SENATE COMMITTEE ON PUBLIC SAFETY

Senator Loni Hancock, Chair
2015 - 2016 Regular

Bill No:	SB 1202	**Hearing Date:**	April 12, 2016
Author:	Leno		
Version:	March 28, 2016		
Urgency:	No	**Fiscal:**	Yes
Consultant:	JM		

Subject: ***Sentencing***

HISTORY

Source: California Attorneys for Criminal Justice

Prior Legislation: AB 765 (Ammiano) died in Assembly Appropriations
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: California Catholic Conference, Inc; California Public Defenders Association; Friends Committee on Legislation of California

Opposition: California District Attorneys Association; California State Sheriffs' Association

PURPOSE

The purpose of this bill is to provide that aggravating factors relied upon by the court to impose an upper term sentence or enhancement must be tried to the jury and found to be true beyond a reasonable doubt.

Existing law provides 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 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, the probation officer's report, other reports including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation and additional evidence introduced at the sentencing hearing. (Pen. Code § 1170, subd. (b).)

Existing law provides that the court shall select the term that best serves the interests of justice and 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 sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended. The provision concerning the authority of the court to choose one of three prescribed sentencing terms upon sunsets on January 1, 2014. (Pen. Code § 1170, subd. (b).)

Existing law provides that the Judicial Council shall seek to promote uniformity in sentencing under Section 1170, by:

- The adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing regarding the court's decision to:
    - grant or deny probation;
    - impose the lower, middle, or upper prison term;
    - impose concurrent or consecutive sentences; and
    - determine whether or not to impose an enhancement where that determination is permitted by law.
- The adoption of rules standardizing the minimum content and the sequential presentation of material in probation officer reports submitted to the court. (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.)

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

Existing U.S. Supreme Court decisional law established that to adjust California's sentencing law to make it conform 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 - Decision Syllabus.)

Existing law amended Penal Code sections 1170 and 1170.3, in response to the Cunningham decision, to make the choice of lower, middle, or upper prison term one within the sound discretion of the court. (SB 40 (Romero) – Ch. 3, Stats. 2007.)

Existing law includes the following uncodified legislative findings that were adopted as part of SB 40 (2007): "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* … It is further the 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.

Existing law amending Penal Code sections 1170 and 1170.3 (SB 40) also included a "sunset" provision, declaring that its provisions would remain in effect only until January 1, 2009, unless a later enacted statute, that is enacted before that date, deletes or extends that date. Subsequent legislation has extended that sunset date and these provisions will currently remain in effect until January 1, 2017. (SB 463 (Pavley) Ch. 598 Stats. 2013.)

Existing law provides that certain sentencing enhancements carry an additional penalty of a lower, middle, or upper term of years. These sections were amended in response to the Cunningham decision, to make the choice of lower, middle, or upper prison term one within the sound discretion of the court. (SB 150 (Wright), Ch. 171, Stats. 2009; Penal Code §§ 186.22, 186.33, 12021.5, 12022.2, 12022.3, 12022.4.) SB 150 also included a "sunset" provision, declaring that its provisions would remain in effect only until January 1, 2011, unless a later enacted statute deletes or extends that date. The sunset date on enhancement triads has also been extended to January 1, 2017. (SB 463 (Pavley) Ch. 598 Stats. 2013.)

Existing law provides that prior convictions used to enhance a defendant's sentence or subject the defendant to a special sentencing scheme, including the Three Strikes law, must be alleged in the charging document and proved the jury (or court in a court trial) beyond a reasonable doubt. (Pen. Code § 1025.)

Existing decisional law grants a court discretion to "bifurcate" trial of prior conviction allegations used to enhance a defendant's sentence, such that trial of the prior conviction allegations is only held after the jury has convicted the defendant on the underlying criminal charges. (*People v. Calderon* (1994) 9 Cal.4th 69, 72-79.)

Existing decisional law provides that neither the defendant not the prosecution has a right to "unitary" trial on the prior conviction allegations conducted before the jury in conjunction with the underlying criminal charges. (*Id.*, at p. 72; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1332-1335.)[1]

[1] Defendants typically request bifurcation of prior conviction allegations. Prosecutors have requested bifurcation in some Three Strikes cases – particularly before Three Strikes reform in 2012 - to prevent jurors from acquitting the defendant to spare him or her from a life term for a relatively minor felony. (*Cline* at p. 1332-1336.)

Existing provision of the California Constitution provide that prior convictions can be used without limitation for impeachment or enhancement of sentence. "When a prior felony conviction is an element of any offense, it shall be proven to the jury in open court." (Cal. Const., Art. I, § 28 (d).)

This bill prohibits imposition of the upper term of imprisonment for a criminal conviction or enhancement allegation unless aggravating factors are found to be true by the finder of fact.

This bill:

- Makes a legislative declaration that, to ensure proportionality in sentencing, upper terms should be reserved for cases in which aggravating facts exist and have been proven to be true.

- Provides that the court may not impose an upper term based on aggravating facts unless the facts were first presented to the fact-finder and the fact-finder found the facts to be true.

- Requires the court to state on the record at the time of sentencing the specific facts in aggravation relied upon to impose an upper term.

This bill provides that a fact pled in the indictment or information (document setting out the charges) cannot be used as an aggravating factor at sentencing unless the fact has been proved to the trier of fact (jury or court in a court trial) or admitted by the defendant

This bill provides that a prior conviction that has been pled in the charging document of a jury trial may be proven to the court to the same extent as permitted prior to the effective date of this bill.

This bill provides that trial of all facts pled in aggravation of sentence shall be bifurcated. During trial of the underlying charges and any enhancement, the jury shall not be informed of the facts alleged as factors in aggravation unless that fact is admitted or otherwise relevant to prove an element of a charge or enhancement and not excluded as overly prejudicial.

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:

> Senate Bill 1202 seeks to address the constitutional defect in our California Felony Sentencing laws. In 2007, the United States Supreme Court, in its decision in *Cunningham v. California*, 59 U.S. 270 (2007), found California's felony sentencing to be unconstitutional. The court found that judges in California improperly sentenced persons to longer prison sentences based on facts that were never presented to the jury and proven true beyond a reasonable doubt. Following the *Cunningham* decision, the legislature sought to cure this constitutional defect by allowing judges to consider "factors," not "facts" in aggravation when imposing an enhanced sentence. This law, implemented under SB 40 with a

sunset provision, has been extended multiple times since 2007. However, the sunset is set to expire on January 1, 2017.

Given California's move towards more thoughtful and innovative criminal justice reform - Realignment and Propositions 36 and 47 - 2016 is the year to make a powerful stance on over-criminalization. Along with the Governor's ballot measure, SB 1202 seeks to prevent the unilateral impositions of longer sentences by judges. This bill would require any aggravating facts to be presented to the jury, and proved true beyond a reasonable doubt, before an increased sentenced can be imposed. Furthermore, this bill would require judges to state on the record the reasons for its sentencing choice, including specific facts of aggravation that led to an imposition of an upper term. This bill would change California's focus from addressing issue of over incarceration at the back end, to providing a mechanism to lower sentences on the front end. The time has come to make major sentencing reform changes. SB 1202 will help lead California.

2. Background: The Holding in *Cunningham v. California*: California's Determinate Sentencing Law was Unconstitutional

California's determinate sentencing law (DSL) provides that crimes may be punished by one of three prison terms in a "triad," referred to as the lower, middle, or upper term. Prior to SB 40, Section 1170 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." (Pen. Code § 1170, subd. (b).) Having established this system of sentencing "triads," the Legislature delegated to the Judicial Council the duty to adopt rules to guide the trial judge in making a decision to impose the lower, middle, or upper prison term. (Pen. Code § 1170.3.) According to the Rules of Court established by the Judicial Council prior to SB 40, in sentencing a defendant under the DSL, "[t]he middle term must be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation." (Cal. Rules of Court, Rule 4.420(a).)

Prior to SB 40, the Rules of Court, Rule 4.420(b) further required that, "[c]ircumstances in aggravation and mitigation must be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation."

In 2000, in the landmark ruling in *Apprendi v. New Jersey*, the U.S. Supreme Court held that, "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham v. California*, supra, 549 U.S. 270, 274-275, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; and *United States v. Booker* (2005) 543 U.S. 220.) The Supreme Court clarified this principle in Blakely v. Washington as follows: "The relevant statutory maximum, is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any

additional findings." *(Blakely*, supra, 542 U.S., at 303-304, emphasis in original.) The United States Supreme Court has recently extended *Apprendi* to clarify that it applies to any fact that authorizes imposition of a sentence in excess of the statutory minimum or maximum. (*Alleyne v. United States* (2013) 186 L.Ed.2nd 314

In finding that California's DSL, prior to SB 40, violated the right to a trial by jury, as defined under *Apprendi*, the Supreme Court stated, "California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." (*Cunningham v. California, supra*, 549 U.S. 270, 279.) Because the DSL required the judge, in order to impose the upper term, to find facts that were not elements of the offense found true by the jury, and because the court could find those facts by a preponderance of the evidence as opposed to the higher standard of beyond a reasonable doubt, the DSL did exactly what was forbidden under *Apprendi*, namely, it "allow[ed] a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Apprendi*, supra, 530 U.S. 466.) "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." (*Cunningham v. California, supra*, 549 U.S. 270, 281.)

3. **SB 40 (2007) Amended California's DSL to Satisfy Constitutional Requirements**

The Supreme Court in *Cunningham* provided clear direction as to what steps California's Legislature could take to address the DSL's Constitutional infirmities. "As to the adjustment of California's sentencing system in light of our decision, the ball . . . lies in [California's] court. … [S]everal States have modified their systems … to retain determinate sentencing …. 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 v. California, supra,* 549 U.S. 270, 293-294, citations and footnotes omitted.)

SB 40 amended California's DSL to give judges the discretion to impose the lower, middle, or upper term without the need for additional fact-finding. In addition, SB 40 included legislative intent language stating that its purpose was to address *Cunningham*, and to stabilize the criminal justice system while sentencing and correctional policies in California are being reviewed.

4. Sentence Enhancements Containing Three Possible Terms

Most sentence enhancements provide for a single term of years. (See e.g., Pen. Code § 667, subd. (a) – 5 years for each prior serious felony conviction.) Some sentence enhancements, however, like the term for the underlying conviction, provide that the court must select one of three possible terms, a lower, middle or upper term. (See e.g. Pen. Code § 12022.5, subd. (a), imposing a sentence enhancement of 3, 4 or 10 years for personally using a firearm in the commission of a felony.)

Penal Code Section 1170.1, subdivision (b), instructs sentencing judges how to impose sentence enhancements where there is a choice of terms, "If an enhancement is punishable by one of three terms, the court shall impose the middle term unless there are circumstances in aggravation or mitigation, and state the reasons for its sentencing choice, other than the middle term, on the record at the time of sentencing." Although in *Cunningham*, the Court found that sentence enhancements, per se, in California, did not violate the right to have a jury decide all facts that could increase the sentence, the Court did not address the specific issue of those enhancements that carry a choice of terms. (*See Cunningham v. California*, *supra*, 549 U.S. 270.)

After the enactment of SB 40, the California Court of Appeal found that section 1170.1 "suffers from the identical constitutional infirmities identified by the United States Supreme Court in *Cunningham* … and is similarly unconstitutional. The Legislature has taken no step to amend this provision to render it compliant with the Sixth Amendment . . ." (*People v. Lincoln* (2007) 157 Cal. App. 4th 196, 205. The enactment of SB 150 (Wright), Ch. 171, Stats. of 2009, did just that. SB 150 applied the same "fix" to sentence enhancement triads that SB 40 applied to the base term triads: It authorized the court to impose any of the three terms without making any additional factual findings. This approach was expressly approved by the California Supreme Court in *People v. Sandoval* (2007 41 Cal.4th 825, 844-845 (2007).) The changes to the rules concerning imposition of an enhancement from a choice of three terms were also extended until January 1, 2017 in SB 463 (Pavley), Ch. 598, in 2013.

5. The Trial Court need not formally find a Specific Fact to Impose an Upper Term, but there are Limits on a Court's Authority to Impose an Upper Term

The sponsor has argued that *Cunningham* has made it more difficult to challenge an improper imposition of an upper term. Prior to *Cunningham*, the court had to make a finding of a specific fact to impose the upper term. After SB 40, the court simply had to articulate a reason for imposing the upper term. The defendant could previously argue on appeal that there was insufficient evidence of the aggravating fact, while now a defendant must establish that the court abused its discretion in relying on a particular reason to impose an upper term. However, as a practical matter, a court seldom had difficulty finding a fact to impose the upper term prior to the decision in *Cunningham*. Nevertheless, regardless of whether an upper term is supported by a finding of fact or imposed through the sound discretion of the court, the aggravating factor or reason supporting an upper term must reflect that the defendant's crime is distinctly worse than the average conviction for that same crime. (*People v. Black* (2007) 41 Cal.4th 799, 817; *People v. Moreno* (1982) 128 Cal.App.3d 103, 110.)

Further, California law - from the time of the enactment of the DSL in 1976 - has prohibited the court from using a fact that underlies an enhancement as a reason to impose the upper term. (Pen. Code § 1170, subd. (b).) For example, if a defendant is convicted of burglary and the prosecutor proved an enhancement allegation that the defendant used a firearm, the court can impose an enhancement for the firearm, but it cannot rely on the use of a firearm to impose the upper term. The court can rely on firearm use to impose an upper term, but the court cannot impose punishment for the enhancement. This rule is part of broader prohibition on the "dual use" of the same fact to impose more than one punishment.

6. Prejudice Issues and Concerns Raised by Trying Aggravating Factors That are not Elements of a Crime to the Jury

The most common aggravating factors concern a defendant's criminal record, including prior convictions, poor performance on parole or probation and arrests. To avoid the prohibition on the dual use of a fact to impose more than one punishment, one prior conviction can be alleged as the basis of a one-year enhancement for a prior prison or felony jail term and a separate conviction can be the basis of an upper term.

The common reliance on the defendant's criminal record and other "bad acts" to support an upper term reveals the thorniest issue in this bill. As a long-standing rule of constitutional due process, the prosecution cannot present evidence that merely shows the defendant's propensity to commit the charged crime. This is classic improper character evidence. This evidence is not inadmissible because it is irrelevant. Rather, such evidence is immensely powerful. Jurors hearing evidence of a defendant's criminal record - especially crimes similar to the one charged offense – are highly likely to convict because the defendant is a bad person prone to commit crimes, not because the evidence in the charged offense establishes his or her guilt beyond a reasonable doubt. (*People v. Thompson* (1988) 45 Cal.3d 86, 109; *People v. Thompson* (1980) 27 Cal.3d 303, 318.)

Proof of aggravating factors to the jury would involve numerous other matters than prior convictions. These could include prior juvenile adjudications, arrests, poor performance on parole, conduct in prison, failure to show remorse, failure to pay fines or restitution, a veritable Pandora's Box of highly prejudicial matter that would otherwise be grounds for a mistrial if admitted into evidence.

To address this issue, this bill was recently amended to require bifurcation of the trial of aggravating factors. That is, trial on the aggravating factors would be held after the defendant is convicted of the underlying offense and any enhancement allegations. Current sentencing law allows a defendant to bifurcate most prior conviction allegations. These would include prior convictions to establish an enhancement for a prior prison term and qualifying Three Strike convictions. Prior convictions that are elements of an offense - prior felony conviction in a trial for possession of a gun by a convicted felon for example - must be tried to the jury. (Cal. Const. Art. I § 28 (f).) Nevertheless, the defendant can avoid the prejudicial effect of the jury learning the nature of his or her prior conviction by admitting the prior conviction so that the jury learns only that the defendant has been convicted of a felony.

7. Rates of Upper Term Sentences since 2006

Concerns were raised that SB 40 (Romero) in 2007 would result in a substantial increase in upper term sentences. SB 40 went into effect on March 31, 2007. However, any analysis of upper term sentencing practices must be divided into two distinct periods - the years prior to implementation of realignment and the years after realignment was enacted . Inmates committed prior to realignment are a substantially different and more diverse population than inmates committed after realignment. After realignment, only defendants with prior or current serious felony convictions or who were required to register as sex offenders were sent to prison. These inmates generally had much longer and more serious criminal records than those sentenced to felony county jail terms. They include many defendants sentenced for gang crimes. One significant exception to that rule is drug commerce offenders with enhancements for prior convictions and for cases that involved exceptionally large amounts of drugs. These inmates often have relatively long criminal records and can be sentenced to relatively long terms in comparison to other felony jail inmates.

The charts below are split into separate tables for pre and post-realignment sentences for men and for women.

- **Upper Term Sentences from 2006-2010 – the Year Prior to SB 40 until Enactment of Criminal Justice Realignment**

Year	Total Commitments	Upper Terms
2006	62,491	9,455 - 14.3%
2007	60,581	7,612 - 12.5 %
2008	59,498-	8,962 - 14.3 %
2009	57,093 –	9,213 - 16.5 %
2010	52,375	9,358 - 16 %

- **Upper Term Sentences for Men after Enactment of Realignment**

Year	Total Commitments	Upper Terms
2011	45,934	8,633 - 20 %
2012	31,817	7,051 - 23 %
2013	34,714	6,850 - 20 %
2014	34,789	7,572 - 25 %

- **Upper Term Sentences for Women from the year prior to SB 40 until Realignment**

Year	Total Commitments	Upper Terms
2006	8,038	859 - 11%
2007	7,845	728 - 9%
2008	7,917	856 - 11%
2009	7,150	832 - 12.5%
2010	6,811	912 - 14.3%

- **Upper Term Sentences for Women from Realignment through 2014**

2011	5,177	735 - 14.3%
2012	2,180	340 - 16.7%
2013	2,624	420 - 16.7%
2014	2,616	478 - 16.7%

It is difficult to draw conclusions about whether courts have changed sentencing patterns in imposing upper terms from this data. As noted above, after the October 1, 2011 effective date of Criminal Justice Realignment, only defendants with current or prior serious felony

convictions, or those required to register as sex offenders, were sentenced to prison.[2] Inmates with less serious criminal histories and convicted of less serious crimes served executed felony sentences in county jails.

This data also does not reveal if average sentence lengths have increased over this time. Increases in the proportion of upper term sentences do not necessarily mean that average sentence lengths have increased. As a practical matter, virtually all defendants who must serve their sentences in prison are subject to at least two-strike sentences under the Three Strikes law. A two strike sentence requires the court to double the sentence otherwise imposed. The court, however, can strike or dismiss the prior strike allegation and impose an upper term, imposing a shorter sentence than without a doubled middle or lower term. Courts usually have a wide range of sentencing choices available to them. A reason to impose an upper term sentence cannot be used to impose an enhancement. A court could impose the upper term and strike (choose not to impose) an enhancement with a longer term than the increase from the middle term to the upper term.

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[2] Defendants convicted under Penal Code Section 186.11 of white collar fraud in which the amount taken by the defendant or lost by the victim exceeded $100,000 also serve sentences in prison. Such defendants would be a particularly small proportion of the prison population. (Pen. Code § 1170, subd. (h)(3)