

AMENDED IN ASSEMBLY MARCH 3, 1999

CALIFORNIA LEGISLATURE—1999–2000 REGULAR SESSION

ASSEMBLY BILL

No. 35

Introduced by Assembly Member Strickland
(Principal coauthor: Assembly Member Baldwin)
(Coauthors: Assembly Members Cox, House, Kaloogian,
Maldonado, Oller, 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 amended, 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 Section 37, 128, 219, or 4500 of this code,
12 the trier of fact shall determine whether the penalty shall
13 be death or confinement in state prison for a term of life
14 without the possibility of parole. In the proceedings on
15 the question of penalty, evidence may be presented by
16 both the people and the defendant as to any matter
17 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 the conviction
21 or convictions involved a crime of violence, the presence
22 or absence of other criminal activity by the defendant
23 which involved the use or attempted use of force or



1 violence or which involved the express or implied threat
2 to use force or violence, and the defendant's character,
3 background, history, and mental and physical condition.

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

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

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

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

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

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

38 (b) The presence or absence of criminal activity by the
39 defendant which involved the use or attempted use of



1 force or violence or the express or implied threat to use
2 force or violence.

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

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

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

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

15 (g) Whether or not the defendant acted under
16 extreme duress or under the substantial domination of
17 another person.

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

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

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

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

30 After having heard and received all of the evidence,
31 and after having heard and considered the arguments of
32 counsel, the trier of fact shall consider, take into account
33 and be guided by the aggravating and mitigating
34 circumstances referred to in this section, and shall impose
35 a sentence of death if the trier of fact concludes that the
36 aggravating circumstances outweigh the mitigating
37 circumstances. If the trier of fact determines that the
38 mitigating circumstances outweigh the aggravating
39 circumstances the trier of fact shall impose a sentence of



1 confinement in state prison for a term of life without the
2 possibility of parole.

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

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

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

25 SEC. 3. Section 288 of the Penal Code is amended to
26 read:

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

36 (b) (1) Any person who commits an act described in
37 subdivision (a) by use of force, violence, duress, menace,
38 or fear of immediate and unlawful bodily injury on the
39 victim or another person, is guilty of a felony and shall be



1 punished by imprisonment in the state prison for three,
2 six, or eight years.

3 (2) Any person who is a caretaker and commits an act
4 described in subdivision (a) upon a dependent adult by
5 use of force, violence, duress, menace, or fear of
6 immediate and unlawful bodily injury on the victim or
7 another person, with the intent described in subdivision
8 (a), is guilty of a felony and shall be punished by
9 imprisonment in the state prison for three, six, or eight
10 years.

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

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

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

34 (e) In any arrest or prosecution under this section or
35 Section 288.5, the peace officer, district attorney, and the
36 court shall consider the needs of the child victim and shall
37 do whatever is necessary, within existing budgetary
38 resources, and constitutionally permissible to prevent
39 psychological harm to the child victim or to prevent



1 psychological harm to the dependent adult victim
2 resulting from participation in the court process.

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

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

24 (g) For purposes of paragraph (2) of subdivision (b)
25 and paragraph (2) of subdivision (c), the following
26 definitions apply:

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

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

35 (B) Clinics.

36 (C) Home health agencies.

37 (D) Adult day health care centers.

38 (E) Secondary schools that serve dependent adults
39 ages 18 to 22 years and postsecondary educational
40 institutions that serve dependent adults or elders.



- 1 (F) Sheltered workshops.
- 2 (G) Camps.
- 3 (H) Community care facilities, as defined by Section
- 4 1402 of the Health and Safety Code, and residential care
- 5 facilities for the elderly, as defined in Section 1569.2 of the
- 6 Health and Safety Code.
- 7 (I) Respite care facilities.
- 8 (J) Foster homes.
- 9 (K) Regional centers for persons with developmental
- 10 disabilities.
- 11 (L) A home health agency licensed in accordance with
- 12 Chapter 8 (commencing with Section 1725) of Division
- 13 2 of the Health and Safety Code.
- 14 (M) An agency that supplies in-home supportive
- 15 services.
- 16 (N) Board and care facilities.
- 17 (O) Any other protective or public assistance agency
- 18 that provides health services or social services to elder or
- 19 dependent adults, including, but not limited to, in-home
- 20 supportive services, as defined in Section 14005.14 of the
- 21 Welfare and Institutions Code.
- 22 (P) Private residences.
- 23 (2) "Board and care facilities" means licensed or
- 24 unlicensed facilities that provide assistance with one or
- 25 more of the following activities:
- 26 (A) Bathing.
- 27 (B) Dressing.
- 28 (C) Grooming.
- 29 (D) Medication storage.
- 30 (E) Medical dispensation.
- 31 (F) Money management.
- 32 (3) "Dependent adult" means any person 18 years of
- 33 age or older who has a mental disability or disorder that
- 34 restricts his or her ability to carry out normal activities or
- 35 to protect his or her rights, including, but not limited to,
- 36 persons who have developmental disabilities; *or* persons
- 37 whose mental abilities have significantly diminished
- 38 because of age.
- 39 (h) Paragraph (2) of subdivision (b) and paragraph
- 40 (2) of subdivision (c) apply to the owners, operators,



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

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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