

ASSEMBLY BILL

No. 35

**Introduced by Assembly Member Strickland
(Coauthors: Assembly Members Cox and Pescetti)**

December 7, 1998

An act to amend Sections 190.3, 264, and 288 of the Penal Code, relating to the death penalty.

LEGISLATIVE COUNSEL'S DIGEST

AB 35, as introduced, Strickland. Death penalty: rape and child molestation.

Existing law punishes the offenses of rape and lewd and lascivious acts upon a child under the age of 14 years by imprisonment in the state prison for 3, 6, or 8 years. Existing law also requires increased punishment for subsequent convictions for either of these two offenses, so that one prior conviction of either offense will result in twice the term otherwise provided as punishment for the current offense.

This bill would authorize imposition of the death penalty on a defendant convicted of rape if that defendant has one prior rape conviction that has been pled and proved. This bill would also authorize imposition of the death penalty on a defendant convicted of a lewd and lascivious act on a child under the age of 14 years, if that defendant has a prior conviction for that offense that has been pled and proved.

Existing law, added by initiative measure, requires that after the determination of guilt has been made in death penalty cases, a separate penalty phase hearing must be held

to determine whether or not the death penalty should be imposed.

This bill would also require that the determination to impose the death penalty upon conviction for either rape or child molestation with a like prior conviction, be made pursuant to the above initiative measure requiring a separate penalty phase hearing. By amending an initiative measure, this bill will only become effective when submitted to, and approved by, the voters.

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

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

1 SECTION 1. Section 190.3 of the Penal Code is
 2 amended to read:
 3 190.3. If the defendant has been found guilty of
 4 murder in the first degree, and a special circumstance has
 5 been charged and found to be true, or if the defendant
 6 may be subject to the death penalty *pursuant to*
 7 *subdivision (a) of Section 264 or subdivision (d) of*
 8 *Section 288, or if the defendant may be subject to the*
 9 *death penalty* after having been found guilty of violating
 10 subdivision (a) of Section 1672 of the Military and
 11 Veterans Code or ~~Sections~~ *Section* 37, 128, 219, or 4500 of
 12 this code, the trier of fact shall determine whether the
 13 penalty shall be death or confinement in state prison for
 14 a term of life without the possibility of parole. In the
 15 proceedings on the question of penalty, evidence may be
 16 presented by both the people and the defendant as to any
 17 matter relevant to aggravation, mitigation, and sentence
 18 including, but not limited to, the nature and
 19 circumstances of the present offense, any prior felony
 20 conviction or convictions whether or not ~~such~~ *the*
 21 conviction or convictions involved a crime of violence,
 22 the presence or absence of other criminal activity by the
 23 defendant which involved the use or attempted use of
 24 force or violence or which involved the express or implied
 25 threat to use force or violence, and the defendant's



1 character, background, history, *and* mental—~~condition~~ and
2 physical condition.

3 However, no evidence shall be admitted regarding
4 other criminal activity by the defendant which did not
5 involve the use or attempted use of force or violence or
6 which did not involve the express or implied threat to use
7 force or violence. As used in this section, criminal activity
8 does not require a conviction.

9 However, in no event shall evidence of prior criminal
10 activity be admitted for an offense for which the
11 defendant was prosecuted and acquitted. The restriction
12 on the use of this evidence is intended to apply only to
13 proceedings pursuant to this section and is not intended
14 to affect statutory or decisional law allowing ~~such~~ *this*
15 evidence to be used in any other proceedings.

16 Except for evidence in proof of the offense or special
17 circumstances which subject a defendant to the death
18 penalty, no evidence may be presented by the
19 prosecution in aggravation unless notice of the evidence
20 to be introduced has been given to the defendant within
21 a reasonable period of time as determined by the court,
22 prior to trial. Evidence may be introduced without ~~such~~
23 *this* notice in rebuttal to evidence introduced by the
24 defendant in mitigation.

25 The trier of fact shall be instructed that a sentence of
26 confinement to state prison for a term of life without the
27 possibility of parole may, in *the* future after sentence is
28 imposed, be commuted or modified to a sentence that
29 includes the possibility of parole by the Governor of the
30 State of California.

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

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

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



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

3 (d) Whether or not the offense was committed while
4 the defendant was under the influence of extreme mental
5 or emotional disturbance.

6 (e) Whether or not the victim was a participant in the
7 defendant's homicidal conduct or consented to the
8 homicidal act.

9 (f) Whether or not the offense was committed under
10 circumstances which the defendant reasonably believed
11 to be a moral justification or extenuation for his *or her*
12 conduct.

13 (g) Whether or not *the* defendant acted under
14 extreme duress or under the substantial domination of
15 another person.

16 (h) Whether or not at the time of the offense the
17 capacity of the defendant to appreciate the criminality of
18 his *or her* conduct or to conform his *or her* conduct to the
19 requirements of law was impaired as a result of mental
20 disease or defect, or the affects of intoxication.

21 (i) The age of the defendant at the time of the crime.

22 (j) Whether or not the defendant was an accomplice
23 to the offense and his *or her* participation in the
24 commission of the offense was relatively minor.

25 (k) Any other circumstance which extenuates the
26 gravity of the crime even though it is not a legal excuse
27 for the crime.

28 After having heard and received all of the evidence,
29 and after having heard and considered the arguments of
30 counsel, the trier of fact shall consider, take into account
31 and be guided by the aggravating and mitigating
32 circumstances referred to in this section, and shall impose
33 a sentence of death if the trier of fact concludes that the
34 aggravating circumstances outweigh the mitigating
35 circumstances. If the trier of fact determines that the
36 mitigating circumstances outweigh the aggravating
37 circumstances the trier of fact shall impose a sentence of
38 confinement in state prison for a term of life without the
39 possibility of parole.

40



1 SEC. 2. Section 264 of the Penal Code is amended to
2 read:

3 264. (a) Rape, as defined in Section 261 or 262, is
4 punishable by imprisonment in the state prison for three,
5 six, or eight years. *Notwithstanding any other provision*
6 *of law, a person convicted of rape, as defined in Section*
7 *261, who has one prior conviction for that offense and that*
8 *prior conviction has been pled and proved, may be*
9 *punished by death, pursuant to Section 190.3. Unlawful*
10 *sexual intercourse, as defined in Section 261.5, is*
11 *punishable either by imprisonment in a county jail for not*
12 *more than one year or in the state prison.*

13 (b) In addition to any punishment imposed under this
14 section, the judge may assess a fine not to exceed seventy
15 dollars (\$70) against any person who violates Section 261,
16 261.5, or 262 with the proceeds of this fine to be used in
17 accordance with Section 1463.23. The court shall,
18 however, take into consideration the defendant's ability
19 to pay, and no defendant shall be denied probation
20 because of his or her inability to pay the fine permitted
21 under this subdivision.

22 SEC. 3. Section 288 of the Penal Code is amended to
23 read:

24 288. (a) Any person who willfully and lewdly
25 commits any lewd or lascivious act, including any of the
26 acts constituting other crimes provided for in Part 1, upon
27 or with the body, or any part or member thereof, of a child
28 who is under the age of 14 years, with the intent of
29 arousing, appealing to, or gratifying the lust, passions, or
30 sexual desires of that person or the child, is guilty of a
31 felony and shall be punished by imprisonment in the state
32 prison for three, six, or eight years.

33 (b) (1) Any person who commits an act described in
34 subdivision (a) by use of force, violence, duress, menace,
35 or fear of immediate and unlawful bodily injury on the
36 victim or another person, is guilty of a felony and shall be
37 punished by imprisonment in the state prison for three,
38 six, or eight years.

39 (2) Any person who is a caretaker and commits an act
40 described in subdivision (a) upon a dependent adult by



1 use of force, violence, duress, menace, or fear of
2 immediate and unlawful bodily injury on the victim or
3 another person, with the intent described in subdivision
4 (a), is guilty of a felony and shall be punished by
5 imprisonment in the state prison for three, six, or eight
6 years.

7 (c) (1) Any person who commits an act described in
8 subdivision (a) with the intent described in that
9 subdivision, and the victim is a child of 14 or 15 years, and
10 that person is at least 10 years older than the child, is guilty
11 of a public offense and shall be punished by imprisonment
12 in the state prison for one, two, or three years, or by
13 imprisonment in a county jail for not more than one year.
14 In determining whether the person is at least 10 years
15 older than the child, the difference in age shall be
16 measured from the birth date of the person to the birth
17 date of the child.

18 (2) Any person who is a caretaker and commits an act
19 described in subdivision (a) upon a dependent adult,
20 with the intent described in subdivision (a), is guilty of a
21 public offense and shall be punished by imprisonment in
22 the state prison for one, two, or three years, or by
23 imprisonment in a county jail for not more than one year.

24 (d) *Notwithstanding any other provision of law, a*
25 *person convicted under subdivision (a) or (b) who has*
26 *one prior conviction for an offense under either*
27 *subdivision (a) or (b), and that prior conviction has been*
28 *pled and proved, may be punished by death, pursuant to*
29 *Section 190.3.*

30 (e) In any arrest or prosecution under this section or
31 Section 288.5, the peace officer, district attorney, and the
32 court shall consider the needs of the child victim and shall
33 do whatever is necessary, within existing budgetary
34 resources, and constitutionally permissible to prevent
35 psychological harm to the child victim or to prevent
36 psychological harm to the dependent adult victim
37 resulting from participation in the court process.

38 ~~(e)~~

39 (f) Upon the conviction of any person for a violation of
40 subdivision (a) or (b), the court may, in addition to any



1 other penalty or fine imposed, order the defendant to pay
2 an additional fine not to exceed ten thousand dollars
3 (\$10,000). In setting the amount of the fine, the court shall
4 consider any relevant factors, including, but not limited
5 to, the seriousness and gravity of the offense, the
6 circumstances of its commission, whether the defendant
7 derived any economic gain as a result of the crime, and
8 the extent to which the victim suffered economic losses
9 as a result of the crime. Every fine imposed and collected
10 under this section shall be deposited in the
11 Victim-Witness Assistance Fund to be available for
12 appropriation to fund child sexual exploitation and child
13 sexual abuse victim counseling centers and prevention
14 programs pursuant to Section 13837.

15 If the court orders a fine imposed pursuant to this
16 subdivision, the actual administrative cost of collecting
17 that fine, not to exceed 2 percent of the total amount paid,
18 may be paid into the general fund of the county treasury
19 for the use and benefit of the county.

20 ~~(f)~~

21 (g) For purposes of paragraph (2) of subdivision (b)
22 and paragraph (2) of subdivision (c), the following
23 definitions apply:

24 (1) "Caretaker" means an owner, operator,
25 administrator, employee, independent contractor, agent,
26 or volunteer of any of the following public or private
27 facilities when the facilities provide care for elder or
28 dependent adults:

29 (A) Twenty-four hour health facilities, as defined in
30 Sections 1250, 1250.2, and 1250.3 of the Health and Safety
31 Code.

32 (B) Clinics.

33 (C) Home health agencies.

34 (D) Adult day health care centers.

35 (E) Secondary schools that serve dependent adults
36 ages 18 to 22 years and postsecondary educational
37 institutions that serve dependent adults or elders.

38 (F) Sheltered workshops.

39 (G) Camps.



1 (H) Community care facilities, as defined by Section
2 1402 of the Health and Safety Code, and residential care
3 facilities for the elderly, as defined in Section 1569.2 of the
4 Health and Safety Code.

5 (I) Respite care facilities.

6 (J) Foster homes.

7 (K) Regional centers for persons with developmental
8 disabilities.

9 (L) A home health agency licensed in accordance with
10 Chapter 8 (commencing with Section 1725) of Division
11 2 of the Health and Safety Code.

12 (M) An agency that supplies in-home supportive
13 services.

14 (N) Board and care facilities.

15 (O) Any other protective or public assistance agency
16 that provides health services or social services to elder or
17 dependent adults, including, but not limited to, in-home
18 supportive services, as defined in Section 14005.14 of the
19 Welfare and Institutions Code.

20 (P) Private residences.

21 (2) “Board and care facilities” means licensed or
22 unlicensed facilities that provide assistance with one or
23 more of the following activities:

24 (A) Bathing.

25 (B) Dressing.

26 (C) Grooming.

27 (D) Medication storage.

28 (E) Medical dispensation.

29 (F) Money management.

30 (3) “Dependent adult” means any person 18 years of
31 age or older who has a mental disability or disorder that
32 restricts his or her ability to carry out normal activities or
33 to protect his or her rights, including, but not limited to,
34 persons who have developmental disabilities, persons
35 whose mental abilities have significantly diminished
36 because of age.

37 ~~(g)~~

38 *(h)* Paragraph (2) of subdivision (b) and paragraph
39 (2) of subdivision (c) apply to the owners, operators,
40 administrators, employees, independent contractors,



1 agents, or volunteers working at these public or private
2 facilities and only to the extent that the individuals
3 personally commit, conspire, aid, abet, or facilitate any
4 act prohibited by paragraph (2) of subdivision (b) and
5 paragraph (2) of subdivision (c).

6 ~~(h)~~

7 (i) Paragraph (2) of subdivision (b) and paragraph (2)
8 of subdivision (c) do not apply to a caretaker who is a
9 spouse of, or who is in an equivalent domestic relationship
10 with, the dependent adult under care.

11 SEC. 4. Section 1 of this act affects an initiative statute
12 and shall become effective only when submitted to, and
13 approved by, the voters pursuant to subdivision (c) of
14 Section 10 of Article II of the California Constitution.

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