

RESOLUTION 01-01-2010

DIGEST

Death Penalty: Elimination

Proposes submission of an initiative to the voters to amend Penal Code sections 37, 128, 190.2, 219 and 4500 and Military Veterans Code section 1672 to eliminate the death penalty.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Identical to Resolutions 03-06-2007, 02-21-2008 and 06-03-2009. Similar to Resolution 04-03-2003, that would have changed the Constitution. Related to Resolutions 03-07-2004 and 09-16-2006, that recommended a moratorium. All were approved in principle.

Reasons:

This resolution proposes submission of an initiative to the voters to amend Penal Code sections 37, 128, 190.2, 219 and 4500 and Military Veterans Code section 1672 to eliminate the death penalty. The resolution should be approved in principle because of the risk of a wrongful conviction, the lack of a deterrent effect, and the burdens of cost and time on the state in administering the penalty.

According to the ACLU, more than 120 people in 25 states have been released from death row based on a determination of factual innocence. It is impossible to eliminate the risk of executing a wrongly convicted prisoner, and the risk is greater for impoverished defendants who do not have the resources to rebut erroneous charges. There is no evidence the death penalty serves a deterrent purpose, and a number of studies show no difference in homicide rates in those states that impose and carry out executions. “. . . [I]t is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment.” (Roger Hood, *The Death Penalty: A World-Wide Perspective*, Oxford, Clarendon Press, 3d ed. 2002, p. 230.)

The costs of administering the death penalty are high, up to \$2,000,000 for each execution when the costs of trial, incarceration and appeals are factored in. Whereas the average cost for incarceration of other prisoners is around \$28,000 per year, the cost for housing a prisoner on death row is approximately \$90,000 per year. Moreover, the mandatory review of death penalty cases consumes a significant portion of the Supreme Court’s finite time and thus reduces the court’s ability to hear other matters.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that the California legislature submit an initiative to the voters to amend Penal Code Sections 37, 128, 190.2, 219 and 4500 and Military Veterans Code Section 1672 to read as follows:

1 §37

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

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

12

13 §128.

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

18

19 §190.2.

20 (a) The penalty for a defendant who is found guilty of murder in the first degree is
21 ~~death or~~ imprisonment in the state prison for life without the possibility of parole if one or
22 more of the following special circumstances has been found under Section 190.4 to be
23 true:

24

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

25

(2) The defendant was convicted previously of murder in the first or second degree.

26

For the purpose of this paragraph, an offense committed in another jurisdiction, which if
27 committed in California would be punishable as first or second degree murder, shall be
28 deemed murder in the first or second degree.

29

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

31

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

35

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

37

(6) The murder was committed by means of a destructive device, bomb, or
38 explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to
39 be mailed or delivered, and the defendant knew, or reasonably should have known, that his

40 or her act or acts would create a great risk of death to one or more human beings.

41 (7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3,
42 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10,
43 830.11, or 830.12, who, while engaged in the course of the performance of his or her
44 duties, was intentionally killed, and the defendant knew, or reasonably should have known,
45 that the victim was a peace officer engaged in the performance of his or her duties; or the
46 victim was a peace officer, as defined in the above-enumerated sections, or a former peace
47 officer under any, of those sections, and was intentionally killed in retaliation for the
48 performance of his or her official duties.

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

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

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

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

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

73 (13) The victim was an elected or appointed official or former official of the federal
74 government, or of any local or state government of this or any other state, and the killing
75 was intentionally carried out in retaliation for, or to prevent the performance of, the
76 victim's official duties.

77 (14) The murder was especially heinous, atrocious, or cruel, manifesting
78 exceptional depravity. As used in this section, the phrase "especially heinous, atrocious, or
79 cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is
80 unnecessarily torturous to the victim.

81 (15) The defendant intentionally killed the victim by means of lying in wait.

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

84 (17) The murder was committed while the defendant was engaged in, or was an
85 accomplice in, the commission of, attempted commission of, or the immediate flight after

86 committing, or attempting to commit, the following felonies:
87 (A) Robbery in violation of Section 211 or 212.5.
88 (B) Kidnapping in violation of Section 207, 209, or 209.5.
89 (C) Rape in violation of Section 261.
90 (D) Sodomy in violation of Section 286.
91 (E) The performance of a lewd or lascivious act upon the person of a child under
92 the age of 14 years in violation of Section 288.
93 (F) Oral copulation in violation of Section 288a.
94 (G) Burglary in the first or second degree in violation of Section 460.
95 (H) Arson in violation of subdivision (b) of Section 451.
96 (I) Train wrecking in violation of Section 219.
97 (J) Mayhem in violation of Section 203.
98 (K) Rape by instrument in violation of Section 289.
99 (L) Carjacking, as defined in Section 215.
100 (M) To prove the special circumstances of kidnapping in subparagraph (B), or
101 arson in subparagraph (H), if there is specific intent to kill, it is only required that there be
102 proof of the elements of those felonies. If so established, those two special circumstances
103 are proven even if the felony of kidnapping or arson is committed primarily or solely for
104 the purpose of facilitating the murder.
105 (18) The murder was intentional and involved the infliction of torture.
106 (19) The defendant intentionally killed the victim by the administration of poison.
107 (20) The victim was a juror in any court of record in the local, state, or federal
108 system in this or any other state, and the murder was intentionally carried out in retaliation
109 for, or to prevent the performance of, the victim's official duties.
110 (21) The murder was intentional and perpetrated by means of discharging a firearm
111 from a motor vehicle, intentionally at another person or persons outside the vehicle with
112 the intent to inflict death. For purposes of this paragraph, "motor vehicle" means any
113 vehicle as defined in *Section 415 of the Vehicle Code*.
114 (22) The defendant intentionally killed the victim while the defendant was an active
115 participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and
116 the murder was carried out to further the activities of the criminal street gang.
117 (b) Unless an intent to kill is specifically required under subdivision (a) for a
118 special circumstance enumerated therein, an actual killer, as to whom the special
119 circumstance has been found to be true under Section 190.4, need not have had any intent
120 to kill at the time of the commission of the offense which is the basis of the special
121 circumstance in order to suffer ~~death or~~ confinement in the state prison for life without the
122 possibility of parole.
123 (c) Every person, not the actual killer, who, with the intent to kill, aids, abets,
124 counsels, commands, induces, solicits, requests, or assists any actor in the commission of
125 murder in the first degree shall be punished by ~~death or~~ imprisonment in the state prison
126 for life without the possibility of parole if one or more of the special circumstances
127 enumerated in subdivision (a) has been found to be true under Section 190.4.
128 (d) Notwithstanding subdivision (c), every person, not the actual killer, who, with
129 reckless indifference to human life and as a major participant, aids, abets, counsels,
130 commands, induces, solicits, requests, or assists in the commission of a felony enumerated
131 in paragraph (17) of subdivision (a) which results in the death of some person or persons,

132 and who is found guilty of murder in the first degree therefor, shall be punished by ~~death~~
133 ~~or~~ imprisonment in the state prison for life without the possibility of parole if a special
134 circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true
135 under Section 190.4.

136 The penalty shall be determined as provided in this section and Sections 190.1,
137 190.3, 190.4, and 190.5.

138

139 §219.

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

152

153 §4500.

154 Every person while undergoing a life sentence, who is sentenced to state prison
155 within this state, and who, with malice aforethought, commits an assault upon the person
156 of another with a deadly weapon or instrument, or by any means of force likely to produce
157 great bodily injury is punishable with ~~death or~~ life imprisonment without possibility of
158 parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and
159 190.4; however, in cases in which the person subjected to such assault does not die within
160 a year and a day after such assault as a proximate result thereof, the punishment shall be
161 imprisonment in the state prison for life without the possibility of parole for nine years.

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

165 Nothing in this section shall be construed to prohibit the application of this section
166 when the assault was committed outside the walls of any prison if the person committing
167 the assault was undergoing a life sentence and was serving a sentence to a state prison at
168 the time of the commission of the assault and was not on parole, on probation, or released
169 on bail pending an appeal.

170

171 §1672.

172 Any person who is guilty of violating Section 1670 or 1671 is punishable as
173 follows:

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

178 injury to any person, a person violating this section is punishable by life imprisonment
179 without possibility of parole.

180 (b) If the act or failure to act does not cause the death of, or great bodily injury to,
181 any person, the person violating this section is punishable by imprisonment in the state
182 prison for two, four, or six years, by a fine of not more than ten thousand dollars (\$10,000),
183 or by both that imprisonment and fine. However, if a person so acts or so fails to act with
184 the intent to hinder, delay, or interfere with the preparation of the United States or of any
185 state for defense or for war, or with the prosecution of war by the United States, or with the
186 rendering of assistance by the United States to any other nation in connection with that
187 nation's defense, the person is punishable by a fine of not more than ten thousand dollars
188 (\$10,000), imprisonment in the state prison for three, five, or seven years, or by both that
189 fine and imprisonment.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: The Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Current law allows persons convicted of certain specified crimes to be executed at the hands of the law.

This Resolution: This resolution will eliminate State sponsored murder.

The Problem: There are currently over four hundred people waiting to be executed in California. The death penalty has always been applied unevenly and freakishly. The death penalty is barbaric. It can never be applied fairly. There is no relief of law whatever is a penalty of death is executed unfairly, c.f. Penal Code 128. This body has always opposed the death penalty. It is suitable to renew our stand.

IMPACT STATEMENT

Many statutes and regulations implement the death penalty. Some of these are:

Penal Code sections: 3605, 3600 et seq., 3604, 679.03, 3603, 3704, 1193, 1227, 987.9, 3601, 3602, 190, 190.3, 190.2, 190 et seq., 190, 190.3, 190.2, 1193, 1219, 1218, 3700, 1218, 1018, 1286, 987.9, 1193, 1227, 1218, 1193, 190.3, 3701 et seq., 1190.1, 190.4, 859, 190.2, 1903, 1376, 3604, 190.5, 190.4, 3605, 190.3, 128, 799, 3605, 3603, 1192.7, 1050, 3705, 3706, 1018, 190.3, 190.9, 190.3, 190.1, 190.4, 1193, 190.8, 1240.1, 190.7, 1193, 3605, 190.1, 190.4, 3700.5 et seq., 1202a, 1170, 190.2, 190.1, 190.4, 790, 190.2, 190.1, 190.4, 1218, 799, 15, 1243, 1227.5, 3700 et seq., 3705, 3706, 190.9, 1218, 1227, 3600 et seq., 3704, 3605, 3700, 1193, 1227, 3605, 190.2, 3702, 1193, 1243, 190.6, 190.8, 4500, 190.3, 1240, 1239, 1254, 190.6 et seq, 190.4, 1270.5, 1286, 190.1, 190.3, 1240.1, 2625, 3605, 1217, 190.3, 1240, 987, 987.9, 987 et seq., 1018, 686, 686.1, 190.9, 1285, 3607, 3600 et seq, 1376, 1054.9, 3701 et seq., 3604, 1903, 1243, 1193, 1227, 1227.5

California Rules of Court, Rules 34, 36, 36.3, 36.1, 34, 36.2, 35.2, 35.1, 34.1, 35.3, 34.2. 34.1, 35-35.3, 36.3, 34.0, 36, 4.117, 76.3, 11.7, 36.1, 36.2, 76.6, 35, 36.3, 4.315.

All of these statutes and regulations will have to be repealed as well. They are not spelled out for the sake of economy.

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