
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair

2021 - 2022 Regular

Bill No: SB 567 **Hearing Date:** April 13, 2021
Author: Bradford
Version: March 9, 2021
Urgency: No **Fiscal:** Yes
Consultant: SC

Subject: *Criminal procedure: sentencing*

HISTORY

Source: California Attorneys for Criminal Justice
Communities United for Restorative Youth Justice (CURYJ)
Legal Services for Prisoners with Children

Prior Legislation: SB 1202 (Leno), held on suspense in Assem. Approps., 2016
AB 765 (Ammiano), held on suspense in Assem. Approps., 2013
SB 463 (Pavley) – Ch. 598 Stats. 2013
SB 576 (Calderon) – Ch. 361, Stats. 2011
AB 2263 (Yamada) – Ch. 256, Stats. 2010
SB 150 (Wright) – Ch. 171, Stats. 2009
SB 1701 (Romero) – Ch. 416, Stats. 2008
SB 1342 (Cogdill) – died in Senate Public Safety; 2008
SB 40 (Romero) – Ch. 3, Stats. 2007

Support: A.L. Costa Community Development Center; Californians for Safety and Justice;
Ella Baker Center for Human Rights; San Francisco Public Defender; San Mateo
County Participatory Defense

Opposition: None known

PURPOSE

The purpose of this bill is to provide that aggravating factors relied upon by the court to impose a sentence exceeding the middle term must be submitted to the factfinder and found to be true, except that prior convictions may be proven by a certified record of conviction.

Existing law states that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. (Pen. Code, § 1170, subd. (a)(1).)

Existing law provides, until January 1, 2022, that 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. (Pen. Code § 1170, subd. (b).)

Existing law states that at least four days prior to the time set for imposition of judgement, 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 or other reports, and statements in aggravation or mitigation submitted by the prosecution, defendant or victim, or family of the victim, and any further evidence introduced at the sentencing hearing. (*Ibid.*)

Existing law states that the court shall select the term which, in the court's discretion, best serves the interests of justice and the court shall set forth on the record the reasons for imposing the term selected. The court may not impose an upper term by using the fact of any enhancement upon which the sentence is imposed. (*Ibid.*)

This bill provides that when a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall, in its sound discretion, order imposition of a sentence not to exceed the middle term, except as provided below.

This bill states that a court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify a term of imprisonment exceeding the middle term and those facts have, in the case of a jury trial, been stipulated to by the defendant or submitted to the jury and proved beyond a reasonable doubt or, in the case of a bench trial, have been found by the court.

This bill specifies, however, that the court may consider the defendant's prior conviction in determining sentencing based on a certified record of conviction without submitting the prior conviction to a jury.

This bill states that in determining whether there are circumstances that justify imposition of any term of imprisonment not exceeding the middle term, the court may consider the record in the case, the probation officer's report or other reports, and statements in aggravation or mitigation submitted to the court at least four days prior to the date set for imposition of judgment by the prosecution, the defendant, or the victim, or the family of the victim, and any further evidence introduced at the sentencing hearing.

This bill clarifies the requirements in existing law that the court shall set forth on the record the facts and reasons for choosing the sentence imposed and that the court may not impose an upper term by using the fact of any enhancement upon which the sentence is imposed.

COMMENTS

1. Need for This Bill

According to the author of this bill:

Courts are imposing maximum terms of imprisonment without granting defendants the opportunity to have a jury review and determine the truthfulness of alleged aggravating facts.

Penal Code section 1170 specifies that if a statute specifies three possible sentencing terms, with variations of time to be served, the choice of the

appropriate term rests with the discretion of the court. At least four days prior to the time set for a judgment, either party of the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation and mitigation of the sentence to the court for consideration. The court then chooses the sentence that best serves the interest of justice. The court shall set forth on the record the reasons for imposing the term selected.

The existing law sunsets on January 1, 2022.

SB 567 creates a presumption of sentencing judgement not to exceed the middle terms, unless there are circumstances in aggravation of a crime that justify the imposition of the upper term. When an upper term is imposed, the facts supporting the aggravation must be 1) stipulated to by the defendant, or 2) submitted to the jury and proved beyond a reasonable doubt, or 3) found/determined by the court in a bench trial. This bill clarifies that courts may consider the defendant's prior convictions in determining sentences based on a certified record of conviction without submitting prior convictions to a jury. This bill specifies that the parties or others submitting statements for mitigation and aggravation can do so to dispute facts in the record or present additional facts. This bill also specifies that facts have to be included in the sentencing records, in addition to the reasons for the sentence per the current requirement.

2. California's Determinate Sentencing Law and *Cunningham v. California* case

The Sixth Amendment right to a jury applies to any factual finding, other than that of a prior conviction, necessary to warrant any sentence beyond the presumptive maximum. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; *Blakely v. Washington* (2004) 524 U.S. 296, 301, 303-04.)

In *Cunningham v. California* (2007) 549 U.S. 270, the United States Supreme Court held California's determinate sentencing law (DSL), whereby specified crimes are punished by one of three statutory terms of imprisonment, known as the lower, middle, or upper term, violated a defendant's right to trial by jury guaranteed under the Sixth Amendment to the U.S. Constitution. (*Id.* at p. 274.) At the time, the DSL stated that, ". . . 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." (Prior Pen. Code, §1170, subd. (b).) Specifically the Court held that "[b]ecause circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt, . . . the DSL violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Id.* at pp. 288-289.) The Court concluded: "Because the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the sentence cannot withstand measurement against our Sixth Amendment precedent." (*Id.* at p. 293.)

The Supreme Court provided direction as to what steps the Legislature could take to address the constitutional infirmities of the DSL:

As to the adjustment of California's sentencing system in light of our decision, the ball . . . lies in [California's] court. We note that several States have modified

their systems in the wake of *Apprendi* and *Blakely* to retain determinate sentencing. They have done so by calling upon the jury - either at trial or in a separate sentencing proceeding - to find any fact necessary to the imposition of an elevated sentence. As earlier noted, California already employs juries in this manner to determine statutory sentencing enhancements. Other States have chosen to permit judges genuinely to exercise broad discretion . . . within a statutory range, which, everyone agrees, encounters no Sixth Amendment shoal. California may follow the paths taken by its sister States or otherwise alter its system, so long as the State observes Sixth Amendment limitations declared in this Court's decisions." (*Cunningham, supra*, 549 U.S. at pp. 293-294.)

Following *Cunningham*, the Legislature amended the DSL, specifically Penal Code sections 1170 and 1170.2, to make the choice of lower, middle, or upper prison terms one within the sound discretion of the court. (See SB 40 (Romero), Ch. 3, Stats. 2007.) This approach was embraced by the California Supreme Court in *People v. Sandoval* (2007) 41 Cal.4th 825, 843-852. The procedure removes the mandatory middle term and the requirement of weighing aggravation against mitigation before imposition of the upper term. Now, the sentencing court is permitted to impose any of the three terms in its discretion, and need only state reasons for the decision so that it will be subject to appellate review for abuse of discretion. (*Id.* at pp. 843, 847.)

SB 40 (Romero), the first of a series of legislation to provide a fix to the constitutional shortcomings of the DSL, contained a sunset provision so that the amendment to the DSL would be repealed on a certain date if further legislative action was not taken before that date. According to intent language contained in SB 40, "It is the intent of the Legislature in enacting this provision to respond to the decision of the United States Supreme Court in *Cunningham v. California*, 2007 U.S. LEXIS 1324 (U.S. 2007). It is the further intent of the Legislature to maintain stability in California's criminal justice system while the criminal justice and sentencing structures in California sentencing are being reviewed." Following SB 40 (Romero), several bills extended the sunset on the amended DSL to continue allowing judges the discretion to impose the lower, middle or upper term of imprisonment authorized by statute. The amended DSL will sunset on January 1, 2022.

This bill would allow a court to impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify a term of imprisonment exceeding the middle term and those facts have been submitted to the factfinder and proven beyond a reasonable doubt. This requirement would not apply to proving prior convictions which could be proven by a certified record of conviction. Additionally, a defendant may stipulate to the circumstance in aggravation. When aggravating factors are not present or not proven, the bill authorizes the court to sentence the defendant to a term not to exceed the middle term meaning that the judge has the discretion to sentence the defendant to a range in between the lower and middle term.

The proponents of the bill argue that this change is necessary to ensure that harsher sentences receive the greatest scrutiny and justification before they are imposed. By allowing aggravating factors to be submitted to the factfinder, defendants will be better able to dispute the information on the record that may not be true. And if the defendant chooses, they could stipulate to the information rather than litigating the issue.

3. California Rules of Court: Circumstances in Aggravation and Mitigation

The California Rules of Court provides a non-exhaustive list of circumstances in aggravation and mitigation for purposes of sentencing. The rules provide that in exercising discretion to select one of the three authorized prison terms referred to in section 1170(b), "the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any evidence introduced at the sentencing hearing." (California Rules of Court, Rule 4.420(b).)

Specifically, the rules enumerate circumstances in aggravation related to the crime which may include any of the following:

- 1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness;
- 2) The defendant was armed with or used a weapon at the time of the commission of the crime;
- 3) The victim was particularly vulnerable;
- 4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission;
- 5) The defendant induced a minor to commit or assist in the commission of the crime;
- 6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;
- 7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed;
- 8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;
- 9) The crime involved an attempted or actual taking or damage of great monetary value;
- 10) The crime involved a large quantity of contraband; and
- 11) The defendant took advantage of a position of trust or confidence to commit the offense.
- 12) The crime constitutes a hate crime.

(Cal. Rules of Court, Rule 4.421(a).)

There are also enumerated circumstances in aggravation related to the defendant which may include any of the following:

- 1) The defendant has engaged in violent conduct that indicates a serious danger to society;
- 2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;
- 3) The defendant has served a prior term in prison or county jail under section 1170(h);
- 4) The defendant was on probation, mandatory supervision, postrelease community supervision, or parole when the crime was committed; and
- 5) The defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was unsatisfactory.

(Cal. Rules of Court, Rule 4.421(b).)

The rules prohibit the sentencing court from using a fact charged and found as an enhancement as a reason for imposing the upper term unless the court exercises its discretion to strike the punishment for the enhancement. (Cal. Rules of Court, Rule 4.420(c).) This prohibition recognizes that separate sentencing enhancements exist that punish the same conduct as the listed factors in aggravation. For example, that the crime involved great violence or bodily harm is substantially similar to the great bodily injury enhancement (Penal Code Section 12022.7); that the defendant was armed with or used a weapon encompasses the same conduct as an arming enhancement (Penal Code Section 12022); and that the crime involved a large quantity of contraband is similar to the weight enhancement for controlled substance violations (Health & Safety Code Section 11370.4).

Under existing law, enhancements must be plead and proven before a jury whereas the factors in aggravation need not, even though both are used to increase a person's sentence.

4. Argument in Support

According to Legal Services for Prisoners with Children, a co-sponsor of this bill:

In 2007, the U.S. Supreme Court ruled in *Cunningham v. California* that California's determinate sentencing law was unconstitutional. The ruling stated that California's law impermissibly allowed a judge to impose an upper/maximum term based upon aggravating facts that were never presented to a jury and deemed to be true. The U.S. Supreme Court found that this violated the 6th amendment's right to a trial by jury.

In response, the legislature adopted a temporary law (SB 40) in 2007 which allowed judges to impose the upper/maximum term without any aggravating facts being presented to the jury. This has led to individuals serving maximum prison sentences without the opportunity to effectively refute alleged aggravating facts.

The sunset to the original law has been extended multiple times, and is not set to sunset December 31, 2021.

This law has had a detrimental impact on individuals across the state and contributed to the failed mass incarceration policies of the past. As of 2010, 77 percent of state prison inmates were serving a determinate sentence. Most convicted felons in California receive a determinate sentence based on a triad sentence structure (with an upper, middle, and lower term). Given the prevalence of this sentencing structure, it is imperative that the law be changed to ensure that aggravating facts are presented to the jury before a judge may impose a maximum sentence. This will help prevent individuals from serving maximum sentences when a lower term is more appropriate based on the facts.

-- END --