia.

SB 155 eliminates provisions making the death penalty mandatory for certain crimes. It adds procedures whereby the trier of fact may consider any mitigating circumstances surrounding the particular crime and the particular defendant before determining whether the penalty should be death or life imprisonment without the possibility of parole.

The purpose of the bill is to provide a procedure for the imposition of the death penalty which will satisfy those procedural standards apparently required by the United States Supreme Court.

The Department of Justice states that 140 people were convicted of first degree murder in 1972, 220 in 1973, and 186 in 1974. It has no estimate of

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the number who would have been subject to the death penalty under the provisions of this bill.

COMMENT

1. Comparision of SB 127 and SB 155

Major provisions:

(a) Both bills would apply the death penalty to the same offenses (See Comment #4).

(b) The mitigating circumstances provided in both bills are substantially the same, save that SB 155 also includes the reasonable belief of moral justification (See Comment #5).

(c) The bills' procedures differ significantly. SB 127 provides for a bifurcated process in which the aggravating and mitigating circumstances are weighed together during the penalty phase (See Comment #6, SB 127 analysis).

SB 155 has a trifurcated procedure: the trial, a hearing on aggravating circumstances, and a separate hearing to determine the penalty (See Comment #8).

(d) In SB 127, the alternate penalty to death is life imprisonment with parole; in SB 155, life imprisonment without possibility of parole.

(e) Neither bill provides for the appellate review of the proportionality of sentences (See Comments #6 & #7).

2. The position of the United States Supreme Court

The United States Supreme Court shows as much division over capital punishment in Gregg as

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it did in Furman. In Gregg the Court did decide by a 7 to 2 margin that the death penalty was not cruel and unusual punishment per se. Yet, it also affirmed the Furman holding that a wanton or freakish application of the death penalty would violate the Eighth Amendment.

In Gregg and its companion cases, the Court divides as follows: Justices Marshall and Brennan hold firm that any death penalty statute is unconstitutional. Justice Rehnquist finds that the death penalty is constitutional and that the Eighth Amendment does not include any procedural requirements. Justices Burger and Blackmun hold that the Court has overstepped its proper authority in both Furman and Gregg. Justice White is unwilling to strike down any new state statute, which attempts to apply the Furman decision, until evidence appears that the statute results in an application of the death penalty which is wanton and freakish.

Justices Stewart, Powell and Stevens, the controlling plurality, look to specific procedural requirements in the individual state statutes as determining whether a death penalty statute is acceptable under the Eighth Amendment. The plurality speaks of:

(a) The discretion of the sentencer being controlled by clear and objective standards.

(b) Consideration by the trier of fact of both aggravating and mitigating circumstances pertaining to the specific homicide and the specific defendant, and

(c) An appellate review that guards against

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arbitrary or capricious sentences.

The plurality states that each state law must be examined on an individual basis. Since its tests are procedural, the Court looks to facts rather than legal principles. Even if once approved, a statute could be challenged later on the basis of new facts. For example, such a challenge could prevail on:

(a) A shift in the Court's understanding of the state statute. (Justice Stewart during oral argument in a subsequent Florida death penalty case: "This Court upheld that statute on the representation of the state of Florida and the decisions of its courts that this was an open and above-board processing. This case gets here and it is apparent that it isn't.")

(b) Any change in the language of the statute.

(c) Evidence that the statute resulted in arbitrary, capricious or discriminatory impositions of the death penalty.

A number of death penalty cases are before the United States Supreme Court. The decision in any one of them might significantly change the requirements which state legislatures must meet.

3. The position of the California Supreme Court

The constitutional amendment on the death penalty (Art. I, Sec. 27), passed by initiative in 1972, specifically limits itself to the statutes in effect on February 17, 1972. These statutes clearly do not meet the tests of Furman and Gregg. Thus, the California Court may be free to repeat the Anderson decision and hold that a new death penalty statute violates the

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California Constitution.

(NB: By the time a death penalty case reaches the Bird Court, no more than two of the justices who participated in Anderson will still be on the court.)

4. Death Penalty Crimes

SB 155 would not change those crimes punishable by death under existing law. They are:

(a) Murder accompanied by one or more of the following special circumstances.

(1) The murder was carried out pursuant to agreement and for a valuable consideration.

(2) The victim was a peace officer.

(3) The victim was a witness to a crime who was intentionally killed to prevent his testimony.

(4) The murder was committed in connection with the following felonies: robbery, kidnapping, infliction of lewd and lascivious acts on a minor under 14 years of age, or first degree burglary.

(5) The victim was tortured.

(6) The defendant was convicted of a second murder at the same trial or previously. (Pen. C. Sec. 190.2)

THESE SPECIAL CIRCUMSTANCES SEEM TO PROVIDE THE DETAILED AND OBJECTIVE STANDARDS LIMITING THE DISCRETION OF THE SENTENCER WHICH THE U.S. SUPREME COURT REQUIRES.

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(b) Sabotage resulting in death. (Mil. & Vet. C. Sec. 1672)

(c) Treason. (Pen. C. Sec. 37)

(d) Wilful perjury resulting in the execution of an innocent person. (Pen. C. Sec. 128)

(e) Malicious use of explosives resulting in death. (Pen. C. Sec. 12310)

(f) Assault by a life prisoner resulting in death. (Pen. C. Sec. 4500)

In (a)(2) ~~through~~ (a)(6), the death penalty would be applied only to a person who was physically present during the murder and who either directly committed or "physically aided" in the commission of the act causing death. In no case would it be imposed on a person under 18 years of age. (Pen. C. Sec. 190.5)

WHAT CONSTITUTES "PHYSICALLY AIDING"?

AT WHAT POINT DOES THE INCLUSION OF THE "PHYSICALLY AIDED" BECOME ARBITRARY OR CAPRICIOUS?

5. Mitigating circumstances

During the penalty hearing phase, the trier of fact is to consider the following:

(a) The defendant's criminal record, if any.

(b) Whether the defendant acted under the influence of an extreme mental or emotional disturbance.

(c) Whether the victim participated in or consented to defendant's conduct.

(d) Whether the defendant reasonably believed that he was morally justified.

(e) Whether he acted under extreme duress or under the substantial domination of another.

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(f) Whether, because of mental disease or intoxication, his ability to understand the criminality of or to control his conduct was substantially impaired.

(g) The defendant's age.

(h) The degree of seriousness of the defendant's participation. (Pen. C. Sec. 190.3)

These factors are substantially identical to those in the Florida Penal Code approved by the United States Supreme Court in Gregg.

SHOULD NOT (f) BE AMENDED TO INCLUDE USE OF DRUGS?

6. Appellate review

SB 155 does not empower the California Supreme Court to review a death sentence and determine whether it was imposed under the influence of passion or prejudice or whether the sentence is disportionate compared to sentences imposed in similar cases. In Gregg such review was referred to as "important" by 6 of the 9 justices as a means of guarding against the random or arbitrary imposition of the death penalty.

DOES NOT THE ABSENCE OF SUCH APPELLATE REVIEW PROVISIONS MAKE THIS BILL CONSTITUTIONALLY SUSPECT?

7. ASIDE FROM CONSTITUTIONAL REQUIREMENTS, WOULD NOT APPELLATE REVIEW OF THE PROPORTIONALITY OF SENTENCES BE GOOD POLICY?

As Justice White, joined by Justices Burger and and Rehnquist, said in Gregg: "Indeed, if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory

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reasons or wantonly or freakishly for any given category of crime will be set aside."

WOULD NOT THIS TYPE OF APPELLATE REVIEW BE DESIRABLE AS AN IMPORTANT GUARANTEE OF FAIRNESS?

8. SB 155 procedures

SB 155 establishes a trifurcated procedure: the trial, a special circumstance hearing, and a penalty hearing. However, as indicated in the Digest on pages 11-13, this could expand to a total of six separate hearings: the trial, a sanity hearing, two special circumstance hearings, and two penalty hearings. (Pen. C. Sec. 190.4) In Gregg, the court expresses its preference for a bifurcated hearing, and certainly requires no more than that the penalty determination be separated from the trial.

DOES NOT THIS PROLIFERATION OF HEARINGS GREATLY INCREASE THE CHANCES FOR REVERSIBLE ERROR?

9. Life imprisonment without possibility of parole

Until now the penalty of life imprisonment without the possibility of parole has been rarely used in California. This bill would make it the alternate punishment for all crimes for which the death penalty is authorized. Should the death penalty provisions be held invalid, all those already sentenced to death would be sentenced instead to life imprisonment without the possibility of parole. Thus, the bill, if enacted, would result in an increasing number of prison inmates incarcerated with no hope of eventual release.

IS IT GOOD POLICY TO CREATE THIS NEW AND EXCEEDINGLY DANGEROUS CATEGORY OF INMATES WITHIN OUR PRISONS?

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10. Supreme Court procedures

The bill requires that capital punishment cases, unlike any other type of cases, must have the appeals written, argued, decided and filed within 150 days of certification of the record by the sentencing court.

COULD NOT THIS RESTRICTION RAISE DUE PROCESS AND EQUAL PROTECTION CHALLENGES?

The last sentence of this section states: "The failure of the Supreme Court to comply with the requirements of this section shall in no way preclude imposition of the death penalty." (Pen. C. Sec. 190.6)

DOES THIS MEAN THAT IF THE SUPREME COURT MISSES THE 150-DAY DEADLINE, THE DEFENDANT IS EXECUTED ANYWAY?

11. Continuances

Existing law provides that no continuance of a criminal trial shall be granted without a showing that "the ends of justice" require it. This bill provides that in capital cases a continuance shall be granted only where "extraordinary and compelling circumstances require it", and facts supporting these circumstances must be stated for the record. "Extraordinary and compelling circumstances" is not defined.

TO THE EXTENT THAT THIS NEW LANGUAGE IMPOSES AN ADDITIONAL BURDEN UPON THE DEFENDANT, COULD IT NOT RAISE QUESTIONS OF DUE PROCESS AND EQUAL PROTECTION?

12. Penalty for sabotage

The bill provides that sabotage resulting in great bodily injury, but not death, is

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punishable by life imprisonment without possibility of parole. (Mil. & Vet. C. Sec. 1672)

SINCE, UNDER THE BILL, THE PUNISHMENT FOR CERTAIN CATEGORIES OF FIRST DEGREE MURDER IS ONLY LIFE IMPRISONMENT WITH PAROLE, IS NOT THIS PENALTY EXCESSIVE?

13. Penalty for bombing

The bill provides that the penalty for those who wilfully and maliciously use explosives resulting in mayhem or great bodily injury, but not death, is imprisonment for life without possibility of parole. (Pen. C. Sec. 12310)

SINCE THE BILL PROVIDES LIFE WITH PAROLE FOR CERTAIN CATEGORIES OF FIRST DEGREE MURDER, IS NOT THE PENALTY EXCESSIVE?

14. Murder for hire

In its language on murder for hire [Pen. C. Sec. 190.2 (a)] the bill refers to "the person who committed the murder" and the person who provides "a valuable consideration". The language is unclear as to whether only one of the two or both are subject to the death penalty.

15. The "witness" special circumstance

One of the special circumstances which authorize the death penalty is the murder of the person "for the purpose of preventing his testimony in any criminal proceeding" [Pen. C. Sec. 190.2 (b)(2)]. The trial court in People v. Bratton (54 Cal. App. 3d 536) held that this provision applied only to situations where the victim was to be a witness in an unrelated case, a decision which was reversed by the court of appeal.

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SB 155 (Deukmejian)
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SHOULD NOT THE BILL BE AMENDED TO SETTLE THIS QUESTION?

DIGEST

Changes the penalty for sabotage or malicious use of explosives resulting in death from "death or life imprisonment" to "death or life imprisonment without possibility of parole"--following the sentencing procedures of Penal Code Sections 190.3 and 190.4. Adds provision that sabotage or malicious use of explosives resulting in great bodily injury is punishable by life imprisonment without possibility of parole. (Mil. & Vet. C. Sec. 1672; Pen. C. Sec. 12310)

Alters penalties from "death" to "death or life imprisonment without possibility of parole," and requires compliance with sentencing procedures of Penal Code Sections 190.3 and 190.4, for the following offenses:

(a) Treason (Pen. C. Sec. 37).

(b) Wilful perjury resulting in the execution of an innocent person (Pen. C. Sec. 128).

(c) Assault by a life prisoner resulting in death (Pen. C. Sec. 4500).

Procedure under SB 155

Provides the following procedure for any case in which the death penalty may be imposed:

(a) The defendant is tried on his guilt or innocence without regard to special circumstances or penalty.

(b) If the defendant pleads insanity, he next receives a sanity hearing under Penal Code Section 1026. (Pen. C. Sec. 190.1)

(More)

(c) If found sane, and one or more special circumstances (listed in Comment #4) are charged, he has a special circumstances hearing in which new evidence may be introduced by either party. A special circumstance must be proved beyond a reasonable doubt. The trier of fact must make a special finding that each special circumstance charged is either true or not true.

Should the jury be unable to reach a unanimous verdict that one or more special circumstances are true, and should it be equally unable to reach a unanimous verdict that all special circumstances charged are not true, the court shall dismiss the jury and order a new jury for a second special circumstances hearing. If the second jury is unable to reach a unanimous verdict, the court shall impose the punishment of life imprisonment. (Pen. C. Sec. 190.4)

(d) If one or more special circumstances are found to be true, the defendant then receives a penalty hearing. Here again, either party may introduce new evidence. The purpose of the hearing is for the trier of fact to set the penalty, and, in so doing, it shall take into account any of the mitigating factors (listed in Comment #5) that are relevant. If the trier of fact finds by a preponderance of the evidence that there are mitigating circumstances sufficiently substantial to call for leniency, the penalty shall be life imprisonment without possibility of parole. (Pen. C. Sec. 190.3)

If the trier of fact is a jury, and it fails to reach a unanimous verdict on the penalty, the court shall dismiss the

(More)

jury and order a new jury for a second hearing. If that jury is unable to reach a unanimous decision, the court shall impose the penalty of imprisonment without possibility of parole. (Pen. C. Sec. 190.4)

Requires that whenever a death sentence has been imposed, the appeal to the California Supreme Court must be decided and an opinion filed within 150 days of certification of the entire record by the sentencing court. States that the failure of the Supreme Court to meet this deadline shall in no way preclude the imposition of the death penalty. (Pen. C. Sec. 190.6)

Limits the application of the death penalty (except in cases of murder-for-hire, sabotage, treason, bombings, assault by a life prisoner, or wilful perjury leading to the execution of an innocent person) to a person who is physically present during the murder and who either directly committed or physically aided in the commission of the act causing death.

Prohibits the imposition of the death penalty on any person who is under the age of 18 at the time of the commission of the crime. (Pen. C. Sec. 190.5)

Provides that, if the death penalty provisions of the bill are invalidated, any person sentenced to death will instead be sentenced to life imprisonment without possibility of parole. Provides that, if provisions of the bill requiring life imprisonment without possibility of parole are invalidated, any person sentenced to life without possibility of parole will be ineligible for parole until he has served 20 years in state prison. (Sec. 24, SB 155)

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ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE

MEMORANDUM
April 11, 1977

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE
Kenneth Maddy, Chairman

State Capitol - Room 2188
445-3268

April 11, 1977

MEMORANDUM

TO: INTERESTED PARTIES

FROM: MICHAEL ULLMAN

RE: DEATH PENALTY LEGISLATION

The following is a list of issues and proposals for a death penalty statute with specific language to accomplish the goals set out. I will discuss these proposals in light of the current California death penalty statute (S.B. 450, 1973 statutes, Deukmejian), the proposed statute is S.B. 155 (Deukmejian, which is substantially identical to A.B. 240, McAlister), and the porposed statute in A.B. 538 (Maddy) as amended April 11, 1977.

1. List of "special circumstances"

The proposed draft (Attachments 1 and 4) of the class of crimes that will qualify a person for the death penalty is substantially the same as the list in the current statute enacted in 1973:

a. Murder for hire - under the 1973 law, it was ambiguous as to whether or not both the hirer and the hiree were covered. Clearly, the one who hires the killer was eligible for the death penalty. Under S.B. 155 and A.B. 538, both are covered. The attached proposal (Attachment 1) also covers both parties.

b. personal vs. vicarious liability - under the 1973 law, it was necessary for the defendant to "personally commit the act which causes the death" before he would qualify for the death penalty. S.B. 155 would expand this liability to accomplices who are physically present and intentionally, physically or "vocally" aid in the act or acts causing death. A.B. 538 would narrow this vicarious liability to acts of aiding and abetting with the accompanying intent to cause death. The proposed draft (Attachments 1 and 4) adopts the 1973 law and limits the death penalty to persons who personally cause the death.

c. killing a peace officer - the 1973 law covered street cops (police, sheriffs, highway patrol), marshalls, constables, and prison guards. S.B. 155 expands this list to include

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state police, university and college police, and investigators and for District Attorneys and the Department of Justice. A.B. 538 adopts the narrower list from the 1973 law, as does the proposed draft (Attachment 1).

d. kidnapping and "brief movements" - the 1973 law allows for the death penalty in cases of kidnapping resulting in death. When the list of special circumstances was placed into the 1973 bill (S.B. 450, September 6, 1973, in the Assembly), the kidnapping clause specifically required more than "brief movements". This was to codify the California Supreme Court decision in People v. Daniels 71 Cal. 2d 1119 (overruling the rationale in the Chessman case, a little too late for Mr. Chessman). S.B. 155 deletes the "brief movement" language. The Attorney General representative testified at the hearing on the McAlister bill (A.B. 240) that the language in question is superfluous; that the Daniels decision would already require this limitation. He indicated that the language was deleted in the 1977 draft to enable the California Supreme Court to reconsider the Daniels rationale. He may or may not be correct in assuming that the courts would require more than brief movements in interpreting this section. However, deleting the "brief movement" language could be construed as manifested legislative intent to overturn the Daniels rationale. A.B. 538 contains the "brief movement" language as does the proposed draft (Attachment 1).

e. death by explosives - the 1973 law did not cover this circumstance (it should be noted that any case in which two persons are killed, such as the L.A. airport bomber, would be covered under another circumstance). The law prior to 1973 was amended in 1970 to allow the death penalty for murder by explosives; however, it was never included in the 1973 legislation (including all versions of S.B. 450). S.B. 155 adds this category. A.B. 538 does not nor does the proposed draft (Attachment 1).

f. killing by a life prisoner - the pre-1973 death penalty law allowed for capital punishment in cases of assaults with a deadly weapon or with a force likely to produce great bodily injury by a life prisoner on another other than another inmate. S.B. 450, as introduced in 1973, struck the "other inmate" exception and required that the assault result in death for capital punishment to apply. On September 6, 1973, the "other inmate" exception was placed back in the bill and was passed into law in this form. S.B. 155 again deletes the "other inmate" exception. It would allow for the death penalty in cases where the victim is a guard or another inmate. A.B. 538 also expands the prior law to cover "other inmates". The proposed draft (Attachment 1, Section 4500) adopts the 1973 law and will not allow for the death penalty in cases where the victim is another inmate. It is felt that this area

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merits further discussion. If it is determined that other inmates should be covered, then the "other than another inmate", phrase should be crossed-out in the proposed draft.

g. the following is a list of other classes of crimes that provide for the death penalty in S.B. 155, but have been deleted in the proposed draft (Attachment 1):

1.) Treason against the state (P.C. Section 37) - this civil war statute was enacted in 1872 with the Penal Code and has not been amended since. Its penalty is a straight death sentence. It was not specifically drafted into the 1973 legislation because it already provided the "mandatory" death penalty. S.B. 155 amends this section to provide for death or life without parole. A.B. 538 is silent (leaving it with an unconstitutional death penalty). The proposed draft (Attachment 1) changes the penalty from death to life imprisonment. A better idea would be to repeal the crime outright.

2.) Sabotage resulting in death (Military and Veterans Code Section 1672) - the law prior to 1973 provided life imprisonment or death for this crime. In 1973, the statute was not amended (the drafters say "overlooked") leaving an unconstitutional death sentence for its commission. S.B. 155 provides death for this violation. A.B. 538 is silent on it. The proposed draft (Attachment 1) amends the penalty to life imprisonment. It also substitutes an S.B. 42 determinate term for a lesser violation not covered in S.B. 42.

3.) Torture - murder - S.B. 155 provides for the death penalty for murder "involving" torture. The current law from last year's Knox bill provides for life with no parole for murder perpetrated by means of torture. In the 1973 bill, as introduced, torture -- murder was a capital crime. However, it was not included in the final version of S.B. 450. A.B. 538, also includes torture-murder in its special circumstances. The proposed draft (Attachment 1) adopts the 1973 law and does not include torture - murder.

2. Mitigating Circumstances: Song Amendment

Senator Song placed an amendment into S.B. 155 which would prohibit the consideration of prior criminal history which did not result in a felony conviction for assaultive behavior The Song amendment was deleted from S.B. 155 on the Senate floor. A.B. 538 does adopt this amendment as does the proposed draft (Attachment 2)

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3. Standard for Jury: Presumption of Death vs. Choosing the Appropriate Penalty

Under the law prior to 1973, there was no presumption of death. The state was "neutral" as to penalty. That neutraility was abandoned in the 1973 legislation due to the belief that only a mandatory penalty would be held constitutional. S.B. 155 adopts the approach that the death penalty is presumed upon a finding of special circumstances. A.B. 538 does not presume death. It retains the concept of neutraility by using a finding of special circumstances to "allow" the jury to consider the appropriate penalty. The difference between the two approaches is important in the instructions that the jury will be given: "you will come back with the verdict of death, unless ..." vs. "you will determine the penalty of death or life imprisonment without the possibility of parole". The proposed draft (Attachment 2) adopts the jury discretion approach. It is felt that this issue merits further discussion. If it is determined that the presumption of death approach is to be adopted, then the language in Attachment 6 should be added to Attachment 2.

4. Bifurcated vs. Trifurcated Proceedings

The pre-1973 death penalty law provided for a bifurcated hearing. The first stage was for the derermination of guilt on the charge of first degree murder. The latter stage was for determination of penalty. The mandatory penalty law from 1973 was also bifurcated: First guilt was to be determined and then truth of special circumstances. S.B. 155 introduces a trifurcated approach: guilt, truth of special circumstances, and then penalty. A.B. 538 adopts a bifurcated approach: guilt, then truth of special circumstances and penalty. The proposed draft adopts this bifurcated approach (Attachments 2 and 3). Although the jury hears evidence on special circumstances and aggravation and mitigation during one hearing, it will not consider the penalty issue until a special circumstance is found to be true beyond a reasonable doubt.

5. Proportionality Review

S.B. 155 does not provide for appellate review of death sentences to guard against disproportionate imposition of such extreme punishment. There is strong language contained in the U. S. Supreme Court decisions upholding the statutes in Georgia, Florida, and Texas, inferring that the absence of such proportionality review would render a statute susceptible to constitutional attack. A.B. 538 provides for such appellate review as does the proposed draft (Attachment 5)

6. Trail Court Power to Reduce

I did not draft a specific proposal to enable the trial court to

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reduce a sentence of death because existing law (Penal Code Section 1181 (7)) already provides for this. Apparently, S.B. 155 intends for the trial court to retain this power.

7. Other Issues Raised by S.B. 155 and A.B. 538 which should be Considered

a. Killing of a witness special circumstance - the 1973 law provided for capital punishment in cases where the murder was perpetrated to keep a witness from testifying in a criminal action. This circumstance is in addition to the circumstance of intentional killings during the commission of specified felonies. However, the language covering "killing of a witness" was so vague, that the Court of Appeals, in People v. Bratton 54 C.A. 3d 536 interpreted it to cover situations of felony murder, that is where the murder victim is the victim of another felony and was killed during the commission of the felony. S.B. 155 adopts the same language as the 1973 law, and with it, presumably, the holding in the Bratton case. A.B. 538 clarifies the "killing of a witness" circumstance and limits it to witnesses of crimes not incidental to the killing.

b. Assault by lifers leading to death: Parole - Section 4500 presents another issue other than victims who are inmates. In the 1973 law and in S.B. 155, this section could be construed to cover acts committed while out on parole. A.B. 538 specifically states that acts on parole are not covered.

c. Speedy appeal - S.B. 155 provides for a total resolution of the appeal in a death penalty case within 150 days. It would be difficult to read the transcripts in that period of time. Such a rush to judgment would also appear to be contrary to the careful proportionality review contemplated by the proposed draft.

d. Restrictions on continuances - S.B. 155 restricts the granting of continuances in capital cases. A.B. 538 does not change the law on continuances. The rules that govern all criminal cases would also apply to capital offenses.

e. hung juries - the pre-1973 law provided that if the jury deciding the issue of penalty could not reach a unanimous verdict on life imprisonment or death, then the court would discharge the jury and could either impose the lesser penalty on his own, or could empanel a new jury to try the issue of penalty again. This would apply also to subsequent hung juries. The mandatory 1973 law took away the court's power to impose the lesser punishment upon the first hung jury. If the second jury hung, then the court must impose

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the life sentence. S.B. 155 adopts the same approach as the 1973 law: one hung jury, the court may not impose the lesser sentence; must empanel a second jury; if the second jury hangs, then the lesser punishment is to be imposed. A.B. 538 adopts the procedure used in Georgia and in other states: if the jury cannot agree on the imposition of the death penalty, then the lesser punishment shall be imposed. It should be noted that the case law permits the questioning of jurors about their opinions concerning capital punishment. The 33% of the population that cannot give a death verdict would be "smoked out". Death penalty cases will have 12 "hanging" jurors. Should the death penalty be imposed when they cannot be unanimous?

f. life vs. life without parole - although S.B. 155 and A.B. 538 both provide for the alternative of life imprisonment without the possibility of parole to the death sentence, the Cordova and McVittie bills adopt the 1973 law which uses life imprisonment with the possibility of parole as the alternative.

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE
ANALYSIS

SB 155 As Amended March 24, 1977
Hearing Date
April 11, 1977

Kenneth L. Maddy, Chairman
Terry Goggin, Vice Charman

ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE
Kenneth Maddy, Chairman

State Capitol - Room 2188
445-3268

BILL ANALYSIS

Staff Member MSU

Ways & Means NO

Rev. & Tax. NO

HEARING DATE: April 11, 1977

BILL: S.B. 155 (As Amended March 24, 1977)

AUTHOR: DEUKMEJIAN

SUBJECT: DEATH PENALTY

BACKGROUND:

The California Supreme Court, in Rockwell v. Superior Court, declared the death penalty statute to be unconstitutional. This decision was based upon the 1976 U. S. Supreme Court decisions (Gregg v. Georgia, et. al.) in which statutes that called for mandatory death penalties were declared as cruel and unusual punishment. The Attorney General has decided not to appeal the Rockwell decision to the U. S. Supreme Court.

A.B. 240 will reinstate the death penalty in California. It will expand on the previous list of special circumstances that will allow for the death penalty and will provide for circumstances to be considered by the trier of fact, for a grant of leniency.

BILL DESCRIPTION:

S.B. 155 will provide for three possible penalties in cases of first degree murder. Death shall be the penalty in cases where specified special circumstances are found to be true and the trier of fact does not find by a preponderance of the evidence that there are mitigating circumstances sufficiently substantial to call for leniency. If there is a determination that leniency is called for, then the penalty will be life imprisonment without the possibility of parole. In cases where there are no special circumstances alleged, or if alleged, not proved, the penalty will be life imprisonment.

Trial Court Procedure:

There shall be a trial on guilt or innocence (or a lesser finding). If the trier of fact finds the defendant guilty of murder in the first degree, and if special circumstances are alleged (and if the defendant has not been found to be not guilty by reason of insanity), the trier of fact shall determine beyond a reasonable doubt, the truth of the special circumstances. If found to be true, there shall be a hearing on penalty. A verdict for life imprisonment without the possibility of parole or for death shall be unanimous.

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If there is a hung jury on the issue of special circumstances, the court shall impanel another jury. If the second jury hangs, the court shall dismiss the jury and impose life imprisonment.

If the jury hangs during the penalty phase, the court shall impanel another jury. If the second jury hangs, the penalty shall be life without the possibility of parole.

Penalty Hearing:

If the special circumstances are found to be true or if the defendant is convicted of specified death penalty crimes, the trier of fact shall determine whether the penalty shall be death or life without the possibility of parole.

Evidence is admissible that is relevant to aggravation, mitigation, sentence, including, but not limited to the nature and circumstances of the present offense, the defendant's prior criminal history, prior character, background, history, mental condition, and physical condition.

The test is whether there are mitigating circumstances sufficiently substantial to call for leniency. If so, the penalty will be life without the possibility of parole.

The trier of fact shall consider the following if relevant:

(a) the presence or absence of significant prior criminal activity.
(b) whether the act was committed while under extreme mental or emotional disturbance.
(c) whether the homicide victim was a participant in the conduct.
(d) whether offense was committed under reasonable belief of moral justification.
(e) extreme duress or substantial domination of another
(f) whether capacity was impaired by mental disease or intoxication.
(g) the age of the defendant.
(h) whether the defendant was a minor accomplice

Limitations on Continuances:

The law governing continuances in criminal cases dictates that no continuances be granted except where "the end of justice require a continuance".

Under S.B. 155 no continuances shall be granted in a capital case except where "extraordinary and compelling circumstances require a continuance".

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Special Circumstances:

The following is a list of special circumstances that allow for the death penalty as compared to the special circumstances that existed in the law prior to Rockwell:

Current Statute	S.B. 155 (Changes to current law underlined)
murder for hire: apparently covers the person who hires and not the killer, but is ambiguous	murder for hire: covers the person who hires and the killer
defendant personally caused the death and any of the following:	defendant was personally present and intentionally physically aided or caused acts causing death by a battery, assault, or by word or conduct provoking the killing and any of the following:
1. Peace officer is intentionally killed by the defendant; defendant knew or reasonably should have known that victim is peace officer engaged in the performance of his duties; includes P.C. 830.1 peace officer (sheriff, police, marshall, constable of judicial district), 830.2(a) peace officer (highway patrol), and 830.5(b) peace officer (prison or Youth Authority guards).	1. the same plus the following peace officers are covered: 830.2(b) (state police) 830.2(d) (Univ. of California Police) 830.2(e) (state college police) 830.3(a) (Dept. of Justice investigators) 830.3(b) (District Atty. investigators)
2. willful, deliberate, premeditated killing of a witness to a crime intentionally killed to prevent testimony	2. the same
3. willful, deliberate, and premeditated killing during commission of:	3. the same
a. robbery in violation of Section 211	a. the same
b. kidnapping, in violation of Section 207 or 209; brief movements incidental to commission of another offense which do not substantially increase the risk of harm to the victim is not kidnapping for this section.	b. kidnapping, in violation of Section 207 or 209; brief movement language is deleted

c. rape under P.C. 261(2) or 261(3) d. child molesting under P.C. 288 e. burglary of inhabited dwelling (P.C. 460(1)) with intent to commit theft or rape	c. the same d. the same e. the same
4. the defendant, in addition to the current conviction for murder in the first degree, has another conviction of murder first or murder second, in this or prior proceedings.	4. the same
	5. <u>the murder was willful, deliberate, and premeditated, and involved the infliction of torture</u>.
Section 209 kidnapping in which the victim suffers death	<u>death penalty deleted from Section 209</u> (is included in (3) (a) above).
Section 219 trainwrecking, in which anyone suffers death.	<u>death penalty deleted for trainwrecking with death; becomes life without the possibility of parole</u>.
life prisoner assaulting another (not an inmate) with a deadly weapon or force likely to produce great bodily injury causing death within a year and a day	the same <u>plus the victim may also be another inmate</u>.
	<u>exploding or igniting a destructive device causing mayhem or great bodily injury; however, "if no death occurs", then life without the possibility of parole.</u>

The following are crimes that were death penalties under the law prior to the Senate Bill 450 (Deukmejian) (1973), were not included in the 1973 legislation, and are death penalty crimes in S.B. 155

Sabotage resulting in death (Mil. and Vet. Code Section 1672)

Procuring the execution of an innocent person through perjury or subornation of perjury or subornation of perjury (P.C. 128)

Treason against the state, levying war against the state, adhering to it enemies, aiding and comforting its enemies (P.C. 37)

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Limitations on Appeal:

Time limits in appeals of criminal cases are governed by rule of the Judicial Council. S.B. 155 would require, in capital cases, for a written opinion on the merits, to be handed down by the Supreme Court within 150 days of sentencing. A delay must be accompanied with a statement of extraordinary and compelling circumstances. Failure to comply will in no way preclude the imposition of the death penalty.

Other Clauses:

S.B. 155 has an urgency clause.

S.B. 155 provides that if the death penalty is held invalid, persons receiving the death penalty shall receive life without the possibility of parole sentences and if the life without parole provisions become invalid, then the penalty will become life with no parole for 20 years.

S.B. 155 has a severability caluse.

COMMENTS:

1. S.B. 155 is virtually identical to S.B. 240 (McAlister).

2. S.B. 155 expands the list of special circumstances (as compared to current law) considerably. This expansion has two major effects:

   a.) provides for the death penalty in more cases than was provided before.

   b.) creates the penalty of life without the possibility of parole for crimes which previously were punished by straight life.

   Should these changes be made:

   a.) changing the requirement that the defendant personally committed the act causing death to being personally present and (intentionally) caused or physically aided in acts causing death. This includes words and physical acts.

   This working provides the death penalty in cases of vicarious liability. The U.S. Supreme Court specifically limited its holdings in Gregg v. Georgia, Proffitt v. Florida, and Jurek v. Texas to cases in which the defendant personally and deliberately caused the death. Doesn't the inclusion of vicarious liability in S.B. 155 invite constitutional challenge? Although the word "intentionally" was added to this caluse, it does not modify the requisite criminal intent to kill. All is required is an intentional act of battery, or an intentional utterance, whether or not it is accompanied by an intent to cause death.

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b.) expands "killing of a peace officer" to include state police, district attorney investigators, Department of Justice investigators and university police.

Shouldn't the line be drawn on street law enforcement officers and correctional personnel? Would adding these peace officers invite adding all 60 classes that enjoy peace officer status?

c.) expands the victim of a life prisoner to include all persons including inmates. Should the death penalty be reserved for killing a guard rather than an inmate?

d.) creates death penalty for bombings causing great bodily injury or mayhem with "death occurring". What causation is required?

3. S.B. 155 re-codifies existing "killing of a witness" special circumstance. Is it the intent that the death penalty should apply in cases where the victim was a witness to some other distinct and separate crime and unconnected with the current offense? People v. Bratton 54 C.A. 3d 536, by a 2:1 vote, ruled that this circumstance would apply where the killing is during the commission of a felony. Should the legislative intent be specified?

4. Current law, through last year's A.B. 4321 (Knox) provides for life without the possibility of parole for first degree murder which is perpetrated by means of torture with intent to kill. S.B. 155 provides for death or life without for willful, deliberate and premeditated murder involving the infliction of torture. Could this cover all murders in which death is not immediate? Should the current standard be relaxed?

5. S.B. 155 provides for death in cases of treason against the State of California. Should the 1977 Legislature be re-codifying this 1872 Civil War statute? Should the penalty be death?

6. Is it desirable to create new broad categories which could bring about the possibility of a death penalty? Wouldn't it cause undue plea bargaining to avoid the possibility of a death sentence?

7. S.B. 155 does not allow for "proportionality review" by the California Supreme Court. The plurality of the U.S. Supreme Court appears to require this safeguard in upholding a death penalty statute. In Gregg v. Georgia, the court found that the appellate review by statute guarded against arbitrary and capricious action by the jury and was fundamental. In Proffitt v. Florida, such review was provided by decision of the Florida Supreme Court and guaranteed the necessary safeguard. In Jurek v. Texas, although not discussing appellate review in the same detail as in the other two cases in which the death penalty was upheld, the court noted that "by pro-

viding prompt judicial review of the jury's decision in a court with statewide, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of the death sentence under the law. In Neal v. Arkansas, the U.S. Supreme Court remanded the case back to Arkansas for further consideration, even though the statute complied with the Florida statute except for proportionality review.

Wouldn't the risk of unconstitutionality be unduly high in a statute like S.B. 155 without statewide proportionality review?

8. Should the trial judge be empowered to overturn a jury's verdict of death? Under the law prior to 1973, the judge had this power. In S.B. 155 he would not. Wouldn't this power guard against capricious jury verdicts?

9. S.B. 155 allows for new juries to be empaneled when the first jury "hangs" on either of the last two phases. Should the death penalty be imposed in cases where the trial jurors cannot unanimously agree on death?

   NOTE: The U.S. Supreme Court has not decided this issue. In all three cases, the trial and penalty jury was unanimous.

10. S.B. 155 provides for three separate trials with three separate jury verdicts. Should the aggravating -mitigation hearing be one hearing? Three hearings may unduly prejudice the jury on the credibility of the defense attorney. Each extra hearing provides for more opportunities for hung juries.

11. Should continuances be limited in death penalty cases? S.B. 155 would not allow a continuance where the ends of justice require a continuance (current law in other criminal cases). Wouldn't this limit the constitutional right to a fair trial?

12. S.B. 155 limits time for appeal. Does this provision violate the separation of powers doctrine? Is it reasonable to expect attorneys and courts in an appeal of a death case, with enough transcripts of pretrial hearings and the trial to fill a room, to prepare, argue and decide an appeal within 150 days?

13. Should such a monumental new procedure go into effect on an urgency basis?

COMPARATIVE SUMMARY OF

SB 155, AB 538 & AB 23

COMPARATIVE SUMMARY OF SB 155, AB 538, and AB 23
(as amended for hearing on May 2, 1977)

ISSUE	AB 23	AB 538	SB 155
Circumstances providing for the death penalty	murder for hire (hiree and hirer)	the same	the same
(vicarious liability vs. personal acts)	defendant personally caused the death and:	defendant aided in the acts causing death with the intent to cause death and:	defendant aided in the acts causing death with the intent to cause death and:
(peace officer included)	killed a peace officer (sheriff, police, marshall, constable, highway patrol, prison guard)	the same	the same (with prison guards deleted and added are state police, D.A. investigators, Dept. of Justice investigators)
	killing of a witness to an independent crime	the same	the same
	willful, deliberate, and premeditated killing during the commission of specified felonies	the same	the same
	two murders (prior or concurrent)	the same	the same
	perjury causing the wrongful execution of an innocent person	the same	the same
	life prisoner killing another (not including parolees)	the same	the same (omit "not including parolee" language)

COMPARATIVE SUMMARY OF SB 155, AB 538, and AB 23
(as amended for hearing on May 2, 1977)

ISSUE	AB 23	AB 538	SB 155
(death vs. lesser penalty)	all of the remaining circumstances are either life or life without parole in AB 23	sabotage causing death	the same
		treason	the same
		trainwrecking causing death	the same
		murder perpetrated by means of torture	murder involving torture
			death by explosives
phases	bifurcated: special circumstances are part of the penalty phase	bifurcated: special circumstances are part of the guilt phase (trifurcated for prior murder circumstance)	bifurcated: special circumstances are part of the guilt phase (trifurcated for prior murder special circumstance)
presumption of the death penalty vs. neutrality	neutrality: the jury chooses between life without and death without special instructions	the same	presumption of the death penalty: jury can find life without only if there substantial mitigating factors
hung juries	if hung on special circumstances, no new jury: impose life sentence; if hung on penalty, no new jury: impose life without parole sentence	the same	if hung on special circumstances, one new jury; if second jury hangs, impose life sentence; if hung on penalty, no new jury: impose life without parole sentence

HLC

COMPARATIVE SUMMARY OF SB 155, AB 538, and AB 23
(as amended for hearing on May 2, 1977)

ISSUE	AB 23	AB 538	SB 155
penalty phase:			
prior criminality	limited to prior felony convictions of assaultive behavior	limited to prior assaultive activity; cannot use conduct for which was acquitted	limited to prior assaultive activity; can use acquitted crimes
notice	no notice required	requires that defense receives notice of other aggravating circumstances	the same
list of mitigating circumstances	specific list of eight circumstances	list of eight plus "any other which extenuates"	the same
appellate review	proprtionality review: Supreme Court make statewide comparison	trial court determines if death sentence is excessive; Supreme Court reviews this decision on appeal	no mandated review by trial or Supreme Court to determine if sentence is excessive or disproportionate
people's appeal trial judge's reduction of death sentence	provided for procedurally	substantive right of appeal	substantive right of appeal and the Supreme Court must review
speedy appeal		Supreme Court must reach decision in 150 days	the same
urgency legislation	no urgency clause	no urgency clause	contains urgency clause

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. DAVID SCOTT DANIELS, Defendant/Appellant.	)	No. S095868

PROPOSED ORDER GRANTING APPELLANT'S REQUEST TO TAKE JUDICIAL NOTICE

No. S095868

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent,

v.

DAVID SCOTT DANIELS, Appellant.

Appellant's "Request to Take Judicial Notice," filed on April __, 2012, is hereby granted.

_____

Chief Justice

DECLARATION OF SERVICE

Re: *People v. David Scott Daniels*

Sacramento Superior Ct No.99F10432
Supreme Court No. S095868

I, KECIA BAILEY, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. I served a copy of the attached:

REQUEST AND PROPOSED ORDER TO TAKE JUDICIAL NOTICE

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
Attn: Larenda Delaini
P.O. Box 944255
Sacramento, CA 94244-2550

Habeas Corpus Resource Center
303 Second Street, Suite 400
San Francisco, CA 94105

David Scott Daniels
P.O. Box K-90141
San Quentin, CA 94974

Each said envelope was then, on April 5, 2012, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on April 5, 2012, at San Francisco, California.

DECLARANT