

## RESOLUTION 06-01-2014

### DIGEST

#### Death Penalty Sentencing: Mitigating Circumstances

Amends Penal Code section 190.3 to add as a mitigating factor whether defendant was or is in the military, or is suffering from sexual trauma, traumatic brain injury or PTSD.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Penal Code section 190.3 to add as a mitigating factor whether defendant was or is in the military, or is suffering from sexual trauma, traumatic brain injury or PTSD. This resolution should be approved in principle because veterans are returning with severe behavioral issues related to conditions that courts should consider in sentencing.

Penal Code section 190.3 lists factors a jury may consider in aggravation or mitigation when determining whether to recommend the death penalty. The “catch-all” provision in subdivision (k) permits defendants to present evidence on almost any subject in mitigation, including expert testimony that a defendant suffers the sort of mental conditions contained in this resolution. Such evidence may also be introduced pursuant to subdivision (d), which permits the jury to consider “[w]hether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.” (See, e.g. *People v. Weaver* (2001) 26 Cal.4th 876, 976-977; *People v. Clark* (1992) 3 Cal.4th 41, 163.)

However, veterans today are suffering increased numbers and severity of traumatic injury. Forces in Afghanistan and Iraq are at increased risk of blast injuries because of IEDs and other explosive devices. It is estimated 22% of all combat casualties from these conflicts are brain injuries, compared to 12% in Vietnam. PTSD is estimated to occur in 11-20% of veterans from today’s wars. Reports of sexual abuse are also on the rise. According to a 2011 Newsweek report, women are more likely to be assaulted by a fellow soldier than killed in combat. In a recent anonymous survey, 23% of women and 4% of men reported experiencing unwanted sexual contact. Given these statistics, it is reasonable to highlight the potentially mitigating nature of the effects of these experiences, particularly in making the serious decision of whether to recommend the death penalty. This resolution, however, does not limit evidence of traumatic injury to preexisting conditions and could permit a defendant to argue for mitigation based on military service or a sexual assault that occurred after the crime and did not influence its commission.

This resolution is based on the original language of AB 2098 (Levine). That bill was amended so it no longer changes section 190.3 and instead makes consideration of these factors a requirement for the court when considering whether to grant probation to eligible defendants. As amended it was passed in the Assembly on April 7, 2014, and ordered to the Senate.

## TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Section 190.3 of the Penal Code to read as provided in Section 1 below, and direct the Secretary of State to submit Section 1 for approval by the voters at a statewide election in accordance with Section 9040 of the Elections Code, in order to amend the Briggs Initiative of 1978, Proposition 7, an initiative statute, as provided by Section 2 below to read as follows:

1 SECTION 1.

2 Section 190.3 of the Penal Code is amended to read:

3 § 190.3.

4 If the defendant has been found guilty of murder in the first degree, and a special  
5 circumstance has been charged and found to be true, or if the defendant may be subject to the  
6 death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the  
7 Military and Veterans Code or Sections 37, 128, 219, or 4500 of this code, the trier of fact shall  
8 determine whether the penalty shall be death or confinement in state prison for a term of life  
9 without the possibility of parole. In the proceedings on the question of penalty, evidence may be  
10 presented by both the people and the defendant as to any matter relevant to aggravation,  
11 mitigation, and sentence including, but not limited to, the nature and circumstances of the present  
12 offense, any prior felony conviction or convictions whether or not ~~such that~~ conviction or those  
13 convictions involved a crime of violence, the presence or absence of other criminal activity by  
14 the defendant ~~which that~~ involved the use or attempted use of force or violence or ~~which that~~  
15 involved the express or implied threat to use force or violence, and the defendant's character,  
16 background, history, mental condition and physical condition.

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

21 However, in no event shall evidence of prior criminal activity be admitted for an offense  
22 for which the defendant was prosecuted and acquitted. The restriction on the use of this evidence  
23 is intended to apply only to proceedings pursuant to this section and is not intended to affect  
24 statutory or decisional law allowing ~~such that~~ evidence to be used in any other proceedings.  
25 Except for evidence in proof of the offense or special circumstances ~~which that~~ subject a  
26 defendant to the death penalty, ~~no~~ evidence ~~may~~ shall not be presented by the prosecution in  
27 aggravation unless notice of the evidence to be introduced has been given to the defendant within  
28 a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced  
29 without ~~such that~~ notice in rebuttal to evidence introduced by the defendant in mitigation.  
30 The trier of fact shall be instructed that a sentence of confinement to state prison for a term of  
31 life without the possibility of parole may in future after sentence is imposed, be commuted or  
32 modified to a sentence that includes the possibility of parole by the Governor of the State of  
33 California.

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

36 (a) The circumstances of the crime of which the defendant was convicted in the present  
37 proceeding and the existence of any special circumstances found to be true pursuant to Section  
38 190.1.

39 (b) The presence or absence of criminal activity by the defendant ~~which that~~ involved the  
40 use or attempted use of force or violence or the express or implied threat to use force or violence.

41 (c) The presence or absence of any prior felony conviction.

42 (d) Whether or not the offense was committed while the defendant was under the

43 influence of extreme mental or emotional disturbance.  
44 (e) Whether or not the victim was a participant in the defendant's homicidal conduct or  
45 consented to the homicidal act.  
46 (f) Whether or not the offense was committed under circumstances ~~which~~ that the  
47 defendant reasonably believed to be a moral justification or extenuation for his conduct.  
48 (g) Whether or not defendant acted under extreme duress or under the substantial  
49 domination of another person.  
50 (h) Whether or not at the time of the offense the capacity of the defendant to appreciate  
51 the criminality of his or her conduct or to conform his or her conduct to the requirements of law  
52 was impaired as a result of mental disease or defect, or the affects of intoxication.  
53 (i) The age of the defendant at the time of the crime.  
54 (j) Whether or not the defendant was an accomplice to the offense and his or her  
55 participation in the commission of the offense was relatively minor.  
56 (k) Whether the defendant was, or currently is, a member of the United States military  
57 and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-  
58 traumatic stress disorder, substance abuse, or mental health problems as a result of that service.  
59 ~~(k)~~(l) Any other circumstance ~~which~~ that extenuates the gravity of the crime even though  
60 it is not a legal excuse for the crime.  
61 After having heard and received all of the evidence, and after having heard and considered the  
62 arguments of counsel, the trier of fact shall consider, take into account and be guided by the  
63 aggravating and mitigating circumstances referred to in this section, and shall impose a sentence  
64 of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating  
65 circumstances. If the trier of fact determines that the mitigating circumstances outweigh the  
66 aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison  
67 for a term of life without the possibility of parole.

## 68 SECTION 2.

69 Section 1 of this resolution amends the Briggs Initiative of 1978, Proposition 7, an  
70 initiative statute, and shall become effective only when submitted to and approved by the  
71 voters. The Secretary of State shall submit Section 1 of this Resolution for approval by the  
72 voters at a statewide election in accordance with §9040 of the Elections Code.  
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(Proposed new language underlined; language to be deleted stricken.)

**PROPONENT:** Bar Association of San Francisco

### **STATEMENT OF REASONS**

The Problem: While veterans' stress-related problems have recently been recognized as mitigating factors elsewhere in the Penal Code, California homicide law, which still allows for the death penalty, has not yet recognized these factors as mitigating circumstances with respect to whether the death penalty may be imposed in a homicide case.

In 2013, finally recognizing the relationship between many stress-related problems arising from military service and the commission of crimes by members of the military and veterans, the Legislature enacted provisions in Penal Code §1170.9, which became effective January 1, 2014, and which provide various types of relief to veterans who may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her service. For those convicted defendants who are eligible for probation, the court may order the defendant into a local, state, federal, or private nonprofit treatment program for a period not to exceed that which the defendant would have served in state prison or

county jail, where he or she will earn sentence credits for the actual time served in residential treatment. Further, for some defendants who acquired a criminal record due to a mental health disorder stemming from service in the United States military, the court may grant restorative relief, including early termination of probation, reduction of eligible felonies to misdemeanors, or dismissal of the action and release from all penalties and disabilities resulting from the offense of which the defendant has been convicted in the dismissed action, including granting an order sealing police records of the arrest and court records of the dismissed action, thereafter viewable by the public only in accordance with a court order.

The Solution: This Resolution would permit a “death jury” to consider as mitigating factors the circumstances that California judges will now consider at sentencing in non-death cases when properly raised by defendants who are military members and veterans.

This resolution would add, as a mitigating factor, whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of that service.

#### **LEGISLATIVE HISTORY**

This resolution is related to AB 2098 (Levine), as initially introduced on February 20, 2014.

#### **IMPACT STATEMENT**

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

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**RESPONSIBLE FLOOR DELEGATE:** Frank Leidman

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### **COMMENTS TO RESOLUTION 06-01-2014**

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#### **SAN DIEGO COUNTY BAR ASSOCIATION**

**DISAPPROVE:** This Resolution should be found to be action unnecessary. A jury already can consider the suggested factors under Penal Code section 190.3, subdivision (k), which allows them to consider all mitigating factors.