

RESOLUTION 09-15-06

DIGEST

Special Circumstance: Killing of a Family Member of a Witness

Amends Penal Code Section 190.2, subdivision (a) to add a special circumstance for the intentional killing of a witness' family member.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Penal Code Section 190.2, subdivision (a) to add a special circumstance for the intentional killing of a witness' family member. This resolution should be approved in principle because there should be serious consequences for those who kill an immediate family member of a witness for the purpose of dissuading that witness from testifying.

There is already a special circumstance that addresses the murder of a witness. This resolution goes one step further and provides for a special circumstance when an immediate family member of a witness is intentionally killed to dissuade that witness from testifying. It is central to the criminal justice system to have witnesses testify and provide the evidence needed for the resolution of a criminal case. There has been an increasing incidence of witnesses not only being dissuaded from testifying, but of family members being threatened or even killed as a means of preventing a witness from testifying.

The proposed amendment would address this very serious issue that bears on both sides of the criminal case. Not only are witnesses coming forward key to the prosecution, but they are also crucial to defendants' ability to defend themselves. The intentional killing of a family member to dissuade a witness can create great reluctance on the part of witnesses to come forward and testify. Witnesses are often in constant fear for their own safety, and often in fear for the safety of their families. Witnesses who feel even the slightest threat of intimidation, retaliation, injury or death to themselves or their loved ones will be reluctant to testify.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Penal Code Section 190.2(a)(10) to read as follows:

- 1 190.2
- 2 (a) The penalty for a defendant who is found guilty of murder in the first degree is
- 3 death or imprisonment in the state prison for life without the possibility of parole if one or
- 4 more of the following special circumstances has been found under Section 190.4 to be true:
- 5 (1) The murder was intentional and carried out for financial gain.
- 6 (2) The defendant was convicted previously of murder in the first or second degree.
- 7 For the purpose of this paragraph, an offense committed in another jurisdiction, which if

8 committed in California would be punishable as first or second degree murder, shall be
9 deemed murder in the first or second degree.

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

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

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

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

22 (7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31,
23 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or
24 830.12, who, while engaged in the course of the performance of his or her duties, was
25 intentionally killed, and the defendant knew, or reasonably should have known, that the
26 victim was a peace officer engaged in the performance of his or her duties; or the victim was
27 a peace officer, as defined in the above-enumerated sections, or a former peace officer under
28 any of those sections, and was intentionally killed in retaliation for the performance of his or
29 her official duties.

30 (8) The victim was a federal law enforcement officer or agent who, while engaged in
31 the course of the performance of his or her duties, was intentionally killed, and the defendant
32 knew, or reasonably should have known, that the victim was a federal law enforcement
33 officer or agent engaged in the performance of his or her duties; or the victim was a federal
34 law enforcement officer or agent, and was intentionally killed in retaliation for the
35 performance of his or her official duties.

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

40 (10) The victim was a witness to a crime or an immediate family member of a
41 witness to a crime who was intentionally killed for the purpose of preventing or dissuading
42 the witness' his or her testimony in any criminal or juvenile proceeding, and the killing was
43 not committed during the commission or attempted commission, of the crime to which he or
44 she was a witness; or the victim was a witness to a crime or an immediate family member of
45 a witness to a crime, and was intentionally killed in retaliation for his or her the witness'
46 testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile
47 proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and
48 Institutions Code. As used in this paragraph, "immediate family member" means any
49 spouse, registered domestic partner, parent, child, any person related by consanguinity or
50 affinity within the second degree, or any other person who regularly resides in the
51 household, or who, within the prior six months, regularly resided in the household.

52 (11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or
53 assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a

54 federal prosecutor's office, and the murder was intentionally carried out in retaliation for, or
55 to prevent the performance of, the victim's official duties.

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

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

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

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

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

70 (17) The murder was committed while the defendant was engaged in, or was an
71 accomplice in, the commission of, attempted commission of, or the immediate flight after
72 committing, or attempting to commit, the following felonies:

73 (A) Robbery in violation of Section 211 or 212.5.

74 (B) Kidnapping in violation of Section 207, 209, or 209.5.

75 (C) Rape in violation of Section 261.

76 (D) Sodomy in violation of Section 286.

77 (E) The performance of a lewd or lascivious act upon the person of a child under the
78 age of 14 years in violation of Section 288.

79 (F) Oral copulation in violation of Section 288a.

80 (G) Burglary in the first or second degree in violation of Section 460.

81 (H) Arson in violation of subdivision (b) of Section 451.

82 (I) Train wrecking in violation of Section 219.

83 (J) Mayhem in violation of Section 203.

84 (K) Rape by instrument in violation of Section 289.

85 (L) Carjacking, as defined in Section 215.

86 (M) To prove the special circumstances of kidnapping in subparagraph (B), or arson
87 in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of
88 the elements of those felonies. If so established, those two special circumstances are proven
89 even if the felony of kidnapping or arson is committed primarily or solely for the purpose of
90 facilitating the murder.

91 (18) The murder was intentional and involved the infliction of torture.

92 (19) The defendant intentionally killed the victim by the administration of poison.

93 (20) The victim was a juror in any court of record in the local, state, or federal
94 system in this or any other state, and the murder was intentionally carried out in retaliation
95 for, or to prevent the performance of, the victim's official duties.

96 (21) The murder was intentional and perpetrated by means of discharging a firearm
97 from a motor vehicle, intentionally at another person or persons outside the vehicle with the
98 intent to inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as
99 defined in Section 415 of the Vehicle Code.

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

103 (b) Unless an intent to kill is specifically required under subdivision (a) for a special
104 circumstance enumerated therein, an actual killer, as to whom the special circumstance has
105 been found to be true under Section 190.4, need not have had any intent to kill at the time of
106 the commission of the offense which is the basis of the special circumstance in order to
107 suffer death or confinement in the state prison for life without the possibility of parole.

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

113 (d) Notwithstanding subdivision (c), every person, not the actual killer, who, with
114 reckless indifference to human life and as a major participant, aids, abets, counsels,
115 commands, induces, solicits, requests, or assists in the commission of a felony enumerated
116 in paragraph (17) of subdivision (a) which results in the death of some person or persons,
117 and who is found guilty of murder in the first degree therefor, shall be punished by death or
118 imprisonment in the state prison for life without the possibility of parole if a special
119 circumstance enumerated in paragraph (17) of subdivision (a) has been found to be true
120 under Section 190.4.

121 The penalty shall be determined as provided in this section and Sections 190.1,
122 190.3, 190.4, and 190.5.

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

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

Existing Law: Permits the imposition of death or imprisonment in the state prison for life without the possibility of parole for a defendant who is found guilty of murder in the first degree if one or more special circumstances have been found under Penal Code Section 190.4 (special findings on truth of each alleged special circumstance) to be true. Penal Code Section 190.2(a)(10) permits the imposition of death or imprisonment in the state prison for life without the possibility of parole if a jury finds that the victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony or in retaliation for such testimony.

This Resolution: Would permit the imposition of death or imprisonment in the state prison for life without the possibility of parole for a defendant who intentionally kills an immediate family member of a witness to a crime, either to prevent or dissuade the witness' testimony, or in retaliation for the witness' testimony.

The Problem: The criminal justice system works when witnesses are willing to come forward and testify to their observations. All too often, and for good reason, witnesses are fearful of

retaliation by a defendant, or his or her close associates or family members, if the witness cooperates with the police in any fashion, including testifying in a criminal proceeding. As a result, witnesses do not come forward; crimes go unsolved and criminals walk free to continue to prey on our communities. This is often the case in such petty crimes as theft and occurs with greater frequency in more serious crimes, particularly where defendants are facing severe penalties for their crimes.

On the other hand, witnesses who do come forward are often subjected to intimidation, threats, injury or death as a result of their cooperation and testimony. It doesn't stop there. In order to prevent or dissuade witnesses from testifying, or in retaliation for such cooperation and testimony, immediate family members are often targeted and killed by criminals and their associates. The end result is the same. Witnesses are either killed or too fearful to come forward after a loved one is murdered.

Whether a criminal kills a witness to prevent his or her testimony or to retaliate for such testimony, or the witness' immediate family (including grandmothers, mothers, and children), the motive, intent and impact on our criminal justice system are the same. Such murderers should be subject to the same penalties – death or life without the possibility of parole – for such an unspeakable crime that so gravely impacts our criminal justice system.

IMPACT STATEMENT

This proposed resolution does not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE: Marian M.J. Thompson

COUNTERARGUMENT

BAR ASSOCIATION OF SAN FRANCISCO

This resolution adds additional categories of persons who may be eligible to be sentenced to death. The Conference of Delegates and the Bar Association of San Francisco have been categorically opposed to the death penalty for a number of years. This resolution is in direct conflict with this history. It is also in direct conflict with Resolution 09-16-06, which seeks a moratorium on the death penalty in California.

The addition of the added special circumstances in this resolution will only increase the potential for arbitrariness in an already arbitrary death penalty statute. The California Commission on the Fair Administration of Justice is now working to correct the patently defective and irrational California death penalty system. This resolution simply increases the potential for illogical and arbitrary results and should be disapproved.