

SUPREME COURT COPY

MICHAEL J. HERSEK
State Public Defender
GAIL R. WEINHEIMER
Senior Deputy State Public Defender
State Bar No. 58589
221 Main Street, 10th Floor
San Francisco, California 94105
Telephone: (415) 904-5600
Weinheimer@ospd.ca.gov
Attorneys for Appellant

SUPREME COURT
FILED

APR - 5 2012

Frederick K. Ohlrich Clerk

Deputy

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

DEATH PENALTY

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
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

EXHIBIT A

AMENDMENT ANALYSIS
OF
SENATE BILL 155

INTRODUCED VERSION
THROUGH
EIGHTH VERSION

SENATE BILL 155

Table of Contents

Page numbers refer to numbers at bottom right hand corner of page, not to page numbers of PDF file.

1.	Amendment of Analysis of SB 155	1-5
2.	Introduced Version 1/19/1977	6 - 23
3.	First Amended Version 2/17/1977	24 - 38
4.	Second Amended Version 3/1/1977	39 - 53
5.	Third Amended Version 3/10/1977	54 - 68
6.	Fourth Amended Version 3/24/1977	69 - 83
7.	Fifth Amended Version 4/13/1977	84 - 99
8.	Sixth Amended Version 4/28/1977	100 - 119
9.	Seventh Amended Version 5/9/1977	120 - 137
10.	Eighth Amended Version 5/12/1977	138 - 155
11.	Special Hearing of the Assembly Committee on Criminal Justice	156 - 217
12.	Assembly Committee on Criminal Justice Analysis SB 155 as amended 4/13/1977	218 - 221
13.	Senate Committee on Judiciary <u>Death Penalty</u> History SB 155 As Amended 2/17/1977	222 - 235
14.	1978 Initiative Ballot Arguments	236 - 246
15.	Senate Committee on Judiciary <u>Death Penalty</u> History SB 155 As Amended 2/17/1977 Penal Code	247 - 259
16.	Assembly Committee on Criminal Justice Memorandum	260 - 265
17.	Analysis SB 155 as amended 5/24/1977	266 - 272
18.	Comparative Summary of SB 155, AB 538 & AB 23	273 - 275

AMENDMENT ANALYSIS
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 what 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

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: 3/4. Appropriation: no. Fiscal committee: no. State-

mandated local program: no.

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

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

3 1672. Any person who is guilty of violating Sections
4 Section 1670 or 1671 is punishable as follows:

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

16 (b) If his act or failure to act does not cause the death
17 of, or great bodily injury to, any person, he is punishable
18 by imprisonment in the state prison for not more than 20
19 years, or a fine of not more than ten thousand dollars
20 (\$10,000), or both. However, if such person so acts or so
21 fails to act with the intent to hinder, delay, or interfere
22 with the preparation of the United States or of any state
23 for defense or for war, or with the prosecution of war by
24 the United States, or with the rendering of assistance by
25 the United States to any other nation in connection with
26 that nation's defense, the minimum punishment shall be
27 imprisonment in the state prison for not less than one
28 year, and the maximum punishment shall be
29 imprisonment in the state prison for not more than 20
30 years, or by a fine of not more than ten thousand dollars
31 (\$10,000), or both.

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

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

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1 persons owing allegiance to the State. *state.* The
2 punishment of treason shall be ~~death.~~ *death or life*
3 *imprisonment without possibility of parole.* The penalty
4 shall be determined pursuant to Penal Code Sections
5 190.3 and 190.4.

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

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

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

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

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

29 190. Every person guilty of murder in the first degree
30 shall suffer death, confinement in state prison for life
31 without possibility of parole, or confinement in state
32 prison for life. The penalty to be applied shall be
33 determined as provided in Sections 190.1, 190.2, 190.3,
34 190.4, and 190.5. Every person guilty of murder in the
35 second degree is punishable by imprisonment in the state
36 prison for five, six, or seven years.

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

38 ~~190.1. In any case in which the death penalty is to be~~
39 ~~imposed as the penalty for an offense only upon the~~
40 ~~finding of the truth of the special circumstances~~

0 0 0 0

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

23 If the defendant was convicted by the court sitting
24 without a jury, the trier of fact shall be a jury unless a jury
25 is waived by the defendant with the consent of the
26 defendant's counsel, in which case the trier of fact shall
27 be the court. If the defendant was convicted by a plea of
28 guilty the trier of fact shall be a jury unless a jury is
29 waived by the defendant with the consent of his counsel.
30 If the defendant was convicted by a jury, the trier of fact
31 shall be the same jury unless, for good cause shown, the
32 court discharges that jury, in which case a new jury shall
33 be drawn to determine the issue of whether or not any
34 of the special circumstances charged are true or not true.
35 If the trier of fact finds, as to any person convicted of
36 any offense under Section 190 requiring further
37 proceedings that any one or more of the special
38 circumstances enumerated in Section 190.2 as charged
39 is true, the defendant shall suffer the penalty of death;
40 and neither the finding that any of the remaining special

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

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

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

23 190.1. A case in which the death penalty may be
24 imposed pursuant to this chapter shall be tried in
25 separate phases as follows:

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

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

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

1 190.4.

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

3 190.2. The penalty for a person found guilty of
4 first-degree murder shall be death in any case in which
5 the trier of fact pursuant to the further proceedings
6 provided for in Section 190.1 makes a special finding that:

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

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

16 (1) The victim is a peace officer, as defined in Section
17 830.1, subdivision (a) of Section 830.2, or subdivision (b)
18 of Section 830.5, who, while engaged in the performance
19 of his duty, was intentionally killed, and the defendant
20 knew or reasonably should have known that such victim
21 was a peace officer engaged in the performance of his
22 duties.

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

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

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

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

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

1 Section 261.

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

5 (v) Burglary, in violation of subdivision (1) of Section
6 460, of an inhabited dwelling housing entered by the
7 defendant with an intent to commit grand or petit
8 larceny or rape.

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

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

18 190.2. The penalty for a defendant found guilty of
19 murder in the first degree shall be death or confinement
20 in the state prison for life without possibility of parole in
21 any case in which one or more of the following special
22 circumstances has been charged and specially found, in a
23 proceeding under Section 190.4, to be true:

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

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

32 (1) The victim is a peace officer as defined in Section
33 830.1, subdivision (a), (b), (d), or (e) of Section 830.2,
34 subdivision (a) or (b) of Section 830.3, or subdivision (b)
35 of Section 830.5, who, while engaged in the performance
36 of his duty was intentionally killed, and the defendant
37 knew or reasonably should have known that such victim
38 was a peace officer engaged in the performance of his
39 duties.

40 (2) The murder was willful, deliberate, and

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

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

7 (i) Robbery in violation of Section 211;

8 (ii) Kidnapping in violation of Section 207 or Section
9 209;

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

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

17 (v) Burglary in violation of subdivision (1) of Section
18 460 of an inhabited dwelling house with an intent to
19 commit grand or petit larceny or rape.

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

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

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

32 190.3. (a) Notwithstanding any other provisions of law,
33 the death penalty shall not be imposed upon any person
34 who was under the age of 18 years at the time of the
35 commission of the crime. The burden of proof as to the
36 age of such person shall be upon the defendant.

37 (b) Except when the trier of facts finds that a murder
38 was committed pursuant to an agreement as defined in
39 subdivision (a) of Section 190.2; or when a person is
40 convicted of a violation of Section 37 or 128, the death

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

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

8 190.3. If the defendant has been found guilty of murder
9 in the first degree, and a special circumstance has been
10 charged and found, in a proceeding under Section 190.4,
11 to be true, or if the defendant may be subject to the death
12 penalty after having been found guilty of violating Penal
13 Code Section 37, Penal Code Section 128, Penal Code
14 Section 4500, Penal Code Section 12310, or Military and
15 Veterans Code Section 1672, the trier of fact shall
16 determine whether the penalty shall be death or life
17 imprisonment without possibility of parole. In the
18 proceedings on the question of penalty, evidence may be
19 presented by either the people or the defendant as to any
20 matter relevant to aggravation, mitigation, and sentence,
21 including, but not limited to, the nature and
22 circumstances of the present offense, and the defendant's
23 prior criminal activity, character, background, history,
24 mental condition and physical condition.

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

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

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

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

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

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

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

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

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

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

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

18 190.4. (a) When special circumstances as enumerated
19 in Section 190.2 are alleged, and the defendant has been
20 found guilty of first degree murder, there shall be a
21 hearing on the issue of the special circumstances. At the
22 hearing the determination of the truth of any or all of the
23 special circumstances charged shall be made by the trier
24 of fact on the evidence presented.

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

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

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

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

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

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

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

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

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

3 (c) If the trier of fact which convicted the defendant
4 of a crime for which he may be subjected to the death
5 penalty was a jury, the same jury shall consider any plea
6 of not guilty by reason of insanity pursuant to Section
7 1026, the truth of any special circumstances which may be
8 alleged, and the penalty to be applied, unless for good
9 cause shown the court discharges that jury in which case
10 a new jury shall be drawn. The court shall state facts in
11 support of the finding of good cause upon the record and
12 cause them to be entered into the minutes.

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

20 SEC. 13. Section 190.5 is added to the Penal Code, to
21 read:

22 190.5. (a) Notwithstanding any other provision of law,
23 the death penalty shall not be imposed upon any person
24 who is under the age of 18 years at the time of commission
25 of the crime. The burden of proof as to the age of such
26 person shall be upon the defendant.

27 (b) Except when the trier of fact finds that a murder
28 was committed pursuant to an agreement as defined in
29 subdivision (a) of Section 190.2, or when a person is
30 convicted of a violation of Penal Code Section 37, 128,
31 4500, or 12310; or a violation of subdivision (a) of Military
32 and Veterans Code Section 1672, the death penalty shall
33 not be imposed upon any person who was a principal in
34 the commission of a capital offense unless he was
35 personally present during the commission of the act or
36 acts causing death, and directly committed or physically
37 aided in the commission of such act or acts.

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

40 190.6. The Legislature finds that the imposition of

1 sentence in all capital cases should be expeditiously
2 carried out.

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

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

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

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

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

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

1 other train, car or engine and thus derails the same, or
2 who unlawfully places any dynamite or other explosive
3 material or any other obstruction upon or near the track
4 of any railroad with the intention of blowing up or
5 derailing any such train, car or engine and thus blows up
6 or derails the same, or who unlawfully sets fire to any
7 railroad bridge or trestle over which any such train, car
8 or engine must pass with the intention of wrecking such
9 train, car or engine, and thus wrecks the same, is guilty
10 of a felony and punishable with death in cases in which
11 any person subjected to any such act suffers death as a
12 proximate result thereof, or imprisonment in the state
13 prison for life without possibility of parole in cases where
14 any person suffers death or bodily harm as a proximate
15 result thereof, or imprisonment in the state prison for life
16 with the possibility of parole, in cases where no person
17 suffers death or bodily harm as a proximate result thereof.

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

20 1018. Unless otherwise provided by law every plea
21 must be entered or withdrawn by the defendant himself
22 in open court. No plea of guilty of a felony for which the
23 maximum punishment is death, or life imprisonment
24 without the possibility of parole, shall be received from a
25 defendant who does not appear with counsel, nor shall
26 any such plea be received without the consent of the
27 defendant's counsel. ~~No plea of guilty to a capital offense~~
28 ~~which does not require the further proceedings provided~~
29 ~~for in Section 190.1 shall be received from a defendant.~~
30 No plea of guilty of a felony for which the maximum
31 punishment is not death or life imprisonment without the
32 possibility of parole shall be accepted from any defendant
33 who does not appear with counsel unless the court shall
34 first fully inform him of his right to counsel and unless the
35 court shall find that the defendant understands his right
36 to counsel and freely waives it and then, only if the
37 defendant has expressly stated in open court, to the court,
38 that he does not wish to be represented by counsel. On
39 application of the defendant at any time before judgment
40 the court may, and in case of a defendant who appeared

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

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

10 1050. *The people of the State of California have a right*
11 *to a speedy trial.* The welfare of the people of the State
12 of California requires that all proceedings in criminal
13 cases shall be set for trial and heard and determined at
14 the earliest possible time, and it shall be the duty of all
15 courts and judicial officers and of all prosecuting
16 attorneys to expedite such proceedings to the greatest
17 degree that is consistent with the ends of justice. In
18 accordance with this policy, criminal cases shall be given
19 precedence over, and set for trial and heard without
20 regard to the pendency of, any civil matters or
21 proceedings. No continuance of a criminal trial shall be
22 granted except upon affirmative proof in open court,
23 upon reasonable notice, that the ends of justice require a
24 continuance. *No continuance shall be granted in a capital*
25 *case except where extraordinary and compelling*
26 *circumstances require a continuance. Facts supporting*
27 *these circumstances must be stated for the record and the*
28 *court in granting a continuance must direct that the*
29 *clerk's minutes reflect the facts requiring a continuance.*
30 Provided, that upon a showing that the attorney of record
31 at the time of the defendant's first appearance in the
32 superior court is a Member of the Legislature of this State
33 state and that the Legislature is in session or that a
34 legislative interim committee of which the attorney is a
35 duly appointed member is meeting or is to meet within
36 the next seven days, the defendant shall be entitled to a
37 reasonable continuance not to exceed 30 days. No
38 continuance shall be granted for any longer time than it
39 is affirmatively proved the ends of justice require.
40 Whenever any continuance is granted, the facts proved

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

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

10 1103. Upon a trial for treason, the defendant cannot be
11 convicted unless upon the testimony of two witnesses to
12 the same overt act, or upon confession in open Court; ~~nor~~
13 *nor, except as provided in Sections 190.3 and 190.4, can*
14 evidence be admitted of an overt act not expressly
15 charged in the indictment or information; nor can the
16 defendant be convicted unless one or more overt acts be
17 expressly alleged therein.

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

20 1105. (a) Upon a trial for murder, the commission of
21 the homicide by the defendant being proved, the burden
22 of proving circumstances of mitigation, or that justify or
23 excuse it, devolves upon him, unless the proof on the part
24 of the prosecution tends to show that the crime
25 committed only amounts to manslaughter, or that the
26 defendant was justifiable or excusable.

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

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

31 4500. Every person undergoing a life sentence in a state
32 prison of this state, who, with malice aforethought,
33 commits an assault upon the person of ~~another, other~~
34 ~~than another inmate, another~~ with a deadly weapon or
35 instrument, or by any means of force likely to produce
36 great bodily injury is punishable with ~~death, death or life~~
37 *imprisonment without possibility of parole. The penalty*
38 *shall be determined pursuant to the provisions of Sections*
39 *190.3 and 190.4; however, in cases in which the person*
40 *subjected to such assault does not die within a year and*

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

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

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

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

16 12310. Every person who willfully and maliciously
17 explodes or ignites any destructive device or any
18 explosive which causes mayhem or great bodily injury to
19 any person is guilty of a felony, and shall be punished by
20 death or imprisonment in the state prison for ~~life~~ *life*
21 *without possibility of parole*. The ~~punishment penalty~~
22 *shall be determined in the manner provided for in*
23 *Section 190.1 pursuant to the provisions of Sections 190.3*
24 *and 190.4. If no death occurs then such person shall be*
25 *punished by imprisonment in the state prison for life*
26 *without possibility of parole.*

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

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

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

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

14 The California Supreme Court has declared the
15 existing death penalty law unconstitutional. This act
16 remedies the constitutional infirmities found to be in
17 existing law, and must take effect immediately in order
18 to guarantee the public the protection inherent in an
19 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: $\frac{2}{3}$. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. Section 1672 of the Military and Veterans
- 2 Code is amended to read:
- 3 1672. Any person who is guilty of violating Section 1670
- 4 or 1671 is punishable as follows:
- 5 (a) If his act or failure to act causes the death of any
- 6 person, he is punishable by death or imprisonment in the
- 7 state prison for life without possibility of parole. The
- 8 penalty shall be determined pursuant to the provisions of
- 9 Penal Code Sections 190.3 and ~~190.4~~ 190.4 of the Penal
- 10 Code. If the act or failure to act causes great bodily injury
- 11 to any person, a person violating this section is punishable
- 12 by life imprisonment without possibility of parole.
- 13 (b) If his act or failure to act does not cause the death
- 14 of, or great bodily injury to, any person, he is punishable
- 15 by imprisonment in the state prison for not more than 20
- 16 years, or a fine of not more than ten thousand dollars
- 17 (\$10,000), or both. However, if such person so acts or so
- 18 fails to act with the intent to hinder, delay, or interfere
- 19 with the preparation of the United States or of any state
- 20 for defense or for war, or with the prosecution of war by
- 21 the United States, or with the rendering of assistance by
- 22 the United States to any other nation in connection with
- 23 that nation's defense, the minimum punishment shall be
- 24 imprisonment in the state prison for not less than one
- 25 year, and the maximum punishment shall be
- 26 imprisonment in the state prison for not more than 20
- 27 years, or by a fine of not more than ten thousand dollars
- 28 (\$10,000), or both.
- 29 SEC. 2. Section 37 of the Penal Code is amended to
- 30 read:
- 31 37. Treason against this state consists only in levying
- 32 war against it, adhering to its enemies, or giving them aid

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

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

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

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

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

16 190. Every person guilty of murder in the first degree
17 shall suffer death, confinement in state prison for life
18 without possibility of parole, or confinement in state
19 prison for life. The penalty to be applied shall be
20 determined as provided in Sections 190.1, 190.2, 190.3,
21 190.4, and 190.5. Every person guilty of murder in the
22 second degree is punishable by imprisonment in the state
23 prison for five, six, or seven years.

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

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

27 190.1. A case in which the death penalty may be
28 imposed pursuant to this chapter shall be tried in
29 separate phases as follows:

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

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

1 (c) If any charged special circumstance is found to be
 2 true, there shall thereupon be further proceedings on the
 3 question of penalty. Such proceedings shall be conducted
 4 in accordance with the provisions of Sections 190.3 and
 5 190.4.

6 SEC. 8. Section 190.2 of the Penal Code is repealed.
 7 SEC. 9. Section 190.2 is added to the Penal Code, to
 8 read:

9 190.2. The penalty for a defendant found guilty of
 10 murder in the first degree shall be death or confinement
 11 in the state prison for life without possibility of parole in
 12 any case in which one or more of the following special
 13 circumstances has been charged and specially found, in a
 14 proceeding under Section 190.4, to be true:

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

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

23 (1) The victim is a peace officer as defined in Section
 24 830.1, subdivision (a), (b), (d), or (e) of Section 830.2,
 25 subdivision (a) or (b) of Section 830.3, or subdivision (b)
 26 of Section 830.5, who, while engaged in the performance
 27 of his duty was intentionally killed, and the defendant
 28 knew or reasonably should have known that such victim
 29 was a peace officer engaged in the performance of his
 30 duties.

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

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

- 38 (i) Robbery in violation of Section 211;
- 39 (ii) Kidnapping in violation of Section 207 or Section
 40 209;

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

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

8 (v) Burglary in violation of subdivision (1) of Section
9 460 of an inhabited dwelling house with an intent to
10 commit grand or petit larceny or rape.

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

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

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

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

25 190.3. If the defendant has been found guilty of murder
26 in the first degree, and a special circumstance has been
27 charged and found, in a proceeding under Section 190.4,
28 to be true, or if the defendant may be subject to the death
29 penalty after having been found guilty of violating Penal
30 Code Section 37, Penal Code Section 128, Penal Code
31 Section 4500, Penal Code Section 12310, or Military and
32 Veterans Code Section 1672, Section 37, 128, 219, 4500, or
33 12310 of this code, or subdivision (a) of Section 1672 of the
34 Military and Veterans Code, the trier of fact shall
35 determine whether the penalty shall be death or life
36 imprisonment without possibility of parole. In the
37 proceedings on the question of penalty, evidence may be
38 presented by either the people or the defendant as to any
39 matter relevant to aggravation, mitigation, and sentence,
40 including, but not limited to, the nature and

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

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

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

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

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

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

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

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

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

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

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

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

37 190.4. (a) When special circumstances as enumerated
38 in Section 190.2 are alleged, and the defendant has been
39 found guilty of first degree murder, there shall be a
40 hearing on the issue of the special circumstances. At the

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

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

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

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

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

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

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

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

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

22 (c) If the trier of fact which convicted the defendant
23 of a crime for which he may be subjected to the death
24 penalty was a jury, the same jury shall consider any plea
25 of not guilty by reason of insanity pursuant to Section
26 1026, the truth of any special circumstances which may be
27 alleged, and the penalty to be applied, unless for good
28 cause shown the court discharges that jury in which case
29 a new jury shall be drawn. The court shall state facts in
30 support of the finding of good cause upon the record and
31 cause them to be entered into the minutes.

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

39 SEC. 13. Section 190.5 is added to the Penal Code, to
40 read:

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1 190.5. (a) Notwithstanding any other provision of law,
2 the death penalty shall not be imposed upon any person
3 who is under the age of 18 years at the time of commission
4 of the crime. The burden of proof as to the age of such
5 person shall be upon the defendant.

6 (b) Except when the trier of fact finds that a murder
7 was committed pursuant to an agreement as defined in
8 subdivision (a) of Section 190.2, or when a person is
9 convicted of a violation of Penal Code Section 37, 128,
10 4500, or 12310, or a violation of subdivision (a) of Military
11 and Veterans Code Section 1672, Section 37, 128, 219,
12 4500, or 12310 of this code, or a violation of subdivision (a)
13 of Section 1672 of the Military and Veterans Code, the
14 death penalty shall not be imposed upon any person who
15 was a principal in the commission of a capital offense
16 unless he was personally present during the commission
17 of the act or acts causing death, and directly committed
18 or physically aided in the commission of such act or acts.

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

21 190.6. The Legislature finds that the imposition of
22 sentence in all capital cases should be expeditiously
23 carried out.

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

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

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

1 intent to hold or detain, or who holds or detains, such
2 individual for ransom, reward or to commit extortion or
3 to exact from relatives or friends of such person any
4 money or valuable thing, or any person who aids or abets
5 any such act, is guilty of a felony and upon conviction
6 thereof shall be punished by imprisonment in the state
7 prison for life without possibility of parole in cases in
8 which any person subjected to any such act suffers death
9 or bodily harm, or shall be punished by imprisonment in
10 the state prison for life with the possibility of parole in
11 cases where no such person suffers death or bodily harm.
12 (b) Any person who kidnaps or carries away any
13 individual to commit robbery shall be punished by
14 imprisonment in the state prison for life with possibility
15 of parole.

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

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

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

38 1018. Unless otherwise provided by law every plea
39 must be entered or withdrawn by the defendant himself
40 in open court. No plea of guilty of a felony for which the

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

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

25 1050. The people of the State of California have a right
26 to a speedy trial. The welfare of the people of the State
27 of California requires that all proceedings in criminal
28 cases shall be set for trial and heard and determined at
29 the earliest possible time, and it shall be the duty of all
30 courts and judicial officers and of all prosecuting
31 attorneys to expedite such proceedings to the greatest
32 degree that is consistent with the ends of justice. In
33 accordance with this policy, criminal cases shall be given
34 precedence over, and set for trial and heard without
35 regard to the pendency of, any civil matters or
36 proceedings. No continuance of a criminal trial shall be
37 granted except upon affirmative proof in open court,
38 upon reasonable notice, that the ends of justice require a
39 continuance. No continuance shall be granted in a capital
40 case except where extraordinary and compelling

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

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

25 1103. Upon a trial for treason, the defendant cannot be
26 convicted unless upon the testimony of two witnesses to
27 the same overt act, or upon confession in open Court; nor,
28 except as provided in Sections 190.3 and 190.4, can
29 evidence be admitted of an overt act not expressly
30 charged in the indictment or information; nor can the
31 defendant be convicted unless one or more overt acts be
32 expressly alleged therein.

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

35 1105. (a) Upon a trial for murder, the commission of
36 the homicide by the defendant being proved, the burden
37 of proving circumstances of mitigation, or that justify or
38 excuse it, devolves upon him, unless the proof on the part
39 of the prosecution tends to show that the crime
40 committed only amounts to manslaughter, or that the

1 defendant was justifiable or excusable.

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

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

6 4500. Every person undergoing a life sentence in a state
7 prison of this state, who, with malice aforethought,
8 commits an assault upon the person of another with a
9 deadly weapon or instrument, or by any means of force
10 likely to produce great bodily injury is punishable with
11 death or life imprisonment without possibility of parole.
12 The penalty shall be determined pursuant to the
13 provisions of Sections 190.3 and 190.4; however, in cases
14 in which the person subjected to such assault does not die
15 within a year and a day after such assault as a proximate
16 result thereof, the punishment shall be imprisonment in
17 the state prison for life without the possibility of parole
18 for nine years.

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

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

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

30 12310. Every person who willfully and maliciously
31 explodes or ignites any destructive device or any
32 explosive which causes mayhem or great bodily injury to
33 any person is guilty of a felony, and shall be punished by
34 death or imprisonment in the state prison for life without
35 possibility of parole. The penalty shall be determined
36 pursuant to the provisions of Sections 190.3 and 190.4. If
37 no death occurs then such person shall be punished by
38 imprisonment in the state prison for life without
39 possibility of parole.

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

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

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

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

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

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

- 1 existing law, and must take effect immediately in order
- 2 to guarantee the public the protection inherent in an
- 3 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: $\frac{2}{3}$. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. Section 1672 of the Military and Veterans
 2 Code is amended to read:
 3 1672. Any person who is guilty of violating Section 1670
 4 or 1671 is punishable as follows:
 5 (a) If his act or failure to act causes the death of any
 6 person, he is punishable by death or imprisonment in the
 7 state prison for life without possibility of parole. The
 8 penalty shall be determined pursuant to the provisions of
 9 Sections 190.3 and 190.4 of the Penal Code. If the act or
 10 failure to act causes great bodily injury to any person, a
 11 person violating this section is punishable by life
 12 imprisonment without possibility of parole.
 13 (b) If his act or failure to act does not cause the death
 14 of, or great bodily injury to, any person, he is punishable
 15 by imprisonment in the state prison for not more than 20
 16 years, or a fine of not more than ten thousand dollars
 17 (\$10,000), or both. However, if such person so acts or so
 18 fails to act with the intent to hinder, delay, or interfere
 19 with the preparation of the United States or of any state
 20 for defense or for war, or with the prosecution of war by
 21 the United States, or with the rendering of assistance by
 22 the United States to any other nation in connection with
 23 that nation's defense, the minimum punishment shall be
 24 imprisonment in the state prison for not less than one
 25 year, and the maximum punishment shall be
 26 imprisonment in the state prison for not more than 20
 27 years, or by a fine of not more than ten thousand dollars
 28 (\$10,000), or both.
 29 SEC. 2. Section 37 of the Penal Code is amended to
 30 read:

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

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

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

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

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

18 190. Every person guilty of murder in the first degree
19 shall suffer death, confinement in state prison for life
20 without possibility of parole, or confinement in state
21 prison for life. The penalty to be applied shall be
22 determined as provided in Sections 190.1, 190.2, 190.3,
23 190.4, and 190.5. Every person guilty of murder in the
24 second degree is punishable by imprisonment in the state
25 prison for five, six, or seven years.

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

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

29 190.1. A case in which the death penalty may be
30 imposed pursuant to this chapter shall be tried in
31 separate phases as follows:

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

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

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

3 (c) If any charged special circumstance is found to be
4 true, there shall thereupon be further proceedings on the
5 question of penalty. Such proceedings shall be conducted
6 in accordance with the provisions of Sections 190.3 and
7 190.4.

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

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

11 190.2. The penalty for a defendant found guilty of
12 murder in the first degree shall be death or confinement
13 in the state prison for life without possibility of parole in
14 any case in which one or more of the following special
15 circumstances has been charged and specially found, in a
16 proceeding under Section 190.4, to be true:

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

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

27 (1) The victim is a peace officer as defined in Section
28 830.1, subdivision (a), (b), (d), or (e) of Section 830.2,
29 subdivision (a) or (b) of Section 830.3, or subdivision (b)
30 of Section 830.5, who, while engaged in the performance
31 of his duty was intentionally killed, and the defendant
32 knew or reasonably should have known that such victim
33 was a peace officer engaged in the performance of his
34 duties.

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

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

1 or attempted commission of any of the following crimes:

2 (i) Robbery in violation of Section 211;

3 (ii) Kidnapping in violation of Section 237 or Section
4 209;

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

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

12 (v) Burglary in violation of subdivision (1) of Section
13 460 of an inhabited dwelling house with an intent to
14 commit grand or petit larceny or rape.

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

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

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

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

29 190.3. If the defendant has been found guilty of murder
30 in the first degree, and a special circumstance has been
31 charged and found, in a proceeding under Section 190.4,
32 to be true, or if the defendant may be subject to the death
33 penalty after having been found guilty of violating
34 Section 37, 128, 219, 4500, or 12310 of this code, or
35 subdivision (a) of Section 1672 of the Military and
36 Veterans Code, the trier of fact shall determine whether
37 the penalty shall be death or life imprisonment without
38 possibility of parole. In the proceedings on the question
39 of penalty, evidence may be presented by either the
40 people or the defendant as to any matter relevant to

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

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

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

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

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

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

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

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

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

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

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

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

39 190.4. (a) When special circumstances as enumerated
40 in Section 190.2 are alleged, and the defendant has been

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

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

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

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

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

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

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

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

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

24 (c) If the trier of fact which convicted the defendant
25 of a crime for which he may be subjected to the death
26 penalty was a jury, the same jury shall consider any plea
27 of not guilty by reason of insanity pursuant to Section
28 1026, the truth of any special circumstances which may be
29 alleged, and the penalty to be applied, unless for good
30 cause shown the court discharges that jury in which case
31 a new jury shall be drawn. The court shall state facts in
32 support of the finding of good cause upon the record and
33 cause them to be entered into the minutes.

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

1 . SEC. 13. Section 190.5 is added to the Penal Code, to
2 read:

3 190.5. (a) Notwithstanding any other provision of law,
4 the death penalty shall not be imposed upon any person
5 who is under the age of 18 years at the time of commission
6 of the crime. The burden of proof as to the age of such
7 person shall be upon the defendant.

8 (b) Except when the trier of fact finds that a murder
9 was committed pursuant to an agreement as defined in
10 subdivision (a) of Section 190.2, or when a person is
11 convicted of a violation of Section 37, 128, 219, 4500, or
12 12310 of this code, or a violation of subdivision (a) of
13 Section 1672 of the Military and Veterans Code, the death
14 penalty shall not be imposed upon any person who was
15 a principal in the commission of a capital offense unless
16 he was personally present during the commission of the
17 act or acts causing death, and directly committed or
18 physically aided in the commission of such act or acts.

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

21 190.6. The Legislature finds that the imposition of
22 sentence in all capital cases should be expeditiously
23 carried out.

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

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

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

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

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

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

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

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

38 1018. Unless otherwise provided by law every plea
39 must be entered or withdrawn by the defendant himself
40 in open court. No plea of guilty of a felony for which the

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

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

25 1050. The people of the State of California have a right
26 to a speedy trial. The welfare of the people of the State
27 of California requires that all proceedings in criminal
28 cases shall be set for trial and heard and determined at
29 the earliest possible time, and it shall be the duty of all
30 courts and judicial officers and of all prosecuting
31 attorneys to expedite such proceedings to the greatest
32 degree that is consistent with the ends of justice. In
33 accordance with this policy, criminal cases shall be given
34 precedence over, and set for trial and heard without
35 regard to the pendency of, any civil matters or
36 proceedings. No continuance of a criminal trial shall be
37 granted except upon affirmative proof in open court,
38 upon reasonable notice, that the ends of justice require a
39 continuance. No continuance shall be granted in a capital
40 case except where extraordinary and compelling

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

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

25 1103. Upon a trial for treason, the defendant cannot be
26 convicted unless upon the testimony of two witnesses to
27 the same overt act, or upon confession in open Court; nor,
28 except as provided in Sections 190.3 and 190.4, can
29 evidence be admitted of an overt act not expressly
30 charged in the indictment or information; nor can the
31 defendant be convicted unless one or more overt acts be
32 expressly alleged therein.

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

35 1105. (a) Upon a trial for murder, the commission of
36 the homicide by the defendant being proved, the burden
37 of proving circumstances of mitigation, or that justify or
38 excuse it, devolves upon him, unless the proof on the part
39 of the prosecution tends to show that the crim
40 committed only amounts to manslaughter, or that the

1 defendant was justifiable or excusable.

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

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

6 4500. Every person undergoing a life sentence in a state
7 prison of this state, who, with malice aforethought,
8 commits an assault upon the person of another with a
9 deadly weapon or instrument, or by any means of force
10 likely to produce great bodily injury is punishable with
11 death or life imprisonment without possibility of parole.
12 The penalty shall be determined pursuant to the
13 provisions of Sections 190.3 and 190.4; however, in cases
14 in which the person subjected to such assault does not die
15 within a year and a day after such assault as a proximate
16 result thereof, the punishment shall be imprisonment in
17 the state prison for life without the possibility of parole
18 for nine years.

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

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

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

30 12310. Every person who willfully and maliciously
31 explodes or ignites any destructive device or any
32 explosive which causes mayhem or great bodily injury to
33 any person is guilty of a felony, and shall be punished by
34 death or imprisonment in the state prison for life without
35 possibility of parole. The penalty shall be determined
36 pursuant to the provisions of Sections 190.3 and 190.4. If
37 no death occurs then such person shall be punished by
38 imprisonment in the state prison for life without
39 possibility of parole.

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

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

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

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

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

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

1 existing law, and must take effect immediately in order
2 to guarantee the public the protection inherent in an
3 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: $\frac{2}{3}$. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. Section 1672 of the Military and Veterans
- 2 Code is amended to read:
- 3 1672. Any person who is guilty of violating Section 1670
- 4 or 1671 is punishable as follows:
- 5 (a) If his act or failure to act causes the death of any
- 6 person, he is punishable by death or imprisonment in the
- 7 state prison for life without possibility of parole. The
- 8 penalty shall be determined pursuant to the provisions of
- 9 Sections 190.3 and 190.4 of the Penal Code. If the act or
- 10 failure to act causes great bodily injury to any person, a
- 11 person violating this section is punishable by life
- 12 imprisonment without possibility of parole.
- 13 (b) If his act or failure to act does not cause the death
- 14 of, or great bodily injury to, any person, he is punishable
- 15 by imprisonment in the state prison for not more than 20
- 16 years, or a fine of not more than ten thousand dollars
- 17 (\$10,000), or both. However, if such person so acts or so
- 18 fails to act with the intent to hinder, delay, or interfere
- 19 with the preparation of the United States or of any state
- 20 for defense or for war, or with the prosecution of war by
- 21 the United States, or with the rendering of assistance by

1 the United States to any other nation in connection with
2 that nation's defense, the minimum punishment shall be
3 imprisonment in the state prison for not less than one
4 year, and the maximum punishment shall be
5 imprisonment in the state prison for not more than 20
6 years, or by a fine of not more than ten thousand dollars
7 (\$10,000), or both.

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

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

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

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

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

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

27 190. Every person guilty of murder in the first degree
28 shall suffer death, confinement in state prison for life
29 without possibility of parole, or confinement in state
30 prison for life. The penalty to be applied shall be
31 determined as provided in Sections 190.1, 190.2, 190.3,
32 190.4, and 190.5. Every person guilty of murder in the
33 second degree is punishable by imprisonment in the state
34 prison for five, six, or seven years.

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

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

38 190.1. A case in which the death penalty may be
39 imposed pursuant to this chapter shall be tried in
40 separate phases as follows:

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

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

12 (c) If any charged special circumstance is found to be
13 true, there shall thereupon be further proceedings on the
14 question of penalty. Such proceedings shall be conducted
15 in accordance with the provisions of Sections 190.3 and
16 190.4.

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

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

20 190.2. The penalty for a defendant found guilty of
21 murder in the first degree shall be death or confinement
22 in the state prison for life without possibility of parole in
23 any case in which one or more of the following special
24 circumstances has been charged and specially found, in a
25 proceeding under Section 190.4, to be true:

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

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

35 (1) The victim is a peace officer as defined in Section
36 830.1, subdivision (a), (b), (d), or (e) of Section 830.2,
37 subdivision (a) or (b) of Section 830.3, or subdivision (b)
38 of Section 830.5, who, while engaged in the performance
39 of his duty was intentionally killed, and the defendant
40 knew or reasonably should have known that such victim

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

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

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

10 (i) Robbery in violation of Section 211;

11 (ii) Kidnapping in violation of Section 207 or Section
12 209;

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

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

20 (v) Burglary in violation of subdivision (1) of Section
21 460 of an inhabited dwelling house with an intent to
22 commit grand or petit larceny or rape.

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

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

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

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

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

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

6 190.3. If the defendant has been found guilty of murder
7 in the first degree, and a special circumstance has been
8 charged and found, in a proceeding under Section 190.4,
9 to be true, or if the defendant may be subject to the death
10 penalty after having been found guilty of violating
11 Section 37, 128, 219, 4500, or 12310 of this code, or
12 subdivision (a) of Section 1672 of the Military and
13 Veterans Code, the trier of fact shall determine whether
14 the penalty shall be death or life imprisonment without
15 possibility of parole. In the proceedings on the question
16 of penalty, evidence may be presented by either the
17 people or the defendant as to any matter relevant to
18 aggravation, mitigation, and sentence, including, but not
19 limited to, the nature and circumstances of the present
20 offense, and the defendant's prior criminal activity, any
21 prior convictions of the defendant for felonies involving
22 the use or threat of force or violence against the person
23 of another, and the defendant's character, background,
24 history, mental condition and physical condition.
25 However, no evidence shall be admitted regarding prior
26 criminal activity by the defendant which did not result in
27 a conviction for a felony involving the use or threat of
28 force or violence against the person of another.

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

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

37 (a) The presence or absence of prior criminal activity
38 by the defendant; prior convictions of the defendant for
39 felonies involving the use or threat of force or violence
40

1 *against the person of another.*

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

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

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

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

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

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

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

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

25 190.4. (a) When special circumstances as enumerated
26 in Section 190.2 are alleged, and the defendant has been
27 found guilty of first degree murder, there shall be a
28 hearing on the issue of the special circumstances. At the
29 hearing the determination of the truth of any or all of the
30 special circumstances charged shall be made by the trier
31 of fact on the evidence presented.

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

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

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

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

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

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

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

1 defendant and the people.

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

10 (c) If the trier of fact which convicted the defendant
11 of a crime for which he may be subjected to the death
12 penalty was a jury, the same jury shall consider any plea
13 of not guilty by reason of insanity pursuant to Section
14 1026, the truth of any special circumstances which may be
15 alleged, and the penalty to be applied, unless for good
16 cause shown the court discharges that jury in which case
17 a new jury shall be drawn. The court shall state facts in
18 support of the finding of good cause upon the record and
19 cause them to be entered into the minutes.

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

27 SEC. 13. Section 190.5 is added to the Penal Code, to
28 read:

29 190.5. (a) Notwithstanding any other provision of law,
30 the death penalty shall not be imposed upon any person
31 who is under the age of 18 years at the time of commission
32 of the crime. The burden of proof as to the age of such
33 person shall be upon the defendant.

34 (b) Except when the trier of fact finds that a murder
35 was committed pursuant to an agreement as defined in
36 subdivision (a) of Section 190.2, or when a person is
37 convicted of a violation of Section 37, 128, 219, 4500, or
38 12310 of this code, or a violation of subdivision (a) of
39 Section 1672 of the Military and Veterans Code, the death
40 penalty shall not be imposed upon any person who was

1 a principal in the commission of a capital offense unless
2 he was personally present during the commission of the
3 act or acts causing death, and directly committed or
4 physically aided in the commission of such act or acts: act
5 or acts causing death, and intentionally physically aided
6 or committed such act or acts causing death.

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

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

16 190.6. The Legislature finds that the imposition of
17 sentence in all capital cases should be expeditiously
18 carried out.

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

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

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

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

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

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

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

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

33 1018. Unless otherwise provided by law every plea
34 must be entered or withdrawn by the defendant himself
35 in open court. No plea of guilty of a felony for which the
36 maximum punishment is death, or life imprisonment
37 without the possibility of parole, shall be received from a
38 defendant who does not appear with counsel, nor shall
39 any such plea be received without the consent of the
40 defendant's counsel. No plea of guilty of a felony for

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

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

20 1050. The people of the State of California have a right
21 to a speedy trial. The welfare of the people of the State
22 of California requires that all proceedings in criminal
23 cases shall be set for trial and heard and determined at
24 the earliest possible time, and it shall be the duty of all
25 courts and judicial officers and of all prosecuting
26 attorneys to expedite such proceedings to the greatest
27 degree that is consistent with the ends of justice. In
28 accordance with this policy, criminal cases shall be given
29 precedence over, and set for trial and heard without
30 regard to the pendency of, any civil matters or
31 proceedings. No continuance of a criminal trial shall be
32 granted except upon affirmative proof in open court,
33 upon reasonable notice, that the ends of justice require a
34 continuance. No continuance shall be granted in a capital
35 case except where extraordinary and compelling
36 circumstances require a continuance. Facts supporting
37 these circumstances must be stated for the record and the
38 court in granting a continuance must direct that the
39 clerk's minutes reflect the facts requiring a continuance.
40 Provided, that upon a showing that the attorney of record

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

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

20 1103. Upon a trial for treason, the defendant cannot be
21 convicted unless upon the testimony of two witnesses to
22 the same overt act, or upon confession in open Court;
23 court; nor, except as provided in Sections 190.3 and 190.4,
24 can evidence be admitted of an overt act not expressly
25 charged in the indictment or information; nor can the
26 defendant be convicted unless one or more overt acts be
27 expressly alleged therein.

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

30 1105. (a) Upon a trial for murder, the commission of
31 the homicide by the defendant being proved, the burden
32 of proving circumstances of mitigation, or that justify or
33 excuse it, devolves upon him, unless the proof on the part
34 of the prosecution tends to show that the crime
35 committed only amounts to manslaughter, or that the
36 defendant was justifiable or excusable.

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

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

1 4500. Every person undergoing a life sentence in a state
2 prison of this state, who, with malice aforethought,
3 commits an assault upon the person of another with a
4 deadly weapon or instrument, or by any means of force
5 likely to produce great bodily injury is punishable with
6 death or life imprisonment without possibility of parole.
7 The penalty shall be determined pursuant to the
8 provisions of Sections 190.3 and 190.4; however, in cases
9 in which the person subjected to such assault does not die
10 within a year and a day after such assault as a proximate
11 result thereof, the punishment shall be imprisonment in
12 the state prison for life without the possibility of parole
13 for nine years.

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

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

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

25 12310. Every person who willfully and maliciously
26 explodes or ignites any destructive device or any
27 explosive which causes mayhem or great bodily injury to
28 any person is guilty of a felony, and shall be punished by
29 death or imprisonment in the state prison for life without
30 possibility of parole. The penalty shall be determined
31 pursuant to the provisions of Sections 190.3 and 190.4. If
32 no death occurs then such person shall be punished by
33 imprisonment in the state prison for life without
34 possibility of parole.

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

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

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

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

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

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

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: $\frac{2}{3}$. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. Section 1672 of the Military and Veterans
- 2 Code is amended to read:
- 3 1672. Any person who is guilty of violating Section 1670
- 4 or 1671 is punishable as follows:
- 5 (a) If his act or failure to act causes the death of any
- 6 person, he is punishable by death or imprisonment in the
- 7 state prison for life without possibility of parole. The
- 8 penalty shall be determined pursuant to the provisions of
- 9 Sections 190.3 and 190.4 of the Penal Code. If the act or
- 10 failure to act causes great bodily injury to any person, a
- 11 person violating this section is punishable by life
- 12 imprisonment without possibility of parole.
- 13 (b) If his act or failure to act does not cause the death
- 14 of, or great bodily injury to, any person, he is punishable
- 15 by imprisonment in the state prison for not more than 20
- 16 years, or a fine of not more than ten thousand dollars
- 17 (\$10,000), or both. However, if such person so acts or so
- 18 fails to act with the intent to hinder, delay, or interfere
- 19 with the preparation of the United States or of any state

1 for defense or for war, or with the prosecution of war by
2 the United States, or with the rendering of assistance by
3 the United States to any other nation in connection with
4 that nation's defense, the minimum punishment shall be
5 imprisonment in the state prison for not less than one
6 year, and the maximum punishment shall be
7 imprisonment in the state prison for not more than 20
8 years, or by a fine of not more than ten thousand dollars
9 (\$10,000), or both.

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

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

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

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

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

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

29 190. Every person guilty of murder in the first degree
30 shall suffer death, confinement in state prison for life
31 without possibility of parole, or confinement in state
32 prison for life. The penalty to be applied shall be
33 determined as provided in Sections 190.1, 190.2, 190.3,
34 190.4, and 190.5. Every person guilty of murder in the
35 second degree is punishable by imprisonment in the state
36 prison for five, six, or seven years.

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

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

40 190.1. A case in which the death penalty may be

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

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

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

14 (c) If any charged special circumstance is found to be
15 true, there shall thereupon be further proceedings on the
16 question of penalty. Such proceedings shall be conducted
17 in accordance with the provisions of Sections 190.3 and
18 190.4.

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

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

22 190.2. The penalty for a defendant found guilty of
23 murder in the first degree shall be death or confinement
24 in the state prison for life without possibility of parole in
25 any case in which one or more of the following special
26 circumstances has been charged and specially found, in a
27 proceeding under Section 190.4, to be true:

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

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

37 (1) The victim is a peace officer as defined in Section
38 830.1, subdivision (a), (b), (d), or (e) of Section 830.2,
39 subdivision (a) or (b) of Section 830.3, or subdivision (b)
40 of Section 830.5, who, while engaged in the performance

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

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

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

12 (i) Robbery in violation of Section 211;

13 (ii) Kidnapping in violation of Section 207 or Section
14 209;

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

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

22 (v) Burglary in violation of subdivision (1) of Section
23 460 of an inhabited dwelling house with an intent to
24 commit grand or petit larceny or rape.

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

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

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

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

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

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

8 190.3. If the defendant has been found guilty of murder
9 in the first degree, and a special circumstance has been
10 charged and found, in a proceeding under Section 190.4,
11 to be true, or if the defendant may be subject to the death
12 penalty after having been found guilty of violating
13 Section 37, 128, 219, 4500, or 12310 of this code, or
14 subdivision (a) of Section 1672 of the Military and
15 Veterans Code, the trier of fact shall determine whether
16 the penalty shall be death or life imprisonment without
17 possibility of parole. In the proceedings on the question
18 of penalty, evidence may be presented by either the
19 people or the defendant as to any matter relevant to
20 aggravation, mitigation, and sentence, including, but not
21 limited to, the nature and circumstances of the present
22 offense, any prior convictions of the defendant for
23 felonies involving the use or threat of force or violence
24 against the person of another, significant prior criminal
25 activity by the defendant, and the defendant's character,
26 background, history, mental condition and physical
27 condition. However, no evidence shall be admitted
28 regarding prior criminal activity by the defendant which
29 did not result in a conviction for a felony involving the
30 use or threat of force or violence against the person of
31 another.

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

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

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

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

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

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

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

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

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

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

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

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

26 190.4. (a) When special circumstances as enumerated
27 in Section 190.2 are alleged, and the defendant has been
28 found guilty of first degree murder, there shall be a
29 hearing on the issue of the special circumstances. At the
30 hearing the determination of the truth of any or all of the
31 special circumstances charged shall be made by the trier
32 of fact on the evidence presented.

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

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

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

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

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

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

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

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

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

11 (c) If the trier of fact which convicted the defendant
12 of a crime for which he may be subjected to the death
13 penalty was a jury, the same jury shall consider any plea
14 of not guilty by reason of insanity pursuant to Section
15 1026, the truth of any special circumstances which may be
16 alleged, and the penalty to be applied, unless for good
17 cause shown the court discharges that jury in which case
18 a new jury shall be drawn. The court shall state facts in
19 support of the finding of good cause upon the record and
20 cause them to be entered into the minutes.

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

28 SEC. 13. Section 190.5 is added to the Penal Code, to
29 read:

30 190.5. (a) Notwithstanding any other provision of law,
31 the death penalty shall not be imposed upon any person
32 who is under the age of 18 years at the time of commission
33 of the crime. The burden of proof as to the age of such
34 person shall be upon the defendant.

35 (b) Except when the trier of fact finds that a murder
36 was committed pursuant to an agreement as defined in
37 subdivision (a) of Section 190.2, or when a person is
38 convicted of a violation of Section 37, 128, 219, 4500, or
39 12310 of this code, or a violation of subdivision (a) of
40 Section 1672 of the Military and Veterans Code, the death

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

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

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

15 190.6. The Legislature finds that the imposition of
16 sentence in all capital cases should be expeditiously
17 carried out.

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

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

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

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

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

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

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

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

32 1018. Unless otherwise provided by law every plea
33 must be entered or withdrawn by the defendant himself
34 in open court. No plea of guilty of a felony for which the
35 maximum punishment is death, or life imprisonment
36 without the possibility of parole, shall be received from a
37 defendant who does not appear with counsel, nor shall
38 any such plea be received without the consent of the
39 defendant's counsel. No plea of guilty of a felony for
40 which the maximum punishment is not death or life

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

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

19 1050. The people of the State of California have a right
20 to a speedy trial. The welfare of the people of the State
21 of California requires that all proceedings in criminal
22 cases shall be set for trial and heard and determined at
23 the earliest possible time, and it shall be the duty of all
24 courts and judicial officers and of all prosecuting
25 attorneys to expedite such proceedings to the greatest
26 degree that is consistent with the ends of justice. In
27 accordance with this policy, criminal cases shall be given
28 precedence over, and set for trial and heard without
29 regard to the pendency of, any civil matters or
30 proceedings. No continuance of a criminal trial shall be
31 granted except upon affirmative proof in open court,
32 upon reasonable notice, that the ends of justice require a
33 continuance. No continuance shall be granted in a capital
34 case except where extraordinary and compelling
35 circumstances require a continuance. Facts supporting
36 these circumstances must be stated for the record and the
37 court in granting a continuance must direct that the
38 clerk's minutes reflect the facts requiring a continuance.
39 Provided, that upon a showing that the attorney of record
40 at the time of the defendant's first appearance in the

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

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

19 1103. Upon a trial for treason, the defendant cannot be
20 convicted unless upon the testimony of two witnesses to
21 the same overt act, or upon confession in open court; nor,
22 except as provided in Sections 190.3 and 190.4, can
23 evidence be admitted of an overt act not expressly
24 charged in the indictment or information; nor can the
25 defendant be convicted unless one or more overt acts be
26 expressly alleged therein.

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

29 1105. (a) Upon a trial for murder, the commission of
30 the homicide by the defendant being proved, the burden
31 of proving circumstances of mitigation, or that justify or
32 excuse it, devolves upon him, unless the proof on the part
33 of the prosecution tends to show that the crime
34 committed only amounts to manslaughter, or that the
35 defendant was justifiable or excusable.

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

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

40 4500. Every person undergoing a life sentence in a state

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

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

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

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

24 12310. Every person who willfully and maliciously
25 explodes or ignites any destructive device or any
26 explosive which causes mayhem or great bodily injury to
27 any person is guilty of a felony, and shall be punished by
28 death or imprisonment in the state prison for life without
29 possibility of parole. The penalty shall be determined
30 pursuant to the provisions of Sections 190.3 and 190.4. If
31 no death occurs then such person shall be punished by
32 imprisonment in the state prison for life without
33 possibility of parole.

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

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

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

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

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

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

O

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: $\frac{2}{3}$. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. Section 1672 of the Military and Veterans
- 2 Code is amended to read:
- 3 1672. Any person who is guilty of violating Section 1670
- 4 or 1671 is punishable as follows:
- 5 (a) If his act or failure to act causes the death of any
- 6 person, he is punishable by death or imprisonment in the
- 7 state prison for life without possibility of parole. The
- 8 penalty shall be determined pursuant to the provisions of
- 9 Sections 190.3 and 190.4 of the Penal Code. If the act or
- 10 failure to act causes great bodily injury to any person, a
- 11 person violating this section is punishable by life
- 12 imprisonment without possibility of parole.
- 13 (b) If his act or failure to act does not cause the death
- 14 of, or great bodily injury to, any person, he is punishable

1 by imprisonment in the state prison for not more than 20
2 years, or a fine of not more than ten thousand dollars
3 (\$10,000), or both. However, if such person so acts or so
4 fails to act with the intent to hinder, delay, or interfere
5 with the preparation of the United States or of any state
6 for defense or for war, or with the prosecution of war by
7 the United States, or with the rendering of assistance by
8 the United States to any other nation in connection with
9 that nation's defense, the minimum punishment shall be
10 imprisonment in the state prison for not less than one
11 year, and the maximum punishment shall be
12 imprisonment in the state prison for not more than 20
13 years, or by a fine of not more than ten thousand dollars
14 (\$10,000), or both.

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

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

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

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

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

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

34 190. Every person guilty of murder in the first degree
35 shall suffer death, confinement in state prison for life
36 without possibility of parole, or confinement in state
37 prison for life. The penalty to be applied shall be
38 determined as provided in Sections 190.1, 190.2, 190.3,
39 190.4, and 190.5. Every person guilty of murder in the
40 second degree is punishable by imprisonment in the state

1 prison for five, six, or seven years.

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

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

5 190.1. A case in which the death penalty may be
6 imposed pursuant to this chapter shall be tried in
7 separate phases as follows:

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

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

19 (c) If any charged special circumstance is found to be
20 true, there shall thereupon be further proceedings on the
21 question of penalty. Such proceedings shall be conducted
22 in accordance with the provisions of Sections 190.3 and
23 190.4.

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

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

27 190.2. The penalty for a defendant found guilty of
28 murder in the first degree shall be death or confinement
29 in the state prison for life without possibility of parole in
30 any case in which one or more of the following special
31 circumstances has been charged and specially found, in a
32 proceeding under Section 190.4, to be true:

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

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

1 circumstances exists:

2 (1) The victim is a peace officer as defined in Section
3 830.1, subdivision (a), (b), (d), or (e) of Section 830.2,
4 subdivision (a) or (b) of Section 830.3, or subdivision (b)
5 of Section 830.5, who, while engaged in the performance
6 of his duty was intentionally killed, and the defendant
7 knew or reasonably should have known that such victim
8 was a peace officer engaged in the performance of his
9 duties.

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

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

17 (i) Robbery in violation of Section 211;

18 (ii) Kidnapping in violation of Section 207 or Section
19 209;

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

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

27 (v) Burglary in violation of subdivision (1) of Section
28 460 of an inhabited dwelling house with an intent to
29 commit grand or petit larceny or rape.

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

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

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

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

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

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

13 190.3. If the defendant has been found guilty of murder
14 in the first degree, and a special circumstance has been
15 charged and found, in a proceeding under Section 190.4,
16 to be true, or if the defendant may be subject to the death
17 penalty after having been found guilty of violating
18 Section 27, 128, 219, 4500, or 12310 of this code, or
19 subdivision (a) of Section 1672 of the Military and
20 Veterans Code, subdivision (a) of Section 1672 of the
21 Military and Veterans Code, or Section 37, 128, 219, 4500,
22 or 12310 of this code, the trier of fact shall determine
23 whether the penalty shall be death or life imprisonment
24 without possibility of parole. In the proceedings on the
25 question of penalty, evidence may be presented by either
26 the people or the defendant as to any matter relevant to
27 aggravation, mitigation, and sentence, including, but not
28 limited to, the nature and circumstances of the present
29 offense, any significant prior criminal activity by the
30 defendant, and the defendant's character, background,
31 history, mental condition and physical condition.
32 However, no evidence shall be admitted regarding prior
33 criminal activity by the defendant which did not result in
34 a conviction for a felony involving the use or threat of
35 force or violence against the person of another, the
36 presence or absence of criminal activity by the defendant
37 which involved the use or attempted use of force or
38 violence or which involved the expressed or implied
39 threat to use force or violence, and the defendant's
40 character, background, history, mental condition and

1 *physical condition.*

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

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

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

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

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

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

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

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

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

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

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

37 190.4. (a) When special circumstances as enumerated
38 in Section 190.2 are alleged, and the defendant has been
39 found guilty of first degree murder, there shall be a
40 hearing on the issue of the special circumstances. At the

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

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

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

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

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

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

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

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

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

22 (c) If the trier of fact which convicted the defendant
23 of a crime for which he may be subjected to the death
24 penalty was a jury, the same jury shall consider any plea
25 of not guilty by reason of insanity pursuant to Section
26 1026, the truth of any special circumstances which may be
27 alleged, and the penalty to be applied, unless for good
28 cause shown the court discharges that jury in which case
29 a new jury shall be drawn. The court shall state facts in
30 support of the finding of good cause upon the record and
31 cause them to be entered into the minutes.

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

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

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

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

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

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

15 SEC. 13. Section 190.5 is added to the Penal Code, to
16 read:

17 190.5. (a) Notwithstanding any other provision of law,
18 the death penalty shall not be imposed upon any person
19 who is under the age of 18 years at the time of commission
20 of the crime. The burden of proof as to the age of such
21 person shall be upon the defendant.

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

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

1 actual killing of the victim.

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

4 190.6. The Legislature finds that the imposition of
5 sentence in all capital cases should be expeditiously
6 carried out.

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

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

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

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

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

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

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

23 1018. Unless otherwise provided by law every plea
24 must be entered or withdrawn by the defendant himself
25 in open court. No plea of guilty of a felony for which the
26 maximum punishment is death, or life imprisonment
27 without the possibility of parole, shall be received from a
28 defendant who does not appear with counsel, nor shall
29 any such plea be received without the consent of the
30 defendant's counsel. No plea of guilty of a felony for
31 which the maximum punishment is not death or life
32 imprisonment without the possibility of parole shall be
33 accepted from any defendant who does not appear with
34 counsel unless the court shall first fully inform him of his
35 right to counsel and unless the court shall find that the
36 defendant understands his right to counsel and freely
37 waives it and then, only if the defendant has expressly
38 stated in open court, to the court, that he does not wish
39 to be represented by counsel. On application of the
40 defendant at any time before judgment the court may,

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

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

10 1050. The people of the State of California have a right
11 to a speedy trial. The welfare of the people of the State
12 of California requires that all proceedings in criminal
13 cases shall be set for trial and heard and determined at
14 the earliest possible time, and it shall be the duty of all
15 courts and judicial officers and of all prosecuting
16 attorneys to expedite such proceedings to the greatest
17 degree that is consistent with the ends of justice. In
18 accordance with this policy, criminal cases shall be given
19 precedence over, and set for trial and heard without
20 regard to the pendency of, any civil matters or
21 proceedings. No continuance of a criminal trial shall be
22 granted except upon affirmative proof in open court,
23 upon reasonable notice, that the ends of justice require a
24 continuance. No continuance shall be granted in a capital
25 case except where extraordinary and compelling
26 circumstances require a continuance. Facts supporting
27 these circumstances must be stated for the record and the
28 court in granting a continuance must direct that the
29 clerk's minutes reflect the facts requiring a continuance.
30 Provided, that upon a showing that the attorney of record
31 at the time of the defendant's first appearance in the
32 superior court is a Member of the Legislature of this state
33 and that the Legislature is in session or that a legislative
34 interim committee of which the attorney is a duly
35 appointed member is meeting or is to meet within the
36 next seven days, the defendant shall be entitled to a
37 reasonable continuance not to exceed 30 days. No
38 continuance shall be granted for any longer time than it
39 is affirmatively proved the ends of justice require.
40 Whenever any continuance is granted, the facts proved

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

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

10 1103. Upon a trial for treason, the defendant cannot be
11 convicted unless upon the testimony of two witnesses to
12 the same overt act, or upon confession in open court; nor,
13 except as provided in Sections 190.3 and 190.4, can
14 evidence be admitted of an overt act not expressly
15 charged in the indictment or information; nor can the
16 defendant be convicted unless one or more overt acts be
17 expressly alleged therein.

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

20 1105. (a) Upon a trial for murder, the commission of
21 the homicide by the defendant being proved, the burden
22 of proving circumstances of mitigation, or that justify or
23 excuse it, devolves upon him, unless the proof on the part
24 of the prosecution tends to show that the crime
25 committed only amounts to manslaughter, or that the
26 defendant was justifiable or excusable.

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

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

31 4500. Every person undergoing a life sentence in a state
32 prison of this state, who, with malice aforethought,
33 commits an assault upon the person of another with a
34 deadly weapon or instrument, or by any means of force
35 likely to produce great bodily injury is punishable with
36 death or life imprisonment without possibility of parole.
37 The penalty shall be determined pursuant to the
38 provisions of Sections 190.3 and 190.4; however, in cases
39 in which the person subjected to such assault does not die
40 within a year and a day after such assault as a proximate

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

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

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

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

15 12310. Every person who willfully and maliciously
16 explodes or ignites any destructive device or any
17 explosive which causes mayhem or great bodily injury to
18 any person is guilty of a felony, and shall be punished by
19 death or imprisonment in the state prison for life without
20 possibility of parole. The penalty shall be determined
21 pursuant to the provisions of Sections 190.3 and 190.4. If
22 no death occurs then such person shall be punished by
23 imprisonment in the state prison for life without
24 possibility of parole.

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

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

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

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

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

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

O

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.

2 2188 10 40

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: $\frac{2}{3}$. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. Section 1672 of the Military and Veterans
- 2 Code is amended to read:
- 3 1672. Any person who is guilty of violating Section 1670
- 4 or 1671 is punishable as follows:
- 5 (a) If his act or failure to act causes the death of any
- 6 person, he is punishable by death or imprisonment in the
- 7 state prison for life without possibility of parole. The
- 8 penalty shall be determined pursuant to the provisions of
- 9 Sections 190.3 and 190.4 of the Penal Code. If the act or
- 10 failure to act causes great bodily injury to any person, a
- 11 person violating this section is punishable by life

1 imprisonment without possibility of parole.

2 (b) If his act or failure to act does not cause the death
3 of, or great bodily injury to, any person, he is punishable
4 by imprisonment in the state prison for not more than 20
5 years, or a fine of not more than ten thousand dollars
6 (\$10,000), or both. However, if such person so acts or so
7 fails to act with the intent to hinder, delay, or interfere
8 with the preparation of the United States or of any state
9 for defense or for war, or with the prosecution of war by
10 the United States, or with the rendering of assistance by
11 the United States to any other nation in connection with
12 that nation's defense, the minimum punishment shall be
13 imprisonment in the state prison for not less than one
14 year, and the maximum punishment shall be
15 imprisonment in the state prison for not more than 20
16 years, or by a fine of not more than ten thousand dollars
17 (\$10,000), or both.

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

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

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

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

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

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

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

1 determined as provided in Sections 190.1, 190.2, 190.3,
2 190.4, and 190.5. Every person guilty of murder in the
3 second degree is punishable by imprisonment in the state
4 prison for five, six, or seven years.

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

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

8 190.1. A case in which the death penalty may be
9 imposed pursuant to this chapter shall be tried in
10 separate phases as follows:

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

13 (b) If the defendant is found guilty, his sanity on any
14 plea of not guilty by reason of insanity under Section 1926
15 shall be determined as provided in Section 190.4. If he is
16 found to be sane, and one or more special circumstances
17 as enumerated in Section 190.2 have been charged, there
18 shall thereupon be further proceedings on the question
19 of the truth of the charged special circumstance or
20 circumstances. Such proceedings shall be conducted in
21 accordance with the provisions of Section 190.4.

22 (c) If any charged special circumstance is found to be
23 true, there shall thereupon be further proceedings on the
24 question of penalty. Such proceedings shall be conducted
25 in accordance with the provisions of Sections 190.3 and
26 190.4.

27 (a) The defendant's guilt shall first be determined. If
28 the trier of fact finds the defendant guilty of first degree
29 murder, it shall at the same time determine the truth of
30 all special circumstances charged as enumerated in
31 Section 190.2, except for a special circumstance charged
32 pursuant to paragraph (5) of subdivision (b) of section
33 190.2.

34 (b) If the defendant is found guilty of first degree
35 murder and one of the special circumstances is charged
36 pursuant to paragraph (5) of subdivision (b) of Section
37 190.2 which charges that the defendant had been
38 convicted in a prior proceeding of the offense of murder
39 of the first or second degree, there shall thereupon be
40 further proceedings on the question of the truth of such

1 *special circumstance.*

2 (c) *If the defendant is found guilty of first degree*
3 *murder and one or more special circumstances as*
4 *enumerated in Section 190.2 has been charged and found*
5 *to be true, his sanity on any plea of not guilty by reason*
6 *of insanity under Section 1026 shall be determined as*
7 *provided in Section 190.4. If he is found to be sane, there*
8 *shall thereupon be further proceedings on the question*
9 *of the penalty to be imposed. Such proceedings shall be*
10 *conducted in accordance with the provisions of Sections*
11 *190.3 and 190.4.*

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

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

14 read:

15 190.2. The penalty for a defendant found guilty of
16 murder in the first degree shall be death or confinement
17 in the state prison for life without possibility of parole in
18 any case in which one or more of the following special
19 circumstances has been charged and specially found, in a
20 proceeding under Section 190.4, to be true:

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

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

30 (1) The victim is a peace officer as defined in Section
31 830.1, subdivision (a), (b), (d), or (e) of Section 830.2, or
32 subdivision (a) or (b) of Section 830.3, or subdivision (b)
33 of Section 830.5, who, while engaged in the performance
34 of his duty was intentionally killed, and the defendant
35 knew or reasonably should have known that such victim
36 was a peace officer engaged in the performance of his
37 duties.

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

1 preventing his testimony in any criminal proceeding.

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

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

11 (i) Robbery in violation of Section 211;

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

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

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

26 (v) Burglary in violation of subdivision (1) of Section
27 460 of an inhabited dwelling house with an intent to
28 commit grand or petit larceny or rape.

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

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

1 second degree.

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

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

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

12 190.3. If the defendant has been found guilty of murder
13 in the first degree, and a special circumstance has been
14 charged and ~~found, in a proceeding under Section 190.4,~~
15 *found* to be true, or if the defendant may be subject to the
16 death penalty after having been found guilty of violating
17 subdivision (a) of Section 1672 of the Military and
18 Veterans Code, or Section 37, 128, 219, 4500, or 12310 of
19 this code, the trier of fact shall determine whether the
20 penalty shall be death or life imprisonment without
21 possibility of parole. In the proceedings on the question
22 of penalty, evidence may be presented by either the
23 people or the defendant as to any matter relevant to
24 aggravation, mitigation, and sentence, including, but not
25 limited to, the nature and circumstances of the present
26 offense, the presence or absence of *other* criminal
27 activity by the defendant which involved the use or
28 attempted use of force or violence or which involved the
29 expressed or implied threat to use force or violence, and
30 the defendant's character, background, history, mental
31 condition and physical condition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 190.4. (a) When special circumstances as enumerated
2 in Section 190.2 are alleged, and the defendant has been
3 found guilty of first degree murder, there shall be a
4 hearing on the issue of the special circumstances. At the
5 hearing the determination of the truth of any or all of the
6 special circumstances charged shall be made by the trier
7 of fact on the evidence presented.

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

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

20 190.4. (a) Whenever special circumstances as
21 enumerated in Section 190.2 are alleged and the trier of
22 fact finds the defendant guilty of first degree murder, the
23 trier of fact shall also make a special finding on the truth
24 of each alleged special circumstance. The determination
25 of the truth of any or all of the special circumstances shall
26 be made by the trier of fact on the evidence presented
27 at the trial or at the hearing held pursuant to subdivision
28 (b) of Section 190.1.

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

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

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

5 If the trier of fact finds that any one or more of the
6 special circumstances enumerated in Section 100.2 as
7 charged is true, there shall be a separate penalty hearing,
8 and neither the finding that any of the remaining special
9 circumstances charged is not true, nor if the trier of fact
10 is a jury, the inability of the jury to agree on the issue of
11 the truth or untruth of any of the remaining special
12 circumstances charged, shall prevent the holding of the
13 separate penalty hearing.

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

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

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

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

4 (c) If the trier of fact which convicted the defendant
5 of a crime for which he may be subjected to the death
6 penalty was a jury, the same jury shall consider any plea
7 of not guilty by reason of insanity pursuant to Section
8 1026, the truth of any special circumstances which may be
9 alleged, and the penalty to be applied, unless for good
10 cause shown the court discharges that jury in which case
11 a new jury shall be drawn. The court shall state facts in
12 support of the finding of good cause upon the record and
13 cause them to be entered into the minutes.

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

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

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

36 The denial of the application may modification of a
37 death penalty verdict pursuant to subdivision (7) of
38 Section 1181 shall be reviewed on the defendant's
39 automatic appeal pursuant to subdivision (b) of Section
40 1239. The granting of the application may shall be

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

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

6 SEC. 13. Section 190.5 is added to the Penal Code, to
7 read:

8 190.5. (a) Notwithstanding any other provision of law,
9 the death penalty shall not be imposed upon any person
10 who is under the age of 18 years at the time of commission
11 of the crime. The burden of proof as to the age of such
12 person shall be upon the defendant.

13 (b) Except when the trier of fact finds that a murder
14 was committed pursuant to an agreement as defined in
15 subdivision (a) of Section 190.2, or when a person is
16 convicted of a violation of subdivision (a) of Section 1672
17 of the Military and Veterans Code, or Section 37, 128,
18 4500, or 12310 of this code, the death penalty shall not be
19 imposed upon any person who was a principal in the
20 commission of a capital offense unless he was personally
21 present during the commission of the act or acts causing
22 death, and intentionally physically aided or committed
23 such act or acts causing death.

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

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

33 190.6. The Legislature finds that the imposition of
34 sentence in all capital cases should be expeditiously
35 carried out.

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

1 time requirement is not met, the Chief Justice of the
2 Supreme Court shall state on the record the
3 extraordinary and compelling circumstances causing the
4 delay and the facts supporting these circumstances. The
5 failure of the Supreme Court to comply with the
6 requirements of this section shall in no way preclude a
7 failure to comply with the time requirements of this
8 section shall not be grounds for precluding the ultimate
9 imposition of the death penalty.

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

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

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

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

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

1 railroad bridge or trestle over which any such train, car
2 or engine must pass with the intention of wrecking such
3 train, car or engine, and thus wrecks the same, is guilty
4 of a felony and punishable with death or imprisonment in
5 the state prison for life without possibility of parole in
6 cases where any person suffers death as a proximate
7 result thereof, or imprisonment in the state prison for life
8 with the possibility of parole, in cases where no person
9 suffers death as a proximate result thereof. The penalty
10 shall be determined pursuant to Sections 190.3 and 190.4.
11 SEC. 17. Section 1018 of the Penal Code is amended to
12 read:

13 1018. Unless otherwise provided by law every plea
14 must be entered or withdrawn by the defendant himself
15 in open court. No plea of guilty of a felony for which the
16 maximum punishment is death, or life imprisonment
17 without the possibility of parole, shall be received from a
18 defendant who does not appear with counsel, nor shall
19 any such plea be received without the consent of the
20 defendant's counsel. No plea of guilty of a felony for
21 which the maximum punishment is not death or life
22 imprisonment without the possibility of parole shall be
23 accepted from any defendant who does not appear with
24 counsel unless the court shall first fully inform him of his
25 right to counsel and unless the court shall find that the
26 defendant understands his right to counsel and freely
27 waives it and then, only if the defendant has expressly
28 stated in open court, to the court, that he does not wish
29 to be represented by counsel. On application of the
30 defendant at any time before judgment the court may,
31 and in case of a defendant who appeared without counsel
32 at the time of the plea the court must, for a good cause
33 shown, permit the plea of guilty to be withdrawn and a
34 plea of not guilty substituted. Upon indictment or
35 information against a corporation a plea of guilty may be
36 put in by counsel. This section shall be liberally construed
37 to effect these objects and to promote justice.

38 SEC. 18. Section 1050 of the Penal Code is amended to
39 read:
40 1050. The people of the State of California have a right

1 to a speedy trial. The welfare of the people of the State
2 of California requires that all proceedings in criminal
3 cases shall be set for trial and heard and determined at
4 the earliest possible time; and it shall be the duty of all
5 courts and judicial officers and of all prosecuting
6 attorneys to expedite such proceedings to the greatest
7 degree that is consistent with the ends of justice. In
8 accordance with this policy, criminal cases shall be given
9 precedence over, and set for trial and heard without
10 regard to the pendency of, any civil matters or
11 proceedings. No continuance of a criminal trial shall be
12 granted except upon affirmative proof in open court,
13 upon reasonable notice, that the ends of justice require a
14 continuance. No continuance shall be granted in a capital
15 case except where extraordinary and compelling
16 circumstances require a continuance. Facts supporting
17 these circumstances must be stated for the record and the
18 court in granting a continuance must direct that the
19 clerk's minutes reflect the facts requiring a continuance.
20 Provided, that upon a showing that the attorney of record
21 at the time of the defendant's first appearance in the
22 superior court is a Member of the Legislature of this state
23 and that the Legislature is in session or that a legislative
24 interim committee of which the attorney is a duly
25 appointed member is meeting or is to meet within the
26 next seven days, the defendant shall be entitled to a
27 reasonable continuance not to exceed 30 days. No
28 continuance shall be granted for any longer time than it
29 is affirmatively proved the ends of justice require.
30 Whenever any continuance is granted, the facts proved
31 which require the continuance shall be entered upon the
32 minutes of the court or, in a justice court, upon the
33 docket. Whenever it shall appear that any court may be
34 required, because of the condition of its calendar, to
35 dismiss an action pursuant to Section 1382 of this code, the
36 court must immediately notify the chairman of the
37 Judicial Council.

38 1050. The welfare of the people of the State of
39 California requires that all proceedings in criminal cases
40 shall be set for trial and heard and determined at the

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

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

1 *immediately notify the chairman of the Judicial Council.*

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

4 1103. Upon a trial for treason, the defendant cannot be
5 convicted unless upon the testimony of two witnesses to
6 the same overt act, or upon confession in open court; nor,
7 except as provided in Sections 190.3 and 190.4, can
8 evidence be admitted of an overt act not expressly
9 charged in the indictment or information; nor can the
10 defendant be convicted unless one or more overt acts be
11 expressly alleged therein.

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

14 1105. (a) Upon a trial for murder, the commission of
15 the homicide by the defendant being proved, the burden
16 of proving circumstances of mitigation, or that justify or
17 excuse it, devolves upon him, unless the proof on the part
18 of the prosecution tends to show that the crime
19 committed only amounts to manslaughter, or that the
20 defendant was justifiable or excusable.

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

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

25 4500. Every person undergoing a life sentence in a state
26 prison of this state, who, with malice aforethought,
27 commits an assault upon the person of another with a
28 deadly weapon or instrument, or by any means of force
29 likely to produce great bodily injury is punishable with
30 death or life imprisonment without possibility of parole.
31 The penalty shall be determined pursuant to the
32 provisions of Sections 190.3 and 190.4; however, in cases
33 in which the person subjected to such assault does not die
34 within a year and a day after such assault as a proximate
35 result thereof, the punishment shall be imprisonment in
36 the state prison for life without the possibility of parole
37 for nine years.

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

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

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

9 12310. Every person who willfully and maliciously
10 explodes or ignites any destructive device or any
11 explosive which causes mayhem or great bodily injury to
12 any person is guilty of a felony, and shall be punished by
13 death or imprisonment in the state prison for life without
14 possibility of parole. The penalty shall be determined
15 pursuant to the provisions of Sections 190.3 and 190.4. If
16 no death occurs then such person shall be punished by
17 imprisonment in the state prison for life without
18 possibility of parole.

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

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

1 magnitude.

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

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

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

24 The California Supreme Court has declared the
25 existing death penalty law unconstitutional. This act
26 remedies the constitutional infirmities found to be in
27 existing law, and must take effect immediately in order
28 to guarantee the public the protection inherent in an
29 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: $\frac{2}{3}$. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. Section 1672 of the Military and Veterans
- 2 Code is amended to read:
- 3 1672. Any person who is guilty of violating Section 1670
- 4 or 1671 is punishable as follows:
- 5 (a) If his act or failure to act causes the death of any
- 6 person, he is punishable by death or imprisonment in the
- 7 state prison for life without possibility of parole. The
- 8 penalty shall be determined pursuant to the provisions of
- 9 Sections 190.3 and 190.4 of the Penal Code. If the act or
- 10 failure to act causes great bodily injury to any person, a
- 11 person violating this section is punishable by life
- 12 imprisonment without possibility of parole.

1 (b) If his act or failure to act does not cause the death
2 of, or great bodily injury to, any person, he is punishable
3 by imprisonment in the state prison for not more than 20
4 years, or a fine of not more than ten thousand dollars
5 (\$10,000), or both. However, if such person so acts or so
6 fails to act with the intent to hinder, delay, or interfere
7 with the preparation of the United States or of any state
8 for defense or for war, or with the prosecution of war by
9 the United States, or with the rendering of assistance by
10 the United States to any other nation in connection with
11 that nation's defense, the minimum punishment shall be
12 imprisonment in the state prison for not less than one
13 year, and the maximum punishment shall be
14 imprisonment in the state prison for not more than 20
15 years, or by a fine of not more than ten thousand dollars
16 (\$10,000), or both.

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

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

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

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

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

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

36 190. Every person guilty of murder in the first degree
37 shall suffer death, confinement in state prison for life
38 without possibility of parole, or confinement in state
39 prison for life. The penalty to be applied shall be
40 determined as provided in Sections 190.1, 190.2, 190.3,

1 190.4, and 190.5. Every person guilty of murder in the
2 second degree is punishable by imprisonment in the state
3 prison for five, six, or seven years.

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

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

7 190.1. A case in which the death penalty may be
8 imposed pursuant to this chapter shall be tried in
9 separate phases as follows:

10 (a) The defendant's guilt shall first be determined. If
11 the trier of fact finds the defendant guilty of first degree
12 murder, it shall at the same time determine the truth of
13 all special circumstances charged as enumerated in
14 Section 190.2, except for a special circumstance charged
15 pursuant to paragraph (5) of subdivision (b) of section
16 ~~190.2~~ 190.2 where it is alleged that the defendant had
17 been convicted in a prior proceeding of the offense of
18 murder of the first or second degree.

19 (b) If the defendant is found guilty of first degree
20 murder and one of the special circumstances is charged
21 pursuant to paragraph (5) of subdivision (b) of Section
22 190.2 which charges that the defendant had been
23 convicted in a prior proceeding of the offense of murder
24 of the first or second degree, there shall thereupon be
25 further proceedings on the question of the truth of such
26 special circumstance.

27 (c) If the defendant is found guilty of first degree
28 murder and one or more special circumstances as
29 enumerated in Section 190.2 has been charged and found
30 to be true, his sanity on any plea of not guilty by reason
31 of insanity under Section 1026 shall be determined as
32 provided in Section 190.4. If he is found to be sane, there
33 shall thereupon be further proceedings on the question
34 of the penalty to be imposed. Such proceedings shall be
35 conducted in accordance with the provisions of Sections
36 190.3 and 190.4.

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

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

40 190.2. The penalty for a defendant found guilty of

1 murder in the first degree shall be death or confinement
2 in the state prison for life without possibility of parole in
3 any case in which one or more of the following special
4 circumstances has been charged and specially found, in a
5 proceeding under Section 190.4, to be true:

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

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

15 (1) The victim is a peace officer as defined in Section
16 830.1, subdivision (a), (b), (d), or (e) of Section 830.2, or
17 subdivision (a) or (b) of Section 830.3, 830.1, subdivision
18 (a) or (b) of Section 830.2, subdivision (a) or (b) of
19 Section 830.3, or subdivision (b) of Section 830.5, who,
20 while engaged in the performance of his duty was
21 intentionally killed, and the defendant knew or
22 reasonably should have known that such victim was a
23 peace officer engaged in the performance of his duties.

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

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

33 (i) Robbery in violation of Section 211;

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

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

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

8 (v) Burglary in violation of subdivision (1) of Section
9 460 of an inhabited dwelling house with an intent to
10 commit grand or petit larceny or rape.

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

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

24 (6) *The murder was willful, deliberate, and*
25 *premeditated, and was perpetrated by means of a*
26 *destructive device or explosive.*

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

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

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

36 190.3. If the defendant has been found guilty of murder
37 in the first degree, and a special circumstance has been
38 charged and found to be true, or if the defendant may be
39 subject to the death penalty after having been found
40 guilty of violating subdivision (a) of Section 1672 of the

1 Military and Veterans Code, or Section 37, 128, 219, 4500,
2 or 12310 of this code, the trier of fact shall determine
3 whether the penalty shall be death or life imprisonment
4 without possibility of parole. In the proceedings on the
5 question of penalty, evidence may be presented by either
6 the people or the defendant as to any matter relevant to
7 aggravation, mitigation, and sentence, including, but not
8 limited to, the nature and circumstances of the present
9 offense, the presence or absence of other criminal
10 activity by the defendant which involved the use or
11 attempted use of force or violence or which involved the
12 expressed or implied threat to use force or violence, and
13 the defendant's character, background, history, mental
14 condition and physical condition.

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

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

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

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

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

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

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

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

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

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

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

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

24 (h) The age of the defendant at the time of the crime,

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

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

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

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

1 190.4. (a) Whenever special circumstances as
2 enumerated in Section 190.2 are alleged and the trier of
3 fact finds the defendant guilty of first degree murder, the
4 trier of fact shall also make a special finding on the truth
5 of each alleged special circumstance. The determination
6 of the truth of any or all of the special circumstances shall
7 be made by the trier of fact on the evidence presented
8 at the trial or at the hearing held pursuant to subdivision
9 (b) of Section 190.1.

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

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

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

35 In any case in which the defendant has been found
36 guilty by a jury, and the jury has been unable to reach a
37 unanimous verdict that one or more of the special
38 circumstances charged are true, and does not reach a
39 unanimous verdict that all the special circumstances
40 charged are not true, the court shall dismiss the jury and

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

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

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

22 (c) If the trier of fact which convicted the defendant
23 of a crime for which he may be subjected to the death
24 penalty was a jury, the same jury shall consider any plea
25 of not guilty by reason of insanity pursuant to Section
26 1026, the truth of any special circumstances which may be
27 alleged, and the penalty to be applied, unless for good
28 cause shown the court discharges that jury in which case
29 a new jury shall be drawn. The court shall state facts in
30 support of the finding of good cause upon the record and
31 cause them to be entered into the minutes.

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

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

1 defendant shall be deemed to have made an application
2 for modification of such verdict or finding pursuant to
3 subdivision 7 of Section 1181. In ruling on the application
4 the judge shall review the evidence, consider, take into
5 account, and be guided by the aggravating and
6 mitigating circumstances referred to in Section 190.3, and
7 shall make an independent determination as to whether
8 the weight of the evidence supports the jury's findings
9 and verdicts. He shall state on the record the reason for
10 his findings.

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

14 The denial of the modification of a death penalty
15 verdict pursuant to subdivision (7) of Section 1181 shall
16 be reviewed on the defendant's automatic appeal
17 pursuant to subdivision (b) of Section 1239. The granting
18 of the application shall be reviewed on the people's
19 appeal pursuant to paragraph (6) of subdivision (a) of
20 Section 1238.

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

24 SEC. 13. Section 190.5 is added to the Penal Code, to
25 read:

26 190.5. (a) Notwithstanding any other provision of law,
27 the death penalty shall not be imposed upon any person
28 who is under the age of 18 years at the time of commission
29 of the crime. The burden of proof as to the age of such
30 person shall be upon the defendant.

31 (b) Except when the trier of fact finds that a murder
32 was committed pursuant to an agreement as defined in
33 subdivision (a) of Section 190.2, or when a person is
34 convicted of a violation of subdivision (a) of Section 1672
35 of the Military and Veterans Code, or Section 37, 128,
36 4500, or 12310 of this code, the death penalty shall not be
37 imposed upon any person who was a principal in the
38 commission of a capital offense unless he was personally
39 present during the commission of the act or acts causing
40 death, and intentionally physically aided or committed

1 such act or acts causing death.

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

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

10 190.6. The Legislature finds that the imposition of
11 sentence in all capital cases should be expeditiously
12 carried out.

13 Therefore, in all cases in which a sentence of death has
14 been imposed, the appeal to the State Supreme Court
15 must be decided and an opinion reaching the merits must
16 be filed within 150 days of certification of the entire
17 record by the sentencing court. In any case in which this
18 time requirement is not met, the Chief Justice of the
19 Supreme Court shall state on the record the
20 extraordinary and compelling circumstances causing the
21 delay and the facts supporting these circumstances. A
22 failure to comply with the time requirements of this
23 section shall not be grounds for precluding the ultimate
24 imposition of the death penalty.

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

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

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

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

7 219. Every person who unlawfully throws out a switch,
8 removes a rail, or places any obstruction on any railroad
9 with the intention of derailing any passenger, freight or
10 other train, car or engine and thus derails the same, or
11 who unlawfully places any dynamite or other explosive
12 material or any other obstruction upon or near the track
13 of any railroad with the intention of blowing up or
14 derailing any such train, car or engine and thus blows up
15 or derails the same, or who unlawfully sets fire to any
16 railroad bridge or trestle over which any such train, car
17 or engine must pass with the intention of wrecking such
18 train, car or engine, and thus wrecks the same, is guilty
19 of a felony and punishable with death or imprisonment in
20 the state prison for life without possibility of parole in
21 cases where any person suffers death as a proximate
22 result thereof, or imprisonment in the state prison for life
23 with the possibility of parole, in cases where no person
24 suffers death as a proximate result thereof. The penalty
25 shall be determined pursuant to Sections 190.3 and 190.4.

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

28 1018. Unless otherwise provided by law every plea
29 must be entered or withdrawn by the defendant himself
30 in open court. No plea of guilty of a felony for which the
31 maximum punishment is death, or life imprisonment
32 without the possibility of parole, shall be received from a
33 defendant who does not appear with counsel, nor shall
34 any such plea be received without the consent of the
35 defendant's counsel. No plea of guilty of a felony for
36 which the maximum punishment is not death or life
37 imprisonment without the possibility of parole shall be
38 accepted from any defendant who does not appear with
39 counsel unless the court shall first fully inform him of his
40 right to counsel and unless the court shall find that the

1 defendant understands his right to counsel and freely
2 waives it and then, only if the defendant has expressly
3 stated in open court, to the court, that he does not wish
4 to be represented by counsel. On application of the
5 defendant at any time before judgment the court may,
6 and in case of a defendant who appeared without counsel
7 at the time of the plea the court must, for a good cause
8 shown, permit the plea of guilty to be withdrawn and a
9 plea of not guilty substituted. Upon indictment or
10 information against a corporation a plea of guilty may be
11 put in by counsel. This section shall be liberally construed
12 to effect these objects and to promote justice.

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

15 1050. The welfare of the people of the State of
16 California requires that all proceedings in criminal cases
17 shall be set for trial and heard and determined at the
18 earliest possible time. To this end the Legislature finds
19 that the criminal courts are becoming increasingly
20 congested with resulting adverse consequences to the
21 welfare of the people and the defendant. It is therefore
22 recognized that the people and the defendant have
23 reciprocal rights and interests in a speedy trial or other
24 disposition, and to that end shall be the duty of all courts
25 and judicial officers and of all counsel, both the
26 prosecution and the defense, to expedite such
27 proceedings to the greatest degree that is consistent with
28 the ends of justice. In accordance with this policy,
29 criminal cases shall be given precedence over, and set for
30 trial and heard without regard to the pendency of, any
31 civil matters or proceedings.

32 To continue any hearing in a criminal proceeding,
33 including the trial, a written notice must be filed within
34 two court days of the hearing sought to be continued,
35 together with affidavits or declarations detailing specific
36 facts showing that a continuance is necessary, unless the
37 court for good cause entertains an oral motion for
38 continuance. Continuances shall be granted only upon a
39 showing of good cause. Neither a stipulation between
40 counsel nor the convenience of the parties is in and of

1 itself a good cause. Provided, that upon a showing that
2 the attorney of record at the time of the defendant's first
3 appearance in the superior court is a Member of the
4 Legislature of this State and that the Legislature is in
5 session or that a legislative interim committee of which
6 the attorney is a duly appointed member is meeting or is
7 to meet within the next seven days, the defendant shall
8 be entitled to a reasonable continuance not to exceed 30
9 days. A continuance shall be granted only for that period
10 of time shown to be necessary by the evidence
11 considered at the hearing on the motion. Whenever any
12 continuance is granted, the facts proved which require
13 the continuance shall be entered upon the minutes of the
14 court or, in a justice court, upon the docket. Whenever it
15 shall appear that any court may be required, because of
16 the condition of its calendar, to dismiss an action pursuant
17 to Section 1382 of this code, the court must immediately
18 notify the chairman of the Judicial Council.

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

21 .1103. Upon a trial for treason, the defendant cannot be
22 convicted unless upon the testimony of two witnesses to
23 the same overt act, or upon confession in open court; nor,
24 except as provided in Sections 190.3 and 190.4, can
25 evidence be admitted of an overt act not expressly
26 charged in the indictment or information; nor can the
27 defendant be convicted unless one or more overt acts be
28 expressly alleged therein.

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

31 .1105. (a) Upon a trial for murder, the commission of
32 the homicide by the defendant being proved, the burden
33 of proving circumstances of mitigation, or that justify or
34 excuse it, devolves upon him, unless the proof on the part
35 of the prosecution tends to show that the crime
36 committed only amounts to manslaughter, or that the
37 defendant was justifiable or excusable.

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

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

1 read:

2 4500. Every person undergoing a life sentence in a state
3 prison of this state, who, with malice aforethought,
4 commits an assault upon the person of another with a
5 deadly weapon or instrument, or by any means of force
6 likely to produce great bodily injury is punishable with
7 death or life imprisonment without possibility of parole.
8 The penalty shall be determined pursuant to the
9 provisions of Sections 190.3 and 190.4; however, in cases
10 in which the person subjected to such assault does not die
11 within a year and a day after such assault as a proximate
12 result thereof, the punishment shall be imprisonment in
13 the state prison for life without the possibility of parole
14 for nine years.

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

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

24 *Nothing in this section shall be construed to prohibit*
25 *the application of this section when the assault was*
26 *committed outside the walls of any prison if the person*
27 *committing the assault was undergoing a life sentence in*
28 *a state prison at the time of the commission of the assault*
29 *and was not on parole.*

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

32 12310. Every person who willfully and maliciously
33 explodes or ignites any destructive device or any
34 explosive which causes mayhem or great bodily injury to
35 any person is guilty of a felony, and shall be punished by
36 death or imprisonment in the state prison for life without
37 possibility of parole. The penalty shall be determined
38 pursuant to the provisions of Sections 190.3 and 190.4. If
39 no death occurs then such person shall be punished by
40 imprisonment in the state prison for life without

1 possibility of parole.

2 12310. (a) Every person who willfully and maliciously
3 explodes or ignites any destructive device or any
4 explosive which causes the death of any person is guilty
5 of a felony, and shall be punished by imprisonment in the
6 state prison for life without the possibility of parole.

7 (b) Every person who willfully and maliciously
8 explodes or ignites any destructive device or any
9 explosive which causes mayhem or great bodily injury to
10 any person is guilty of a felony, and shall be punished by
11 imprisonment in the state prison for life.

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

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

35 If any word, phrase, clause, or sentence in any section
36 amended or added by this act, or any section or provision
37 of this act, or application thereof to any person or
38 circumstance is held invalid, and as a result thereof, a
39 defendant who has been sentenced to life imprisonment
40 without the possibility of parole under the provisions of

1 this act will instead be sentenced to life imprisonment
2 with the possibility of parole.

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

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

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

O

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.**

0 3110 10 10

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: $\frac{2}{3}$. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

- 1 SECTION 1. Section 1672 of the Military and Veterans
- 2 Code is amended to read:
- 3 1672. Any person who is guilty of violating Section 1670
- 4 or 1671 is punishable as follows:
- 5 (a) If his act or failure to act causes the death of any
- 6 person, he is punishable by death or imprisonment in the
- 7 state prison for life without possibility of parole. The
- 8 penalty shall be determined pursuant to the provisions of
- 9 Sections 190.3 and 190.4 of the Penal Code. If the act or
- 10 failure to act causes great bodily injury to any person, a
- 11 person violating this section is punishable by life
- 12 imprisonment without possibility of parole.

1 (b) If his act or failure to act does not cause the death
2 of, or great bodily injury to, any person, he is punishable
3 by imprisonment in the state prison for not more than 20
4 years, or a fine of not more than ten thousand dollars
5 (\$10,000), or both. However, if such person so acts or so
6 fails to act with the intent to hinder, delay, or interfere
7 with the preparation of the United States or of any state
8 for defense or for war, or with the prosecution of war by
9 the United States, or with the rendering of assistance by
10 the United States to any other nation in connection with
11 that nation's defense, the minimum punishment shall be
12 imprisonment in the state prison for not less than one
13 year, and the maximum punishment shall be
14 imprisonment in the state prison for not more than 20
15 years, or by a fine of not more than ten thousand dollars
16 (\$10,000), or both.

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

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

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

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

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

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

36 190. Every person guilty of murder in the first degree
37 shall suffer death, confinement in state prison for life
38 without possibility of parole, or confinement in state
39 prison for life. The penalty to be applied shall be
40 determined as provided in Sections 190.1, 190.2, 190.3,

1 190.4, and 190.5. Every person guilty of murder in the
2 second degree is punishable by imprisonment in the state
3 prison for five, six, or seven years.

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

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

7 190.1. A case in which the death penalty may be
8 imposed pursuant to this chapter shall be tried in
9 separate phases as follows:

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

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

27 (c) If the defendant is found guilty of first degree
28 murder and one or more special circumstances as
29 enumerated in Section 190.2 has been charged and found
30 to be true, his sanity on any plea of not guilty by reason
31 of insanity under Section 1026 shall be determined as
32 provided in Section 190.4. If he is found to be sane, there
33 shall thereupon be further proceedings on the question
34 of the penalty to be imposed. Such proceedings shall be
35 conducted in accordance with the provisions of Sections
36 190.3 and 190.4.

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

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

40 190.2. The penalty for a defendant found guilty of

1 murder in the first degree shall be death or confinement
2 in the state prison for life without possibility of parole in
3 any case in which one or more of the following special
4 circumstances has been charged and specially found, in a
5 proceeding under Section 190.4, to be true:

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

10 (b) *The defendant, with the intent to cause death,*
11 *physically aided or committed such act or acts causing*
12 *death, and the murder was willful, deliberate, and*
13 *premeditated, and was perpetrated by means of a*
14 *destructive device or explosive;*

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

20 (1) The victim is a peace officer as defined in Section
21 830.1, subdivision (a) or (b) of Section 830.2, subdivision
22 (a) or (b) of Section 830.3, or subdivision (b) of Section
23 830.5, who, while engaged in the performance of his duty
24 was intentionally killed, and the defendant knew or
25 reasonably should have known that such victim was a
26 peace officer engaged in the performance of his duties.

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

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

36 (i) Robbery in violation of Section 211;

37 (ii) Kidnapping in violation of Section 207 or 209. Brief
38 movements of a victim which are merely incidental to
39 the commission of another offense and which do not
40 substantially increase the victim's risk of harm over that

1 necessarily inherent in the other offense do not constitute
2 a violation of Section 209 within the meaning of this
3 paragraph.

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

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

11 (v) Burglary in violation of subdivision (1) of Section
12 460 of an inhabited dwelling house with an intent to
13 commit grand or petit larceny or rape.

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

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

27 (6) The murder was willful, deliberate, and
28 premeditated, and was perpetrated by means of a
29 destructive device or explosive.

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

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

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

40 190.3. If the defendant has been found guilty of murder

1 in the first degree, and a special circumstance has been
2 charged and found to be true, or if the defendant may be
3 subject to the death penalty after having been found
4 guilty of violating subdivision (a) of Section 1672 of the
5 Military and Veterans Code, or Section 37, 128, ~~219~~, 4500,
6 ~~or 12319 219~~ or 4500 of this code, the trier of fact shall
7 determine whether the penalty shall be death or life
8 imprisonment without possibility of parole. In the
9 proceedings on the question of penalty, evidence may be
10 presented by either the people or both the people and
11 the defendant as to any matter relevant to aggravation,
12 mitigation, and sentence, including, but not limited to,
13 the nature and circumstances of the present offense, the
14 presence or absence of other criminal activity by the
15 defendant which involved the use or attempted use of
16 force or violence or which involved the expressed or
17 implied threat to use force or violence, and the
18 defendant's character, background, history, mental
19 condition and physical condition.

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

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

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

1 defendant in mitigation.

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

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

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

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

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

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

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

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

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

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

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

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

1 the possibility of parole.

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

4 190.4. (a) Whenever special circumstances as
5 enumerated in Section 190.2 are alleged and the trier of
6 fact finds the defendant guilty of first degree murder, the
7 trier of fact shall also make a special finding on the truth
8 of each alleged special circumstance. The determination
9 of the truth of any or all of the special circumstances shall
10 be made by the trier of fact on the evidence presented
11 at the trial or at the hearing held pursuant to subdivision
12 (b) of Section 190.1.

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

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

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

38 In any case in which the defendant has been found
39 guilty by a jury, and the jury has been unable to reach a
40 unanimous verdict that one or more of the special

1 circumstances charged are true, and does not reach a
2 unanimous verdict that all the special circumstances
3 charged are not true, the court shall dismiss the jury and
4 shall order a new jury impaneled to try the issues, but the
5 issue of guilt shall not be tried by such jury, nor shall such
6 jury retry the issue of the truth of any of the special
7 circumstances which were found by a unanimous verdict
8 of the previous jury to be untrue. If such new jury is
9 unable to reach the unanimous verdict that one or more
10 of the special circumstances it is trying are true, the court
11 shall dismiss the jury and impose a punishment of
12 confinement in state prison for life.

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

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

25 (c) If the trier of fact which convicted the defendant
26 of a crime for which he may be subjected to the death
27 penalty was a jury, the same jury shall consider any plea
28 of not guilty by reason of insanity pursuant to Section
29 1026, the truth of any special circumstances which may be
30 alleged, and the penalty to be applied, unless for good
31 cause shown the court discharges that jury in which case
32 a new jury shall be drawn. The court shall state facts in
33 support of the finding of good cause upon the record and
34 cause them to be entered into the minutes.

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

1 the same trier of fact at the subsequent phase.

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

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

17 The denial of the modification of a death penalty
18 verdict pursuant to subdivision (7) of Section 1181 shall
19 be reviewed on the defendant's automatic appeal
20 pursuant to subdivision (b) of Section 1239. The granting
21 of the application shall be reviewed on the people's
22 appeal pursuant to paragraph (6) of subdivision (a) of
23 Section 1238.

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

27 SEC. 13. Section 190.5 is added to the Penal Code, to
28 read:

29 190.5. (a) Notwithstanding any other provision of law,
30 the death penalty shall not be imposed upon any person
31 who is under the age of 18 years at the time of commission
32 of the crime. The burden of proof as to the age of such
33 person shall be upon the defendant.

34 (b) Except when the trier of fact finds that a murder
35 was committed pursuant to an agreement as defined in
36 subdivision (a) of Section 190.2, or when a person is
37 convicted of a violation of subdivision (a) of Section 1672
38 of the Military and Veterans Code, or Section 37, 128,
39 ~~4500, or 12210~~ 4500, or subdivision (b) of Section 190.2 of
40 this code, the death penalty shall not be imposed upon

1 any person who was a principal in the commission of a
2 capital offense unless he was personally present during
3 the commission of the act or acts causing death, and
4 intentionally physically aided or committed such act or
5 acts causing death.

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

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

14 190.6. The Legislature finds that the imposition of
15 sentence in all capital cases should be expeditiously
16 carried out.

17 Therefore, in all cases in which a sentence of death has
18 been imposed, the appeal to the State Supreme Court
19 must be decided and an opinion reaching the merits must
20 be filed within 150 days of certification of the entire
21 record by the sentencing court. In any case in which this
22 time requirement is not met, the Chief Justice of the
23 Supreme Court shall state on the record the
24 extraordinary and compelling circumstances causing the
25 delay and the facts supporting these circumstances. A
26 failure to comply with the time requirements of this
27 section shall not be grounds for precluding the ultimate
28 imposition of the death penalty.

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

31 209. (a) Any person who seizes, confines, inveigles,
32 entices, decoys, abducts, conceals, kidnaps or carries
33 away any individual by any means whatsoever with
34 intent to hold or detain, or who holds or detains, such
35 individual for ransom, reward or to commit extortion or
36 to exact from relatives or friends of such person any
37 money or valuable thing, or any person who aids or abets
38 any such act, is guilty of a felony and upon conviction
39 thereof shall be punished by imprisonment in the state
40 prison for life without possibility of parole in cases in

1 which any person subjected to any such act suffers death
2 or bodily harm, or shall be punished by imprisonment in
3 the state prison for life with the possibility of parole in
4 cases where no such person suffers death or bodily harm.

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

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

11 219. Every person who unlawfully throws out a switch,
12 removes a rail, or places any obstruction on any railroad
13 with the intention of derailing any passenger, freight or
14 other train, car or engine and thus derails the same, or
15 who unlawfully places any dynamite or other explosive
16 material or any other obstruction upon or near the track
17 of any railroad with the intention of blowing up or
18 derailing any such train, car or engine and thus blows up
19 or derails the same, or who unlawfully sets fire to any
20 railroad bridge or trestle over which any such train, car
21 or engine must pass with the intention of wrecking such
22 train, car or engine, and thus wrecks the same, is guilty
23 of a felony and punishable with death or imprisonment in
24 the state prison for life without possibility of parole in
25 cases where any person suffers death as a proximate
26 result thereof, or imprisonment in the state prison for life
27 with the possibility of parole, in cases where no person
28 suffers death as a proximate result thereof. The penalty
29 shall be determined pursuant to Sections 190.3 and 190.4.

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

32 1018. Unless otherwise provided by law every plea
33 must be entered or withdrawn by the defendant himself
34 in open court. No plea of guilty of a felony for which the
35 maximum punishment is death, or life imprisonment
36 without the possibility of parole, shall be received from a
37 defendant who does not appear with counsel, nor shall
38 any such plea be received without the consent of the
39 defendant's counsel. No plea of guilty of a felony for
40 which the maximum punishment is not death or life

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

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

19 1050. The welfare of the people of the State of
20 California requires that all proceedings in criminal cases
21 shall be set for trial and heard and determined at the
22 earliest possible time. To this end the Legislature finds
23 that the criminal courts are becoming increasingly
24 congested with resulting adverse consequences to the
25 welfare of the people and the defendant. It is therefore
26 recognized that the people and the defendant have
27 reciprocal rights and interests in a speedy trial or other
28 disposition, and to that end shall be the duty of all courts
29 and judicial officers and of all counsel, both the
30 prosecution and the defense, to expedite such
31 proceedings to the greatest degree that is consistent with
32 the ends of justice. In accordance with this policy,
33 criminal cases shall be given precedence over, and set for
34 trial and heard without regard to the pendency of, any
35 civil matters or proceedings.

36 To continue any hearing in a criminal proceeding,
37 including the trial, a written notice must be filed within
38 two court days of the hearing sought to be continued,
39 together with affidavits or declarations detailing specific
40 facts showing that a continuance is necessary, unless the

1 court for good cause entertains an oral motion for
2 continuance. Continuances shall be granted only upon a
3 showing of good cause. Neither a stipulation between
4 counsel nor the convenience of the parties is in and of
5 itself a good cause. Provided, that upon a showing that
6 the attorney of record at the time of the defendant's first
7 appearance in the superior court is a Member of the
8 Legislature of this State and that the Legislature is in
9 session or that a legislative interim committee of which
10 the attorney is a duly appointed member is meeting or is
11 to meet within the next seven days, the defendant shall
12 be entitled to a reasonable continuance not to exceed 30
13 days. A continuance shall be granted only for that period
14 of time shown to be necessary by the evidence
15 considered at the hearing on the motion. Whenever any
16 continuance is granted, the facts proved which require
17 the continuance shall be entered upon the minutes of the
18 court or, in a justice court, upon the docket. Whenever it
19 shall appear that any court may be required, because of
20 the condition of its calendar, to dismiss an action pursuant
21 to Section 1382 of this code, the court must immediately
22 notify the chairman of the Judicial Council.

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

25 1103. Upon a trial for treason, the defendant cannot be
26 convicted unless upon the testimony of two witnesses to
27 the same overt act, or upon confession in open court; nor,
28 except as provided in Sections 190.3 and 190.4, can
29 evidence be admitted of an overt act not expressly
30 charged in the indictment or information; nor can the
31 defendant be convicted unless one or more overt acts be
32 expressly alleged therein.

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

35 1105. (a) Upon a trial for murder, the commission of the
36 homicide by the defendant being proved, the burden of
37 proving circumstances of mitigation, or that justify or
38 excuse it, devolves upon him, unless the proof on the part
39 of the prosecution tends to show that the crime
40 committed only amounts to manslaughter, or that the

1 defendant was justifiable or excusable.

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

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

6 4500. Every person undergoing a life sentence in a state
7 prison of this state, who, with malice aforethought,
8 commits an assault upon the person of another with a
9 deadly weapon or instrument, or by any means of force
10 likely to produce great bodily injury is punishable with
11 death or life imprisonment without possibility of parole.
12 The penalty shall be determined pursuant to the
13 provisions of Sections 190.3 and 190.4; however, in cases
14 in which the person subjected to such assault does not die
15 within a year and a day after such assault as a proximate
16 result thereof, the punishment shall be imprisonment in
17 the state prison for life without the possibility of parole
18 for nine years.

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

23 Nothing in this section shall be construed to prohibit
24 the application of this section when the assault was
25 committed outside the walls of any prison if the person
26 committing the assault was undergoing a life sentence in
27 a state prison at the time of the commission of the assault
28 and was not on parole.

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

31 12310. (a) Every person who willfully and maliciously
32 explodes or ignites any destructive device or any
33 explosive which causes the death of any person is guilty
34 of a felony, and shall be punished by imprisonment in the
35 state prison for life without the possibility of parole.

36 (b) Every person who willfully and maliciously
37 explodes or ignites any destructive device or any
38 explosive which causes mayhem or great bodily injury to
39 any person is guilty of a felony, and shall be punished by
40 imprisonment in the state prison for life.

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

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

24 If any word, phrase, clause, or sentence in any section
25 amended or added by this act, or any section or provision
26 of this act, or application thereof to any person or
27 circumstance is held invalid, and as a result thereof, a
28 defendant who has been sentenced to life imprisonment
29 without the possibility of parole under the provisions of
30 this act will instead be sentenced to life imprisonment
31 with the possibility of parole.

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

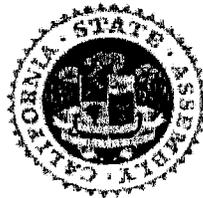
39 SEC. 26. This act is an urgency statute necessary for the
40 immediate preservation of the public peace, health, or

1 safety within the meaning of Article IV of the
2 Constitution and shall go into immediate effect. The facts
3 constituting such necessity are:
4 The California Supreme Court has declared the
5 existing death penalty law unconstitutional. This act
6 remedies the constitutional infirmities found to be in
7 existing law, and must take effect immediately in order
8 to guarantee the public the protection inherent in an
9 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**

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California Legislature

Assembly Committee on Criminal Justice

KENNETH L. MADDY
CHAIRMAN

STATE CAPITOL
SACRAMENTO 95814
TELEPHONE: (916) 445-3268

MICHAEL S. ULLMAN
SENIOR CONSULTANT

PETER JENSEN
ASSOCIATE CONSULTANT

CARSON RAPP
ASSOCIATE CONSULTANT

BILL RUTLAND
ASSOCIATE CONSULTANT

PATTY MARCHAL
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 simply 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. SONDEHEIM: 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 proportionality 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 proportionality 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 Arkansas 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 Constitution 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 their 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 trial 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 against 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 simply 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 innocence?

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 of 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 dimension 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 statute, 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 occurred 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-arbitrarily 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 ⁱⁿ and/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 eligible 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 term 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 other Members 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 -- was 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 guilty 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 term. 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 be 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, whiffing

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 separation 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 throughout 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	<u>MSU</u>
Ways & Means	<u>NO</u>
Rev. & Tax.	<u>NO</u>

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	<u>MSU</u>
Ways & Means	<u>NO</u>
Rev. & Tax.	<u>NO</u>

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. defendant 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--

219

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.

--MORE--

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

SB 155 (Deukmejian)
As amended February 17
Penal Code
(Revised 2/23)

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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

(More)

222

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.

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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.

The position of the California Supreme Court

The constitutional amendment on the death penalty

(More)

204

B 155 (Deukmejian)
age Four

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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.

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(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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B 155 (Deukmejian)
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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?

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 disproportionate compared to sentences imposed 1
in similar cases. In Gregg such review was 5
referred to as "important" by 6 of the 9 justices 5
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-

(More)

229

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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)

220

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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

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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.

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).

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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.

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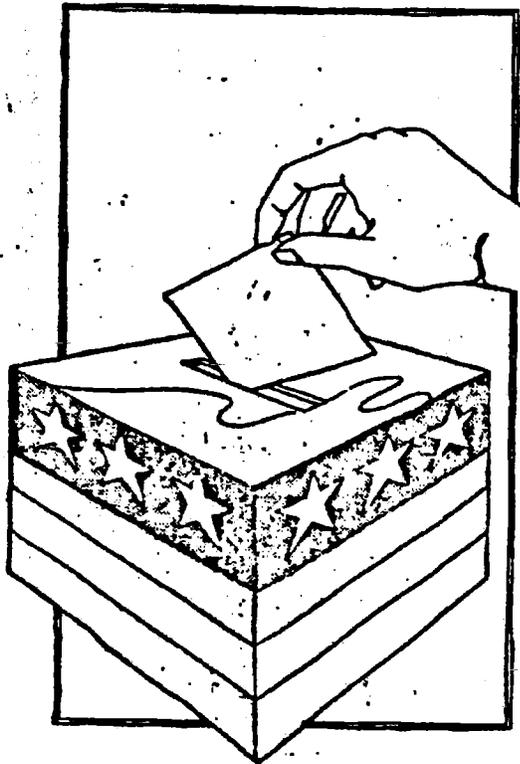
Prohibits the imposition of the death penalty on any person who is under the age of 18 at the time of the commission of the crime. (Pen. C. Sec. 190.5)

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)

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.

236



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

237

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

238

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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 to night 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

Murder. Penalty—Initiative Statute

7

Argument Against Proposition 7

DONT 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. **DONT 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*

(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 § 54987, 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.

ment 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 190.1, 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, phys/

ally 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 811;

(ii) Kidnapping in violation of Section 867 or 869. 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 869 within the meaning of this paragraph.

(iii) Rape by force or violence in violation of subdivision (2) of Section 861; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 861;

(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 888;

(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) 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.

190.2. 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 190.4.

(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 effects 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 deter-

mines 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 190.2.

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 190.2, 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 1229. The granting of the application shall be reviewed on the people's appeal pursuant to paragraph (6) of subdivision (a) of Section 1228.

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 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 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 1229. 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 100.2, or when a person is convicted of a violation of subdivision (a) of Section 1670 of the Military and

Veterans Code, or Section 37, 100, 1500, or subdivision (b) of Section 190.8 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

(More)

SB 155 (Deukmejian)
Page Two

S
B

the number who would have been subject to the
death penalty under the provisions of this bill.

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COMMENT

1. Comparison 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

(More)

248

SB 155 (Deukmejian)
Page Three

S
B

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.

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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.

(More)

SB 155 (Deukmejian)
Page Four

S
B
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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

(More)

17
PENALTY
55
SB 155 (Deukmejian)
Page Five

S
B
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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.

(More)

ON JUDICIARY

155

January 17

SB 155 (Deukmejian)
Page Six

S
B

- (b) Sabotage resulting in death. (Mil. & Vet. C. Sec. 1672) 1
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- (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)

X 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.

(More)

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SB 155 (Deukmejian)
Page Seven

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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.

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(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 disproportionate 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

(More)

SB 155 (Deukmejian)
Page Eight

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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?

(More)

SB 155 (Deukmejian)
Page Nine

S
B
155

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

(More)

SB 155 (Deukmejian)
Page Ten

S
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punishable by life imprisonment without possibility of parole. (Mil. & Vet. C. Sec. 1672)

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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.

(More)

SB 155 (Deukmejian)
Page Eleven

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SHOULD NOT THE BILL BE AMENDED TO SETTLE
THIS QUESTION?

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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)

SB 155 (Deukmejian)
Page Twelve

S
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- (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)

SB 155 (Deukmejian)
Page Thirteen

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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)

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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)

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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)

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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)

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 proposed 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

--MORE--

260

Death Penalty Legislation
April 11, 1977
Page 2

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

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)

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 neutrality 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 neutrality 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 determination 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. Trial Court Power to Reduce

I did not draft a specific proposal to enable the trial court to

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

Death Penalty Legislation
April 11, 1977
Page 6

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	<u>MSU</u>
Ways & Means	<u>NO</u>
Rev. & Tax.	<u>NO</u>

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.

--MORE--

266

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".

--MORE--

267

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

murder for hire: apparently covers the person who hires and not the killer, but is ambiguous
defendant personally caused the death 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, marshal, constable of judicial district), 830.2(a) peace officer (highway patrol), and 830.5(b) peace officer (prison or Youth Authority guards).

2. willful, deliberate, premeditated killing of a witness to a crime intentionally killed to prevent testimony

3. willful, deliberate, and premeditated killing during commission of:

- a. robbery in violation of Section 211
- 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.

S.B. 155 (Changes to current law underlined)

murder for hire: covers the person who hires and the killer

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. 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. the same

3. the same

- a. the same
- 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

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. the murder was willful, deliberate, and premeditated, and involved the infliction of torture.

Section 209 kidnapping in which the victim suffers death

death penalty deleted from Section 209 (is included in (3) (a) above).

Section 219 trainwrecking, in which anyone suffers death.

death penalty deleted for trainwrecking with death; becomes life without the possibility of parole.

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 plus the victim may also be another inmate.

exploding or igniting a destructive device causing mayhem or great bodily injury; however, "if no death occurs", then life without the possibility of parole.

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 its enemies, aiding and comforting its enemies (P.C. 37)

268

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 clause.

COMMENTS:

1. S.B. 155 is virtually identical to P.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 clause, it does not modify the requisite criminal intent to kill. All that is required is an intentional act of battery, or an intentional utterance, whether or not it is accompanied by an intent to cause death.

- 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

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, mar-
shall, constable, high-
way patrol, prison
guard)

the same

the same (with
prison guards deleted
and added are state
police, D.A. investi-
gators, 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 speci-
fied 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 inclu-
ding 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

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

proportionality 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

27

MICHAEL J. HERSEK
State Public Defender
GAIL R. WEINHEIMER
Senior Deputy State Public Defender
California State Bar No. 58589
221 Main Street, 10th Floor
San Francisco, California 94105
Telephone: (415) 904-5600
Weinheimer@ospd.ca.gov
Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

**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

