SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	AB 2199	**Hearing Date:**	June 21, 2016
Author:	Campos		
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Urgency:	No	**Fiscal:**	Yes
Consultant:	JM		

Subject: ***Sexual Offenses Against Minors: Persons In a Position Of Authority***

HISTORY

Source: Author

Prior Legislation: None Known

Support: Association for Los Angeles Deputy Sheriffs; Board of Behavioral Sciences; California Association of Code Enforcement Officers; California Police Chiefs Association; California District Attorneys Association; California Narcotic Officers Association; California Police Chiefs Association; California State Sheriff's Association; Child Abuse Prevention Center; Crime Victims United of California; Los Angeles County Professional Peace Officers Association; Los Angeles Police Protective League; Riverside Sheriffs Association; Secular Coalition for California

Opposition: American Civil Liberties Union of California; Legal Services for Prisoners with Children

Assembly Floor Vote: 77 - 3

PURPOSE

The purpose of this bill is to define a two-year sentence enhancement where a defendant who committed a sex crime against a minor held a position of authority over the minor, as specified.

Existing U.S. Supreme Court decisional law establishes that California's determinate sentencing law prior to enactment of SB 40 (Romero) in 2007 violated the Sixth Amendment right of the accused to a trial by jury. (*Cunningham v. California* (2007) 549 U.S. 270.)

Existing U.S. Supreme Court decisional law established that to conform California law to Constitutional requirements, California may either require juries "to find any fact necessary to the imposition of an elevated sentence" or "permit judges genuinely 'to exercise broad discretion . . . within a statutory range.'" (*Cunningham v. California*, supra, 549 U.S. 270.)

Existing law provides, in response to the Cunningham decision, 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); (SB 40 (Romero) – Ch. 3, Stats. 2007.)

Existing law provides that prior to sentencing, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation, as specified. In determining the appropriate term, the court may consider the record in the case and other relevant material, testimony and argument. (Pen. Code § 1170, subd. (b).)

Existing law provides that the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed. (Pen. Code § 1170, subd. (b).)

Existing law provides that the Judicial Council shall promote uniformity in sentencing through rules providing criteria for the sentencing court to consider in making any sentencing decision, including imposition the lower, middle or upper term or a sentence enhancement. (Pen. Code 1170.3.)

Existing California Rules of Court, provide that:

- When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge must select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules.
- In exercising his or her discretion in selecting 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.
- To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.
- A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term.
- The reasons for selecting one of the three authorized prison terms referred to in section 1170(b) must be stated orally on the record, including where the court imposes the middle term. (Cal. Rule of Court, 4.420.)
- Examples of factors most relevant to the aggravated manner in which a sex crimes was committed against minor include:
    - The defendant induced a minor to commit or assist in the commission of the crime;
    - The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;
    - The manner in which the crime was carried out indicates planning, sophistication, or professionalism;
    - The defendant took advantage of a position of trust or confidence to commit the offense.

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- Specified aggravating factors also in include a defendant’s criminal history and
- The court can consider other factors statutorily declared to be circumstances in aggravation.

This bill provides that any person who is found guilty of felony statutory rape (when the adult is 21 years of age or older, and the minor is under 16 years of age) who holds a "position of authority" over the minor is subject to an additional term of two-years.

This bill provides that any person who is found guilty of the following acts who holds a "position of authority" over the victim is subject to an additional term of two-years in state prison if convicted of the felony offense in lieu of the alternate misdemeanor offense (when the offenses are alternate felony/misdemeanor "wobblers"):

- Sexual penetration, oral copulation and sodomy when the adult is 21 years of age or older, and the minor is under 16 years of age.
- Lewd acts with a 14-15 year old when the adult is 10 years older or more.

This bill defines an offender in a "position of authority" over a victim as "a person, by reason of that position, is able to exercise undue influence over a minor." A position of authority includes, but is not limited to, a stepparent, foster parent, partner of the parent, caretaker, youth leader, recreational director, athletic manager, coach, teacher, counselor, therapist, religious leader, doctor, employer, or employee of one of the aforementioned persons.

This bill defines “undue influence” through a reference to Welfare and Institutions Code Section 15610.70, which defines the term as “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.” In determining whether a person exercised undue influence over another, the following factors are applied:

- The victim was vulnerable, as shown, for example by the victim’s age, incapacity, education, impaired cognitive ability, or related factors.
- The basis or nature of the apparent “authority,” including, for example, being the victim’s fiduciary, family member, health care provider, spiritual adviser or a related position.
- The actions or tactics used by the “influencer, including, for example,
    - Controlling life necessities, medication, sleep and access to information or others
    - Use of affection, intimidation or coercion
    - Changes in personal property rights, especially with secrecy or haste
- The equity of the result, including, for example, economic consequences, divergence from the victim’s plans or intents.

RECEIVERSHIP/OVERCROWDING CRISIS AGGRAVATION

For the past several years this Committee has scrutinized legislation referred to its jurisdiction for any potential impact on prison overcrowding. Mindful of the United States Supreme Court ruling and federal court orders relating to the state’s ability to provide a constitutional level of health care to its inmate population and the related issue of prison overcrowding, this Committee has applied its “ROCA” policy as a content-neutral, provisional measure necessary to ensure that the Legislature does not erode progress in reducing prison overcrowding.

On February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows:

- 143% of design bed capacity by June 30, 2014;
- 141.5% of design bed capacity by February 28, 2015; and,
- 137.5% of design bed capacity by February 28, 2016.

In December of 2015 the administration reported that as "of December 9, 2015, 112,510 inmates were housed in the State's 34 adult institutions, which amounts to 136.0% of design bed capacity, and 5,264 inmates were housed in out-of-state facilities. The current population is 1,212 inmates below the final court-ordered population benchmark of 137.5% of design bed capacity, and has been under that benchmark since February 2015." (Defendants' December 2015 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).) One year ago, 115,826 inmates were housed in the State's 34 adult institutions, which amounted to 140.0% of design bed capacity, and 8,864 inmates were housed in out-of-state facilities. (Defendants' December 2014 Status Report in Response to February 10, 2014 Order, 2:90-cv-00520 KJM DAD PC, 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (fn. omitted).)

While significant gains have been made in reducing the prison population, the state must stabilize these advances and demonstrate to the federal court that California has in place the "durable solution" to prison overcrowding "consistently demanded" by the court. (Opinion Re: Order Granting in Part and Denying in Part Defendants' Request For Extension of December 31, 2013 Deadline, NO. 2:90-cv-0520 LKK DAD (PC), 3-Judge Court, *Coleman v. Brown, Plata v. Brown* (2-10-14). The Committee's consideration of bills that may impact the prison population therefore will be informed by the following questions:

- Whether a proposal erodes a measure which has contributed to reducing the prison population;
- Whether a proposal addresses a major area of public safety or criminal activity for which there is no other reasonable, appropriate remedy;
- Whether a proposal addresses a crime which is directly dangerous to the physical safety of others for which there is no other reasonably appropriate sanction;
- Whether a proposal corrects a constitutional problem or legislative drafting error; and
- Whether a proposal proposes penalties which are proportionate, and cannot be achieved through any other reasonably appropriate remedy.

COMMENTS

1. Need for This Bill

According to the author:

> The dynamic between the perpetrators and victims in statutory rape situations are often very unequal because perpetrators have the power to shape the victims intuitions and feelings about the relationship, especially perpetrators who hold a position of authority over the minor like a teacher, coach, family friend or family member. 14 and 15 year olds are the most vulnerable to the influences of a person in a position of authority, in addition to being one of the most targeted age

groups because these perpetrators know their victim's ages, their vulnerabilities and have direct responsibility over them and can exert undue influence.

Statutory rape cases are often misconceived as a consensual relationship between an adult and a minor, however, researchers state that many victims have a delayed reaction to being manipulated into a sexual relationship, which can lead to negative outcomes like an increased risk for delinquency and longer-term psychological effects. Although the victims may deny harm, researchers argue this cannot be taken at face value because victims often have delayed reactions and "later come to understand the inherent power differential in the relationship, the subtle manipulation they were subjected to, and the adult's use of implied or actual threats" (Grover, 2003).

Currently, cases covered under this bill receive similar sentences to non-violent offenses like car theft because unlike the sentences for sexual relations with minors 13 and younger that have strong penalties (3, 6 or 8 year or life sentences), cases with 14 and 15 year olds are minimal (16 months, 2 years or 3 years).

2. Existing Penalties for the Offenses Subject to Enhancement Under This Bill

Under existing law "unlawful sexual intercourse" and related forms of illegal sodomy, oral copulation, sexual penetration and lewd and lascivious acts with a minor who is 14 or 15 years of age are punished on a scale depending on the conduct of the perpetrator, and the respective ages of the defendant and the victim of the crime.

Minors, by law, do not have the capacity to consent to sexual acts. The essence or purpose of the laws to which the enhancement defined by this bill would apply is to protect children from adults who are in a position of authority or influence over the minors involved. This bill thus would impose an enhancement for something that is typically inherent in the underlying crime and the basis for the punishments imposed under existing law.

3. Basic Sentencing Rules and Procedures applied to this Bill – A Fact used to Impose an Enhancement cannot Support an Upper Term Sentence

The Enhancement in this Bill Considered Alone

The sentencing laws are designed to allow the sentencing court to rely on a wide range of aggravating and mitigating factors to impose an upper term, middle or lower term. The court must state on the record the reasons for any sentencing choice. (Pen Code §§ 1170, subds. (b)-(c), 1170.1, subd. (d).)

This bill would define a sentence enhancement in sex crimes against a minor that are based on the age of the defendant and the minor. An enhancement of two years would be imposed where the defendant held "a position of authority" over the minor. The bill further defines "position of authority" as a position or relationship that gives the perpetrator "undue influence" over the minor.

Because abuse of a position of authority occurs in many cases where an adult engaged in illicit sexual conduct with a minor, the bill appears to be a penalty increase applicable to a very large proportion of these offenses. The application of the bill, however, would be affected by other sentencing rules.

The Enhancement in this Bill Applied in the Context of Existing Sentencing Law

The Rules of Court provide guidance to the sentencing court in imposing sentence. The rules include a list of specified factors in aggravation, although courts are not limited to the enumerated factors. A common factor in aggravation in a sex crime committed by an adult against a minor is the following: "The defendant took advantage of a position of trust or confidence to commit the offense." The abuse of a position of influence or trust is often the major reason the defendant was able to commit the offense. The author's statement in the Assembly analysis refers to this point.

A fact that is an element of or inherent in an offense cannot be used as factor in aggravation or an enhancement. (Cal. Rules of Court, rule 4.420 (d).) For example, the fact that the defendant suffered great bodily harm cannot be used as to enhance the sentence for manslaughter. (*People v. Piceno* (1987) 195 Cal.App.3d 1353, 1357; See, *People v. Dixon* (1993) 20 Cal.App.4th 1029, 1038.) The fact that a defendant took advantage of an elderly person to commit a financial crime could not likely be used as a factor in aggravation to impose an upper term in a conviction under Penal Code Section 368 for a financial crime against a person older than 65 years of age. The use of great violence could not likely be used as a factor in aggravation in a murder committed with a firearm, as such a crime inherently involves violence and an enhancement of 25 years would be imposed because the defendant used a firearm.

It is another basic feature of California sentencing law that a fact used to impose an enhancement cannot be used to impose an upper term. An upper term is essentially considered a sentence enhancement. (Pen. Code § 1170, subd. (b).) If a defendant was convicted of engaging in sexual conduct with a minor under age of 16 crime and the prosecutor proved that the defendant occupied a position of authority, the court could impose the two-year enhancement defined or described by this bill. However, the court could not likely impose an upper term based on the aggravating factor that the defendant "took advantage of a position of trust or confidence" to commit the crime, as that factor greatly overlaps with an enhancement based on the defendant's use of a position of authority to commit the crime. This is particularly likely because this bill defines a position of authority in terms of "undue influence over the minor."

For example: If the court imposes the two-year enhancement because the defendant had a position of authority, the court could only impose the lower (16 months) or middle (two years) term, if no other factors in aggravation exist. The crimes covered by the enhancement defined in this bill do not involve force, violence or weapons. Thus, in many cases the only significant aggravating factor is likely to be an abuse of a position of authority or trust. The result would be a maximum possible increase of one year over the upper (three years) term maximum sentence under current law. If the court imposed the enhancement and the lower term (16 months), the maximum sentence would be three years and 4 months.

The court could, however, rely on the defendant's position of authority or undue influence over the minor as a factor in aggravation to impose an upper term, and not the enhancement. This sentencing choice would result in no change over the current maximum sentence.

Prosecutor's Arguments that other Factors in Aggravation would Justify Imposition of the Upper Term

In discussions with committee staff, prosecutors have argued that these cases generally involve factors other than abuse of a position of authority and trust that the court could rely upon in imposing an upper term. Specifically mentioned were the degree of callousness involved, the vulnerability of the victim, whether the victim induced a minor (other than the victim) to assist in the crime, planning and sophistication and whether the defendant interfered with the judicial process.

Arguably, it would be difficult to separate the callous nature of the offense, the vulnerability of victim and the defendant's planning or sophistication from the fact that an adult defendant abused a position of authority and trust to prey on minor for sexual gratification. The victim is vulnerable because of the defendant's position of authority and influence and the defendant would show callousness in abusing his or her position. The ability to manipulate a vulnerable victim also arguably shows planning and sophistication, possibly merging that factor with the enhancement as well. The fact that a defendant used another minor to commit the offense would be a separate factor in aggravation. Interference with the judicial process can often be charged as a felony. (Pen. Code § 136.1) If the defendant recruited others to interfere with the judicial process, a conspiracy could be charged. However, if interfering with the judicial process is not charged as a separate crime, that can be the basis of a factor in aggravation.

Sentencing law is complex and it is difficult to predict how the enhancement would be applied in individual cases. The application of the enhancement defined by this bill is likely to be fully determined through litigation over time. This bill would add to the complexity of sentencing law, which is so complex currently that judges often make errors in imposing sentence. These errors would be subject to challenge and correction on appeal.

4. California Sentencing is so Complex as to often Result in Sentencing Errors That Require Remand to Trial Courts or Correction of Unauthorized Sentences

While sentences may not change substantially if this bill is enacted, sentencing calculations and decisions will become more complex. Courts and practitioners very often make mistakes in sentencing. It is not uncommon for cases to be remanded to the trial court from the appellate court to fix a sentencing error. Sentencing has become so complex that it is not unusual for an inmate to learn that he or she faces a greater sentence than the one the court imposed, because the court failed to impose a mandatory penalty. While a defendant cannot receive a greater sentence because he or she appealed, an "unauthorized" sentence can be corrected at any time.

5. The Definition of Undue Influence in the Bill is Drawn from Elder Financial Abuse Law and May be Difficult to Apply in Sex Crimes Against Minors

This bill imports a definition of "undue influence" from the Welfare and Institutions Code that is complex on its own. This standard or definition of undue influence was added to the code by AB 140 (Dickinson) Ch. 668, Stats. 2013. The standard is designed for cases of financial abuse of elderly persons. Many of the factors in the standard would not apply in a case involving sex between an adult and a minor. This could lead to confusion for juries and be the basis for defendants to argue that their conduct is not described in the applicable definition of an abuse of authority or influence.

6. Author's Proposed Amendment to Strike the Reference to an "Employee" as a Person of Authority Over a Minor

The bill includes an "employee" as a person of authority who could exert undue influence on a minor. Prosecutors have informed the author that an "employee" should not be included as a person of authority over a minor. The author has agreed to amend the bill to strike "employee" from the descriptive list of persons in a position of authority.

7. Deterrence and Punishment Issues Generally

Punishment Theory – Just Deserts

The use of criminal sentences to punish, rather than rehabilitate or incapacitate an offender, is described as "just deserts" in criminology. A 2002 article in the Journal of Personality and Social Psychology succinctly described the theory:

> The theory of just deserts is retrospective rather than prospective. The punisher need not be concerned with future outcomes, only with providing punishment appropriate to the given harm. Although it is certainly preferable that the punishment serve a [deterrence] function… its justification lies in righting a wrong, not a … future benefit. The central precept… is that the punishment be proportionate to the harm. The task …is to assess the magnitude of the harm and to devise a punishment that is proportionate in severity, if not in kind. Kant (1952) recommended censure proportionate to a perpetrator's "internal wickedness," a quantity that may be approximated by society's sense of moral outrage over the crime. (*Why do We Punish?*, Journal of Personality and Social Psychology, (2002) Vol. 83, No. 2, 284–299, Carlsmith, Darley and Robinson.)[1]

Deterrence Issues

Criminal justice experts and commentators have noted that, with regard to sentencing, "a key question for policy development regards whether enhanced sanctions or an enhanced possibility of being apprehended provide any additional deterrent benefits.

> Research to date generally indicates that increases in the certainty of punishment, as opposed to the severity of punishment, are more likely to produce deterrent benefits.[2]

A comprehensive report published in 2014, entitled *The Growth of Incarceration in the United States*, discusses the effects on crime reduction through incapacitation and deterrence, and describes general deterrence compared to specific deterrence:

> A large body of research has studied the effects of incarceration and other criminal penalties on crime. Much of this research is guided by the hypothesis that incarceration reduces crime through incapacitation and deterrence. Incapacitation refers to the crimes averted by the physical isolation of convicted

[1] http://www.colgate.edu/portaldata/imagegallerywww/184416d4-5863-4a3e-a73b-b2b6b86e7b60/ImageGallery/Carlsmith_Darley_Robinson_2002.pdf

[2] Valerie Wright, Ph.D., *Deterrence in Criminal Justice Evaluating Certainty vs. Severity of Punishment* (November 2010), The Sentencing Project (http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf.)

> offenders during the period of their incarceration. Theories of deterrence distinguish between general and specific behavioral responses. General deterrence refers to the crime prevention effects of the threat of punishment, while specific deterrence concerns the aftermath of the failure of general deterrence—that is, the effect on reoffending that might result from the experience of actually being punished. Most of this research studies the relationship between criminal sanctions and crimes other than drug offenses.

In regard to deterrence, the authors note that in "the classical theory of deterrence, crime is averted when the expected costs of punishment exceed the benefits of offending. Much of the empirical research on the deterrent power of criminal penalties has studied sentence enhancements and other shifts in penal policy. . . .

> Deterrence theory is underpinned by a rationalistic view of crime. In this view, an individual considering commission of a crime weighs the benefits of offending against the costs of punishment. Much offending, however, departs from the strict decision calculus of the rationalistic model. Robinson and Darley (2004) review the limits of deterrence through harsh punishment. They report that offenders must have some knowledge of criminal penalties to be deterred from committing a crime, but in practice often do not."[3]

Members may wish to discuss whether imposing enhancements for factors that are often inherent in crimes involving illicit sexual conduct between minors and adults would deter possible offenders.

The authors of the 2014 report discussed above conclude that incapacitation of certain dangerous offenders can have "large crime prevention benefits," but that incremental, lengthy prison sentences are ineffective for crime deterrence:

> Whatever the estimated average effect of the incarceration rate on the crime rate, the available studies on imprisonment and crime have limited utility for policy. The incarceration rate is the outcome of policies affecting who goes to prison and for how long and of policies affecting parole revocation. Not all policies can be expected to be equally effective in preventing crime. Thus, it is inaccurate to speak of the crime prevention effect of incarceration in the singular. *Policies that effectively target the incarceration of highly dangerous and frequent offenders can have large crime prevention benefits, whereas other policies will have a small prevention effect or, even worse, increase crime in the long run if they have the effect of increasing postrelease criminality.*
>
> Evidence is limited on the crime prevention effects of most of the policies that contributed to the post-1973 increase in incarceration rates. *Nevertheless, the evidence base demonstrates that lengthy prison sentences are ineffective as a crime control measure. Specifically, the incremental deterrent effect of increases in lengthy prison sentences is modest at best. Also, because recidivism rates decline markedly with age and prisoners necessarily age as they serve their prison sentence, lengthy prison sentences are an inefficient approach to preventing crime by incapacitation unless they are specifically targeted at very*

[3] *Id.* at 132-133.

> *high-rate or extremely dangerous offenders.* For these reasons, statutes mandating lengthy prison sentences cannot be justified on the basis of their effectiveness in preventing crime.[4]

WOULD REQUIRING ENHANCEMENTS BASED THE DEFENDANT'S POSITION OF AUTHORITY IN SEX CRIMES DEFINED BY THE AGE OF THE PARTICIPANTS DETER PERSONS FROM COMMITTING SUCH OFFENSES?

-- END –

[4] *Id.* at 155-156 (emphasis added).