

AMENDED IN ASSEMBLY MARCH 15, 2007

AMENDED IN ASSEMBLY MARCH 8, 2007

AMENDED IN SENATE FEBRUARY 1, 2007

AMENDED IN SENATE JANUARY 25, 2007

SENATE BILL

No. 40

Introduced by Senator Romero

December 20, 2006

An act to amend, repeal, and add Sections 1170 and 1170.3 of the Penal Code, relating to sentencing, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 40, as amended, Romero. Sentencing.

Existing law establishes various felonies punishable by a triad of terms of incarceration in the state prison, comprised of low, middle, and upper terms. Existing law requires the court to impose the middle term, unless there are circumstances in mitigation or aggravation of the crime.

This bill would instead provide that the choice of the appropriate term would rest within the sound discretion of the court. The bill would make other nonsubstantive changes. This bill would provide that these changes would be repealed on January 1, 2009. The bill would make other conforming changes.

The bill would require the Department of Corrections and Rehabilitation, commencing July 1, 2007, to post on its Internet Web site biannual, updates of the number of felons admitted to state prison with at least one upper term sentence, as specified. The bill would also require the Judicial Council to report to the Legislature on or before

January 1, 2008, on the implementation of the provisions of the bill, as specified.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes.

State-mandated local program: no.

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

1 SECTION 1. It is the intent of the Legislature in enacting this
2 provision to respond to the decision of the United States Supreme
3 Court in *Cunningham v. California*, No. 05-6551, 2007 U.S. Lexis
4 1324. It is the further intent of the Legislature to maintain stability
5 in California's criminal justice system while the criminal justice
6 and sentencing structures in California sentencing are being
7 reviewed.

8 SEC. 2. Section 1170 of the Penal Code is amended to read:

9 1170. (a) (1) The Legislature finds and declares that the
10 purpose of imprisonment for crime is punishment. This purpose
11 is best served by terms proportionate to the seriousness of the
12 offense with provision for uniformity in the sentences of offenders
13 committing the same offense under similar circumstances. The
14 Legislature further finds and declares that the elimination of
15 disparity and the provision of uniformity of sentences can best be
16 achieved by determinate sentences fixed by statute in proportion
17 to the seriousness of the offense as determined by the Legislature
18 to be imposed by the court with specified discretion.

19 (2) Notwithstanding paragraph (1), the Legislature further finds
20 and declares that programs should be available for inmates,
21 including, but not limited to, educational programs, that are
22 designed to prepare nonviolent felony offenders for successful
23 reentry into the community. The Legislature encourages the
24 development of policies and programs designed to educate and
25 rehabilitate nonviolent felony offenders. In implementing this
26 section, the Department of Corrections and Rehabilitation is
27 encouraged to give priority enrollment in programs to promote
28 successful return to the community to an inmate with a short
29 remaining term of commitment and a release date that would allow
30 him or her adequate time to complete the program.

(3) In any case in which the punishment prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life. In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the Secretary of the Department of Corrections and Rehabilitation. The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole. The sentence shall be deemed a separate prior prison term under Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the Secretary of the Department of Corrections and Rehabilitation.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation. In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports including

1 reports received pursuant to Section 1203.03 and statements in
2 aggravation or mitigation submitted by the prosecution, the
3 defendant, or the victim, or the family of the victim if the victim
4 is deceased, and any further evidence introduced at the sentencing
5 hearing. The court shall select the term which, in the court's
6 discretion, best serves the interests of justice. The court shall set
7 forth on the record the reasons for imposing the term selected and
8 the court may not impose an upper term by using the fact of any
9 enhancement upon which sentence is imposed under any provision
10 of law. A term of imprisonment shall not be specified if imposition
11 of sentence is suspended.

12 (c) The court shall state the reasons for its sentence choice on
13 the record at the time of sentencing. The court shall also inform
14 the defendant that as part of the sentence after expiration of the
15 term he or she may be on parole for a period as provided in Section
16 3000.

17 (d) When a defendant subject to this section or subdivision (b)
18 of Section 1168 has been sentenced to be imprisoned in the state
19 prison and has been committed to the custody of the Secretary of
20 the Department of Corrections and Rehabilitation, the court may,
21 within 120 days of the date of commitment on its own motion, or
22 at any time upon the recommendation of the secretary or the Board
23 of Parole Hearings, recall the sentence and commitment previously
24 ordered and resentence the defendant in the same manner as if he
25 or she had not previously been sentenced, provided the new
26 sentence, if any, is no greater than the initial sentence. The
27 resentence under this subdivision shall apply the sentencing rules
28 of the Judicial Council so as to eliminate disparity of sentences
29 and to promote uniformity of sentencing. Credit shall be given for
30 time served.

31 (e) (1) Notwithstanding any other law and consistent with
32 paragraph (1) of subdivision (a), if the Secretary of the Department
33 of Corrections and Rehabilitation or the Board of Parole Hearings
34 or both determine that a prisoner satisfies the criteria set forth in
35 paragraph (2), the secretary or the board may recommend to the
36 court that the prisoner's sentence be recalled.

37 (2) The court shall have the discretion to resentence or recall if
38 the court finds both of the following:

39 (A) The prisoner is terminally ill with an incurable condition
40 caused by an illness or disease that would produce death within

1 six months, as determined by a physician employed by the
2 department.

3 (B) The conditions under which the prisoner would be released
4 or receive treatment do not pose a threat to public safety.

5 The Board of Parole Hearings shall make findings pursuant to
6 this subdivision before making a recommendation for resentencing
7 or recall to the court. This subdivision does not apply to a prisoner
8 sentenced to death or a term of life without the possibility of parole.

9 (3) Within 10 days of receipt of a positive recommendation by
10 the secretary or the board, the court shall hold a hearing to consider
11 whether the prisoner's sentence should be recalled.

12 (4) The prisoner or his or her family member or designee may
13 request consideration for recall and resentencing by contacting the
14 chief medical officer at the prison or the Secretary of the
15 Department of Corrections and Rehabilitation. Upon receipt of the
16 request, if the secretary determines that the prisoner satisfies the
17 criteria set forth in paragraph (2), the secretary or board may
18 recommend to the court that the prisoner's sentence be recalled.
19 The secretary shall submit a recommendation for release within
20 30 days in the case of inmates sentenced to determinate terms and,
21 in the case of inmates sentenced to indeterminate terms, the
22 secretary may make a recommendation to the Board of Parole
23 Hearings with respect to the inmates who have applied under this
24 section. The board shall consider this information and make an
25 independent judgment pursuant to paragraph (2) and make findings
26 related thereto before rejecting the request or making a
27 recommendation to the court. This action shall be taken at the next
28 lawfully noticed board meeting.

29 (5) Any recommendation for recall submitted to the court by
30 the Secretary of the Department of Corrections and Rehabilitation
31 or the Board of Parole Hearings shall include one or more medical
32 evaluations, a postrelease plan, and findings pursuant to paragraph
33 (2).

34 (6) If possible, the matter shall be heard before the same judge
35 of the court who sentenced the prisoner.

36 (f) Any sentence imposed under this article shall be subject to
37 the provisions of Sections 3000 and 3057 and any other applicable
38 provisions of law.

1 (g) A sentence to state prison for a determinate term for which
2 only one term is specified, is a sentence to state prison under this
3 section.

4 (h) This section shall remain in effect only until January 1,
5 2009, and as of that date is repealed, unless a later enacted statute,
6 that is enacted before that date, deletes or extends that date.

7 SEC. 3. Section 1170 is added to the Penal Code, to read:

8 1170. (a) (1) The Legislature finds and declares that the
9 purpose of imprisonment for crime is punishment. This purpose
10 is best served by terms proportionate to the seriousness of the
11 offense with provision for uniformity in the sentences of offenders
12 committing the same offense under similar circumstances. The
13 Legislature further finds and declares that the elimination of
14 disparity and the provision of uniformity of sentences can best be
15 achieved by determinate sentences fixed by statute in proportion
16 to the seriousness of the offense as determined by the Legislature
17 to be imposed by the court with specified discretion.

18 (2) Notwithstanding paragraph (1), the Legislature further finds
19 and declares that programs should be available for inmates,
20 including, but not limited to, educational programs, that are
21 designed to prepare nonviolent felony offenders for successful
22 reentry into the community. The Legislature encourages the
23 development of policies and programs designed to educate and
24 rehabilitate nonviolent felony offenders. In implementing this
25 section, the Department of Corrections and Rehabilitation is
26 encouraged to give priority enrollment in programs to promote
27 successful return to the community to an inmate with a short
28 remaining term of commitment and a release date that would allow
29 him or her adequate time to complete the program.

30 (3) In any case in which the punishment prescribed by statute
31 for a person convicted of a public offense is a term of imprisonment
32 in the state prison of any specification of three time periods, the
33 court shall sentence the defendant to one of the terms of
34 imprisonment specified unless the convicted person is given any
35 other disposition provided by law, including a fine, jail, probation,
36 or the suspension of imposition or execution of sentence or is
37 sentenced pursuant to subdivision (b) of Section 1168 because he
38 or she had committed his or her crime prior to July 1, 1977. In
39 sentencing the convicted person, the court shall apply the
40 sentencing rules of the Judicial Council. The court, unless it

determines that there are circumstances in mitigation of the punishment prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or expressly provides for imprisonment in the state prison for life. In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, the entire sentence shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the Secretary of *the Department of Corrections and Rehabilitation*. The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole. The sentence shall be deemed a separate prior prison term under Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision

1 of law. A term of imprisonment shall not be specified if imposition
2 of sentence is suspended.

3 (c) The court shall state the reasons for its sentence choice on
4 the record at the time of sentencing. The court shall also inform
5 the defendant that as part of the sentence after expiration of the
6 term he or she may be on parole for a period as provided in Section
7 3000.

8 (d) When a defendant subject to this section or subdivision (b)
9 of Section 1168 has been sentenced to be imprisoned in the state
10 prison and has been committed to the custody of the Secretary of
11 Corrections and Rehabilitation, the court may, within 120 days of
12 the date of commitment on its own motion, or at any time upon
13 the recommendation of the secretary or the Board of Parole
14 Hearings, recall the sentence and commitment previously ordered
15 and resentence the defendant in the same manner as if he or she
16 had not previously been sentenced, provided the new sentence, if
17 any, is no greater than the initial sentence. The resentence under
18 this subdivision shall apply the sentencing rules of the Judicial
19 Council so as to eliminate disparity of sentences and to promote
20 uniformity of sentencing. Credit shall be given for time served.

21 (e) (1) Notwithstanding any other law and consistent with
22 paragraph (1) of subdivision (a), if the Secretary of *the Department*
23 *of* Corrections and Rehabilitation or the Board of Parole Hearings
24 or both determine that a prisoner satisfies the criteria set forth in
25 paragraph (2), the secretary or the board may recommend to the
26 court that the prisoner's sentence be recalled.

27 (2) The court shall have the discretion to resentence or recall if
28 the court finds both of the following:

29 (A) The prisoner is terminally ill with an incurable condition
30 caused by an illness or disease that would produce death within
31 six months, as determined by a physician employed by the
32 department.

33 (B) The conditions under which the prisoner would be released
34 or receive treatment do not pose a threat to public safety.

35 The board shall make findings pursuant to this subdivision before
36 making a recommendation for resentence or recall to the court.
37 This subdivision does not apply to a prisoner sentenced to death
38 or a term of life without the possibility of parole.

1 (3) Within 10 days of receipt of a positive recommendation by
2 the secretary or the board, the court shall hold a hearing to consider
3 whether the prisoner's sentence should be recalled.

4 (4) The prisoner or his or her family member or designee may
5 request consideration for recall and resentencing by contacting the
6 chief medical officer at the prison or the secretary. Upon receipt
7 of the request, if the secretary determines that the prisoner satisfies
8 the criteria set forth in paragraph (2), the secretary or board may
9 recommend to the court that the prisoner's sentence be recalled.
10 The secretary shall submit a recommendation for release within
11 30 days in the case of inmates sentenced to determinate terms and,
12 in the case of inmates sentenced to indeterminate terms, the
13 secretary may make a recommendation to the board with respect
14 to the inmates who have applied under this section. The board shall
15 consider this information and make an independent judgment
16 pursuant to paragraph (2) and make findings related thereto before
17 rejecting the request or making a recommendation to the court.
18 This action shall be taken at the next lawfully noticed board
19 meeting.

20 (5) Any recommendation for recall submitted to the court by
21 the secretary or the board shall include one or more medical
22 evaluations, a postrelease plan, and findings pursuant to paragraph
23 (2).

24 (6) If possible, the matter shall be heard before the same judge
25 of the court who sentenced the prisoner.

26 (f) Any sentence imposed under this article shall be subject to
27 the provisions of Sections 3000 and 3057 and any other applicable
28 provisions of law.

29 (g) A sentence to state prison for a determinate term for which
30 only one term is specified, is a sentence to state prison under this
31 section.

32 (h) This section shall become operative on January 1, 2009.

33 SEC. 4. Section 1170.3 of the Penal Code is amended to read:
34 1170.3. The Judicial Council shall seek to promote uniformity
35 in sentencing under Section 1170, by:

36 (a) The adoption of rules providing criteria for the consideration
37 of the trial judge at the time of sentencing regarding the court's
38 decision to:

39 (1) Grant or deny probation.

40 (2) Impose the lower, middle, or upper prison term.

1 (3) Impose concurrent or consecutive sentences.

2 (4) Determine whether or not to impose an enhancement where
3 that determination is permitted by law.

4 (b) The adoption of rules standardizing the minimum content
5 and the sequential presentation of material in probation officer
6 reports submitted to the court.

7 (c) This section shall remain in effect only until January 1, 2009,
8 and as of that date is repealed, unless a later enacted statute, that
9 is enacted before January 1, 2009, deletes or extends that date.

10 SEC. 5. Section 1170.3 is added to the Penal Code, to read:

11 1170.3. The Judicial Council shall seek to promote uniformity
12 in sentencing under Section 1170, by:

13 (a) The adoption of rules providing criteria for the consideration
14 of the trial judge at the time of sentencing regarding the court's
15 decision to:

16 (1) Grant or deny probation.

17 (2) Impose the lower or upper prison term.

18 (3) Impose concurrent or consecutive sentences.

19 (4) Determine whether or not to impose an enhancement where
20 that determination is permitted by law.

21 (b) The adoption of rules standardizing the minimum content
22 and the sequential presentation of material in probation officer
23 reports submitted to the court.

24 (c) This section shall become operative on January 1, 2009.

25 SEC. 6. (a) *The Department of Corrections and Rehabilitation*
26 *shall, commencing July 1, 2007, post on its Internet Web site,*
27 *biannual updates for that calendar year of the number of felons*
28 *admitted to state prison with at least one upper term sentence.*

29 (b) *On or before January 1, 2008, the Judicial Council shall*
30 *advise the Legislature on the implementation of the provisions of*
31 *the act adding this paragraph, including, but not limited to, the*
32 *development of revised rules of court and any relevant information*
33 *concerning implementation consequences relating to the effect of*
34 *this act.*

35 ~~SEC. 6.~~

36 SEC. 7. This act is an urgency statute necessary for the
37 immediate preservation of the public peace, health, or safety within
38 the meaning of Article IV of the Constitution and shall go into
39 immediate effect. The facts constituting the necessity are:

1 In order to respond to the United States Supreme Court decision
2 in *Cunningham v. California* and provide for stability in
3 California’s criminal justice system, it is necessary that this act
4 take effect immediately.

O