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SPECIAL DIRECTIVE 07-02

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOHN K. SPILLANE 
Chief Deputy District Attorney

SUBJECT: **LEGISLATIVE RESPONSE TO *CUNNINGHAM* v. *CALIFORNIA***

DATE: APRIL 3, 2007

On March 30, 2007, Governor Schwarzenegger signed SB 40 into law. As it was signed as urgency legislation, the law took immediate effect. SB 40 amends Penal Code sections 1170 and 1173 to remedy the constitutional defect identified in *Cunningham v. California*, (2007) ____ U.S. ____ [127 S.Ct. 856, 166 L.Ed.2d 856].¹ However, SB 40 remedies the constitutional defect only with respect to offenses, and not with respect to enhancements, which continue to be subject to sentencing under the presumptive middle term of the triad, as section 1170.1, subdivision (d) was not amended.

The central change brought about by SB 40 is that it eliminates the presumption of the midterm formerly set forth at section 1170 for offenses. Deputies are urged to read both the old and the new versions of section 1170 to thoroughly familiarize themselves with the changes. Section 1170 as amended by SB 40 states:

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.*

(§ 1170, subd. (b), italics added.)²

As amended by SB 40, section 1170, subdivision (b) deletes references to circumstances in aggravation and mitigation. The amended version states that “[t]he court shall select the term which, in the court’s discretion, *best serves the interests of justice.*” (§ 1170, subd. (b), italics added.)

The amended version requires the court to “set forth on the record the *reasons* for imposing the term selected . . .” (§ 1170, subd. (b), italics added.) The court must set forth reasons for

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² It had previously stated: “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.” (§ 1170, subd. (b), italics added.)

whichever of the three terms the court selects, even the middle term. Previously, the court was required to “set forth on the record the *facts* and reasons for imposing the upper or lower term.” (§ 1170, subd. (b), *italics added.*) As amended by SB 40, section 1170 now requires the court to set forth on the record *reasons*, and has eliminated the reference to facts. Both the old version and the new version specify that the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed. (§ 1170, subd. (b).)

Any argument that SB 40 applies to cases pending prior to March 30, 2007 may invite an *ex post facto* challenge. Consistent with the position taken by the Attorney General, the policy of this office will be that SB 40 is prospective only. The guidelines and policies provided in Special Directive 07-01 will continue to apply to all pending cases. These same policies and procedures should be followed in all cases alleging an offense that was committed prior to the effective date of the legislation no matter when in the future that case might be filed. This policy may be revised in the future based upon further guidance from the California Supreme Court.

The guidelines and policies provided in Special Directive 07-01 will also continue to apply to all enhancements with a sentencing triad, as SB 40 did not amend section 1170.1, subdivision (d).

With respect to *offenses* occurring after the effective date of SB 40, Special Directive 07-01 will no longer apply. Deputies should be prepared to provide reasons to the court as to why the judge in exercising discretion should impose a specific term of imprisonment. It is likely that any standard of appellate review regarding the imposition of a sentence will include a reasonableness test. Identifying circumstances in aggravation that are set forth in the California Rules of Court will continue to be good legal practice, as these are reasons for imposing the high term that have historically stood the test of judicial review. The manner in which the circumstances in aggravation are utilized, however, should be reconfigured to appropriately conform to the requirements of the amended statutes. The inclusion of circumstances in aggravation for which a court could impose the high term without jury findings prior to the passage of SB 40 (such as those based upon multiple victims, recidivism, or where the court could have imposed consecutive sentences but imposed concurrent sentences instead) should continue to be a basic part of any argument.

Continue to access the *Cunningham* database on Lotus Notes for updates and revised templates and documents related to sentencing as well as other relevant information on this issue. The text for SB 40 can be found on the database.

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