IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **TONY HARDIN,** Defendant and Appellant.	Case No. S277487 Second Appellate District, Division 7, No. B315434 Los Angeles County Super. Ct. No. A893110

APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF, PROPOSED *AMICUS CURIAE* BRIEF ON BEHALF OF THE DISTRICT ATTORNEY OF SANTA CLARA COUNTY IN SUPPORT OF THE PEOPLE OF THE STATE OF CALIFORNIA

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, the Santa Clara County District Attorney respectfully submits this application and proposed *amicus curiae* brief in support of the People of the State of California. This proposed brief is offered to show that Penal Code[1] section 3051 does not violate equal protection but that if the Appellant is correct and the law is found to violate the Constitution, then the remedy is not necessarily to include Appellant Hardin within its ambit, but rather to honor the command of the voters when they set the penalties for special circumstances murder. The Court need not reach this issue, however, as that Penal Code Section 3051 does not violate equal protection principles.

Neither the People of the State of California nor any of the appellants, or their counsel, authored any part of this brief, in whole or in part, or made a monetary contribution for the preparation or submission of this brief.

INTERESTS OF *AMICUS*

Jeffrey F. Rosen is the elected District Attorney for the County of Santa Clara. The District Attorney of Santa Clara County is the prosecutor responsible for bringing criminal cases in the name of the People of the

[1] All further statutory references are to the Penal Code unless otherwise noted.

State of California for crimes committed within Santa Clara County and has cases past and present that will be directly impacted by the outcome of this case.

Amicus offers a perspective on the issues that has not been fully or adequately addressed by the parties and will assist this Court.

STATEMENT OF THE CASE

Relevant to this amicus brief, Appellant was convicted of first degree murder (§ 187), robbery (§ 211), and grand theft of a vehicle (§ 487, subd. (3). (CT 24-25.) The jury additionally found true an allegation under section 190.2, subdivision (a)(17). (CT 25.) For the murder, Appellant was sentenced to life without the possibility of parole (LWOP) as the sentence on the other counts were imposed and stayed. (CT 25.)

Appellant appealed. In an unpublished opinion, the Court of Appeal rejected Appellant's claims of insufficiency of the evidence that he killed the victim as well as his claims that there was insufficient evidence of a willful, premediated, and deliberated killing. (*People v. Hardin*, unpub. opn., B051873, July 19, 1993.) The Court of Appeal further rejected claims of legally insufficient evidence for felony murder on a theory of robbery as well as the robbery special circumstance. The Court of Appeal also rejected additional claims with respect to jury instructions, pre-arrest statements, alleged improper prosecutorial argument, and the trial court's denial of a motion to compel pubic hair samples of emergency responders.

Thirty-one years after his conviction, Appellant sought to develop youth-related factors seeking to develop a record for an eventual youth offender parole hearing pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 and *In re Cook* (2019) 7 Cal.5th 439. (CT 26-29.) In his motion, Appellant claimed that section 3051, subdivision (h) denied him equal

protection of the laws by denying the right to a youth offender parole hearing to inmates sentenced to life without the possibility of parole for crimes committed between the ages of 18 and 25 while authorizing youth offender parole hearings for individuals who committed first degree murder and received a sentence of 25 years to life.[2] (CT 26-29.) The trial court denied his motion. (CT 31-32.)

Appellant appealed to the Second District Court of Appeal, and for the first time, a court of appeal found Appellant's particular equal protection claim was indeed a violation of equal protection principles. The Court of Appeal ordered: "The order denying Hardin's motion for a *Franklin* hearing is reversed. The cause is remanded with directions to schedule the hearing and to conduct all appropriate further proceedings not inconsistent with this opinion." (*People v. Hardin* (2022) 84 Cal.App.5th 273, 291.) The opinion did not address the selection of remedies analysis that ordinarily comes with a finding of an equal protection violation.

Citing to the weight of authority opposed to *Hardin* and the nascent conflict in the courts of appeal, the Attorney General sought review in this Court requesting that the matter be stayed behind *People v. Williams* (2020) 47 Cal.App.5th 475 (review granted July 22, 2020, S262229), or in the

[2] Although his sentence of life without the possibility of parole precluded it, there is nothing in the record to reflect that Appellant brought his equal protection claim to the entity that could conduct his youthful offender parole hearing—the Board of Parole Hearings.

alternative, grant review and order a briefing schedule. This Court chose the latter.

QUESTION PRESENTED

Does Penal Code section 3051, subdivision (h), violate the Equal Protection Clause of the Fourteenth Amendment by excluding young adults sentenced to life without the possibility of parole from youth offender parole consideration, while young adults sentenced to parole-eligible terms are entitled to such consideration?[3]

STATEMENT OF FACTS [4]

Appellant's murder here is especially egregious. At age 25, well past the age of majority, Appellant worked as the nighttime security guard at the Casa La Paz Apartments. Appellant knew Norma Barber who lived alone in an apartment in the complex two doors down from his apartment. They were friendly and on occasion socialized in Ms. Barber's apartment.

The last time Ms. Barber was known to be alive was the night of April 4, 1989. At 8:00 a.m. the next morning, Appellant had tried to purchase rock cocaine with a necklace regularly worn by Ms. Barber. The drug dealer, Richardson, stated that he only accepted cash. Instead, he gave

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[3] Appellant Hardin writes the question differently. (ABM at 8.) However, the phrasing herein is the question upon which this Court granted review.

[4] The Statement of Facts is derived from the unpublished Second Appellate District (Div. 7) opinion in *People v. Tony Hardin* (No. B051873) filed on July 19, 1993.

Appellant cocaine in exchange for a ride to pick up a supply of drugs. They then drove to a pawn shop where Appellant exchanged two necklaces, two charms and a woman's ring for $15. Witnesses later identified the jewelry items as always being worn by Ms. Barber that she almost never removed.

Later, Appellant convinced Richardson to accept a microwave for cocaine. They went to Ms. Barber's apartment which Appellant unlocked with a key. Richardson entered the apartment and took the microwave. In exchange for more cocaine, the Appellant also let Richardson borrow Ms. Barber's car.

On Saturday night, April 8, 1989, Ms. Barber's son, concerned his mother was not answering his phone calls, went to her apartment. He found his mother's body under her bed. She had bruises on her head and chest and ligature marks on her neck and wrists. Her legs were bound with a belt. Her shorts and pantyhose had been pulled down to her knees and her t-shirt and robe had been pulled up to her breasts. There were small blood stains on her clothes as well as some blood on her left hand and under her fingernail. Other stains on her t-shirt and shorts appeared to be urine. Tests of the blood were inconclusive and tests to detect a sexual assault were negative. The coroner determined the cause of death was manual strangulation with the binding marks on her neck and wrists occurring after death.

Before finding his mother's body, Ms. Barber's son noticed that her car was not parked in its usual spot and several days of newspapers were stacked, unread, at her patio door. The deadbolt on her apartment door was unlocked, and her VCR and microwave were missing. It was later determined that her purse, wallet, bank checks, glasses, stun gun, car, apartment keys and answering machine tapes were also missing.

According to Ms. Barber's son, neighbors and friends, Ms. Barber was very security conscious, and it was her habit to lock her windows and doors, which included bolting the front door. She would not let anyone into her apartment she didn't know, and if someone knocked on her door, she would use the peephole to see if she recognized a visitor before letting them inside. The complex where she lived was totally enclosed and required keys or pass cards to enter. The police found no signs of forced entry or a struggle, and the windows were closed and locked.

Ms. Barber's car was found a few blocks away and fingerprint examination revealed a fingerprint belonging to Appellant on the inside of the driver's side window although Appellant told police he had never been in her car.

ARGUMENT

The Attorney General has properly addressed the legal principles relating to equal protection. As a result, the standard for an equal protection claim will not be discussed here. However, the parties' briefs

neglect to adequately address two key points that bear on the distinction drawn by the Legislature and codified in section 3051.

The first is that the Legislature's exclusion of persons sentenced under the voter enacted penalty scheme for special circumstance murders has a rational basis because the Legislature could rationally conclude that it did not have the authority to include them. The Legislature was presented with the choice of doing nothing about its concerns over the sentencing of those over age 18, despite it not being constitutionally compelled, or tackling an issue it felt warranted legislative action. Equal protection principles allow for partial efforts. In any equal protection analysis, compliance with constitutional mandates should not be characterized as arbitrary.

The second is the issue of remedy. Should this Court find an equal protection violation, the proper remedy for such a violation is not automatically as Appellant has assumed and that the Attorney General eschews by its silence. In any equal protection violation, a court has a choice of remedies beyond simply providing the excluded class the benefits granted to the non-excluded class. Rather, it is Appellant's burden to show that the sought-after remedy here would be the clear preference of the legislative body. Here, the legislative body includes the voters of the state of California. Those voters did not enact section 3051, but they did enact the statutes that the Legislature did not have the power to amend.

It is clear in our California Constitution that the initiative statutes of the voters control over any contrary statutes of the Legislature. In evaluating the intent of the legislative body, the voters' intent was clear: The penalty for special circumstances murders was either life without the possibility of parole, or death. (§ 190.2, subd. (a).) This provision was added by the voters in 1978 as part of Proposition 7, an initiative that did not permit any amendment to its provisions. Unfortunately, neither party assists this Court with a discussion of the substantial body of law surrounding equal protection remedies. However, in the event an equal protection violation is found, such an analysis reveals that section 3051—as it applies to adults—cannot stand, not that Appellant must receive a youthful offender parole hearing.

This is the danger in what the Appellant is demanding. Appellant assumes that if this Court finds agrees with him, then the only remedy is to afford him relief, but in fact, the next step is to determine whether the voters who enacted Proposition 7 would have preferred to carve out an exception along the lines of section 3051 to the sentence of life without parole for the most violent murders. Appellant provides no evidence for this unlikely proposition. Of course, it is our position that this Court need not reach this decision, as there is no equal protection violation. Adults who were charged, tried, and convicted of a special circumstance murder and then sentenced to life without parole are not similarly situated to those

who were convicted of less serious murder charges, and the Legislature acted rationally in crafting legislation that avoided violating the constitutional mandate of a lawfully enacted proposition.

I. THE HISTORY OF SECTION 3051

Section 3051 provides for specialized parole ("youth offender parole" or "YOP") hearings in advance of the normal parole process for qualifying offenders. Since its enactment in 2013, section 3051 has continuously expanded the range of eligible offenders based upon age, but it has always retained its initial language excluding those sentenced under it to life in prison without the possibility of parole.[5] Section 3051 currently states:

> This section shall not apply to cases in which sentencing occurs pursuant to Section 1170.12, subdivisions (b) to (i), inclusive, of Section 667, or Section 667.61, or to cases in which an individual is sentenced to life in prison without the possibility of parole for a controlling offense that was committed after the person had attained 18 years of age. This section shall not apply to an individual to whom this section would otherwise apply, but who, subsequent to attaining 26 years of age, commits an additional crime for which malice aforethought is a necessary element of the crime or for which the individual is sentenced to life in prison.

(§ 3051, subd. (h).)

For indeterminately sentenced first degree murderers whose

[5] It has also always excluded those sentenced to death. It does so by defining eligibility in terms of a "controlling offense" which does not include those sentenced to death. (See § 3051, subd. (b).)

controlling offense carries a sentence of 25 to life, section 3051 provides for eligibility of release on parole "on first day of the person's 25th year of incarceration." (§ 3051, subd. (b)(3).)

Section 3051 was enacted with the passage of Senate Bill 260 in 2013. (Stats. 2013, ch. 312 [SB 260].) This bill was *limited to those under the age of 18* and expressly for the purpose of bringing California into compliance with federal constitutional principles relating to juveniles and the Eighth Amendment.

> The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* (2012) 55 Cal.4th 262 and the decisions of the United States Supreme Court in *Graham v. Florida* (2010) 560 U.S. 48, and *Miller v. Alabama* (2012) 183 L.Ed.2d 407.

(SB 260, §1, uncodified findings.) As section 3051 does today, SB 260 excluded from its ambit those sentenced under the voter-enacted penalty scheme for special circumstances murder. (SB 260, § 1, subds. (b) & (h) [excluding those sentenced to LWOP or death].) It additionally excluded those sentenced under the Three Strikes Law (§§ 667, subd. (b)-(i), 1170.12) and those sentenced under section 667.61.[6] (SB 260, § 1, subd.

[6] Section 3051, subdivision (h) has one additional exclusion for those otherwise eligible but who, at age 26 or older, commit a life crime or a crime having as a necessary element, malice aforethought.

(h).)

Section 3051 was amended two years later. Its primary change was to extend its provisions *for the first time to adults* who committed their crimes before the age of 23. (Stats. 2015, ch. 471 [SB 261].) This change was not constitutionally mandated as the constitutional protections surrounding the sentencing of youth only apply to juveniles, i.e., those under the age of 18. (*Miller v. Alabama* (2012) 567 U.S. 460; *Graham v. Florida* (2010) 560 U.S. 48; *Roper v. Simmons* (2005) 543 U.S. 551.)[7] SB 261 retained the exclusion of those sentenced to LWOP or death, as well as the other exclusions from SB 260. (See SB 261, § 1, subd. (h).)

In a pair of bills in 2017, the Legislature further amended section 3051, primarily to extend its terms to those who committed their crimes before attaining the age of 26. (Stats. 2017, ch. 675 [AB 1308].) Since Appellant was 25 years old at the time he murdered Norma Barber, it is this bill that would have brought him within section 3051's terms but for his

[7] Both before and after the extension of section 3051 to adults, California courts have been uniform in rejecting the argument that the principles of *Roper*, *Graham*, and *Miller* constitutionally compel a different treatment of younger adults. The line for the Eighth Amendment in this context continues to be drawn at the age of 18. (*People v. Flores* (2020) 9 Cal.5th 371, 429; *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1380; *People v. Winfield* (2021) 59 Cal.App.5th 496, 525-527; *People v. Montelongo* (2020) 55 Cal.App.5th 1016, 1032; *In re Williams* (2020) 57 Cal.App.5th 427, 439; *People v. Perez* (2016) 3 Cal.App.5th 612, 617; *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1220-1221; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482.)

special circumstance.[8] This extension, whatever the Legislature's motivation, was also not constitutionally compelled (see, *supra*), and it retained the same exclusions from the original SB 260.

Also in 2017, the Legislature amended section 3051 in order to comply with this Court's ruling in *In re Kirchner* (2017) 2 Cal.5th 1040 which held that then section 1170, subdivision (d)(2) was insufficient to comply with the Supreme Court's requirements relating to juveniles who were sentenced to life without parole. (*Id*. at 1053.) With Senate Bill 394 (Stats. 2017, ch. 684), section 3051 was amended to add language that, in effect, converted all *juvenile* life without the possibility of parole sentences to 25 years to life.[9]

In 2019, the Legislature amended section 3051 into its current form. The amendments did not change the pool of eligible offenders, but rather made changes to when a qualifying a youthful offender shall be considered for youthful offender parole. (Stats. 2019, ch. 577 [AB 965].)

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[8] Appellant Hardin was 25 when he committed his murder. (*Hardin*, *supra*, 84 Cal.App.5th at 277.)

[9] The remedy now found in section 3051, subdivision (b)(4) goes beyond the requirement of *Miller v. Alabama* (2012) 567 U.S. 460 which held only that it was a violation of the Eighth Amendment to sentence a juvenile to *mandatory* life without parole." (*Id*. at 465.) *Montgomery v. Louisiana* (2016) 577 U.S. 190 provided that this rule was retroactive to all final cases. (*Id*. at 212.)

II. PROPOSITION 7

Proposition 7 was enacted by the voters in 1978. The purpose of Proposition 7 was to override the then Legislature's "weak and ineffective" death penalty law. (Prop. 7, 1978 Gen. Elec., Voter Information Guide, Arg. in Favor, p. 34.) Specific to the issues here, Proposition 7 repealed and then added new sections 190 and 190.2 to require LWOP or death for special circumstances murders. (Prop. 7, §§ 2 & 6.) Proposition 7 did not contain a provision permitting legislative amendment, therefore by operation of our California Constitution, only a vote of the People could change its terms. (Cal. Const., art. II, § 10, subd. (c); see *People v. Kelly* (2010) 47 Cal.4th 1008, 1036-1042 [describing decades of failed efforts to change this now quite venerable provision].)

Proposition 7 also added a new section 190.5 continuing the then existing prohibition against imposing of the death penalty for juveniles, i.e., those under age 18. (Prop. 7, §§ 11 & 12.)

III. THE SENTENCING SCHEME IN APPELLANT'S CASE AND SECTION 3051

Appellant was convicted of first degree murder along with a special circumstance. Because Appellant was an adult,[10] he was eligible for only

[10] The extremely limited record in this appeal shows that Appellant was age 25 at the time of his murder. (*Hardin*, *supra*, 84 Cal.App.5th at 277; CT 26.)

two possible sentences under the voter enacted penalty scheme for his murder: life without the possibility of parole or death. (See §§ 190, 190.2, subd. (a).)[11]

IV. THE LEGISLATURE'S EXCLUSION OF SPECIAL CIRCUMSTANCE MURDERS HAS A RATIONAL BASIS AS THE LEGISLATURE DID NOT HAVE THE LEGISLATIVE AUTHORITY TO INCLUDE THEM

Amicus will assume for the sake of discussion that this Court has been persuaded that relevant classification for the purposes of Appellant's equal protection claim is not the nature and severity of the criminal acts, but rather, the age of a defendant at the time of the crime.[12] Even if twenty-five year old special circumstance murderers like Appellant are similarly

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[11] While CDCR still utilizes the "Three Judge Panel" orders to mitigate prison overcrowding, the Three Judge Panel Orders also exclude those sentenced to LWOP or death. (CDCR Elderly Parole Fact Sheet https://www.cdcr.ca.gov/bph/wp-content/uploads/sites/161/2022/03/Elderly-Parole-Fact-Sheet3_18-1.pdf, last accessed August 31, 2023.)

[12] It appears the Attorney General accepts this framing of the classification. (OBM at 21, 24-40 [only arguing a rational basis for the distinction].) This approach raises questions about the distinctions drawn by section 3051 for *when* the YOP hearing shall occur, a fact in which Appellant seems to agree. (ABM at 44-45.) It is quite clear that section 3051 provides for substantially advanced parole hearings in certain cases based upon the controlling offense. The controlling offense is a function of the penalty for the most serious crime for which a defendant is convicted, However, if the relevant criterion is age, then all 18 to 25 year olds within section 3051 arguably should get a YOP hearing at the earliest time, unless of course the seriousness of the crime provides a rational basis for the distinction. Amicus argues that it does.

situated[13] to offenders who commit first degree murder but are not found to have committed an aggravated murder justifying the potential application of the death penalty, the distinction is still constitutionally permissible. The Attorney General has properly argued the law to be applied in this area as well as the rational basis for the distinction. (OBM at 20-23, 24-40). However, Amicus is concerned that what is missing is a powerful reason why persons sentenced under a voter-mandated penalty scheme were excluded from section 3051—the Legislature simply did not have the authority to include them. When enacting legislation, the Legislature was presented with doing nothing or excluding those it was not constitutionally authorized to include. It chose the latter, which was a rational distinction—i.e., not a distinction that was arbitrary or capricious.

Rational basis review, which applies here,[14] allows for a piecemeal approach to legislation. In an equal protection analysis:

> the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. (*McLaughlin v. Florida* (1964) 379 U.S. 184, 191;

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[13] Amicus does not agree that the Legislative classifications drawn in section 3051 are similarly situated for equal protection purposes. However, it is understood that another amicus will be discussing this aspect of equal protection; Amicus has nothing to add to that discussion.

[14] Both the Attorney General and Appellant agree, as did the Court below, that the standard here is rational basis.

> see *Warden v. State Bar of California* (1999) 21 Cal.4th 628, 649.) This principle applies equally to the classifications for purpose of death eligibility. (See *In re Anderson* (1968) 69 Cal.2d 613, 632; see also *Gregg v. Georgia* (1976) 428 U.S. 153, 186.)

(*People v. Ward* (2005) 36 Cal.4th 186, 217, internal quotations and parallel citations omitted.) As *Ward* reminds us, even for the most serious of crimes—those invoking the death penalty—the legislative distinction must be given the benefit of *every conceivable circumstance* that would reject a conclusion of arbitrary and invidious discrimination. Here, the Legislature's distinction is far from arbitrary, or invidious for that matter.[15]

The Legislature simply did not have the authority to include the Appellant as his sentence was mandated by voter-enacted provisions that could not be amended by the Legislature. That is hardly an arbitrary distinction. Rather, it is narrowly focused and adheres to the requirement that a legislature only act within constitutional constraints.

Invidious, at least for the purposes of discriminatory prosecution, has been defined as "one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests . . . ." (*Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 833.) To the extent that this definition might be argued to apply here, it can hardly be argued that

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[15] As *Ward* was addressing the concept with respect to both the state and federal constitutions, no different result would occur upon federal equal protection principles. (*Ward* at 217.)

legislative attempts to stay within its constitutional boundaries is not a legitimate state interest.

Both the United States and California Supreme courts have found that compliance with existing law does indeed constitute a legitimate state interest and rational basis for disparate treatment of groups or other challenged conduct. (*Harris v. Arizona Independent Redistricting Com'n* (2016) 578 U.S. 253; *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527.) In *Harris,* the appellants challenged a redistricting plan for the state's legislature on the ground that the plan's new districts were insufficiently equal in population, thus violating equal protection. (*Harris* at 255.) In upholding the plan, the United States Supreme Court affirmed the lower court's ruling that any complained of population deviations contained in the new plan were based on an effort to comply with the federal Voting Rights Act, "even though partisanship played some role." (*Id.* at 263.) The Supreme Court further agreed that efforts to comply with existing law was, in fact, a legitimate state interest. (*Ibid*.) Likewise, the California Supreme Court found that exclusion of specified types of religious organizations from the Women's Contraception Equity Act rationally served the legitimate interest of complying with the "ministerial exception"—a non-statutory, constitutionally compelled exception to the Civil Rights Act of 1964. (*Catholic Charities* at 543-544, 567.) In plain terms, a statute's distinctions are not arbitrary, or irrational

when they are employed to comply with other laws.

There are only three published cases that have held that any portion of section 3051, subdivision (h), has created a classification that violates equal protection—the instant case, *People v. Edwards* (2019) 34 Cal.App.5th 183, and *In re Woods* (2021) 62 Cal.App.5th 740, review granted Jun. 16, 2021, S268740.[16] Every other case to address section 3051, subdivision (h) and equal protection has found the asserted classification was either not similarly situated, or that there was a rational basis for the distinction, or both. (*In re Williams* (2020) 57 Cal.App.5th 427, 433-436 [not similarly situated, but also a rational basis], review den. Feb. 10, 2021, No. S266154; *People v. Acosta* (2021) 60 Cal.App.5th 769, 778-781 [similarly situated, but with a rational basis], review den. June 9, 2021, No. S267783; *People v. Jackson* (2021) 61 Cal.App.5th 189, 199-200 [not similarly situated, but also a rational basis], review den. June 9, 2021, No. S267812; *People v. Morales* (2021) 67 Cal.App.5th 326, 345-349 [assumed, but did not decide, similarly situated, but with a rational basis] review den. Oct. 20, 2021, No. S270807; *People v. Sands* (2021) 70 Cal.App.5th 193, 202-205 [assumed, but did not decide, similarly situated, but with a rational basis], review den. Dec. 22, 2021, No. S271797; *People*

[16] *Woods* is being held pending the outcome before this Court in *Williams*, S262229.

v. Ngo (2023) 89 Cal.App.5th 116, [assumed, but did not decide, similarly situated, but with a rational basis], review granted and held for this case May 17, 2023, S279458; see also, *People v. Delgado* (2022) 78 Cal.App.5th 95, 101-102 [persons sentenced under the strike law not similarly situated to those who were not, "this dooms appellant's claim from the outset"]; *People v. Wilkes* (2020) 46 Cal.App.5th 1159, 1165, review den. July 15, 2020, S262431 [same].)

The issue decided in *Edwards* (and *Woods, supra*) was rejected by *Williams*, *supra*, 47 Cal.App.5th 475, and will be decided by this Court. (*People v. Williams*, rev. granted, July 22, 2020, S262229). Unfortunately, in *Edwards*, the point made here—that voter-mandated penalties cannot be overridden by intentional or unintentional legislative action to create an equal protection violation—was not addressed. Cases are not authority for propositions not considered. (*People v. Casper* (2004) 33 Cal.4th 38, 43.) Further, *Edwards* has been the subject of criticism. (See *Williams*, *supra*, 47 Cal.App.5th at 493, review granted July 22, 2020, S262191; *People v. Moseley* (2021) 59 Cal.App.5th 1160, 1170 [two-to-one decision], review granted Apr. 14, 2021, S267309; *People v. Miranda* (2021) 62 Cal.App.5th 162, 186, review granted June 16, 2021, S268384.)

The only other case to hold that an exclusion found in section 3051, subdivision (h) creates an equal protection violation is the Court of Appeal in this case. Appellant argued that the distinction between adult special

circumstance murderers and adult murderers who did not commit a special circumstance murder was not the proper analysis, but rather looking at murderers within the age range identified in section 3051. (*Hardin*, *supra*, 84 Cal.App.5th at 277-278.) Stating the relevant classification in those terms, *Hardin* then found such offenders similarly situated. (*Ibid*.) *Hardin* found no conceivable rational basis for the distinction stating that "the goal of section 3051 was to apply the *Miller* [*supra*, 567 U.S. 460] youth-related mitigating factors to young adults up to the age of 26 . . . ."[17] (*Hardin* at 288.) That may have been *part of* the Legislature's goal—to apply non-constitutionally compelled juvenile Eighth Amendment factors to adults—however equal protection principles require a deeper examination.

> While the realities of the subject matter cannot be completely ignored, a court may engage in "rational speculation" as to the justifications for the legislative choice. It is immaterial for rational basis review whether or not any such speculation has a foundation in the record. To mount a successful rational basis challenge, a party must negative every conceivable basis that might support the disputed statutory disparity. If a plausible basis exists for the disparity, courts

[17] SB 260, which was limited to those under age 18, expressly stated in its uncodified findings that the purpose was to address *Miller* and other Eighth Amendment cases. However, there were no similar uncodified legislative findings in SB 261 (the bill that extended section 3051 to adults). The later bills amending section 3051 (AB 1308, SB 394, and AB 965) similarly did not have any uncodified findings stating the Legislature's adopted reasoning. This is not to say that *Miller* and related cases were not discussed in various committees and analyses of the bills. However, no case has required, as an Eighth Amendment constitutional matter, the application of *Miller*'s Eighth Amendment principles to persons like Appellant—a special circumstance murderer at age twenty-five.

may not second-guess its wisdom, fairness, or logic.

(*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881, cleaned up.) Given that it seems readily apparent why the Legislature excluded adults sentenced to life without the possibility of parole—both because they are not similarly situated and because it was not authorized to do so as Proposition 7 set the penalty for special circumstances murder (Prop. 7, § 6, codified at § 190.2, subd. (a))—it is rather surprising that *Hardin* could not manage to "rationally speculate" about the reason for the distinction. At the very least, *Hardin* should have addressed and rejected the reason if it felt it inadequate. The same applies to the parties here, yet it is rather studiously ignored.

Just as the Legislature excluded those sentenced under the Three Strikes Law from section 3051's ambit,[18] it similarly excluded those sentenced to life without the possibility of parole (or death). The reason was because it did not have the authority to modify the sentence of life

[18] The Three Strikes Law is also a voter-mandated penalty scheme. Originally enacted by the voters in 1994, Proposition 184 mandated doubling and sometimes the tripling of the minimum parole eligibility terms found in the Penal Code, including those found in section 190. As none of the bills that created, or amended, section 3051 reached a two-thirds majority, to the extent that section 3051 would purport to amend Proposition 184, or the changes made by Proposition 36, any attempt at amendment with those vote totals would be unauthorized. (Prop. 184, 1994 Gen. Elec., § 3 [requiring a two-majority for amendment]; Prop. 36, 2012 Gen. Elec., § 11 [same].)

without the possibility of parole (or death) for any adult convicted of special circumstances murder, whether they were 18-25, or older. Just as it did for the penalty for first degree murder, Proposition 7 set the penalty for a first degree murder with a special circumstance at life without the possibility of parole or death. (Prop. 7, § 6, codified at § 190.2, subd. (a).) As noted earlier, Proposition 7 did not include any mechanism for amendment or repeal by a future legislature. As a result, it may only be amended by a vote of the people. (Cal. Const. art. II, § 10, subd. (c).)

When examining a rational basis in an equal protection analysis this Court has stated:

> Nothing compels the state "to choose between attacking every aspect of a problem or not attacking the problem at all." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1312–1313 [].) Far from having to "solve all related ills at once" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 829 []), the Legislature has "broad discretion" to proceed in an incremental and uneven manner without necessarily engaging in arbitrary and unlawful discrimination. (*People v. Ward* (2005) 36 Cal.4th 186, 217 [], citing *McLaughlin v. Florida* (1964) 379 U.S. 184, 191 []; *Warden v. State Bar of California* (1999) 21 Cal.4th 628, 649 [].)

(*People v. Barrett* (2018) 54 Cal.4th 1081, 1110, parallel citations omitted.) The United States Supreme Court has stated the same for federal equal protection principles. (See *F.C.C. v. Beach Communications, Inc.* (*Beach*) (1993) 508 U.S. 307, 315-316.)

To this, Appellant must argue that the Legislature's avoidance of a constitutional violation—by excluding voter-enacted penalties it was not

authorized to include—is insufficient to constitute a rational basis. Should this be Appellant's argument, he will find no authority in support. There is also the state and federal equal protection principle that hold that a legislature has broad authority to address issues on a piecemeal basis. Several courts have recognized that these are issues for legislation, not for the courts. (See *Murray*, *supra*, 68 Cal.App.5th 456, 464; *Acosta*, *supra,* 60 Cal.App.5th 769, 781; *Williams*, *supra*, 57 Cal.App.5th 427, 436, fn.7.) The "legislature" for the purposes of Proposition 7 is the voters of the State of California. (Cal. Const., art. II, § 8 & art. IV, § 1.)

However, if this Court disagrees, Appellant may not be entitled to the remedy he seeks.

V. THE PARTIES FAIL TO ADDRESS THE PROPER ANALYSIS FOR THE REMEDY OF AN EQUAL PROTECTION VIOLATION

Just as it is Appellant's burden to establish the requirements of an equal protection violation, it is also his burden to demonstrate the propriety of the remedy he seeks. (*Burnham v. Public Employee's Retirement System* (2012) 208 Cal.App.4th 1576, 1588; see also *Beach, supra*, 508 U.S. at 315.) A review of Appellant's briefing reveals not a single word about choice of remedies. Rather he assumes that he gets the benefit of inclusion within section 3051 upon a finding of an equal protection violation. That is not the law and the fact that Appellant, both in the trial court and on appeal, failed to address the requirements ordinarily results in forfeiture. (See

People v. Duff (2014) 58 Cal.4th 527, 550 fn. 9.)

"When a court concludes that a statutory classification violates the constitutional guarantee of equal protection of the laws, *it has a choice* of remedies." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1207, emphasis added, citing *Califano v. Westcott* (1979) 443 U.S. 76, 89-91; *Heckler v. Matthews* (1984) 465 U.S. 728, 740; *People v. Liberta* (1984) 64 N.Y.2d 152.)[19] When selecting the proper remedy for an equal protection violation, the goal is to select the alternative that the legislative body would have preferred. (*Id*. at 1208, citing *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 651; *Hayes v. Superior Court* (1971) 6 Cal.3d 216, 224; *Liberta*, *supra*, 64 N.Y.2d 152.) These principles apply whether state or federal equal protection principles are raised. (*Heckler*, *supra*, 465 U.S. at 740 fn. 8 ["we have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others"].)

When the voters of the State of California enact legislation, they are acting as a legislative body. (Cal. Const., art. IV, § 1 ["The legislative

[19] While *Hofsheier*'s conclusion—that there was an equal protection violation presented—was overruled in *Johnson*, *supra*, 60 Cal.4th at 888, *Johnson* did not repudiate *Hofsheier*'s discussion of the standard for the remedy of an equal protection violation. Because *Johnson* concluded that the alleged equal protection violation had a rational basis, *Johnson* had no occasion to speak further on remedies in the event of a violation.

power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."].) Any initiative legislation passed by the voters is entitled to supremacy over that of the Legislature unless the initiative statute permits amendment or repeal. (Cal. Const., art. II, § 10, subd. (c).) It seems highly questionable that the Legislature can, in effect, amend a statute they have no power to amend by creating an equal protection violation so as to rewrite it. It has been said that the "Legislature should not be permitted to do indirectly that which it cannot do directly." (*People v. Oluwa* (1989) 207 Cal.App.3d 439, 446.)

Of course, it is our position that the statute does not violate equal protection principles. But if this Court reaches this issue, then it would seem prudent to direct the parties to address equal protection remedies. A case of this significance could potentially impact hundreds, if not thousands, of prisoners between the ages of 18-25 sentenced according to the voter enacted penalty scheme found in sections 190 and 190.2. Such an important issue to so many murder cases should not be overlooked, and the parties should have a say before this Court addresses them on its own as it is required to do upon a finding of a violation of equal protection principles.

CONCLUSION

Amicus respectfully requests that this Court reverse the Court of Appeal and direct that the trial court's ruling be affirmed.

Dated: August 31, 2023

JEFFREY F. ROSEN
District Attorney, County of Santa Clara

/S/ DAVID R. BOYD
DAVID R. BOYD
Deputy District Attorney

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that the attached *AMICUS CURIAE* APPLICATION AND BRIEF uses a 13-point Times New Roman font and contains 6,378 words excluding title page, tables, word count and signature blocks.

Dated: August 31, 2023

/S/ DAVID R. BOYD
DAVID R. BOYD
Deputy District Attorney

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Tony Hardin** No.: **S277487**

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On August 31, 2023, I electronically served the attached **Amicus Brief** by transmitting a true copy via this Court's TrueFiling system.

Service Via TrueFiling
William Temko
Counsel for Petitioner

Courtesy Copy Via Email
Steven Katz, Deputy District Attorney

CAP – L.A.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 31, 2023, at San Jose, California.

David R. Boyd
Declarant for eFiling

/s/ David R. Boyd
Signature

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Pomona Courthouse South
400 Civic Center Plaza
Criminal Division, Department H
Pomona, CA 91766

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 31, 2023, at San Jose, California.

David R. Boyd
Declarant for U.S Mail

/s/ David R. Boyd
Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Case Name: **PEOPLE v. HARDIN**
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Lower Court Case Number: **B315434**

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8/31/2023

Date

/s/David Boyd

Signature

Boyd, David (184614)

Last Name, First Name (PNum)

Santa Clara County District Attorney

Law Firm