



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-081

For business meeting on: March 11, 2022

Title

Criminal Law: Felony Sentencing

Agenda Item Type

Action Required

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453

Effective Date

March 14, 2022

Date of Report

March 2, 2022

Recommended by

Criminal Law Advisory Committee
Hon. Brian M. Hoffstadt, Chair

Contact

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Executive Summary

The Criminal Law Advisory Committee recommends amendments to specified felony sentencing rules of the California Rules of Court to reflect several major legislative changes that were made to sentencing of felony offenses and enhancements, which went into effect January 1, 2022. The recommended amendments will reflect statutory changes (1) requiring aggravated factors to be stipulated to by the defendant or found true beyond a reasonable doubt when imposing the upper term of a felony offense or enhancement; (2) allowing courts to consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified official records, but that this exception may not be used to select the upper term of an enhancement; (3) discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice; (4) regarding mitigating circumstances requiring imposition of the lower term; (5) identifying specified mitigating circumstances for consideration in sentencing; (6) allowing an act or omission that is punishable in different ways by different laws to be punished under either of those provisions; and (7) amending dismissal of enhancements due to specified mitigating circumstances. The recommended amendments would also clarify that courts may consider aggravating factors in exercising discretion in imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining

whether to exercise discretion pursuant to Penal Code section 1385(c) and make nonsubstantive technical amendments.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective March 14, 2022:

1. Repeal rules 4.300 and 4.453 of the California Rules of Court to reflect changes discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice;
2. Amend rule 4.405 to:
 - clarify the definition of “base term,” and add definitions of “principal term,” “subordinate term,” and “offense;”
 - modify the definition of “aggravation” to apply to factors that justify the imposition of the upper prison term or factors that the court may consider in exercising discretion authorized by statute and under these rules including imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to section 1385(c); and
 - amend the advisory committee comment to reflect changes regarding sentencing triads;
3. Amend rule 4.406 to :
 - delete a provision requiring the court to state reasons for declining to commit an eligible juvenile found amenable to treatment to the Department of Corrections and Rehabilitation, Division of Juvenile Justice, to reflect the repeal of Welfare and Institutions Code section 707.2;
 - require a court to state reasons for selecting a term for either an offense or an enhancement; and
 - amend the advisory committee comment to rule 4.406 to reflect changes regarding sentencing triads;
4. Amend the advisory committee comment to rule 4.408 to reflect changes regarding sentencing triads;
5. Amend rule 4.411.5 to:
 - require the contents of a probation officer’s presentence investigation report to include: whether factors in aggravation were proven beyond a reasonable doubt or

stipulated; specific factors in mitigation that may require imposition of a low term; and discussion of both aggravating and mitigating factors related to disposition;

- to require the contents of a probation officer's presentence investigation report to include any mitigating factors pursuant to Penal Code section 1385(c);
 - to delete references to chargeable probation services and attorney fees under Penal Code section 987.8, to reflect the repeal of these fees by Assembly Bill 1869 (Stats. 2020, ch. 92);
6. Amend rule 4.414 to state that a court may consider factors in aggravation and mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt, when determining a defendant's suitability for probation;
 7. Amend rule 4.420 to
 - clarify in the title that it addresses offenses, and not enhancements;
 - reflect changes regarding sentencing triads, including under what circumstances the court may impose the upper term;
 - reflect changes regarding mandatory imposition of the low term under specified circumstances; and
 - amend the advisory committee comment to reflect changes regarding sentencing triads and to include a definition of "interests of justice;"
 8. Amend the advisory committee comment to rule 4.421 to reflect changes regarding sentencing triads and nonsubstantive technical amendments;
 9. Amend rule 4.423 to add mitigating factors specified in Penal Code section 1385(c);
 10. Amend rule 4.424 to reflect changes allowing the court to use its discretion regarding which act or omission to punish under Penal Code section 654;
 11. Amend rule 4.425 to clarify that a court may consider any circumstances in aggravation or mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt, when considering whether to impose consecutive or concurrent sentences, with specified exceptions;
 12. Amend rule 4.427 to:
 - reflect changes to Penal Code section 1385(c) regarding dismissal of enhancements; and

- amend the advisory committee comment to reflect changes to Penal Code sections 1170.1, regarding requirements to impose the upper term of an enhancement, and 1385(c), regarding dismissal of enhancements;
13. Amend rule 4.428 to reflect changes regarding enhancements with triads and include a new section on dismissal of enhancements under Penal Code section 1385(c);
 14. Amend the advisory committee comment to rule 4.428 to include definitions of “furtherance of justice” and “great weight;”
 15. Amend the advisory committee comment to rule 4.437 to state that the requirement that a statement in aggravation or mitigation include notice of intention to rely on new evidence may include either party’s intention to provide evidence to prove or contest the existence of a factor in mitigation that would require imposition of the low term for the underlying offense or dismissal of an enhancement; and
 16. Amend rule 4.447 to refer to Penal Code section 1385(c).

The proposed amended and repealed rules are attached at pages 9–27.

Relevant Previous Council Action

The Judicial Council last amended the felony sentencing rules of the California Rules of Court, rules 4.401–4.480, effective January 1, 2018, to (1) reflect amendments and updates related to changes in California’s Determinate Sentencing Law, indeterminate sentences, and sentencing enhancements; (2) reflect statutory amendments enacted as part of the Criminal Justice Realignment Act; (3) provide guidance to courts on the referral of cases to probation for investigation reports; (4) clarify the use of risk/needs assessments in a probation officer’s presentence report; (5) add the reporting requirements of Penal Code section 29810(c)(2) to the contents of a probation officer’s presentence report; and (6) make nonsubstantive technical amendments.

Analysis/Rationale

Effective January 1, 2022, several major legislative changes were made to sentencing of felony offenses and enhancements.

Penal Code section 1170(b)(1)–(3) and 1170.1(d) were added to state that a court may impose an upper term of custody if aggravating factors were found true beyond a reasonable doubt or stipulated to by the defendant, except when a prior conviction is used as an aggravating factor to impose the upper base term, but not for the upper term of an enhancement (Sen. Bill 567; Stats. 2021, ch. 731).

Penal Code section 1170(b)(6) was added to require the imposition of the low term of custody in specified circumstances, except if imposition of the low term would not be in the interests of justice if aggravating factors outweigh mitigating factors. The specified circumstances are (1) if

the person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence; (2) the person was a youth (defined as any person under 26 years of age) at the time of the commission of the offense; or (3) prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking (Assem. Bill 124; Stats. 2021, ch. 695).

Penal Code section 1385 was amended to direct the exercise of judicial discretion in striking enhancements in specified circumstances, unless the court finds that dismissal would endanger public safety (Sen. Bill 81; Stats. 2021, ch 721). The specified circumstances are as follows:

- Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of section 745.
- Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.
- The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.
- The current offense is connected to mental illness.
- The current offense is connected to prior victimization or childhood trauma.
- The current offense is not a violent felony as defined in subdivision (c) of section 667.5.
- The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.
- The enhancement is based on a prior conviction that is over five years old.
- Though a firearm was used in the current offense, it was inoperable or unloaded.

Most of the recommended amendments reflect these changes to Penal Code sections 1170, 1170.01, and 1385. In addition, the proposed amendments reflect the committee's conclusion that the new statutory requirements for imposition of an upper term of an offense or enhancement do not apply when the court is imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to section 1385(c). (See *People v. Black* (2007) 41 Cal.4th 799, 815–816 (*Black II*) [aggravating circumstances serve two analytically distinct functions in California's current determinate sentencing scheme; one function is to raise the maximum permissible sentence from the middle term to the upper term, and the other function is to serve as a consideration in the trial court's exercise of its discretion in selecting the appropriate term from among those authorized for the defendant's offense].) These changes are reflected in the recommended amendments to rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.425, 4.427, 4.428, 4.437, and 4.447.

Finally, Penal Code section 654 was amended to allow an act or omission that is punishable in different ways by different laws to be punished under either of those provisions (Assem. Bill 518; Stats. 2021, ch. 441). The statutory amendment is reflected in the recommended amendment to rule 4.424.

The committee also recommends repealing rules 4.430 and 4.453, and amending rule 4.406 to reflect statutory changes discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (Sen. Bill 92; Stats. 2021, ch. 18).

Policy implications

The proposed rule amendments reflect several major legislative changes to sentencing of felony offenses and enhancements, which went into effect January 1, 2022, and should take effect immediately to ensure that the rules of court are consistent with statute.

Comments

Six stakeholders submitted comments: two superior courts (Los Angeles and San Diego Counties), a public defender's office (San Diego County), the Pacific Juvenile Defender Center, California Attorneys for Criminal Justice, and a member of the public. One commenter agreed with the proposal and five agreed if modified. The committee incorporated several comments suggesting further clarity and consistency in the rules.

Standard of proof of aggravating circumstances when the mitigating circumstances in section 1170(b)(6) are present. The San Diego County Public Defender's Office recommended that the rules state that aggravating circumstances in the context of Penal Code section 1170(b)(6) must be stipulated to by the defendant or proven true beyond a reasonable doubt. The committee does not recommend this language because section 1170(b)(6) does not state that aggravating circumstances that the court relies on to not impose the lower term must be proven beyond a reasonable doubt or stipulated to by the defendant.

Official record of conviction when imposing the upper term can only be used to prove the existence of a prior conviction but not an enhancement attached to the prior conviction.

Penal Code section 1170(b)(1)–(3) and 1170.1(d) were added to state that a court may impose an upper term of custody if aggravating factors were found true beyond a reasonable doubt or stipulated to by the defendant, except when a prior conviction is used as an aggravating factor to impose the upper base term, but not for the upper term of an enhancement (Sen. Bill 567; Stats. 2021, ch. 731).

The proposed amendments include advisory committee comments to rules 4.405, 4.408, and 4.421 referencing the exception:

In determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified official records. This exception may not be used to select the upper term of an enhancement.

The San Diego County Public Defender's Office recommended additional language stating that “this exception only applies to the base crime of the prior conviction and not to any enhancements attached to that base crime,” which is a restatement of another clause in Penal

Code section 1170(b)(3): “This paragraph does not apply to enhancements imposed on prior convictions.” The committee does not recommend adding language about the exception not applying to enhancements attached to the prior conviction as that goes to issues of proof rather than sentencing.

Restitution order becoming a judgment. California Attorneys for Criminal Justice recommended deleting language in rule 4.411.5 concerning a recommendation by the probation officer about whether any restitution order should become a judgment under section 1203(j) if unpaid. They noted that under section 1214(b), any restitution order is a judgment, so that it was unclear why the probation officer would recommend that it should become a judgment, and could result in a conflict between court orders and section 1214(b). Because this would be an important substantive change to the proposal, the committee believes public comment should be sought before they are considered for adoption, and the committee will consider this suggestion during the next rules cycle.

Legislative history on application of Penal Code section 1385(c), dismissal of enhancements, to alternative sentencing schemes. The advisory committee comment to rule 4.428 included the following language in the proposal that circulated for comment:

The legislative history on Senate Bill 81 states that the presumption created by Penal Code section 1385(c) does not apply to alternative sentencing schemes such as One Strike, Two Strikes, or Three Strikes. (See Assem. Com. Pub. Safety, Report on Sen. Bill 81 (2021–2022 Reg. Sess.) June 29, 2021, pp. 5–6.) Unlike an offense specific enhancement, an alternative sentencing scheme does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence for the underlying felony itself when it is proven that certain conditions specified in the statute are true. (See *People v. Anderson* (2009) 47 Cal.4th 92, 102; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.)

Three commenters—California Attorneys for Criminal Justice, the Pacific Juvenile Defender Center, and the San Diego County Public Defender’s Office—raised concerns about whether the Legislature intended for dismissals of enhancements under section 1385(c) to apply to prior serious and violent felony convictions and adjudications under the Three Strikes Law. In light of these comments, the committee recommends deleting the legislative history and case law included in the comment.

Alternatives considered

The committee did not consider alternatives, determining that the rule amendments were needed to reflect legislative changes.

Fiscal and Operational Impacts

No implementation or operational impacts are likely.

Attachments and Links

1. Cal. Rules of Court, rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.433, at pages 9–27
2. Attachment A: Chart of comments, at pages 28–57

Rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, and 4.447 are amended, and rules 4.300 and 4.453 are repealed, effective March 14, 2022, to read:

Rule 4.300. Commitments to nonpenal institutions

~~When a defendant is convicted of a crime for which sentence could be imposed under Penal Code section 1170 and the court orders that he or she be committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice under Welfare and Institutions Code section 1731.5, the order of commitment must specify the term of imprisonment to which the defendant would have been sentenced. The term is determined as provided by Penal Code sections 1170 and 1170.1 and these rules, as though a sentence of imprisonment were to be imposed.~~

Advisory Committee Comment

~~Commitments to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (formerly Youth Authority) cannot exceed the maximum possible incarceration in an adult institution for the same crime. (See *People v. Olivas* (1976) 17 Cal.3d 236.)~~

~~Under the indeterminate sentencing law, the receiving institution knew, as a matter of law from the record of the conviction, the maximum potential period of imprisonment for the crime of which the defendant was convicted.~~

~~Under the Uniform Determinate Sentencing Act, the court's discretion as to length of term leaves doubt as to the maximum term when only the record of convictions is present.~~

Rule 4.405. Definitions

As used in this division, unless the context otherwise requires:

(1) * * *

(2) “Base term” is the determinate or indeterminate sentence imposed for the commission of a crime, not including any enhancements that carry an additional term of imprisonment. ~~determinate term in prison or county jail under section 1170(h) selected from among the three possible terms prescribed by statute; the determinate term in prison or county jail under section 1170(h) prescribed by statute if a range of three possible terms is not prescribed; or the indeterminate term in prison prescribed by statute.~~

(3) When a person is convicted of two or more felonies, the “principal term” is the greatest determinate term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable count-specific enhancements.

- (4) When a person is convicted of two or more felonies, the “subordinate term” is the determinate term imposed for an offense, plus any count-specific enhancements applicable to the offense ordered to run consecutively to the principal term.
- ~~(3)~~ (5) “Enhancement” means an additional term of imprisonment added to the base term.
- (6) “Offense” means the offense of conviction unless a different meaning is specified or is otherwise clear from the context. The term “instant” or “current” is used in connection with “offense” or “offense of conviction” to distinguish the violation for which the defendant is being sentenced from an enhancement, prior or subsequent offense, or from an offense before another court.
- ~~(4)~~ (7) “Aggravation,” or “circumstances in aggravation” ~~“mitigation,” or “circumstances in mitigation”~~ means factors that justify the imposition of the upper prison term referred to in Penal Code section 1170(b) and 1170.1, or factors that the court may consider in exercising discretion authorized by statute and under these rules including imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to Penal Code section 1385(c). ~~that the court may consider in its broad sentencing discretion authorized by statute and under these rules.~~
- (8) “Mitigation” or “circumstances in mitigation” means factors that the court may consider in its broad sentencing discretion authorized by statute and under these rules.
- ~~(5)~~ (9) “Sentence choice” means the selection of any disposition of the case that does not amount to a dismissal, acquittal, or grant of a new trial.
- ~~(6)~~ (10) “Section” means a section of the Penal Code.
- ~~(7)~~ (11) “Imprisonment” means confinement in a state prison or county jail under section 1170(h).
- ~~(8)~~ (12) “Charged” means charged in the indictment or information.
- ~~(9)~~ (13) “Found” means admitted by the defendant or found to be true by the trier of fact upon trial.
- ~~(10)~~ (14) “Mandatory supervision” means the period of supervision defined in section 1170(h)(5)(A), (B).

1 (11) (15) “Postrelease community supervision” means the period of supervision governed
2 by section 3451 et seq.

3
4 (12) (16) “Risk/needs assessment” means a standardized, validated evaluation tool
5 designed to measure an offender’s actuarial risk factors and specific needs that, if
6 successfully addressed, may reduce the likelihood of future criminal activity.

7
8 (13) (17) “Evidence-based practices” means supervision policies, procedures, programs,
9 and practices demonstrated by scientific research to reduce recidivism among
10 individuals under probation, parole, or postrelease supervision.

11
12 (14) (18) “Community-based corrections program” means a program consisting of a
13 system of services for felony offenders under local supervision dedicated to the
14 goals stated in section 1229(c)(1)–(5).

15
16 (15) (19) “Local supervision” means the supervision of an adult felony offender on
17 probation, mandatory supervision, or postrelease community supervision.

18
19 (16) (20) “County jail” means local county correctional facility.

20 21 **Advisory Committee Comment**

22
23 ~~Following the United States Supreme Court decision in *Cunningham v. California* (2007) 549~~
24 ~~U.S. 270, the Legislature amended the determinate sentencing law to remove the presumption that~~
25 ~~the court is to impose the middle term on a sentencing triad, absent aggravating or mitigating~~
26 ~~circumstances. (See Sen. Bill 40; Stats. 2007, ch. 3.) It subsequently amended sections 186.22,~~
27 ~~186.33, 1170.1, 12021.5, 12022.2, and 12022.4 to eliminate the presumptive middle term for an~~
28 ~~enhancement. (See Sen. Bill 150; Stats. 2009, ch. 171.) Instead of finding facts in support of a~~
29 ~~sentencing choice, courts are now required to state reasons for the exercise of judicial discretion~~
30 ~~in sentencing.~~

31
32 The Legislature amended the determinate sentencing law to require courts to order imposition of
33 a sentence or enhancement not to exceed the middle term unless factors in aggravation justify
34 imposition of the upper term and are stipulated to by the defendant or found true beyond a
35 reasonable doubt at trial by the jury or by the judge in a court trial. (See Sen. Bill 567; Stats.
36 2021, ch. 731.) However, in determining whether to impose the upper term for a criminal offense,
37 the court may consider as an aggravating factor that a defendant has suffered one or more prior
38 convictions, based on certified records of conviction. This exception may not be used to select the
39 upper term of an enhancement.

40
41 The court may exercise its judicial discretion in imposing the middle term or low term and must
42 state the facts and reasons on the record for choosing the sentence imposed. In exercising this
43 discretion between the middle term and the low term, the court may rely on aggravating factors

1 that have not been stipulated to by the defendant or proven beyond a reasonable doubt. (*People v.*
2 *Black* (2007) 41 Cal.4th 799.)

3
4 The Legislature also amended the determinate sentencing law to require courts to order
5 imposition of the low term when the court finds that certain factors contributed to the commission
6 of the crime unless the court finds that it would not be in the interests of justice to do so because
7 the aggravating factors outweigh the mitigating factors. (Pen. Code, § 1170(b)(6).)
8

9 **Rule 4.406. Reasons**

10
11 **(a) * * ***

12 13 **(b) When reasons required**

14
15 Sentence choices that generally require a statement of a reason include, but are not
16 limited to:

- 17
18 (1) Granting probation when the defendant is presumptively ineligible for
19 probation;
20
21 (2) Denying probation when the defendant is presumptively eligible for
22 probation;
23
24 ~~(3) Declining to commit an eligible juvenile found amenable to treatment to the~~
25 ~~Department of Corrections and Rehabilitation, Division of Juvenile Justice;~~
26
27 (4) (3) Selecting a term for either an offense or an enhancement one of the three
28 authorized terms in prison or county jail under section 1170(h) referred to in
29 section 1170(b) for either a base term or an enhancement;
30
31 ~~(5) (4) Imposing consecutive sentences;~~
32
33 ~~(6) (5) Imposing full consecutive sentences under section 667.6(c) rather than~~
34 ~~consecutive terms under section 1170.1(a), when the court has that choice;~~
35
36 ~~(7) (6) Waiving a restitution fine;~~
37
38 ~~(8) (7) Granting relief under section 1385; and~~
39
40 ~~(9) (8) Denying mandatory supervision in the interests of justice under section~~
41 ~~1170(h)(5)(A).~~
42

43 **Advisory Committee Comment**

1
2 * * *

3
4 **Rule 4.408. Listing of factors not exclusive; sequence not significant**

5
6 (a)–(b) * * *

7 **Advisory Committee Comment**

8
9 The variety of circumstances presented in felony cases is so great that no listing of criteria could
10 claim to be all-inclusive. (Cf., Evid. Code, § 351.)

11
12 The court may impose a sentence or enhancement exceeding the middle term only if the facts
13 underlying the aggravating factor were stipulated to by the defendant or found true beyond a
14 reasonable doubt at trial by the jury or by the judge in a court trial. (Pen. Code, § 1170(b)(2).)

15
16 However, in determining whether to impose the upper term for a criminal offense, the court may
17 consider as an aggravating factor that a defendant has suffered one or more prior convictions,
18 based on certified records of conviction. This exception may not be used to select the upper term
19 of an enhancement. (Pen. Code, § 1170(b)(3).)

20
21 The Legislature also amended the determinate sentencing law to require courts to order
22 imposition of the low term when the court finds that certain factors contributed to the commission
23 of the crime unless the court finds that it would not be in the interests of justice to do so because
24 the aggravating factors outweigh the mitigating factors. (Pen. Code, § 1170(b)(6).)

25
26
27 **Rule 4.411.5. Probation officer's presentence investigation report**

28
29 (a) **Contents**

30
31 A probation officer's presentence investigation report in a felony case must include
32 at least the following:

33
34 (1) A face sheet showing at least:

35
36 (A) The defendant's name and other identifying data;

37
38 (B) The case number;

39
40 (C) The crime of which the defendant was convicted, and any
41 enhancements which were admitted or found true;
42

(D) Any factors in aggravation including whether the factors were stipulated to by the defendant, found true beyond a reasonable doubt at trial by a jury, or found true beyond a reasonable doubt by a judge in a court trial;

~~(D)~~ (E) The date of commission of the crime, the date of conviction, and any other dates relevant to sentencing;

~~(E)~~ (F) The defendant's custody status; and

~~(F)~~ (G) The terms of any agreement on which a plea of guilty was based.

(2)–(5) * * *

(6) Any relevant facts concerning the defendant's social history, including those categories enumerated in section 1203.10, organized under appropriate subheadings, including, whenever applicable, "Family," "Education," "Employment and income," "Military," "Medical/psychological," "Record of substance abuse or lack thereof," and any other relevant subheadings. This includes;

(A) ~~F~~Factors relevant to whether the defendant may be suffering from sexual trauma, traumatic brain injury, posttraumatic stress disorder, substance abuse, or mental health problems as a result of his or her U.S. military service; and

(B) Factors listed in section 1170(b)(6) and whether the current offense is connected to those factors.

(7)–(9) * * *

(10) Any mitigating factors pursuant to section 1385(c).

~~(10)~~ (11) The probation officer's recommendation. When requested by the sentencing judge or by standing instructions to the probation department, the report must include recommendations concerning the length of any prison or county jail term under section 1170(h) that may be imposed, including the base term, the imposition of concurrent or consecutive sentences, and the imposition or striking of the additional terms for enhancements charged and found.

~~(11)~~ (12) Detailed information on presentence time spent by the defendant in custody, including the beginning and ending dates of the period or periods of

1 custody; the existence of any other sentences imposed on the defendant
2 during the period of custody; the amount of good behavior, work, or
3 participation credit to which the defendant is entitled; and whether the sheriff
4 or other officer holding custody, the prosecution, or the defense wishes that a
5 hearing be held for the purposes of denying good behavior, work, or
6 participation credit.

7
8 ~~(12)~~ (13) A statement of mandatory and recommended restitution, restitution fines,
9 and other fines, fees, assessments, penalties, and costs to be assessed against
10 the defendant; including chargeable probation services and attorney fees
11 under section 987.8 when appropriate, findings concerning the defendant's
12 ability to pay, and a recommendation whether any restitution order should
13 become a judgment under section 1203(j) if unpaid; and, when appropriate,
14 any finding concerning the defendant's ability to pay.

15
16 ~~(13)~~ (14) Information pursuant to ~~Penal Code~~ section 29810(c):

17
18 (A)–(B) * * *

19
20 (b)–(c) * * *

21
22 **Rule 4.414. Criteria affecting probation**

23
24 Criteria affecting the decision to grant or deny probation include facts relating to the
25 crime and facts relating to the defendant.

26
27 (a)–(b) * * *

28
29 **(c) Suitability for probation**

30
31 In determining the suitability of the defendant for probation, the court may consider
32 factors in aggravation and mitigation, whether or not the factors have been
33 stipulated to by the defendant or found true beyond a reasonable doubt at trial by a
34 jury or the judge in a court trial.

35
36 **Advisory Committee Comment**

37
38 * * *

39
40 **Rule 4.420. Selection of term of imprisonment for offense**

41
42 (a) When a ~~sentence~~ judgment of imprisonment is imposed, or the execution of a
43 ~~sentence~~ judgment of imprisonment is ordered suspended, the sentencing judge

1 must, in their sound discretion, order imposition of a sentence not to exceed the
2 middle term, except as otherwise provided in paragraph (b). ~~select the upper,~~
3 ~~middle, or lower term on each count for which the defendant has been convicted, as~~
4 ~~provided in section 1170(b) and these rules.~~

5
6 **(b)** The court may only choose an upper term when (1) there are circumstances in
7 aggravation of the crime that justify the imposition of an upper term, and (2) the
8 facts underlying those circumstances have been (i) stipulated to by the defendant,
9 (ii) found true beyond a reasonable doubt at trial by a jury, or (iii) found true
10 beyond a reasonable doubt by the judge in a court trial.

11
12 **(c)** Notwithstanding paragraphs (a) and (b), the court may consider the fact of the
13 defendant's prior convictions based on a certified record of conviction without it
14 having been stipulated to by the defendant or found true beyond a reasonable doubt
15 at trial by a jury or the judge in a court trial. This exception does not apply to the
16 use of the record of a prior conviction in selecting the upper term of an
17 enhancement.

18
19 ~~**(b)**~~ **(d)** In selecting between the middle and lower terms of imprisonment, exercising his
20 or her discretion in selecting one of the three authorized terms of imprisonment
21 referred to in section 1170(b), the sentencing judge may consider circumstances in
22 aggravation or mitigation, and any other factor reasonably related to the sentencing
23 decision. The court may consider factors in aggravation and mitigation, whether or
24 not the factors have been stipulated to by the defendant or found true beyond a
25 reasonable doubt at trial by a jury or the judge in a court trial. The relevant
26 circumstances may be obtained from the case record, the probation officer's report,
27 other reports and statements properly received, statements in aggravation or
28 mitigation, and any evidence introduced at the sentencing hearing.

29
30 **(e)** Notwithstanding section 1170(b)(1), and unless the court finds that the aggravating
31 circumstances outweigh the mitigating circumstances such that imposition of the
32 lower term would be contrary to the interests of justice, the court must order
33 imposition of the lower term if any of the following was a contributing factor in the
34 commission of the offense:

35
36 **(1)** The defendant has experienced psychological, physical, or childhood trauma,
37 including, but not limited to, abuse, neglect, exploitation, or sexual violence;

38
39 **(2)** The defendant is a youth, or was a youth as defined under section 1016.7(b)
40 at the time of the commission of the offense; or
41

(3) Prior to the instant offense, or at the time of the commission of the offense, the defendant is or was a victim of intimate partner violence or human trafficking.

(f) Paragraph (e) does not preclude the court from imposing the lower term even if there is no evidence of the circumstances listed in paragraph (e).

(e) (g) To comply with section 1170(b)(5), a fact charged and found as an enhancement may be used as a reason for imposing a particular 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.

(d) (h) A fact that is an element of the crime on which punishment is being imposed may not be used to impose a particular term.

(e) (i) The reasons for selecting one of the three authorized terms of imprisonment referred to in section 1170(b) must be stated orally on the record.

Advisory Committee Comment

~~The determinate sentencing law authorizes the court to select any of the three possible terms of imprisonment even though neither party has requested a particular term by formal motion or informal argument. Section 1170(b) vests the court with discretion to impose any of the three authorized terms of imprisonment and requires that the court state on the record the reasons for imposing that term.~~

It is not clear whether the reasons stated by the judge for selecting a particular term qualify as “facts” for the purposes of the rule prohibition on dual use of facts. Until the issue is clarified, judges should avoid the use of reasons that may constitute an impermissible dual use of facts. For example, the court is not permitted to use a reason to impose a greater term if that reason also is either (1) the same as an enhancement that will be imposed, or (2) an element of the crime. The court should not use the same reason to impose a consecutive sentence as to impose an upper term of imprisonment. (*People v. Avalos* (1984) 37 Cal.3d 216, 233.) It is not improper to use the same reason to deny probation and to impose the upper term. (*People v. Bowen* (1992) 11 Cal.App.4th 102, 106.)

The rule makes it clear that a fact charged and found as an enhancement may, in the alternative, be used as a factor in aggravation.

People v. Riolo (1983) 33 Cal.3d 223, 227 (and note 5 on 227) held that section 1170.1(a) does not require the judgment to state the base term (upper, middle, or lower) and enhancements,

1 computed independently, on counts that are subject to automatic reduction under the one-third
2 formula of section 1170.1(a).

3
4 Even when sentencing is under section 1170.1, however, it is essential to determine the base term
5 and specific enhancements for each count independently, in order to know which is the principal
6 term count. The principal term count must be determined before any calculation is made using the
7 one-third formula for subordinate terms.

8
9 In addition, the base term (upper, middle, or lower) for each count must be determined to arrive at
10 an informed decision whether to make terms consecutive or concurrent; and the base term for
11 each count must be stated in the judgment when sentences are concurrent or are fully consecutive
12 (i.e., not subject to the one-third rule of section 1170.1(a)).

13
14 Case law suggests that in determining the “interests of justice” the court should consider the
15 constitutional rights of the defendant and the interests of society represented by the people; the
16 defendant’s background and prospects, including the presence or absence of a record; the nature
17 and circumstances of the crime and the defendant’s level of involvement; the factors in
18 aggravation and mitigation including the specific factors in mitigation of Penal Code section
19 1170(b)(6); and the factors that would motivate a “reasonable judge” in the exercise of their
20 discretion. The court should not consider whether the defendant has simply pled guilty, factors
21 related to controlling the court’s calendar, or antipathy toward the statutory scheme. (See *People*
22 *v. Romero* (1996) 13 Cal.4th 947; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v.*
23 *Kessel* (1976) 61 Cal.App.3d 322; *People v. Orin* (1975) 13 Cal.3d 937.)

24 25 **Rule 4.421. Circumstances in aggravation**

26
27 Circumstances in aggravation include factors relating to the crime and factors relating to
28 the defendant.

29
30 **(a)–(c) * * ***

31 32 **Advisory Committee Comment**

33
34 ~~Circumstances in aggravation may justify imposition of the middle or upper of three possible~~
35 ~~terms of imprisonment. (Section 1170(b).)~~

36
37 ~~The list of circumstances in aggravation includes some facts that, if charged and found, may be~~
38 ~~used to enhance the sentence.~~

39
40 Courts may not impose a sentence greater than the middle term except when aggravating factors
41 justifying the imposition of the upper term have been stipulated to by the defendant or found true
42 beyond a reasonable doubt at trial by the jury or the judge in a court trial. These requirements do
43 not apply to consideration of aggravating factors for the lower or middle term. If the court finds

1 that any of the factors listed in section 1170(b)(6)(A–C) were a contributing factor to the
2 commission of the offense, the court must impose the lower term (see rule 4.420(e)) unless the
3 court finds that the aggravating factors outweigh the mitigating factors to such a degree that
4 imposing the lower term would be contrary to the interests of justice. In this instance, since the
5 court is not addressing the imposition of the upper term, the court may consider factors in
6 aggravation that have not been stipulated to by the defendant or found true beyond a reasonable
7 doubt at trial by the jury or the judge in a court trial.

8
9 In determining whether to impose the upper term for a criminal offense, the court may consider as
10 an aggravating factor that a defendant has suffered one or more prior convictions, based on a
11 certified record of conviction. This exception may not be used to select the upper term of an
12 enhancement.

13
14 This rule does not deal with the dual use of the facts; the statutory prohibition against dual use is
15 included, in part, in the comment to rule 4.420.

16
17 ~~Conversely, such facts as infliction of bodily harm, being armed with or using a weapon, and a~~
18 ~~taking or loss of great value may be circumstances in aggravation even if not meeting the~~
19 ~~statutory definitions for enhancements or charged as an enhancement.~~

20
21 ~~Facts concerning the defendant’s prior record and personal history may be considered. By~~
22 ~~providing that the defendant’s prior record and simultaneous convictions of other offenses may~~
23 ~~not be used both for enhancement and in aggravation, section 1170(b) indicates that these and~~
24 ~~other facts extrinsic to the commission of the crime may be considered in aggravation in~~
25 ~~appropriate cases.~~

26
27 Refusal to consider the personal characteristics of the defendant in imposing sentence may raise
28 serious constitutional questions. The California Supreme Court has held that sentencing decisions
29 must take into account “the nature of the offense and/or the offender, with particular regard to the
30 degree of danger both present to society.” (*In re Rodriguez* (1975) 14 Cal.3d 639, 654, quoting *In*
31 *re Lynch* (1972) 8 Cal.3d 410, 425.) In *Rodriguez* the court released petitioner from further
32 incarceration because “it appears that neither the circumstances of his offense *nor his personal*
33 *characteristics* establish a danger to society sufficient to justify such a prolonged period of
34 imprisonment.” (*Id.* at p. 655, fn. omitted, italics added.) “For the determination of sentences,
35 justice generally requires . . . that there be taken into account the circumstances of the offense
36 together with the character and propensities of the offender.” (*Pennsylvania ex rel. Sullivan v.*
37 *Ashe* (1937) 302 U.S. 51, 55, quoted with approval in *Gregg v. Georgia* (1976) 428 U.S. 153,
38 189.)

39
40 ~~Former subdivision (a)(4), concerning multiple victims, was deleted to avoid confusion. Some of~~
41 ~~the cases that had relied on that circumstance in aggravation were reversed on appeal because~~
42 ~~there was only a single victim in a particular count.~~

~~Old age or youth of the victim may be circumstance in aggravation; see section 1170.85(b). Other statutory circumstances factors in aggravation are listed, for example, in sections 422.76, 1170.7, 1170.71, 1170.8, and 1170.85, and may be considered to impose the upper term if stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial.~~

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include factors relating to the crime and factors relating to the defendant.

(a) Factors relating to the crime

Factors relating to the crime include that:

(1)–(9) * * *

(10) If a firearm was used in the commission of the offense, it was unloaded or inoperable.

(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1)–(2) * * *

(3) The defendant experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence and it was a factor in the commission of the crime;

(4) The commission of the current offense is connected to the defendant's prior victimization or childhood trauma, or mental illness as defined by section 1385(c);

(5) The defendant is or was a victim of intimate partner violence or human trafficking at the time of the commission of the offense, and it was a factor in the commission of the offense;

(6) The defendant is under 26 years of age, or was under 26 years of age at the time of the commission of the offense;

(7) The defendant was a juvenile when they committed the current offense;

- (3) (8) The defendant voluntarily acknowledged wrongdoing before arrest or at an early stage of the criminal process;
- (4) (9) The defendant is ineligible for probation and but for that ineligibility would have been granted probation;
- (10) Application of an enhancement could result in a sentence over 20 years;
- (11) Multiple enhancements are alleged in a single case;
- (12) Application of an enhancement could result in a discriminatory racial impact;
- (13) An enhancement is based on a prior conviction that is over five years old;
- (5) (14) The defendant made restitution to the victim; and
- (6) (15) The defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was satisfactory.

(c) * * *

Advisory Committee Comment

* * *

Rule 4.424. Consideration of applicability of section 654

Before determining whether to impose either concurrent or consecutive sentences on all counts on which the defendant was convicted, the court must determine whether the proscription in section 654 against multiple punishments for the same act or omission requires a stay of execution of the sentence imposed on some of the counts. If a stay of execution is required due to the prohibition against multiple punishments for the same act, the court has discretion to choose which act or omission will be punished and which will be stayed.

Rule 4.425. Factors affecting concurrent or consecutive sentences

Factors affecting the decision to impose consecutive rather than concurrent sentences include:

(a) * * *

1 **(b) Other facts and limitations**

2
3 Any circumstances in aggravation or mitigation, whether or not the factors have
4 been stipulated to by the defendant or found true beyond a reasonable doubt at trial
5 by a jury or the judge in a court trial, may be considered in deciding whether to
6 impose consecutive rather than concurrent sentences, except:

- 7
8 (1) A fact used to impose the upper term;
9
10 (2) A fact used to otherwise enhance the defendant's sentence in prison or county
11 jail under section 1170(h); and
12
13 (3) A fact that is an element of the crime, ~~may not be used to impose consecutive~~
14 ~~sentences.~~

15
16 **Advisory Committee Comment**

17
18 * * *

19
20 **Rule 4.427. Hate crimes**

21
22 **(a)–(b)** * * *

23
24 **(c) Hate crime enhancement**

25
26 If a hate crime enhancement is pled and proved, the punishment for a felony
27 conviction must be enhanced under section 422.75 unless the conviction is
28 sentenced as a felony under section 422.7.

- 29
30 (1) The following enhancements apply:
31
32 (A) An enhancement of a term in state prison as provided in section
33 422.75(a). Personal use of a firearm in the commission of the offense is
34 an aggravating factor that must be considered in determining the
35 enhancement term.
36
37 (B) An additional enhancement of one year in state prison for each prior
38 felony conviction that constitutes a hate crime as defined in section
39 422.55.
40
41 (2) The court may strike enhancements under (c) if it finds mitigating
42 circumstances under rule 4.423, or pursuant to section 1385(c) and states
43 those mitigating circumstances on the record.

(3) The punishment for any enhancement under (c) is in addition to any other punishment provided by law.

(d)–(e) * * *

Advisory Committee Comment

Multiple enhancements for prior convictions under subdivision (c)(1)(B) may be imposed if the prior convictions have been brought and tried separately. (Pen. Code, § 422.75(d).)

In order to impose the upper term based on section 422.75, the fact of the enhancement pursuant to sections 422.55 or 422.6 must be stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial.

Any enhancement alleged pursuant to this section may be dismissed pursuant to section 1385(c).

Rule 4.428. Factors affecting imposition of enhancements

(a) Enhancements punishable by one of three terms

If an enhancement is punishable by one of three terms, the court must, in its sound discretion, order imposition of a sentence not to exceed the middle term, unless there are circumstances in aggravation that justify the imposition of a term of imprisonment exceeding the middle term, and the facts underlying those circumstances have been stipulated to by the defendant, or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. ~~, in its discretion, impose the term that best serves the interest of justice and state the reasons for its sentence choice on the record at the time of sentencing. In exercising its discretion in selecting the appropriate term, the court may consider factors in mitigation and aggravation as described in these rules or any other factor authorized by rule 4.408.~~

(b) Striking or dismissing enhancements under section 1385

If the court has discretion under section 1385(a) to strike an enhancement in the interests of justice, the court also has the authority to strike the punishment for the enhancement under section 1385(e**b**). In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration.

1 **(c) Dismissing enhancements under section 1385(c)**

- 2
- 3 (1) The court shall exercise the discretion to dismiss an enhancement if it is in
- 4 the furtherance of justice to do so, unless the dismissal is prohibited by
- 5 initiative statute.
- 6
- 7 (2) In exercising its discretion under section 1385(c), the court must consider and
- 8 afford great weight to evidence offered by the defendant to prove that any of
- 9 the mitigating circumstances in section 1385(c) are present.
- 10
- 11 (A) Proof of the presence of one or more of these circumstances weighs
- 12 greatly in favor of dismissing the enhancement, unless the court finds
- 13 that dismissal of the enhancement would endanger public safety.
- 14
- 15 (B) The circumstances listed in 1385(c) are not exclusive.
- 16
- 17 (C) “Endanger public safety” means there is a likelihood that the dismissal
- 18 of the enhancement would result in physical injury or other serious
- 19 danger to others.
- 20
- 21 (3) If the court dismisses the enhancement pursuant to 1385(c), then both the
- 22 enhancement and its punishment must be dismissed.
- 23

24 **Advisory Committee Comment**

25

26 Case law suggests that in determining the “furtherance of justice” the court should consider the

27 constitutional rights of the defendant and the interests of society represented by the people; the

28 defendant’s background and prospects, including the presence or absence of a record; the nature

29 and circumstances of the crime and the defendant’s level of involvement; the factors in

30 aggravation and mitigation including the specific factors in mitigation of section 1385(c); and the

31 factors that would motivate a “reasonable judge” in the exercise of their discretion. The court

32 should not consider whether the defendant has simply pled guilty, factors related to controlling

33 the court’s calendar, or antipathy toward the statutory scheme. (See *People v. Romero* (1996) 13

34 Cal.4th 947; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v. Kessel* (1976) 61 Cal.App.3d

35 322; *People v. Orin* (1975) 13 Cal.3d 937.)

36

37 How to afford great weight to a mitigating circumstance is not further explained in section 1385.

38 The court is not directed to give conclusive weight to the mitigating factors, and must still engage

39 in a weighing of both mitigating and aggravating factors. A review of case law suggests that the

40 court can find great weight when there is an absence of “substantial evidence of countervailing

41 considerations of sufficient weight to overcome” the presumption of dismissal when the

42 mitigating factors are present. (*People v. Martin* (1996) 42 Cal.3d 437.) In exercising this

43 discretion, the court may rely on aggravating factors that have not been stipulated to by the

1 defendant or proven beyond a reasonable doubt at trial by a jury or a judge in a court trial.
2 (People v. Black (2007) 41 Cal.4th 799.)

3
4 **Rule 4.437. Statements in aggravation and mitigation**

5
6 **(a)–(e) * * ***

7
8 **Advisory Committee Comment**

9
10 Section 1170(b)(4) states in part:

11
12 “At least four days prior to the time set for imposition of judgment, either party or the victim, or
13 the family of the victim if the victim is deceased, may submit a statement in aggravation or
14 mitigation to dispute facts in the record or the probation officer’s report, or to present additional
15 facts.”

16
17 This provision means that the statement is a document giving notice of intention to dispute
18 evidence in the record or the probation officer’s report, or to present additional facts.

19
20 The statement itself cannot be the medium for presenting new evidence, or for rebutting
21 competent evidence already presented, because the statement is a unilateral presentation by one
22 party or counsel that will not necessarily have any indicia of reliability. To allow its factual
23 assertions to be considered in the absence of corroborating evidence would, therefore, constitute a
24 denial of due process of law in violation of the United States (14th Amend.) and California (art. I,
25 § 7) Constitutions.

26
27 The requirement that the statement include notice of intention to rely on new evidence will
28 enhance fairness to both sides by avoiding surprise and helping to ensure that the time limit on
29 pronouncing sentence is met. This notice may include either party’s intention to provide evidence
30 to prove or contest the existence of a factor in mitigation that would require imposition of the low
31 term for the underlying offense or dismissal of an enhancement.

32
33 **Rule 4.447. Sentencing of enhancements**

34
35 **(a) Enhancements resulting in unlawful sentences**

36
37 Except pursuant to section 1385(c), Aa court may not strike or dismiss an
38 enhancement solely because imposition of the term is prohibited by law or exceeds
39 limitations on the imposition of multiple enhancements. Instead, the court must:

- 40
41 (1) Impose a sentence for the aggregate term of imprisonment computed without
42 reference to those prohibitions or limitations; and
43

(2) Stay execution of the part of the term that is prohibited or exceeds the applicable limitation. The stay will become permanent once the defendant finishes serving the part of the sentence that has not been stayed.

(b) Multiple enhancements

Notwithstanding section 1385(c), if a defendant is convicted of multiple enhancements of the same type, the court must either sentence each enhancement or, if authorized, strike the enhancement or its punishment. While the court may strike an enhancement, the court may not stay an enhancement except as provided in (a) or as authorized by section 654.

Advisory Committee Comment

Subdivision (a). Statutory restrictions may prohibit or limit the imposition of an enhancement in certain situations. (See, for example, sections 186.22(b)(1), 667(a)(2), 667.61(f), 1170.1(f) and (g), 12022.53(e)(2) and (f), and Vehicle Code section 23558.)

Section 1385(c) requires that in the furtherance of justice certain enhancements be dismissed unless dismissal is prohibited by any initiative statute.

Present practice of staying execution is followed to avoid violating a statutory prohibition or exceeding a statutory limitation, while preserving the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1129–1130; *People v. Niles* (1964) 227 Cal.App.2d 749, 756.)

Only the portion of a sentence or component thereof that exceeds a limitation is prohibited, and this rule provides a procedure for that situation. This rule applies to both determinate and indeterminate terms.

Subdivision (b). A court may stay an enhancement if section 654 applies. (See *People v. Bradley* (1998) 64 Cal.App.4th 386; *People v. Haykel* (2002) 96 Cal.App.4th 146, 152.)

Rule 4.453. Commitments to nonpenal institutions

~~When a defendant is convicted of a crime for which sentence could be imposed under Penal Code section 1170 and the court orders that he or she be committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice under Welfare and Institutions Code section 1731.5, the order of commitment must specify the term of imprisonment to which the defendant would have been sentenced. The term is determined as provided by Penal Code sections 1170 and 1170.1 and these rules, as though a sentence of imprisonment were to be imposed.~~

~~Advisory Committee Comment~~

~~Commitments to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (formerly Youth Authority) cannot exceed the maximum possible incarceration in an adult institution for the same crime. (See *People v. Olivas* (1976) 17 Cal.3d 236.)~~

~~Under the indeterminate sentencing law, the receiving institution knew, as a matter of law from the record of the conviction, the maximum potential period of imprisonment for the crime of which the defendant was convicted.~~

~~Under the Uniform Determinate Sentencing Act, the court's discretion as to length of term leaves doubt as to the maximum term when only the record of convictions is present.~~

SP22-02**Criminal Law: Felony Sentencing** (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	Position	Comment	Committee Response
1.	Caitlin Peters	AM	<p>1.) Does the proposal appropriately address the stated purpose?</p> <p>-It addresses the need for change but it neglects to address cases for example “warbler”. If the defendant is available for the warbler misdemeanor then a felony 5 year probation and in custody sentence should not be an appropriate sentence. Also, I feel and have witnessed many civil cases wrongly admitted into criminal court resulting in incarceration of inmates criminally when the matter should have been civilly. Mainly, the biggest concern is accountability and the information for abusive practices. More times than not a judge knows the “victim” and inevitably discriminates on the defendant by criminal convictions instead of civil judgement when civil is the jurisdiction in which it belongs. Without the ability to exercise our constitutional rights inevitably fiscal overhead is sky rocketing as a multitude of corrupt judges continue to disregard “justice for all” because there’s no justice when a civilian challenge the justices. A defendant challenging the Justices ends up incarcerated, discriminated against, and the abuse becomes excessive abuse done at the hands of “Justice”.</p> <p>The advisory committee also seeks comments from courts on the following cost and implementation matters:</p>	The committee has reviewed the comment, but the concerns raised regarding alleged practices in the courts are outside the scope of this proposal, which is to implement the changes in felony sentencing enacted in recent legislation.

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	Position	Comment	Committee Response
			<p>2.) Would the proposal provide cost savings? If so, please quantify.</p> <p>-If the courts acted with an ethical mind and no greed your cost and savings would be appropriate and not in gross excess. There is no “changes” that can fix this aside from criminal prosecution to judicial administration committing crimes against civilians and the way the conduct abusive practices within the individual justice systems.</p> <p>3.) What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?</p> <p>* TEACH ETHICS AND THEN HOLD ACCOUNTIBILITY FOR ABUSIVE PRACTICES. TEACH HUMAN KINDNESS. WHEN HIRING DO NOT HIRE CRIMINALS WITH NO ETHICS TO CONDUCT JUDICIAL BUSINESS. NO MORE TENURE. IF A JUDGE IS FOUND TO BE IN VIOLATION OF ANYTHING THEY ARE OUT AND IF THAT IS IGNORED THEN THEY ARE INCARCERATED. YOU WANT TO SAVE TAX PAYERS DOLLARS THEN FIX YOU COLLEAGUES AND NOT THE CIVILIANS. TEACH WHAT THE TRUE MEANING OF</p>	

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	Position	Comment	Committee Response
			<p>INTENT IS AND CONDUCT AUDITS AND REVIEWS RANDOMLY OF DIFFERENT VOLUMES OF COURT PROCEEDINGS TO ENSURE SUPERIOR COURTS ARE ACTING ACCORDINGLY, IF NOT THEN YOU NEED TO ACT ACCORDINGLY.</p> <p>4.) How well would this proposal work in courts of different sizes?</p> <p>* THE PROBLEM IS NOT IN SIZE BUT IN NEGLIGENCE BY UPPER COURTS TO HOLD LOWER COURTS ACCOUNTABILITY FOR ABUSIVE BEHAVIORS. ALSO, THE INABILITY TO REQUEST ASSISTANCE IN MATTERS OF UNETHICAL PRACTICES CONDUCTED BY SUPERIOR COURT OR EMPLOYEES IS APPALLING. QUIT WRONGFULLY PROSECUTING AND ENSLAVING US CITIZENS IN PRIVATE FOR PROFIT PRISONS. MAKING THE INCARCERATION AND CORRUPT COURT JUSTICES GO HAND IN HAND DUE TO A NEED. TAKE ACCOUNTABILITY AND THE PROCESS OF GAINING ACCOUNTABILITY BE OF MORE PRIORITY AND YOU WONT HAVE AN UNEQUAL BALANCE OF INMATES ARRESTED WITHOUT BEING A DANGER TO SOCIETY. WHICH IS TRULY THE ONLY REASON A PERSON SHOULD EVER</p>	

SP22-02**Criminal Law: Felony Sentencing** (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	Position	Comment	Committee Response
			BE INCARCERATED.	
2.	California Attorneys for Criminal Justice by Stephen Munkelt, Executive Director	AM	See comments on specific provisions below.	
3.	Pacific Juvenile Defender Center by Lana Kreidie and Jonathan Laba, Executive Board Members	AM	See comments on specific provisions below.	
4.	San Diego County Public Defender's Office	AM	See comments on specific provisions below.	
5.	Superior Court of Los Angeles County by Bryan Borys	A	We have no objections to the proposed changes. See comments on specific provisions below.	
6.	Superior Court of San Diego County by Mike Roddy, Court Executive Officer	AM	<ul style="list-style-type: none"> • Does the proposal appropriately address the stated purpose? Yes. • Would the proposal provide cost savings? If so, please quantify. No. • What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? 	No response required.

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	Position	Comment	Committee Response
			Unknown at this time. • How well would this proposal work in courts of different sizes? The impact should not differ based on court size. See comments on specific provisions below.	

SP22-02

Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.405, Definitions		
Commenter	Comment	Committee Response
San Diego County Public Defender's Office	<p>(7) "Aggravation," or "circumstances in aggravation" means factors <u>that justify the imposition of the upper prison term, or a prison term exceeding the low term if the court finds that factors pursuant to Penal Code section 1170(b)(6) were a contributing factor to the offense, referred to in Penal Code sections 1170(b) and 1170.1, or factors that the court may consider in exercising discretion authorized by statute and under these rules including imposing the middle term instead of the low term when Penal Code section 1170(b)(6) factors are not present, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to Penal Code section 1385(c).</u></p> <p>Advisory committee comment</p> <p><u>The Legislature amended the determinate sentencing law to require courts to order imposition of a sentence or enhancement not to exceed the middle term unless factors in aggravation justify imposition of the upper term and are stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial. (See Sen. Bill 567; Stats. 2021, ch. 731.) However, in determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified official records of conviction. This exception can only be used to prove the existence of a prior conviction and does not apply to any enhancements attached to the prior conviction. (Pen. Code § 1170, subd. (b)(3).) This exception may not be used to select the upper term of an enhancement.</u></p>	<p>The committee is not adding this language to the recommended rule because aggravating circumstances under section 1170(b)(6) are incorporated into the definition.</p> <p>The committee agrees to change "certified official records" to "certified records of conviction." The committee is not adding language about the exception not applying to enhancements attached to the prior conviction as that goes to issues of proof rather than sentencing.</p>

SP22-02**Criminal Law: Felony Sentencing** (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.405, Definitions		
Superior Court of Los Angeles County	One issue for consideration: Rule 4.405(2) amends the definition of “base term.” It eliminates language regarding the use of the “base term” for crimes that carry determinate or indeterminate sentences. There is no apparent reason for this amendment other than to simplify the previous definition. None of the new laws requires changes to the definition of the “base term.”	The committee is recommending the amendment to simplify the definition of base term.
Superior Court of San Diego County	<ul style="list-style-type: none">• Since 4.405(10) (as amended) defines the term “section” as a “section of the Penal Code,” perhaps delete “Penal Code” where it appears in 4.405(7) (as amended); 4.411.5(a)(6)(B), (a)(10), and (a)(14); 4.427(c)(2) and advisory committee comments; 4.428 advisory committee comments; and 4.447 advisory committee comments.• Rule 4.405(17) (as amended) – add a period to the end of the sentence.	The committee agrees with these suggestions.

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.408, Listing of factors not exclusive; sequence not significant		
Commenter	Comment	Committee Response
San Diego County Public Defender's Office	<p>Advisory Committee Comment (re: Rule 4.408 - page 10) *** <u>However, in determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on a certified official records record of conviction. This exception only applies to the base crime of the prior conviction and not to any enhancements attached to that base crime. This exception may not be used to select the upper term of an enhancement. (Pen. Code § 1170(b)(3).)</u></p>	The committee agrees to amend “certified official records” to “certified records of conviction.” The committee declines to add language about the exception not applying to enhancements attached to the prior conviction as that goes to issues of proof rather than sentencing.
Superior Court of San Diego County	In the advisory committee comment to rule 4.408, it may be a good idea to repeat the info that the low term may be mandatory in some cases (similar to the language in advisory committee comment for rule 4.405).	The committee agrees with the recommendation.

SP22-02**Criminal Law: Felony Sentencing** (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.411.5, Probation officer's presentence investigation report		
Commenter	Comment	Committee Response
Superior Court of San Diego County	<ul style="list-style-type: none"> In rule 4.411.5(a)(1)(C) consider adding the following underlined language: "...any enhancements which were <u>admitted or</u> found true." Rule 4.411.5(a)(11) (as amended) – keep the "and." In rule 4.411.5(a)(14) (as amended), consider adding the following underlined language "restitution, restitution fines, <u>and</u> other fines, <u>fees, assessments, penalties, and</u> costs..." 	The committee agrees with these suggestions and has incorporated them into the amendments that it is recommending to the Council.
California Attorneys for Criminal Justice	<p>Rule 4.411.5(a)(13)</p> <p>This concern is directed to language that has been in the Rule previously, but which may be inappropriate or obsolete. The Rule generally is describing requirements for the probation officer's pre-sentence report. Subdivision (a)(13) is proposed to read:</p> <p>"A statement of mandatory and recommended restitution, restitution fines, other fines, and costs to be assessed against the defendant; a recommendation whether any restitution order should become a judgment under section 1203(j) if unpaid.; and, when appropriate, any finding concerning the defendant's ability to pay."</p>	

SP22-02**Criminal Law: Felony Sentencing** (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.411.5, Probation officer's presentence investigation report		
	Under Penal Code § 1214(b) any restitution order is a judgment, so it is unclear why the probation officer should recommend that it should become a judgment. If the probation officer recommended that the restitution not be made a judgment the court's orders would be in conflict with § 1214, and the defendant would be mis-advised, and led to believe the sum could not be collected as a judgment. CACJ believes the clause "a recommendation whether any restitution order should become a judgment under section 1203(j) if unpaid" should be dropped from the Rule.	Because this would be an important substantive change to the proposal, the committee believes public comment should be sought before it is considered for adoption. The committee will consider this suggestion during the next rules cycle.

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.420, Selection of term of imprisonment for offense		
Commenter	Comment	Committee Response
San Diego County Public Defender's Office	<p>Rule 4.420. Selection of term of imprisonment for offense.</p> <p>(c) Notwithstanding paragraphs (a) and (b), the court may consider the fact of defendant's prior convictions based on a certified record of conviction without it having been stipulated to by the defendant or found true beyond a reasonable doubt to a jury at trial or the judge in a court trial. <i>This exception only applies to the base crime of the prior conviction and not to any enhancements attached to that base crime.</i> This exception does not apply to the use of the record of a prior conviction in selecting the upper term of an enhancement.</p> <p>(d) In selecting between the middle term and the lower terms of imprisonment, the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The court may consider factors in aggravation and mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt at a trial by a jury or a judge in a court trial. The relevant circumstances <i>that do not require stipulation by the defendant or proof beyond a reasonable doubt</i> 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.</p>	<p>The committee is not adding the proposed language about the exception not applying to enhancements attached to the prior conviction as that goes to issues of proof rather than sentencing.</p> <p>The committee is not adding this additional clause, as the requirements are articulated in the prior sentence.</p>

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.420, Selection of term of imprisonment for offense

San Diego County Public
Defender's Office

(e) Notwithstanding section 1170(b)(1), and unless the court finds that the aggravating circumstances, *which were stipulated to by the defendant or found true beyond a reasonable doubt by a jury at trial or by a judge in a court trial*, outweigh the mitigating circumstances such that imposition of the lower term would be contrary to the interests of justice, the court must order imposition of the lower term if any of the following was a contributing factor in the commission of the offense:

(1)-(3) * * *

*This paragraph does not apply to a sentence that must be imposed pursuant to Penal Code section 1170(b)(6). Where a factor listed in Penal Code section 1170(b)(6) is a contributing factor in the commission of the offense, **the court must impose the low term** unless the circumstances in aggravation so far outweigh the circumstances in mitigation that imposition of the low term is contrary to the interest of justice. A court may only use circumstances in aggravation that have been proved beyond a reasonable doubt or stipulated to by the defendant.*

Advisory Committee Comment

Case law suggests that in determining the “interests of justice” the court should consider the constitutional rights of the defendant and the interests of society represented by the people; the defendant’s background and prospects, including the presence or absence of a record; the nature and circumstances of the crime and the defendant’s level of involvement; the factors in aggravation and mitigation including the specific factors in mitigation of Penal Code section 1170(b)(6) *and section 1385(c)*; and the factors that would motivate a “reasonable judge” in the exercise of their discretion. The court should not consider whether the defendant

The committee is not adding this comment to its recommendations because section 1170(b)(6) does not state that aggravating factors that the court relies on to not impose the lower term must be proved beyond a reasonable doubt or stipulated to by the defendant.

The committee is not adding a reference to section 1385(c) to its recommended comment, since this rule concerns selecting the term of imprisonment for the offense, not enhancements.

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.420, Selection of term of imprisonment for offense		
	has simply pled guilty, factors related to controlling the court's calendar, or antipathy toward the statutory scheme. (See <i>People v. Romero</i> (1996) 13 Cal.4th 947; <i>People v. Dent</i> (1995) 38 Cal.App.4th 1726; <i>People v. Kessel</i> (1976) 61 Cal.App.3d 322; <i>People v. Orin</i> (1975) 13 Cal.3d 937.)	
Superior Court of San Diego County	Rule 4.420(c) (as amended) - change to "...by a jury or a judge in a court trial;" change (e)(2) (as amended) to "section 1016.7(b) (instead of "subd. (b) of...) to match other citation formatting in the rules.	The committee is modifying the language in its recommended rule to "at trial by a jury or a judge in a court trial," and has changed the reference to 1016.7(b).

SP22-02**Criminal Law: Felony Sentencing** (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.421, Circumstances in aggravation		
Commenter	Comment	Committee Response
California Attorneys for Criminal Justice	<p>The fourth paragraph of the proposed comment reads:</p> <p>“By providing that the defendant’s prior record and simultaneous convictions of other offenses may not be used both for enhancement and in aggravation, section 1170(b) indicates that these and other facts extrinsic to the commission of the crime may be considered in aggravation in appropriate cases.”</p> <p>As amended, § 1170(b)(3) says that prior convictions proven by a certified record may be used as factors in aggravation without being pled and proven. Neither this subdivision nor any other part of the statute describes a procedure for “simultaneous convictions.” Hence the meaning of the quoted text is unclear. The first paragraph of the comment already points out that aggravating facts may be used in choosing the lower or mid-terms without being pled and proven. Dual use of facts is also referenced in the first paragraph, and under Rule 4.420(e).</p> <p>CACJ believes the quoted language should be deleted.</p>	<p>The committee agrees that the sentence is not clear and is deleting it from the recommendation.</p>

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.421, Circumstances in aggravation

San Diego County Public
Defender's Office

Advisory Committee Comment

Courts may not impose a sentence greater than the middle term except when aggravating factors justifying the imposition of the upper term have been stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial. These requirements do not apply to consideration of aggravating factors for the lower or middle term, unless the low term must be imposed pursuant to Penal Code section 1170(b)(6). If the court finds that any of the factors listed in section 1170(b)(6)(A–C) were a contributing factor to the commission of the offense, the court must impose the lower term (see rule 4.420(e)) unless the court finds that the aggravating factors, which have been stipulated to by the defendant or found true beyond a reasonable doubt by a jury at trial or a judge at a court trial, outweigh the mitigating factors to such a degree that imposing the lower term would be contrary to the interests of justice. In this instance, since the court is not addressing the imposition of the upper term, the court may consider factors in aggravation that have not been stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial.

In determining whether to impose the upper term for a criminal offense, the court may consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on a certified official records record of conviction. This exception only applies to the base crime of the prior conviction and not to any enhancements attached to that base crime. This exception may not be used to select the upper term of an enhancement.

The committee is not adding this language to its recommendation because section 1170(b)(6) does not state that aggravating factors that the court relies on to not impose the lower term must be proved beyond a reasonable doubt or stipulated to by the defendant.

The committee agrees to amend “certified official records” to “certified records of conviction.” The committee is not adding language about the exception not applying to enhancements attached to the prior conviction as that goes to issues of proof rather than sentencing.

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.421, Circumstances in aggravation

~~Old age or youth of the victim may be circumstance in aggravation; see section 1170.85(b).~~ Other statutory ~~circumstances~~ factors in aggravation are listed, for example, in sections 422.76, 1170.7, 1170.71, 1170.8, and 1170.85, and may be considered to impose the upper term, or to exceed the low term if the court finds that factors pursuant to Penal Code section 1170(b)(6) contributed to the commission of the offense, if stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial.

The committee is not adding this language because section 1170(b)(6) does not state that aggravating factors that the court relies on to not impose the lower term must be proved beyond a reasonable doubt or stipulated to by the defendant.

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.423, Circumstances in mitigation		
Commenter	Comment	Committee Response
Superior Court of San Diego County	<ul style="list-style-type: none">• In rule 4.423(b) (as amended), subsection (6) would seem to also cover juvenile offenders listed in subsection (7).	The committee is keeping both of these factors in its recommendation, as rule 4.423(b)(6) reflects statutory language from Penal Code section 1170(b)(6)(B), and rule 4.423(b)(7) reflects statutory language from Penal Code section 1385(c)(3)(G).
	<ul style="list-style-type: none">• Rule 4.423(b)(4) (as amended) and 4.428(c)(2)(B) and (3) - add “section” before “1385(c).”	The committee agrees with this suggestion.

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.425, Factors affecting concurrent or consecutive sentences		
Commenter	Comment	Committee Response
San Diego County Public Defender's Office	<p>Rule 4.425. Factors affecting concurrent or consecutive sentences</p> <p>Factors affecting the decision to impose consecutive rather than concurrent sentences include:</p> <p>(a) * * *</p> <p>(b) Other facts and limitations</p> <p>Any circumstances in aggravation or mitigation, <u>whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial</u>, may be considered in deciding whether to impose consecutive rather than concurrent sentences, except:</p> <p>(1) A fact used to impose the upper term <i>or a term other than the low term if factors pursuant to Penal Code section 1170(b)(6) were a contributing factor to the commission of the offense</i>;</p> <p>(2) – (3) ***</p> <p>Advisory Committee Comment (top of page 20)</p> <p><u>In order to impose the upper term, or a term other than the low term if factors pursuant to Penal Code section 1170(b)(6) were a contributing factor to the commission of the offense, based on Penal Code section 422.75, the fact of the enhancement pursuant to Penal Code sections 422.55 or 422.6 must be stipulated to by the defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial.</u></p>	<p>The committee is not adding this language because section 1170(b)(6) does not state that aggravating factors that the court relies on to not impose the lower term must be proved beyond a reasonable doubt or stipulated to by the defendant.</p>

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.425, Factors affecting concurrent or consecutive sentences		
Superior Court of San Diego County	Rule 4.425(b)(3) there should be a period after the word “crime” and the remainder of the sentence deleted.	The committee agrees with this suggestion.

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All comments are verbatim unless indicated by an asterisk (*).

Rule 4.428, Factors affecting imposition of enhancements		
Commenter	Comment	Committee Response
Superior Court of San Diego County	<ul style="list-style-type: none"> Recommend that 4.428(b) be repurposed/retitled so that it addresses striking the punishment on the enhancement and subdivision (c) addresses dismissing the enhancement itself. Typically, an enhancement would be “dismissed” and a sentence/punishment would be “stricken” although the two terms are and can be used interchangeably, as written in section 1385. If the subdivisions are not going to be separated out between one subdivision that addresses striking the punishment on the enhancement and one dismissing the enhancement itself, then it is recommended that subdivision (b) mirror section 1385 and add the term “dismiss” to the title and the body of the text. In other words, it should include the language “strike or dismiss.” Rule 4.428, change citation to the legislative history to “...Reg. Sess., June....” 	<p>The committee has changed the title to recommended rule 4.428(b) as “striking or dismissing enhancements under section 1385.”</p> <p>The committee agrees with this suggestion.</p>

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.428, Factors affecting imposition of enhancements

California Attorneys for Criminal Justice	<p>*Rule 4.428 Advisory Comment</p> <p>One area of concern is the proposed advisory comments to Rule 4.428 on the imposition of enhancements, in Paragraph 3 of the proposed comment. This states that the new provisions regarding dismissal of enhancements do not apply to One Strike, Two Strike or Three Strike sentencing, because these are “alternative sentencing schemes”, not “offense specific enhancements.” The comment references a portion of the legislative history to support this conclusion.</p> <p>We request that this paragraph be deleted or substantially amended. There will be many defendants with Three Strike sentences, or under other “alternate schemes” who will argue that the new amendments do apply in their cases. The statute does not specifically address this question, and there is no case authority at this early date. Because this will be an important issue for many defendants, it should be and will be litigated. CACJ believes it is inappropriate for the Council to state this opinion as a fact, before litigation with evidence, full briefing and argument. This comment essentially “puts a thumb on the scale” of every trial court’s analysis of the issue before litigation.</p> <p>It seems clear there are other considerations to be brought forward before a final determination whether “alternative sentencing schemes” are exempt from the standards for dismissal of enhancements. See, for example, the Senate Public Safety analysis for 3/16/21, which talks about enhancements doubling a person's sentence or converting a determinate term into a life sentence, almost certainly referring to strikes; and its extensive reference to the Committee for the Revision of the Penal Code, which wrote extensively about strikes in its 2020 Annual Report.</p>	<p>In light of comments received from California Attorneys for Criminal Justice, Pacific Juvenile Defender Center, and the San Diego County Public Defender’s Office, the committee is deleting the comment on the legislative history of Senate Bill 81 from the recommended changes to this advisory committee comment.</p>
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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.428, Factors affecting imposition of enhancements

There is also §1385(c)(3)(G), affording great weight in favor of dismissal where a “prior juvenile adjudication [] triggers the enhancement or enhancements applied in this case.” This almost certainly refers to a juvenile “strike” offense.

The council should not make a comment, like this one, which seems to preempt the interpretation of a new, and ambiguous, statute.

We recognize that an important function of the advisory comments to the Rules is to signal potential issues. But this can be done without suggesting that the council has an opinion on the correct resolution of the issue. We would have no objection if this paragraph were amended to say that it is unclear whether the changes will apply to “alternative sentencing schemes” such as Three Strikes, as distinct from “enhancements.”

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.428, Factors affecting imposition of enhancements

Pacific Juvenile Defender Center	<p>*Specifically, we request the following paragraph be deleted from the proposed Advisory Committee Comment to Rule 4.428:</p> <p>The legislative history on Senate Bill 81 states that the presumption created by Penal Code section 1385(c) does not apply to alternative sentencing schemes such as One Strike, Two Strikes, or Three Strikes. (See Assm. Com. Pub. Safety, Report on Sen. Bill 81 (2021–2022 Reg. Sess.) June 29, 2021, pp. 5–6.) Unlike an offense specific enhancement, an alternative sentencing scheme does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence for the underlying felony itself when it is proven that certain conditions specified in the statute are true. (See <i>People v. Anderson</i> (2009) 47 Cal.4th 92, 102; <i>People v. Superior Court (Romero)</i> (1996) 13 Cal.4th 497, 527.)</p> <p><u>Comment Regarding Proposed Advisory Committee Comment to Rule 4.428</u></p> <p>Senate Bill 81, effective January 1, 2022, amended Penal Code section 1385 by adding provisions “aim[ing] to provide clear guidance on how and when judges may apply sentence enhancements.” (Sen. Com. Public Safety, Report on Sen. Bill 81 (2021- 2022 Reg. Sess.) March 16, 2021, p. 3.) SB 81’s highly consequential changes to Penal Code section 1385 were derived from recommendations made by the Commission for the Revision of the Penal Code (“CRPC”), whose 2020 Annual Report is quoted extensively in the various committee analyses for SB 81. As quoted in the Senate Public Safety Committee analysis:</p>	<p>In light of comments received from California Attorneys for Criminal Justice, Pacific Juvenile Defender Center, and the San Diego County Public Defender’s Office, the committee is deleting the comment on the legislative history of Senate Bill 81 from the recommended changes to this advisory committee comment.</p>
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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.428, Factors affecting imposition of enhancements

Sentence enhancements can be dismissed by sentencing judges. The current legal standard instructs judges to dismiss a sentence enhancement when “in furtherance of justice.” Courts have not clarified or defined this standard, and the California Supreme Court noted that the law governing when judges should impose or dismiss enhancements remains an “amorphous concept.” As a result, this discretion may be inconsistently exercised and underused because judges do not have guidance on how courts should exercise the power. The lack of clarity and guidance is especially concerning given demographic disparities in sentences. As noted, Three Strikes sentences and gang enhancements in California are disproportionately applied against people of color. People suffering from mental illness are also overrepresented among people currently serving life sentences under the Three Strikes Law for nonviolent crimes.

(Sen. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) March 16, 2021, p. 5.)

Despite the legislation’s laudable goal to provide “clear guidance on how and when judges may apply sentence enhancements,” there are various unresolved legal issues regarding the applicability of SB 81 to different types of “enhancements.” One such issue is whether the nine mitigating circumstances described in new section 1385(c) apply to prior serious and violent felony convictions and

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Criminal Law: Felony Sentencing (Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453)

All comments are verbatim unless indicated by an asterisk (*).

Rule 4.428, Factors affecting imposition of enhancements

(Sen. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) March 16, 2021, p. 3.) The Three Strikes Law is the only penalty provision that doubles a person's sentence. The reference to "enhancements" is this language must be a reference to "strikes."

- 1) The Senate Public Safety Committee analysis cites a September 2017 publication of the Public Policy Institute of California titled *Sentence Enhancements: Next Targets of Corrections Reform*. As quoted in the committee analysis, the publication describes strikes as "enhancements":

Aside from second and third strikes, the most common enhancement adds one year for each previous prison or jail term.

(Sen. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) March 16, 2021, p. 3.)³

- 2) Both Senate and Assembly analyses unambiguously state that SB 81 implements the recommendations of the Commission on the Revision of the Penal Code (CRPC), and the CRPC's recommendations regarding sentencing enhancements, as contained in its 2020 Annual Report, unquestionably included "strikes." In fact, both the Senate and Assembly analyses quote the portions of the CRPC's report that reference the Three Strikes Law. To repeat the language we quoted earlier in this Comment:

³ The PPIC report describes the Three Strikes Law as an enhancement mechanism: "California's best-known sentence enhancement mechanism is the Three Strikes Law, passed in 1994. The law doubles the sentence of

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any offender convicted of a second serious or violent crime. A third conviction results in a sentence of between 25 years to life. There are roughly 38,000 second and third “strikers” in California prisons, a little more than one-third of the prison population.” Report found at <https://www.ppic.org/blog/sentence-enhancements-next-target-corrections-reform> (as of February 14, 2022).

Sentence enhancements can be dismissed by sentencing judges. The current legal standard instructs judges to dismiss a sentence enhancement when “in furtherance of justice.” Courts have not clarified or defined this standard, and the California Supreme Court noted that the law governing when judges should impose or dismiss enhancements remains an “amorphous concept.” As a result, this discretion may be inconsistently exercised and under used because judges do not have guidance on how courts should exercise the power.

The lack of clarity and guidance is especially concerning given demographic disparities in sentences. As noted, Three Strikes sentences and gang enhancements in California are disproportionately applied against people of color. People suffering from mental illness are also overrepresented among people currently serving life sentences under the Three Strikes law for nonviolent crimes.

(Sen. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) March 16, 2021, p. 5; Assm. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) June 29, 2021, p. 3.)

3) While the Assembly Public Safety analysis concludes that

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“enhancements” do not include “alternative sentencing schemes,” it does so in reliance on the definition in the California Rules of Court, and cites cases that support this narrow definition. (Assm. Com. Public Safety, Report on Sen. Bill 81 (2021-2022 Reg. Sess.) June 29, 2021, pp. 5- 6). But in fact, as demonstrated in *People v. Brookfield* (2009) 47 Cal.4th 583, 592, “enhancements” sometimes include “alternative sentencing schemes.”

And a reading of the case law on this point demonstrates that when there are competing interpretations, the question should be decided by the appellate courts based on statutory language and legislative intent rather than on how other cases interpreted other statutes and initiatives. In *Brookfield*, the Supreme Court notes that the Legislature, when crafting future legislation on the subject, may want to consider the distinction the courts have drawn between “enhancements” and penalty provisions in other prior contexts. (Id. at p. 595.) But at no point does the Supreme Court impose this narrow definition on the Legislature; in fact, they instead recognize the Legislature’s broader definition in the legislation at issue in that case.

For the reasons stated above, the legislative history and statutory language taken as a whole suggest the Legislature intended the term “enhancements” to include “alternative sentencing schemes,” unless those alternative sentencing schemes are explicitly excluded under Penal Code section 1385(c)(1).

The language of Penal Code section 1385(c)(3)(G) provides further evidence that SB 81 was intended to apply to “strikes.”

The seventh of the nine mitigating circumstances created by

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SB 81 -- and one of particular interest to PJDC, as an association of juvenile defenders – is contained in subdivision (c)(3)(G). The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.

(Pen. Code, §1385, subd. (c)(3)(G).) This subdivision applies in two circumstances:

- If the defendant was a juvenile when they committed the current offense; and
- If the defendant was a juvenile when they committed any prior juvenile adjudication that triggers the enhancement in the current case.

Juvenile adjudications are not considered “convictions.” (Welf. & Inst. Code, §203.) The one exception in the sentencing “enhancements” context is the Three Strikes Law, which defines a juvenile adjudication as a “conviction” for purposes of the Three Strikes Law if specified circumstances are met. (See Pen. Code, §§667, subd. (d)(3); 1170.12, subd. (b)(3); *People v. Garcia* (1999) 21 Cal.4th 1.) The undersigned are aware of no other juvenile adjudications that trigger sentencing “enhancements,” as that term must be used in section 1385(c)(3)(G), when appended to adult criminal charges.

The language in the second bullet point has meaning only if it applies to juvenile adjudications being used as “strikes” in criminal court. When interpreting a statute, the courts must endeavor to harmonize and give effect to all of its provisions. (*People v. Garcia*, *supra*, 21 Cal.4th at p. 6.)

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	<p>Applying that principle, section 1385(c)(3)(G) must be read to apply to juvenile “strikes,” which are the “enhancements” that explicitly are referenced in that subdivision. If SB 81 were interpreted to not apply to “strikes,” the referenced language in 1385(c)(3)(G) would be surplusage.</p> <p>Since subdivision (c)(3)(G) must be interpreted to apply to juvenile “strike” adjudications, the Legislature plainly used the word “enhancement” in Penal Code section 1385(c) – as exemplified by its use in section 1385(c)(3)(G) -- to include “strikes” under the Three Strikes Law. This interpretation is not only necessary in order to give meaning to the language in section 1385(c)(3)(G), but is also consistent with the purpose of SB 81, and its intended codification of the recommendations of the Commission on the Revision of the Penal Code, as discussed above.</p> <p>For the foregoing reasons, we request the Judicial Council delete the proposed language in Rule 4.428 that mandates that SB 81 does not apply to “strike” convictions and adjudications.</p>	
San Diego County Public Defender’s Office	<p>Advisory committee comment:</p> <p>The legislative history on Senate Bill 81 states that the presumption created by Penal Code section 1385(c) does not apply to alternative sentencing schemes such as One Strike, Two Strikes, or Three Strikes. (See Assem. Com. Pub. Safety, Report on Sen. Bill 81 (2021–2022 Reg. Sess.) June 29, 2021, pp. 5–6.) Unlike an offense specific enhancement, an alternative sentencing scheme does not add an additional term of imprisonment to the base term; instead, it provides for an alternate sentence for the underlying felony itself when it is proven that certain conditions specified in the statute are true. (See <i>People v. Anderson</i> (2009) 47 Cal.4th 92, 102; <i>People v.</i></p>	<p>In light of comments received from California Attorneys for Criminal Justice, Pacific Juvenile Defender Center, and the San Diego County Public Defender’s Office, the committee is deleting the comment on the legislative history of Senate Bill 81 from the recommended changes to this advisory committee comment.</p>

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Superior Court (Romero) (1996) 13 Cal.4th 497, 527.

(Penal Code section 1385 is the vehicle with which courts dismiss prior strike offenses for the purposes of sentencing when it is in the furtherance of justice to do so. (See *People v. Superior Court (Romero) (1996) 13 Cal.4th 497.*) There is no question that prior strike sentencing significantly enhances a defendant's sentence. Senate Bill 81 defines and assists the court in its exercise of discretion to dismiss enhancements in the furtherance of justice pursuant to Penal Code section 1385. Though One Strike, Two Strike and Three Strike sentencing have been considered "alternative sentencing schemes" and not "enhancements" by some courts, these cases all significantly predate section 1385(c). Further, the actual language of the section 1385(c) is silent as to its application to prior strike sentencing. The Advisory Committee should, thus, also remain silent on this issue until the courts have had a chance to interpret the new law.)