



Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS

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December 26, 2007

Ms. Diane F. Boyer-Vine
Legislative Counsel
State of California
State Capitol, Room 3021
Sacramento, California 95814

Mr. Gregory P. Schmidt
Secretary of the Senate
State Capitol, Room 400
Sacramento, California 95814

Mr. E. Dotson Wilson
Chief Clerk of the Assembly
State Capitol, Room 3196
Sacramento, California 95814

Re: Implementation of Sentencing Reform Under Senate Bill 40 (Romero)

Dear Ms. Boyer-Vine, Mr. Schmidt, and Mr. Wilson:

Please accept this report on behalf of the Judicial Council of California on the implementation of legislative changes to the Determinate Sentencing Law, which is submitted in compliance with Senate Bill 40 (Romero; Stats. 2007, ch. 3, § 6). As you know, the Legislature in March 2007 enacted SB 40, which amends California's Determinate Sentencing Law in light of the United States Supreme Court's decision in *Cunningham v. State of California* (2007) 549 U.S. ____ [127 S.Ct. 856]. According to section 6(b) of SB 40, the Judicial Council, by January 1, 2008, is to "advise the Legislature on the implementation" of SB 40. This advisement is to include any

revisions of “rules of court and any relevant information concerning implementation consequences.”

After the enactment of SB 40, the Judicial Council amended the California Rules of Court, effective May 23, 2007. Those amendments:

- Deleted the requirement that the judge (1) impose the middle term absent justification for imposing the lower or upper term; and (2) find justification for deviating from the middle term by a preponderance of the evidence. (Rule 4.420(a) and (b).)
- Clarified that the judge has discretion to impose one of the three terms authorized under Penal Code section 1170(b). In doing so, the amended rules provide that “the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.” (Rule 4.420(b).)
- Replaced the requirement that the judge state reasons for deviating from the middle term with a new provision requiring that the judge state the reason for choosing a particular term. (See rules 4.405(4) & (5), 4.406(b)(4), 4.420(e), 4.433(b) & (c)(1), 4.437(c)(1), and 4.452(3).)
- Deleted references to judges making factual findings, relying upon facts, or hearing evidence. (See rules 4.405(5), 4.420(b), 4.421(a)–(c), 4.423(a) & (b), 4.433(b), and 4.437(c)(1).)
- Deleted the rule provision addressing enhancements with three possible terms. (Rule 4.428.) That rule provided that the middle term was to be imposed unless there were circumstances to justify imposing the lower or upper term. Although these enhancements were not specifically addressed in *Cunningham*, the reasoning in *Cunningham* supports the argument that this sentencing scheme is similarly flawed. The Legislature, however, did not address that issue in SB 40. Nonetheless, given the strong possibility that this scheme is unconstitutional, rule 4.428(b) was deleted. (See also the advisory committee comment to rule 4.405.)
- Revised and updated the advisory committee’s comments in light of these changes.

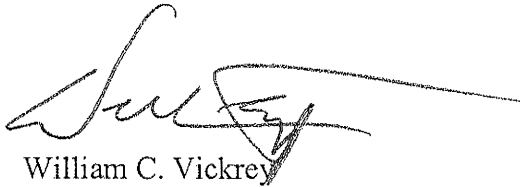
The rule amendments were also circulated for public comment over a nine-week period in spring 2007. As a result of public comments received, the rules were again amended by the Judicial Council, effective January 1, 2008. These amendments were technical and clarifying.

Judicial education has also been enhanced in response to SB 40. Judges are now informed of their discretion under SB 40 and the proper sentencing procedures, including the requirement to state on the record their reasons for sentencing choices. We have included this component in

several education sessions this year, including the felony sentencing section at the September 2007 Bench Bar Biannual Conference in Anaheim and the AOC Education Division/Center for Judicial Education and Research's recent Criminal Law Institute. These educational efforts will continue and will be enhanced as practical experience and appellate interpretation necessitate. At this time, we are not aware of any appellate decisions addressing SB 40 or other implementation consequences.

Thank you for the opportunity to inform you of our efforts in implementing SB 40. If you have any questions about this implementation, please feel free to contact Arturo Castro, staff to the Judicial Council's Criminal Law Advisory Committee, at 415-865-7702 or arturo.castro@jud.ca.gov.

Sincerely,



William C. Vickrey
Administrative Director of the Courts

WCV/JW/jl/lk

cc: Members of the Judicial Council
Hon. Gloria Romero, Chair, Senate Public Safety Committee
Hon. Dave Cogdill, Vice Chair, Senate Public Safety Committee
Hon. Jose Solorio, Chair, Assembly Public Safety Committee
Hon. Greg Aghazarian, Vice Chair, Assembly Public Safety Committee
Ms. Alison Anderson, Chief Counsel, Senate Public Safety Committee
Ms. Laura Enderton, Consultant, Senate Republican Caucus
Mr. Gregory Pagan, Chief Counsel, Assembly Public Safety Committee
Mr. Gary Olson, Consultant, Assembly Republican Caucus
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bcc: Hon. Steven Z. Perren, Associate Justice, Court of Appeal, Second Appellate District,
Division Six

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