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OFFICE OF THE CITY CLERK  
OAKLAND

2011 JUL 21 PM 12:22  
Date:

July 26, 2011

# CITY OF OAKLAND

## BILL ANALYSIS



Bill Number: SB 490

Bill Author: Hancock

### DEPARTMENT INFORMATION

Department: City Council, District 3, Councilmember Nancy Nadel  
City Council, District 4, Councilmember Libby Schaaf

Contact: Xiaojing Wang, District 3  
238-7031; [xwang@oakiandnet.com](mailto:xwang@oakiandnet.com)

### RECOMMENDED POSITION: SUPPORT

#### Summary of the Bill

**SB 490** (Hancock) abolishes the death penalty as a punishment option for persons convicted of murder in the first degree. If passed by the California Legislature, voters must approve this measure to halt executions and provide instead for imprisonment for life without the possibility of parole. Defendants or inmates sentenced to death prior to the enactment of the bill would automatically transition to a sentence of life imprisonment without the possibility of parole.

Existing law, including Proposition 7 which was approved by voters in 1978, provides for imposition of the death penalty for murder in the first degree if certain special circumstances are proved. Proposition 7 may only be amended if the Legislature passes a statute that is subsequently approved by the voters of California.

#### Positive Factors for Oakland

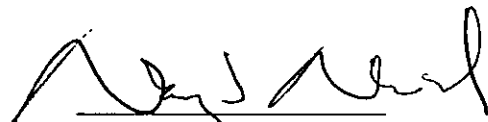
Removing the death penalty as a sentencing option in California is likely to save millions of dollars that could be redirected to other much-needed public safety programs and strategies throughout the state. Californians have spent more than \$4 billion on capital punishment since it was reinstated in 1978. Housing prisoners on death row costs California taxpayers \$184 million more each year than if these prisoners were sentenced to life without the possibility of parole.

The *Death Penalty Information Center* review of state death penalty practices depicts a system where few cases result in executions among thousands of eligible cases, and

Item: \_\_\_\_\_  
City Council.  
July 26, 2011

California District Attorneys Association  
California Fraternal Order of Police  
California Peace Officers' Association  
Chico Police Officers' Association  
Crime Victims United of California  
Cypress Police Officers' Association  
Imperial County Deputy Sheriff's Association  
La Habra Police Association  
Laguna Beach Police Employees Association  
Long Beach Police Officers Association  
Los Angeles South Chapter of the Peace Officers Research Association of California  
Orange County Chapter of the Peace Officers Research Association of California  
Peace Officers Research Association of California  
Riverside Sheriffs' Association  
Sacramento County Deputy Sheriffs Association  
Santa Ana Police Officers Association

Respectfully Submitted,



Councilmember Nadel



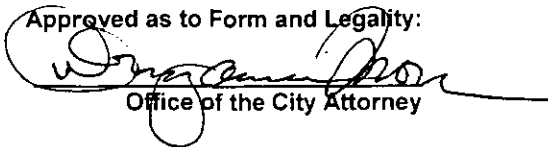
Councilmember Schaaf

Item: \_\_\_\_\_  
City Council.  
July 26, 2011

FILED  
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2011 JUL 21 PM 12:22

Approved as to Form and Legality:

  
Office of the City Attorney

## Oakland City Council

RESOLUTION No. \_\_\_\_\_ C.M.S.

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### RESOLUTION IN SUPPORT OF SENATE BILL 490 (HANCOCK), WHICH ABOLISHES THE DEATH PENALTY IN CALIFORNIA IF PASSED BY THE CALIFORNIA LEGISLATURE AND APPROVED BY THE VOTERS

**WHEREAS**, existing law, as added and amended by various initiatives, including Proposition 7 approved by the voters at the November 7, 1978, statewide general election, provides for imposition of the death penalty for murder in the first degree if certain special circumstances are proved; and

**WHEREAS**, Proposition 7 may only be amended by the Legislature by approving a statute that can become effective if subsequently approved by the voters; and

**WHEREAS**, if approved by the voters, **SB 490** would halt executions and provide instead for imprisonment for life without the possibility of parole; and

**WHEREAS**, if approved by the voters, **SB 490** would provide that where a defendant or inmate was sentenced to death prior to the date of the enactment of the bill the defendant's or inmate's sentence would automatically be converted to life imprisonment without the possibility of parole; and

**WHEREAS**, many studies have shown that capital punishment as a penalty is not a deterrent; and

**WHEREAS**, a recent report by the *Death Penalty Information Center* found that race, geography and the size of a county's budget play a major role in who receives the death penalty; and

**WHEREAS**, the same report stated that the a majority of the nine Justices who served on the Supreme Court in 1976 when the death penalty was approved eventually concluded the experiment had failed; and

**WHEREAS**, the American Civil Liberties Union (**ACLU**) stated in a 2009 report that while the national trend has seen a reduction in the number of death sentences imposed, imposition of the death penalty in California is increasing; and

**WHEREAS**, the California Supreme Court has a backlog of automatic appeals in death penalty cases with 30 inmates having been on death row for more than 25 years, 119 for more than 20 years, and 240 for more than 15; and

**WHEREAS**, more than a dozen people were wrongly executed in Illinois before that state banned the death penalty earlier this year; and

**WHEREAS**, since 1978, there have been a total of 13 executions in California, while 78 prisoners have died of natural or other causes on death row, and as of 2008, 98 convicted inmates have left death row because of overturned convictions or sentences; and

**WHEREAS**, the death penalty costs three times as much as permanent imprisonment and a recent study in the Loyola of Los Angeles Law Review found that California spends \$184 million a year on the death penalty; and

**WHEREAS**, the same study found that Californians have spent more than \$4 billion on capital punishment since it was reinstated in 1978, or about \$308 million for each of the 13 executions carried out since reinstatement; and

**WHEREAS**, the millions of dollars spent on the death penalty could be used to make our communities safer by funding other public safety programs; now, therefore, be it

**RESOLVED:** That the Oakland City Council hereby provides that it supports Senate Bill 490 and authorizes the City Administrator to communicate to the California State Legislature the City Council's support of the Bill.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

AYES - BROOKS, BRUNNER, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL,  
SCHAAF, AND PRESIDENT REID

NOES -

ABSENT -

ABSTENTION -

ATTEST:

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LATONDA SIMMONS  
City Clerk and Clerk of the Council of  
the City of Oakland, California

AMENDED IN ASSEMBLY JULY 12, 2011

AMENDED IN ASSEMBLY JUNE 28, 2011

AMENDED IN SENATE MAY 31, 2011

AMENDED IN SENATE MAY 10, 2011

AMENDED IN SENATE APRIL 25, 2011

**SENATE BILL**

**No. 490**

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Introduced by Senator **Hancock**

February 17, 2011

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An act to amend Sections 190, 190.2, and 190.4 of, and to repeal Sections 190.1 and 190.3 of, the Penal Code, relating to the death penalty.

LEGISLATIVE COUNSEL'S DIGEST

SB 490, as amended, **Hancock**. Death penalty.

Existing law, as added and amended by various initiatives, including Proposition 7, approved by the voters at the November 7, 1978, statewide general election, provides for imposition of the death penalty for murder in the first degree if certain special circumstances are proved. Proposition 7 may only be amended by the Legislature by a statute that becomes effective only when approved by the electors.

This bill would abolish the death penalty, and provide instead for imprisonment in the state prison for life without the possibility of parole. The bill would halt executions unless the voters fail to approve this bill and would provide that where a defendant or inmate was sentenced to death prior to the date of the enactment of the bill, upon voter approval of this bill, the defendant's or inmate's sentence would automatically be converted to life imprisonment without the possibility of parole. The

bill would state findings and declarations of the Legislature regarding the death penalty. The bill would provide that it would only become effective if certain of its provisions are submitted to and approved by the electors at the next statewide general election.

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

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

1 SECTION 1. The Legislature finds and declares all of the  
2 following:

3 (a) It is the intent of the Legislature to replace the death penalty  
4 with permanent imprisonment.

5 (b) The death penalty costs three times as much as permanent  
6 imprisonment.

7 (c) A recent study published in the Loyola of Los Angeles Law  
8 Review found that California spends \$184 million a year on the  
9 death penalty.

10 (d) The same study found that Californians have spent more  
11 than \$4 billion on capital punishment since it was reinstated in  
12 1978, or about \$308 million for each of the 13 executions carried  
13 out since reinstatement.

14 (e) The millions of dollars spent on the death penalty could be  
15 used to make our communities safer by funding other public safety  
16 programs.

17 SEC. 2. Section 190 of the Penal Code is amended to read:

18 190. (a) (1) Every person guilty of murder in the first degree  
19 shall be punished by imprisonment in the state prison for life  
20 without the possibility of parole, or imprisonment in the state  
21 prison for a term of 25 years to life. The penalty to be applied shall  
22 be determined as provided in Sections 190.2, 190.4, and 190.5.

23 (2) Except as provided in subdivision (b), (c), or (d), every  
24 person guilty of murder in the second degree shall be punished by  
25 imprisonment in the state prison for a term of 15 years to hfe.

26 (b) Except as provided in subdivision (c), every person guilty  
27 of murder in the second degree shall be punished by imprisonment  
28 in the state prison for a term of 25 years to life if the victim was a  
29 peace officer, as defined in subdivision (a) of Section 830.1,  
30 subdivision (a), (b), or (c) of Section 830.2, subdivision (a) of  
31 Section 830.33, or Section 830.5, who was killed while engaged

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

4 (c) Every person guilty of murder in the second degree shall be  
5 punished by imprisonment in the state prison for a term of life  
6 without the possibility of parole if the victim was a peace officer,  
7 as defined in subdivision (a) of Section 830.1, subdivision (a), (b),  
8 or (c) of Section 830.2, subdivision (a) of Section 830.33, or  
9 Section 830.5, who was killed while engaged in the performance  
10 of his or her duties, and the defendant knew, or reasonably should  
11 have known, that the victim was a peace officer engaged in the  
12 performance of his or her duties, and any of the following facts  
13 has been charged and found true:

14 (1) The defendant specifically intended to kill the peace officer.

15 (2) The defendant specifically intended to inflict great bodily  
16 injury, as defined in Section 12022.7, on a peace officer.

17 (3) The defendant personally used a dangerous or deadly weapon  
18 in the commission of the offense, in violation of subdivision (b)  
19 of Section 12022.

20 (4) The defendant personally used a firearm in the commission  
21 of the offense, in violation of Section 12022.5.

22 (d) Every person guilty of murder in the second degree shall be  
23 punished by imprisonment in the state prison for a term of 20 years  
24 to life if the killing was perpetrated by means of shooting a firearm  
25 from a motor vehicle, intentionally at another person outside of  
26 the vehicle with the intent to inflict great bodily injury.

27 (e) Article 2.5 (commencing with Section 2930) of Chapter 7  
28 of Title 1 of Part 3 shall not apply to reduce any minimum term  
29 of a sentence imposed pursuant to this section. A person sentenced  
30 pursuant to this section shall not be released on parole prior to  
31 serving the minimum term of confinement prescribed by this  
32 section.

33 SEC. 3. Section 190.1 of the Penal Code is repealed.

34 SEC. 4. Section 190.2 of the Penal Code is amended to read:

35 190.2. (a) The penalty for a defendant who is found guilty of  
36 murder in the first degree is imprisonment in the state prison for  
37 life without the possibility of parole if one or more of the following  
38 special circumstances has been found under Section 190.4 to be  
39 true:

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

3 (2) The defendant was convicted previously of murder in the  
4 first or second degree. For the purpose of this paragraph, an offense  
5 committed in another jurisdiction, which if committed in California  
6 would be punishable as first or second degree murder, shall be  
7 deemed murder in the first or second degree.

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

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

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

18 (6) The murder was committed by means of a destructive device,  
19 bomb, or explosive that the defendant mailed or delivered,  
20 attempted to mail or deliver, or caused to be mailed or delivered,  
21 and the defendant knew, or reasonably should have known, that  
22 his or her act or acts would create a great risk of death to one or  
23 more human beings.

24 (7) The victim was a peace officer, as defined in Section 830.1,  
25 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36,  
26 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while  
27 engaged in the course of the performance of his or her duties, was  
28 intentionally killed, and the defendant knew, or reasonably should  
29 have known, that the victim was a peace officer engaged in the  
30 performance of his or her duties; or the victim was a peace officer,  
31 as defined in the above-enumerated sections, or a former peace  
32 officer under any of those sections, and was intentionally killed  
33 in retaliation for the performance of his or her official duties.

34 (8) The victim was a federal law enforcement officer or agent  
35 who, while engaged in the course of the performance of his or her  
36 duties, was intentionally killed, and the defendant knew, or  
37 reasonably should have known, that the victim was a federal law  
38 enforcement officer or agent engaged in the performance of his or  
39 her duties; or the victim was a federal law enforcement officer or



1 agent, and was intentionally killed in retaliation for the performance  
2 of his or her official duties.

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

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

18 (11) The victim was a prosecutor or assistant prosecutor or a  
19 former prosecutor or assistant prosecutor of any local or state  
20 prosecutor’s office in this or any other state, or of a federal  
21 prosecutor’s office, and the murder was intentionally carried out  
22 in retaliation for, or to prevent the performance of, the victim’s  
23 official duties.

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

28 (13) The victim was an elected or appointed official or former  
29 official of the federal government, or of any local or state  
30 government of this or any other state, and the killing was  
31 intentionally carried out in retaliation for, or to prevent the  
32 performance of, the victim’s official duties.

33 (14) The murder was especially heinous, atrocious, or cruel,  
34 manifesting exceptional depravity. As used in this section, the  
35 phrase “especially heinous, atrocious, or cruel, manifesting  
36 exceptional depravity” means a conscienceless or pitiless crime  
37 that is unnecessarily torturous to the victim.

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

- 1 (16) The victim was intentionally killed because of his or her  
2 race, color, religion, nationality, or country of origin.
- 3 (17) The murder was committed while the defendant was  
4 engaged in, or was an accomplice in, the commission of, attempted  
5 commission of, or the immediate flight after committing, or  
6 attempting to commit, the following felonies:
- 7 (A) Robbery in violation of Section 211 or 212.5.
  - 8 (B) Kidnapping in violation of Section 207, 209, or 209.5.
  - 9 (C) Rape in violation of Section 261.
  - 10 (D) Sodomy in violation of Section 286.
  - 11 (E) The performance of a lewd or lascivious act upon the person  
12 of a child under the age of 14 years in violation of Section 288.
  - 13 (F) Oral copulation in violation of Section 288a.
  - 14 (G) Burglary in the first or second degree in violation of Section  
15 460.
  - 16 (H) Arson in violation of subdivision (b) of Section 451.
  - 17 (I) Train wrecking in violation of Section 219.
  - 18 (J) Mayhem in violation of Section 203.
  - 19 (K) Rape by instrument in violation of Section 289.
  - 20 (L) Carjacking, as defined in Section 215.
  - 21 (M) To prove the special circumstances of kidnapping in  
22 subparagraph (B), or arson in subparagraph (H), if there is specific  
23 intent to kill, it is only required that there be proof of the elements  
24 of those felonies. If so established, those two special circumstances  
25 are proven even if the felony of kidnapping or arson is committed  
26 primarily or solely for the purpose of facilitating the murder.
- 27 (18) The murder was intentional and involved the infliction of  
28 torture.
- 29 (19) The defendant intentionally killed the victim by the  
30 administration of poison.
- 31 (20) The victim was a juror in any court of record in the local,  
32 state, or federal system in this or any other state, and the murder  
33 was intentionally carried out in retaliation for, or to prevent the  
34 performance of, the victim's official duties.
- 35 (21) The murder was intentional and perpetrated by means of  
36 discharging a firearm from a motor vehicle, intentionally at another  
37 person or persons outside the vehicle with the intent to inflict death.  
38 For purposes of this paragraph, "motor vehicle" means any vehicle  
39 as defined in Section 415 of the Vehicle Code.

1 (22) The defendant intentionally killed the victim while the  
2 defendant was an active participant in a criminal street gang, as  
3 defined in subdivision (f) of Section 186.22, and the murder was  
4 carried out to further the activities of the criminal street gang.

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

12 (c) Every person, not the actual killer, who, with the intent to  
13 kill, aids, abets, counsels, commands, induces, solicits, requests,  
14 or assists any actor in the commission of murder in the first degree  
15 shall be punished by imprisonment in the state prison for life  
16 without the possibility of parole if one or more of the special  
17 circumstances enumerated in subdivision (a) has been found to be  
18 true under Section 190.4.

19 (d) (1) Notwithstanding subdivision (c), every person, not the  
20 actual killer, who, with reckless indifference to human life and as  
21 a major participant, aids, abets, counsels, commands, induces,  
22 solicits, requests, or assists in the commission of a felony  
23 enumerated in paragraph (17) of subdivision (a) which results in  
24 the death of some person or persons, and who is found guilty of  
25 murder in the first degree therefor, shall be punished by  
26 imprisonment in the state prison for life without the possibility of  
27 parole if a special circumstance enumerated in paragraph (17) of  
28 subdivision (a) has been found to be true under Section 190.4.

29 (2) The penalty shall be determined as provided in this section  
30 and Sections ~~190.1, 190.3, 190.4~~, 190.4 and 190.5.

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

32 SEC. 6. Section 190.4 of the Penal Code is amended to read:

33 190.4. (a) (1) Whenever special circumstances as enumerated  
34 in Section 190.2 are alleged and the trier of fact finds the defendant  
35 guilty of first degree murder, the trier of fact shall also make a  
36 special finding on the truth of each alleged special circumstance.  
37 The determination of the truth of any or all of the special  
38 circumstances shall be made by the trier of fact on the evidence  
39 presented at the trial.

1 (2) In case of a reasonable doubt as to whether a special  
2 circumstance is true, the defendant is entitled to a finding that is  
3 not true. The trier of fact shall make a special finding that each  
4 special circumstance charged is either true or not true. Whenever  
5 a special circumstance requires proof of the commission or  
6 attempted commission of a crime, such crime shall be charged and  
7 proved pursuant to the general law applying to the trial and  
8 conviction of the crime.

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

15 (4) If the trier of fact finds that any one or more of the special  
16 circumstances enumerated in Section 190.2 as charged is true, the  
17 defendant shall be punished by imprisonment in state prison for  
18 life without the possibility of parole.

19 (b) If the trier of fact which convicted the defendant of a crime  
20 for which he or she may be subject to imprisonment in state prison  
21 for life without the possibility of parole was a jury, the same jury  
22 shall consider any plea of not guilty by reason of insanity pursuant  
23 to Section 1026, the truth of any special circumstances which may  
24 be alleged, unless for good cause shown the court discharges that  
25 jury in which case a new jury shall be drawn. The court shall state  
26 facts in support of the finding of good cause upon the record and  
27 cause them to be entered into the minutes.

28 SEC. 7. (a) The State of California shall not carry out any  
29 execution following the enactment of this act unless the voters fail  
30 to ~~appeal~~ *approve* Sections 2 to 6, inclusive, of this act.

31 (b) In any case where a defendant or inmate was sentenced to  
32 death prior to the date of the enactment of this act, upon voter  
33 approval of this act, the sentence of each defendant or inmate shall  
34 automatically be converted to life imprisonment without the  
35 possibility of parole under the terms and conditions of this act.

36 SEC. 8. The provisions of this act are severable. If any  
37 provision of this measure or its application is held invalid, that  
38 invalidity shall not affect other provisions or applications that can  
39 be given effect without the invalid provision or application.

1 SEC. 9. (a) Sections 2 to 6, inclusive, amend or repeal  
2 provisions of law added or amended by initiatives, and shall only  
3 be effective if submitted to and approved by the electors at the  
4 next statewide general election.

5 (b) *The Secretary of State shall place Sections 2 to 6, inclusive,*  
6 *on the ballot of the next statewide general election.*

Date of Hearing: July 5, 2011  
Counsel: Sandy Uribe  
Counsel: Stella Choe

ASSEMBLY COMMITTEE ON PUBLIC SAFETY  
Tom Ammiano, Chair

SB 490 (Hancock) – As Amended: June 28, 2011

SUMMARY: Abolishes the death penalty as a punishment option for persons convicted of murder in the first degree with special circumstances. Specifically, this bill:

- 1) States legislative findings regarding the economic cost of the death penalty.
- 2) Makes murder in the first degree where one or more special circumstances are found to be true punishable by imprisonment in the state prison for life without the possibility of parole (LWOP) by eliminating the death penalty option.
- 3) Provides that the state shall not carry out any execution following the enactment of this act unless the voters fail to approve this act.
- 4) States that in any case where a defendant or inmate was sentenced to death prior to the enactment of this act, upon voter approval of this act, the sentence of each defendant or inmate shall be automatically converted to life imprisonment without the possibility of parole under the terms and conditions of this act.
- 5) Provides that the provisions of this act are severable. If any provision of this measure or its application is found invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.
- 6) Makes several conforming changes.

EXISTING LAW:

- 1) Provides that murder is the unlawful killing of a human being, or a fetus, with malice aforethought. (Penal Code Section 187.)
- 2) Provides that malice aforethought may be express or implied. Malice aforethought is expressed when the perpetrator manifests a deliberate intention to take the life of another human. Malice aforethought is implied when there was "no considerable provocation" for the killing, or when the circumstances surrounding the killing show "an abandoned and malignant heart." (Penal Code Section 188.)
- 3) Classifies murder according to degrees, either first degree or second degree. (Penal Code Section 189.)

- 4) Provides that first-degree murder includes murders perpetrated by destructive device or explosive; knowing use of ammunition designed primarily to penetrate metal or armor; poison; lying in wait; torture; any kind of willful, deliberate, and premeditated killing; discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death; and any murder committed in the perpetration of, or attempt to perpetrate:
  - a) Arson;
  - b) Rape;
  - c) Carjacking;
  - d) Robbery;
  - e) Burglary;
  - f) Mayhem;
  - g) Kidnapping;
  - h) Train wrecking;
  - i) Sodomy;
  - j) Lewd or lascivious acts on a child under age 14;
  - k) Oral copulation; or,
  - l) Penetration of genital or anal openings with a foreign object. (Penal Code Section 189.)
- 5) Provides that second-degree murders include all murders not enumerated as first degree. (Penal Code Section 189.)
- 6) Specifies that first-degree murder without "special circumstances" (Penal Code Section 190.2) is punishable in the state prison for a term of 25-years-to-life. (Penal Code Section 190.)
- 7) Specifies that first-degree murder with "special circumstances" (Penal Code Section 190.2) is punishable by death, or in the state prison for LWOP. (Penal Code Section 190.)
- 8) Limits imposition of the death penalty to those first-degree murder cases where the trial jury finds true at least one "special circumstance." Currently, the Penal Code lists 22 separate categories of "special circumstances":
  - a) The murder was intentional and carried out for financial gain;
  - b) The defendant was convicted previously of first- or second-degree murder;

- c) The defendant, in the present proceeding, has been convicted of more than one offense of first- or second-degree murder;
- d) The murder was committed by means of a destructive device planted, hidden or concealed in any place, area, dwelling, building or structure;
- e) The murder was committed to avoid arrest or make an escape;
- f) The murder was committed by means of a destructive device that the defendant mailed or delivered, or attempted to mail or deliver;
- g) The victim was a peace officer who was intentionally killed while performing his or her duties and the defendant knew or should have known that; or the peace officer/former peace officer was intentionally killed in retaliation for performing his or her duties;
- h) The victim was a federal law enforcement officer who was intentionally killed [the same as Item (g) above];
- i) The victim was a firefighter who was intentionally killed while performing his or her duties;
- j) The victim was a witness to a crime and was intentionally killed to prevent his or her testimony, or killed in retaliation for testifying;
- k) The victim was a local, state or federal prosecutor murdered in retaliation for, or to prevent the performance of, official duties;
- l) The victim was a local, state, or federal judge murdered in retaliation for, or to prevent the performance of, official duties;
- m) The victim was an elected or appointed official of local, state or federal government murdered in retaliation for, or to prevent the performance of, official duties;
- n) The murder was especially heinous, atrocious, or cruel, "manifesting exceptional depravity." "Manifesting exceptional depravity" is defined "a conscienceless or pitiless crime that is unnecessarily torturous";
- o) The defendant intentionally killed the victim while lying in wait;
- p) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin;
- q) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or immediate flight after, committing or attempting to commit the following crimes: robbery; kidnapping; rape; sodomy; lewd or lascivious act on a child under age 14; oral copulation; burglary; arson; train wrecking; mayhem; rape by instrument; carjacking; torture; poison; the victim was a local, state or federal juror murdered in retaliation for, or to prevent the performance of his or her



official duties; and, the murder was perpetrated by discharging a firearm from a vehicle.

- r) The murder was intentional and involved the infliction of torture;
  - s) The defendant intentionally killed the victim by the administration of poison;
  - t) The victim was a juror and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's duties as a juror;
  - u) The murder was intentional and committed by discharging a firearm from a motor vehicle; or,
  - v) The defendant intentionally killed the victim while actively participating in a criminal street gang. (Penal Code Section 190.2.)
- 9) Requires three separate findings at the trial in order to qualify for the death penalty: (a) guilty of first-degree murder, (b) a finding that at least one of the charged "special circumstances" is true, and (c) the jury's determination that death is appropriate rather than LWOP. The first two findings occur when the jury deliberates at the close of the "guilt phase." (Penal Code Sections 190.1 and 190.4.) The penalty determination takes place during the "penalty phase" where either the judge or jury considers factors in aggravation or mitigation. (Penal Code Section 190.3) If the jury fixes the penalty at death, the judge still retains the power to reject the jury's penalty verdict and impose LWOP. [Penal Code Section 190.4(e).]
- 10) Provides that during the penalty phase of a death penalty trial, the prosecution and the defendant may present evidence relevant to aggravation, mitigation, and sentence. In determining the penalty to be imposed, the trier of fact may take into account any relevant enumerated factors. Such factors in aggravation or mitigation include:
- a) The circumstances of the crime and the existence of any special circumstances;
  - b) The presence or absence of threats or the actual use of force or violence;
  - c) Prior felony convictions;
  - 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 or consented to the homicidal act;
  - f) Whether or not the offense was committed under circumstances that the defendant believed to be a moral justification or extenuation of his or her conduct.
  - g) Whether or not the 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 or her conduct or to conform his or her conduct to the law was impaired

as a result of mental disease, defect, or the effects of intoxication;

- i) The age of the defendant at the time of the crime;
- j) Whether or not the defendant was an accomplice and his or her participation in the offense was relatively minor; or,
- k) Any other circumstance that extenuates the gravity of the crime, though not a legal excuse for the crime. (Penal Code Section 190.3.)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) Author's Statement: According to the author, "Capital punishment is an expensive failure and an example of the dysfunction of our prisons. California's death row is the largest and most costly in the United States. It is not helping to protect our state; it is helping to bankrupt us.

"Study after study has shown that capital punishment as a penalty is not a deterrent and that the multiple appeals that drag on for years and years multiply costs and add to the uncertainty and anxiety of victims.

"The most recent report "Executing the Will of the Voters: A Roadmap to Men or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle," written by U.S. 9<sup>th</sup> Circuit Judge Arthur L. Alarcon, a former prosecutor, and Loyola Law School professor Paula M. Mitchell, projects that the cost of maintaining the death penalty will rise to \$9 billion by 2030. The study reports that taxpayers have already spent more than \$3 billion on only 13 executions since the death penalty was reinstated in 1978.

"The death penalty failings cannot be fixed. Distinguished prosecutors such as Los Angeles County's long-time DA Gil Garcetti have come out against it. It is time for the Legislature to act.

"It is not simply a cost issue. More than a dozen people were wrongly executed in Illinois before that state banned the death penalty earlier this year. I don't want to see that kind of tragic statistic in California. We need to join Illinois and the 15 other states that have chosen to substitute life imprisonment without the possibility of parole for a failed death penalty.

"Today, we're not tough on crime; we're tough on the taxpayer. Every time we spend money on failed policies like the death penalty, we drain money from having more police officers on the street, more job training, more education, more of the things that would truly make for safer communities."

- 2) Death Penalty Information Center Report: The Death Penalty Information Center recently prepared a report, Struck by Lightning: The Continuing Arbitrariness of the Death Penalty Thirty-Five Years After Its Re-instatement in 1976. According to the report's executive summary, "The United States Supreme Court approved the re-instatement of the death penalty 35 years ago on July 2, 1976. Although the death penalty had earlier been held

unconstitutional because of its arbitrary and unpredictable application, the Court was willing to sanction new systems that states had proposed to make capital punishment less like 'being struck by lightning' and more like retribution for only the 'worst of the worst' offenders. The court also deferred to the states' judgment that the death penalty served the goals of retribution and deterrence.

"After three and a half decades of experience under these revised statutes, the randomness of the system continues. Many of the country's constitutional experts and prominent legal organizations have concluded that effective reform is impossible and the practice should be ended. In polls, jury verdicts and state legislative action, there is evidence of the American people's growing frustration with the death penalty. A majority of the nine Justices who served on the Supreme Court in 1976 when the death penalty was approved eventually concluded the experiment had failed.

"Four states have abolished the death penalty in the last four years, and nationwide executions and death sentences have been cut since 2000. A review of state death penalty practices exposes a system in which an unpredictable few cases result in executions from among thousands of eligible cases. Race, geography and the size of a county's budget play a major role in who receives the ultimate punishment. Many cases thought to embody the worst crimes and defendants are overturned on appeal and then assessed very differently the second time around at retrial. Even these reversals depend significantly on the quality of the lawyers assigned and on who appointed the appellate judges reviewing the cases. In such a haphazard process, the rationales of deterrence and retribution make little sense.

"In 1976, the newly reformed death penalty was allowed to resume. However, it has proved unworkable in practice. Keeping it in place, or attempting still more reform, would be enormously expensive, with little chance of improvement. The constitution requires fairness not just in lofty word, but also in daily practice. On that score, the death penalty has missed the mark."

- 3) Number of Executions: According to recent articles in the Los Angeles Times and the San Francisco Daily Journal, a legal newspaper, there are currently 714 prisoners on death row. Since the death penalty was reinstated in 1978 by Proposition 7, there have been a total of 13 executions, while 78 prisoners have died of natural or other causes on death row. (See <<http://articles.latimes.com/2011/jun/20/local/la-me-adv-death-penalty-costs-20110620>>; and San Francisco Daily Journal, June 21, 2011, page 6.) As of 2008, 98 convicted inmates have left death row because of overturned convictions or sentences. (See <<http://articles.latimes.com/2008/jul/01/local/me-death1>>.)
- 4) Disparity in Application? Recently, the American Civil Liberties Union (ACLU) of Northern California published a report on the death penalty, Death in Decline '09. (See <[http://www.aclunc.org/docs/criminal\\_justice/death\\_penalty/death\\_in\\_decline\\_09.pdf](http://www.aclunc.org/docs/criminal_justice/death_penalty/death_in_decline_09.pdf)>.) The report states that while the national trend has seen a reduction in the number of death sentences imposed, imposition of the death penalty in California is increasing. (*Id.* at page 1.) The report further found that three counties, Los Angeles, Riverside and Orange, account for the majority of the death penalty sentences. In fact, in 2009, Los Angeles County sent more people to death row than did the entire state of Texas in the same year. (*Id.* at pages 2-3.) The report also notes that African Americans and Latinos make up a majority of the people on death row, which raises questions about the choices prosecutors make in charging

death penalty cases. (*Id.* at pages 8-9.)

A 2005 Santa Clara Law Review article examined racial, ethnic, and geographical variations present in the imposition of the death penalty in California. [Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999*, 46 SANTA CLARA L. REV. 1 (2005), <[http://law.scu.edu/lawreview/File/lawreview\\_46sclr001.pdf](http://law.scu.edu/lawreview/File/lawreview_46sclr001.pdf)>.] The authors found that in addition to disparities based on the location of the crime, as mentioned above, a defendant was 67% less likely to be sentenced to death if the victim was non-Hispanic white than if the victim was African American or Latino. (*Id.* at 21).

- 5) Delay between Sentence and Execution: The California Supreme Court has a backlog of automatic appeals in death penalty cases. The average time to litigate an automatic appeal is between 11.7 and 13.7 years. [2008 Final Report by California Commission on the Fair Administration of Justice, p. 131-132 (hereinafter CCFAJ Report) <<http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf>>.] It is only after state appeal and habeas remedies have been exhausted that the federal court will begin to consider the case. For federal habeas review, the average time between filing the application and disposition is 6.2 years. (*Id.* at p. 136.) In total, the time from death sentence to execution in California is 20 to 25 years, compared with the national average of 12 years. Thirty inmates have been on death row more than 25 years, 119 for more than 20 years, and 240 for more than 15. (See <<http://articles.latimes.com/2008/jul/01/local/me-death1>>, citing CCFAJ Report.)

"The reality is that most California death sentences are actually sentences of lifetime incarceration. The defendant will die in prison before he or she is ever executed." (CCFAJ Report p. 144.) The system's "failures create cynicism and disrespect for the rule of law . . . weaken any possible deterrent benefits of capital punishment, increase the emotional trauma experienced by murder victims' families and delay the resolution of meritorious capital appeals," the Commission concluded. (CCFAJ Report, p. 115.)

- 6) Costs of Litigation: A 2011 report, Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion Dollar Debacle, by Judge Arthur L. Alarcon and Professor Paula M. Mitchell, attempts to calculate the costs expended on litigating death penalty cases.

Death penalty trials take longer and cost considerably more than non-death penalty murder trials. (*Id.* at p. 71.) The additional costs are based on several factors. First, whereas most criminal trials are handled by one attorney for each party, there are usually two death-penalty qualified attorneys for the prosecution and defense, which is almost always publicly funded. Next, the defense team usually employs multiple investigators and expert witnesses. Additionally, the jury selection process takes much longer than in a non-capital murder trial because each side is allowed more peremptory challenges and more prospective jurors are excused. (*Id.* at pp. S76-79.) Another increased cost is attributable to the fact that death penalty trials are conducted in two phases, guilt and penalty. Finally, the costs of statutorily mandated court reporter are much higher given the lengthy proceedings. California has spent approximately 1.94 billion on prosecution of an estimated 1940 death penalty trials since 1978. (*Id.* at p. S70, S79.)

In addition to trial costs, the state has "spent approximately 925 million to fund the litigation of the automatic appeals and state habeas corpus petitions filed by capital prisoners since 1985." (Executing the Will of the Voters, at p. S79.) The Office of the State Public Defender currently represents more than 130 death row inmates in their appeals. The agency, which is funded by the General Fund, had an annual budget of approximately \$12 million in 2008-2009. (*Id.* at p. S87.) Similarly, the Habeas Corpus Resource Center, created by the Legislature, is available to take appointments in capital habeas corpus proceedings. However, the number of cases it can accept is limited by a statutory cap on the number of staff and by available fiscal resources. In 2008-2009, the budget was \$13,857,000. (*Id.* at p. S86.) Additionally, the California Supreme Court has an annual budget of \$15,406,000 to compensate and reimburse expenses for privately appointed lawyers doing both direct appeals and habeas corpus cases for death row inmates; \$5.585 million of that is allocated to the California Appellate Project (CAP), which maintains a staff of 18 attorneys to supervise and assist private lawyers who accept appointments to handle death penalty appeals. (*Id.* at pp. S85-86.) Finally, the Office of the Attorney General's Criminal Law Division represents California in automatic appeals and capital state and federal habeas corpus proceedings. Former Attorney General Bill Lockyer estimated in 2005 that 15% of the criminal division budget was devoted to death penalty cases. The approximate expense incurred by the Office of the Attorney General for these cases in 2009-2010 was approximately \$17,280,000. (*Id.* at pp. S87-S88.) Thus, the current annual costs associated with capital post-conviction litigation is approximately \$58,543,000. (*Id.* at p. S88.)

- 7) Other Costs of Administering the Death Penalty: According to another report issued by the ACLU of Northern California, housing on death row costs at least \$90,000 more per inmate per year than housing in the general prison population, where those sentenced to permanent imprisonment are housed. (The Hidden Death Tax: The Secret Costs of Seeking Execution in California, by Natasha Minsker <[http://www.aclunc.org/docs/criminal\\_justice/death\\_penalty/the\\_hidden\\_death\\_tax.pdf](http://www.aclunc.org/docs/criminal_justice/death_penalty/the_hidden_death_tax.pdf)>.) And a 2007 report from the state auditor finds that California is expected to spend an additional \$1 billion in the coming years to build a larger death-row facility that will accommodate 1,000 condemned inmates and require hiring 347 additional staff (<<http://www.bsa.ca.gov/pdfs/reports/2007-120.2.pdf>>.)
- 8) Retroactive Application to Final Judgments: This bill provides that in any case where a death sentence was imposed prior to the enactment of the act, the sentence shall be automatically converted to LWOP.

The California Supreme Court held in *In re Estrada* (1965) 63 Cal.2d 740 that when pending finality of a conviction, the Legislature reduces the penalty for that offense, the defendant is entitled to the benefit of that change in the law. However, the retroactivity provisions of this bill can apply to judgments that are already final. And yet, the *Estrada* rule does not apply to all cases; but only to those which are not yet final. [*People v. Nasalga* (1996) 12 Cal.4th 784, 789.] The *Estrada* court noted, "It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it *constitutionally* could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*In re Estrada, supra*, 63 Cal.2d at p. 745.)

*Estrada* draws a distinction between final and non-final judgments is because of the

separation of powers doctrine. "This doctrine unquestionably places limits upon the actions of each branch with respect to the other branches. The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function. The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds. And the Legislature may not undertake to readjudicate controversies that have been litigated in the courts and resolved by final judicial judgment." [*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53, citations omitted.] An automatic conversion of a final death sentence to an LWOP sentence arguably violates the separation of powers doctrine.

On the other hand, case law recognizes that a final judgment is not immune from the Legislature's power to adjust prison sentences for a legitimate public purpose. For example, constitutional considerations may require that an ameliorative provision be applied retroactively. [*In re Chavez* (2004) 114 Cal.App.4th 989, 1000-1001.] Also, no separation of powers violation occurs when final judgments are affected only as an incident of a reform of the penal system with some legitimate purpose other than commuting punishment. [*Way v. Superior Court* (1977) 74 Cal.App.3d 165, 179-180 (rejecting an argument that retroactive application of the Determinate Sentencing Law would constitute a legislative infringement of the governor's power to commute sentences).]

Under either rationale, it might be argued be that the bill's retroactivity provision can be applied to final judgments without violating the separation of powers doctrine. To execute a defendant after the State has abolished the death penalty because his or her judgment was already final would give rise to equal protection challenges under the California and federal constitutions. The two groups of prisoners would be similarly situated since the only thing distinguishing them would be the date of finality of their judgments. [See *In re Kapperman* (1974) 11 Cal.3d 542.] Likewise, because of the legislative declarations regarding abolition of the death penalty as a cost-saving measure, the effect of altering final judgments of death might be viewed as incidental to a larger legislative purpose restructuring a class of sentences in order to realize the intended cost savings.

9) Arguments in Support:

- a) According to the American Civil Liberties Union, "California's death penalty wastes hundreds of millions of taxpayer dollars, as demonstrated in the new study by Ninth Circuit Judge Arthur Alarcon and Professor Paula Mitchell, and the 2008 report of the non-artisan California Commission on the Fair Administration of Justice. Our state has already wasted more than \$4 billion on only 13 executions in more than 30 years. The death penalty process is long and expensive and yet we remain at risk of executing an innocent person. Further, the system is a hollow promise to victims' families, creating uncertainty which continues to cause pain and frustration.

"If California replaces the death penalty with life without possibility of parole, we will save \$1 billion in five years, without releasing a single prisoner. SB 490 is a step in the right direction. With sentences of life without possibility of parole, we can hold criminals accountable, provide victims with the finality they deserve, and keep dangerous criminals behind bars for the rest of their life. In addition, we eliminate the terrible risk

of executing an innocent person. Finally, with the money we save, we can support criminal justice policies that actually work, like increasing law enforcement, which makes a positive difference in the safety of our community.

"The death penalty cannot be fixed. It must be replaced with the effective alternative punishment of life without the possibility of parole, and with programs that actually make our communities safer. Our state must prioritize community safety and cut wasteful programs."

- b) According to the Conference of California Bar Associations, "SB 490 is a practical bill. Whatever one may think of the death penalty as a moral issue, it is clear that California's death penalty law may well be the most expensive and least effective in the nation. According to a study printed in the Winter 2011 edition of the Loyola of Los Angeles Law Review, since the death penalty was reinstated more than 30 years ago, roughly four billion dollars in taxpayer money has been spent to maintain the current death penalty system. For that money, only 13 prisoners have been executed, and the vast majority of the 714 prisoners on death row will die of natural causes before their cases can be resolved.

"The resources that go into a death penalty case are enormous, adding millions to each phase of the process, from trial, to appeal, to habeas proceedings, plus the additional costs of incarceration. According to the California Commission on the Fair Administration of Justice's final report from 2008, a death penalty trial costs California Counties at least \$1.1 million more than a conventional murder trial. The cost for housing a prisoner on death row is approximately \$90,000 per year, compared to an average cost for incarceration of other prisoners of around \$28,000 per year. In addition, 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, further increasing both costs and delays."

#### 10) Arguments in Opposition:

- a) According to Crime Victims United of California, "In 1978, under the guise of Proposition 7, Californians voted to reinstate the death penalty in California. This law enacted by the people did not provide for amendments by the Legislature; rather under our state constitution, changes to the death penalty law require a vote of the people. While SB 490 provides that abolishment would only be enacted after a vote of the people, such a vote is not likely to occur when a 2010 survey conducted by the Field Poll for the Press Enterprise and other California media found 70% of those polled were in favor of the death penalty.

"With all due respect, SB 490 is an insult to murder victims. Such action says to victims that even though you have waited decades for justice, that justice is too expensive and not important to the State of California. California's execution process moves along at an incredibly slow pace, allowing for a virtually unending time frame for appeals – a major cost driver. That said, twelve-member juries unanimously found these criminals guilty beyond a reasonable doubt. Even though the jurors faced the agonizing choice of deciding whether a convicted murderer should die or spend the rest of his or her life in prison, decided that the aggravating factors outweighed the mitigating factors, and voted

unanimously in favor of execution. The facts and logic compel the opposite conclusion – that these offenders committed their crimes and deserve the ultimate punishment."

- b) According to the California District Attorneys Association, "First, we must convey that we as an association share the public's support of the death penalty. As it is currently constituted, the death penalty is a legally appropriate response to the most heinous crimes that can be committed. The death penalty deters future criminality, especially by permanently incapacitating potential repeat offenders, and acknowledges the fact that certain offenses are so serious that a penalty for violations thereof as strong and final as death must be available.

"Additionally, we believe that the provisions of your bill that convert sentences of death that have already been imposed to LWOP are extremely unfair to communities that expect justice and to victims' families who have been promised ultimate closure. We cannot imagine the conversation prosecutors would have with victims if this bill were to pass and our members were faced with the duty to tell victims that the person who killed their parent, spouse, child, or sibling would not be facing the death penalty after the years of court proceedings that resulted in such a sentence. This is especially unimaginable in the context of those sentences that have been affirmed by the California Supreme Court and are awaiting federal disposition. Further, we feel the conversion of these sentences raises potential constitutional separation of powers issues inasmuch as the Legislature would be effectively changing sentences that were appropriately imposed by the judiciary."

#### 11) Related Legislation:

- a) AB 1455 (Isenberg), of the 1993-1994 Legislative Session, would have prohibited the application of the death penalty for people determined to be mentally retarded. AB 1455 failed passage on the Assembly Floor.
- b) AB 557 (Aroner), of the 2001-2002 Legislative Session, would have prohibited the application of the death penalty for people determined to be mentally retarded. AB failed passage on Concurrence in Senate Amendments on the Assembly Floor.
- c) AB 1512 (Aroner) of the 2001-2002 Legislative session, would have prohibited the application of the death penalty for people determined to be mentally retarded. AB 1512 died on the Assembly Appropriations Committee suspense file.

#### REGISTERED SUPPORT / OPPOSITION:

##### Support

American Civil Liberties Union  
California Catholic Conference  
California Public Defenders Association  
Conference of California Bar Associations  
Friends Committee on Legislation of California  
Kehilla Community Synagogue  
One private individual



Opposition

Anaheim Police Association  
Association for Los Angeles Deputy Sheriffs  
Association of Orange County Deputy Sheriffs  
California Association of Highway Patrolmen  
California District Attorneys Association  
California Fraternal Order of Police  
California Peace Officers' Association  
Chico Police Officers' Association  
Crime Victims United of California  
Cypress Police Officers' Association  
Imperial County Deputy Sheriff s Association  
La Habra Police Association  
Laguna Beach Police Employees Association  
Long Beach Police Officers Associafion  
Los Angeles South Chapter of the Peace Officers Research Association of California  
Orange County Chapter of the Peace Officers Research Association of California  
Peace Officers Research Association of California  
Riverside Sheriffs' Association  
Sacramento County Deputy Sheriffs Association  
Santa Ana Pohce Officers Association  
Three private individuals

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