



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on September 14–15, 2017

Title	Agenda Item Type
Criminal Law: Felony Sentencing	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rules 4.403, 4.405, 4.406, 4.408, 4.409, 4.410, 4.411, 4.411.5, 4.412, 4.413, 4.415, 4.420, 4.421, 4.423, 4.425, 4.428, 4.433, 4.435, 4.437, 4.447, 4.451, and 4.452	January 1, 2018
	Date of Report
	August 15, 2017
	Contact
Recommended by	Sarah Fleischer-Ihn, (415) 865-7702
Criminal Law Advisory Committee	Sarah.Fleischer-Ihn@jud.ca.gov
Hon. Tricia A. Bigelow, Chair	

Executive Summary

The Criminal Law Advisory Committee proposes amendments to specified criminal sentencing rules of the California Rules of Court 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.

Recommendation

The Criminal Law Advisory Committee (CLAC) recommends that the Judicial Council, effective January 1, 2018:

1. Amend rules 4.405, 4.406, 4.408, 4.410, 4.420, 4.421, 4.423, 4.428, and 4.452 and/or the corresponding advisory committee comments to reflect changes to California's Determinate Sentencing Law (DSL) after the U.S. Supreme Court's decision in *Cunningham v. California* (2007) 549 U.S. 270 and the legislative responses to that decision, and provide further guidance to judges in exercising sentencing discretion under the DSL.
2. Amend the title of division 5 from "Sentencing Determinate" to "Felony Sentencing Law."
3. Amend rules 4.403, 4.405, and 4.451 and/or the corresponding advisory comments to expand the application of the rules to certain indeterminate sentences.
4. Add subdivision (b) to rule 4.428 to clarify the court's authority to strike an enhancement or the punishment for an enhancement under section 1385(a) and (c), and to identify factors a court may consider in determining whether to strike the entire enhancement or only the punishment for the enhancement.
5. Add subdivision (b) to rule 4.447 to provide guidance to courts for when a defendant is convicted of multiple enhancements of the same type.
6. Amend rule 4.447's advisory committee comment to provide that a court may stay an enhancement if section 654 applies.
7. Amend rules 4.405, 4.411.5, 4.412, 4.435, and 4.451 and/or the corresponding advisory committee comments to incorporate terms relevant to the Criminal Justice Realignment Act (mandatory supervision, postrelease community supervision, term of imprisonment, and supervision).
8. Further amend rule 4.435 to (1) provide that in determining whether to permanently revoke supervision, a judge may consider the nature of the violation and the defendant's past performance on supervision; and (2) amend the advisory committee comment to explain that the holding in *People v. Griffith* (1984) 153 Cal.App.3d 796 refers only to probation, but likely applies to any form of supervision.
9. Amend rule 4.411 to (1) identify when a court must refer to probation for investigations and reports, and (2) rephrase the statement in subdivision (d) addressing the purpose of presentence investigation reports and move it to the advisory committee comment. Upon further review post-circulation, the chairs recommend amending the Advisory Committee Comment around uses of probation officer reports to also include "the probation department in supervising the defendant."
10. Further amend rule 4.411 to (1) strike the statement in subdivision (a) that reads, "Waivers of the presentence report should not be accepted except in unusual circumstances"; (2) strike the statement in the advisory committee comment discouraging waivers; (3) state how

parties may waive the report; (4) identify criteria a court should consider in deciding whether to consent to a waiver; and (5) clarify that a waiver does not affect the requirement under section 1203c that probation create a report whenever the court commits a person to state prison.

11. Amend subdivision (a)(5) of rule 4.111.5 to provide that the presentence investigation report must include information about “[a]ny physical or psychological injuries suffered by the victim” and to clarify that the amount of a victim’s loss refers to monetary losses.
12. Further amend rule 4.411.5 to include reporting requirements under Penal Code section 29810(c)(2).
13. Amend rules 4.405, 4.411.5, 4.413, and 4.415 and/or corresponding advisory committee comments to address risk/needs assessments and their use by courts.
14. Further amend rules 4.405, 4.408, 4.409, 4.410, 4.412, 4.413, 4.420, 4.425, 4.427, 4.428, 4.437, and 4.447 and/or relevant portions of advisory committee comments for technical and nonsubstantive amendments. Upon further review post-circulation, the chairs recommend an additional technical and nonsubstantive amendment to rule 4.420.

The text of the proposed rule amendments is attached at pages 7–27.

Previous Council Action

Sentencing-related amendments

The Judicial Council last amended the California Rules of Court on January 1, 2008, to implement changes to California’s DSL resulting from *Cunningham v. California* (2007) 549 U.S. 270 and the legislative responses to that decision.

Realignment-related amendments

The Criminal Law Advisory Committee has undertaken several efforts to update the criminal rules to incorporate changes related to the Realignment Act. Effective January 1, 2015, the Judicial Council adopted rule 4.415 to govern the imposition of mandatory supervision under Penal Code section 1170(h)(5). It also updated rules 4.411 and 4.411.5, which govern the use and contents of presentence probation reports, by adding references to county jail under section 1170(h). Effective January 1, 2017, the council added references in various criminal rules to mandatory supervision under section 1170(h)(5), postrelease community supervision under sections 3450–3464, parole under section 3000.08, and terms of imprisonment in county jail under section 1170(h).

Referrals for and waivers of presentence investigations and reports, rule 4.411

Rule 4.411 was last amended effective January 1, 2015.

Required contents of a probation officer's presentence investigation report, rule 4.411.5
Rule 4.411.5 was last amended effective January 1, 2017.

Risk/needs assessment-related amendments

As part of the rule amendments implementing the Realignment Act that went into effect on January 1, 2015, the Judicial Council also added several provisions related to risk/needs assessments to the criminal rules. In adopting new rule 4.415, the council provided that courts may consider “[t]he defendant’s specific needs and risk factors identified by a validated risk/needs assessment, if available,” to select the appropriate period and conditions of mandatory supervision. In addition, the council amended rule 4.411.5 to require that presentence investigation reports include “[a]ny available, reliable risk/needs assessment information.”

Rationale for Recommendation

Sentencing-related amendments

In *Cunningham v. California* (2007) 549 U.S. 270, the U.S. Supreme Court held that the DSL was unconstitutional because (1) judges, not juries, were making factual findings to increase a sentence beyond the maximum that could be imposed based on findings made by the jury; and (2) the burden of proof for those findings was a preponderance of the evidence, not beyond a reasonable doubt. (*Id.* at p. 288.) To address these constitutional defects, the California Legislature subsequently amended the DSL to delete the presumption that judges impose the middle term and to provide instead that judges have discretion to impose any of the three possible terms. (Pen. Code, § 1170(b).) In addition, rather than finding facts, the legislation provides that judges state reasons in support of their choice of the appropriate term. The Legislature subsequently amended sections 186.22, 186.33, 1170.1, 12021.5, 12022.2, and 12022.4 to eliminate the presumptive middle term for enhancements with sentencing triads. (Sen. Bill 150; Stats. 2009, ch. 171.)

This proposal updates the rules and corresponding advisory committee comments to reflect the changes to the DSL post-*Cunningham*, and also updates the rules addressing indeterminate sentences and sentencing enhancements.

Realignment-related amendments

The Criminal Justice Realignment Act amended several sentencing and supervision provisions to persons convicted of felony offenses and sentenced on or after October 1, 2011. (Assem. Bill 17; Stats. 2011, ch. 12.) Many defendants convicted of felonies and not granted probation now serve their incarceration term in county jail instead of state prison. (See Pen. Code, § 1170(h).) In a later amendment to the law, the Legislature mandated that judges suspend execution of a concluding portion of the county jail term and order the defendant to be supervised by the county probation department unless the court finds, in the interests of justice, that such suspension is not appropriate in a particular case. (*Id.*, § 1170(h)(5)(A).) This term of supervision is referred to as “mandatory supervision.” (*Id.*, § 1170(h)(5)(B).)

The Realignment Act also created “postrelease community supervision” (PRCS), whereby certain offenders released from state prison are no longer supervised by the state parole system but are instead supervised by a local county supervision agency. (Pen. Code, §§ 3450–3465.) PRCS does not apply to prisoners released from state prison after serving a term for certain of the more dangerous and violent crimes; these prisoners continue to be placed on parole under supervision of the Department of Corrections and Rehabilitation, Division of Adult Parole Operations. (*Id.*, § 3000.08(a).) Following the Realignment Act, parole revocation proceedings are no longer administrative proceedings under the jurisdiction of the Board of Parole Hearings but are instead adversarial judicial proceedings conducted in county superior courts. (*Id.*, § 1203.2.)

This proposal updates the rules and corresponding advisory committee comments to reflect the current statutory sentencing provisions by incorporating terms relevant to realignment.

Referrals for and waivers of presentence investigations and reports, rule 4.411

The current version of rule 4.411 and its advisory committee comment strongly discourage the waiver of presentence reports. However, the current practice is that waivers occur for a variety of reasons, and the rule neither reflects this nor provides courts with guidance on how to consider a waiver. The proposed amendments strike a balance between acknowledging current practices and providing guidance on criteria a judge should consider when deciding whether to consent to a waiver.

Required contents of a probation officer’s presentence investigation report, rule 4.411.5

This proposal updates the rule, in part, by requiring probation officers to provide more detailed information concerning the victims’ injuries and monetary losses to the court.

This proposal further updates the rule by adding new statutory reporting requirements by probation to the court within rule 4.411.5. Effective January 1, 2018, Penal Code section 29810(c)(2) requires probation officers to report to the court, prior to final disposition or sentencing, whether a defendant convicted of specified offenses under Penal Code section 29800 or 29805 has complied with firearms relinquishment requirements by relinquishing all firearms and timely submitting a completed Prohibited Persons Relinquishment Form.

The Criminal Law Advisory Committee sought specific comments in the invitation to comment about whether these new firearm relinquishment reporting requirements should be included in as-required contents of a probation officer’s presentence investigation report under rule 4.411.5. One commenter from a large county responded to this question, suggesting that amending the rule to include the new firearm relinquishment reporting requirements would expedite court proceedings. The Criminal Law Advisory Committee agrees that including this required information within the presentence investigation report would promote efficiency and has revised the proposal to incorporate the reporting requirement into the rule.

Risk/needs assessment–related amendments

This proposal updates current rules relating to risk/needs assessments to provide clarity around the assessments and their proper uses.

Comments, Alternatives Considered, and Policy Implications

The committee circulated the proposal for public comment during the spring 2017 invitation-to-comment cycle. Four comments were received. Comments received from the Superior Courts of San Diego and Los Angeles Counties and the Orange County Bar Association agreed with the proposal. The comment from the Superior Court of Los Angeles County suggested amending rule 4.411.5 to include the reporting requirements under Penal Code section 29810(c)(2), with which the committee agrees. One commenter did not indicate a position and suggested a technical, nonsubstantive amendment with which the committee agrees.

Alternatives considered

The committee considered whether to decline to recommend including the reporting requirements of Penal Code section 29810(c)(2) in rule 4.411.5, namely because it would place a reporting requirement within a presentencing report that may be waived. However, the committee decided to include the amendment because it would likely be helpful for counties in which presentence investigations and reports routinely occur in all required cases.

Implementation Requirements, Costs, and Operational Impacts

No implementation requirements or operational impacts on courts are likely. The inclusion of the reporting requirements of Penal Code section 29810(c)(2) in rule 4.411.5 will largely impact probation departments.

Attachments and Links

1. Cal. Rules of Court, rules 4.403, 4.405, 4.406, 4.408, 4.409, 4.410, 4.411, 4.411.5, 4.412, 4.413, 4.415, 4.420, 4.421, 4.423, 4.425, 4.428, 4.433, 4.435, 4.437, 4.447, 4.451, and 4.452 at pages 7–28
2. Chart of comments, at pages 29–31

Rules 4.403, 4.405, 4.406, 4.408, 4.409, 4.410, 4.411, 4.411.5, 4.412, 4.413, 4.415, 4.420, 4.421, 4.423, 4.425, 4.428, 4.433, 4.435, 4.437, 4.447, 4.451, and 4.452 of the California Rules of Court would be amended, effective January 1, 2018, to read as follows:

Title 4. Criminal Rules

Division 5. ~~Sentencing-Determinate~~ Felony Sentencing Law

Rule 4.403. Application

These rules apply to criminal cases in which the defendant is convicted of one or more offenses punishable as a felony by (1) a determinate sentence imposed under Penal Code part 2, title 7, chapter 4.5 (commencing with section 1170) and (2) an indeterminate sentence imposed under section 1168(b) only if it is imposed relative to other offenses with determinate terms or enhancements.

Advisory Committee Comment

~~The sentencing rules do not apply to offenses carrying a life term or other indeterminate sentences for which sentence is imposed under section 1168(b).~~

The operative portions of section 1170 deal exclusively with prison sentences; and the mandate to the Judicial Council in section 1170.3 is limited to criteria affecting the length of prison sentences, sentences in county jail under section 1170(h), and the grant or denial of probation.

Rule 4.405. Definitions

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

(1) * * *

(2) “Base term” is the determinate term in prison term or county jail under section 1170(h) selected from among the three possible terms prescribed by statute; or the determinate term in prison term or county jail under section 1170(h) prescribed by law statute if a range of three possible terms is not prescribed; or the indeterminate term in prison prescribed by statute.

(3) * * *

(4) “Aggravation,” ~~or~~ “circumstances in aggravation,” “mitigation,” or “circumstances in mitigation” means factors that the court may consider in its broad sentencing discretion ~~in imposing one of the three authorized terms of imprisonment referred to in section 1170(b) authorized by statute and under these rules.~~

(5) ~~“Mitigation” or “circumstances in mitigation” means factors that the court may consider in its broad discretion in imposing one of the three authorized terms of~~

~~imprisonment referred to in section 1170(b) or factors that may justify the court in striking the additional punishment for an enhancement when the court has discretion to do so.~~

(6)(5) “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.

~~(7)~~(6) “Section” means a section of the Penal Code.

~~(8)(7)~~ “Imprisonment” means confinement in a state prison or county jail under section 1170(h).

~~(9)~~(8) "Charged" means charged in the indictment or information.

~~(10)~~(9) “Found” means admitted by the defendant or found to be true by the trier of fact upon trial.

~~(11)~~(10) “Mandatory supervision” means the period of supervision defined in section 1170(h)(5)(A), (B).

~~(12)~~(11) “Postrelease community supervision” means the period of supervision governed by section 3451 et seq.

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

(13)–(16) * * *

Advisory Committee Comment

“Base term” is the term of imprisonment selected under section 1170(b) from the three possible terms. (See section 1170(a)(3); *People v. Scott* (1994) 9 Cal.4th 331, 349.) Following the United States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. 270, the Legislature amended the determinate sentencing law to remove the presumption that the court is to impose the middle term on a sentencing triad, absent aggravating or mitigating circumstances. (See Sen. Bill 40; Stats. 2007, ch. 3.) It subsequently amended sections 186.22, 186.33, 1170.1, 12021.5, 12022.2, and 12022.4 to eliminate the presumptive middle term for an enhancement. (See Sen. Bill 150; Stats. 2009, ch. 171.) Instead of finding facts in support of a sentencing choice, courts are now required to state reasons for the exercise of judicial discretion in sentencing. To comply with those changes, these rules were also amended. In light of those amendments, for clarity, the phrase “base term” in (4) and (5) was replaced with “one of the three authorized prison terms.” This language was subsequently changed to “three authorized terms of imprisonment” to incorporate county jail sentences under section 1170(h) in light of more recent legislative amendments to the determinate sentencing law. (See Assem. Bill 109; Stats. 2011, ch. 15.) It is an open question whether the definitions in (4) and (5) apply to enhancements for which the statute provides for three possible terms. The Legislature in SB 40 amended section 1170(b) but did not modify sections 1170.1(d), 12022.2(a), 12022.3(b), or any other section providing for an

enhancement with three possible terms. The latter sections provide that “the court shall impose the middle term unless there are circumstances in aggravation or mitigation.” (See, e.g., section 1170.1(d).) It is possible, although there are no cases addressing the point, that this enhancement triad with the presumptive imposition of the middle term runs afoul of Cunningham. Because of this open question, rule 4.428(b) was deleted.

“Enhancement.” The facts giving rise to an enhancement, the requirements for pleading and proving those facts, and the court’s authority to strike the additional term are prescribed by statutes. See, for example, sections 667.5 (prior prison terms), 12022 (being armed with a firearm or using a deadly weapon), 12022.5 (using a firearm), 12022.6 (excessive taking or damage), 12022.7 (great bodily injury), 1170.1(e) (pleading and proof), and 1385(c) (authority to strike the additional punishment). Note: A consecutive sentence is not an enhancement. (See section 1170.1(a); *People v. Tassell* (1984) 36 Cal.3d 77, 90 [overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401].)

“Sentence choice.” Section 1170(e) requires the judge to state reasons for the sentence choice. This general requirement is discussed in rule 4.406.

“Imprisonment” in state prison or county jail under section 1170(h) is distinguished from confinement in other types of facilities.

“Charged” and “found.” Statutes require that the facts giving rise to all enhancements be charged and found. See section 1170.1(e).

Item (13), see sections 17.5(a)(9) and 3450(b)(9).

Item (15), see section 1229(e).

Rule 4.406. Reasons

(a) How given

If the sentencing judge is required to give reasons for a sentence choice, the judge must state in simple language the primary factor or factors that support the exercise of discretion ~~or, if applicable, state that the judge has no discretion~~. The statement need not be in the language of the statute or these rules. It must be delivered orally on the record. The court may give a single statement explaining the reason or reasons for imposing a particular sentence or the exercise of judicial discretion, if the statement identifies the sentencing choices where discretion is exercised and there is no impermissible dual use of facts.

(b) When reasons required

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

- (1) Granting probation when the defendant is presumptively ineligible for probation;

- 1
2 (2) ~~Imposing a prison sentence or sentence in county jail under section 1170(h)~~
3 ~~and thereby denying probation~~ Denying probation when the defendant is
4 presumptively eligible for probation;
5
6 (3) Declining to commit an eligible juvenile found amenable to treatment to the
7 Department of Corrections and Rehabilitation, Division of Juvenile Justice ~~an~~
8 ~~eligible juvenile found amenable to treatment;~~
9
10 (4) Selecting one of the three authorized ~~prison~~ terms in prison or county jail
11 under section 1170(h) referred to in section 1170(b) for either ~~an offense a~~
12 base term or an enhancement;
13
14 (5)–(6) * * *
15
16 (7) ~~Striking the punishment for an enhancement;~~
17
18 (8)(7) Waiving a restitution fine;
19
20 (9) ~~Not committing an eligible defendant to the California Rehabilitation Center;~~
21
22 (10)(8) ~~Striking an enhancement or prior conviction allegation~~ Granting relief
23 under section 1385(a); and
24
25 (11)(9) Denying mandatory supervision in the interests of justice under section
26 1170(h)(5)(A).
27

28 **Advisory Committee Comment**

29
30 This rule is not intended to expand the statutory requirements for giving reasons, and is not an
31 independent interpretation of the statutory requirements.
32

33 The court is not required to separately state the reasons for making each sentencing choice so
34 long as the record reflects the court understood it had discretion on a particular issue and its
35 reasons for making the particular choice. For example, if the court decides to deny probation and
36 impose the upper term of punishment, the court may simply state: “I am denying probation and
37 imposing the upper term because of the extensive losses to the victim and because the defendant’s
38 record is increasing in seriousness.” It is not necessary to state a reason after exercising each
39 decision.
40

41 The court must be mindful of impermissible dual use of facts in stating reasons for sentencing
42 choices. For example, the court is not permitted to use a reason to impose a greater term if that
43 reason also is either (1) the same as an enhancement that will be imposed, or (2) an element of the
44 crime. The court should not use the same reason to impose a consecutive sentence and to impose
45 an upper term of imprisonment. (*People v. Avalos* (1984) 37 Cal.3d 216, 233.) It is not improper
46 to use the same reason to deny probation and to impose the upper term. (*People v. Bowen* (1992)
47 11 Cal.App.4th 102, 106.)
48

1 Whenever relief is *granted* under section 1385, the court's reasons for exercising that discretion
2 must be stated orally on the record and entered in the minutes if requested by a party or if the
3 proceedings are not recorded electronically or reported by a court reporter. (Pen. Code,
4 § 1385(a).) Although no legal authority requires the court to state reasons for *denying* relief, such
5 a statement may be helpful in the appellate review of the exercise of the court's discretion.
6
7

8 **Rule 4.408. Criteria Listing of factors not exclusive; sequence not significant**
9

10 (a) ~~The enumeration in these rules of some criteria for the making of discretionary~~
11 ~~sentencing decisions does not prohibit the application of additional criteria~~
12 ~~reasonably related to the decision being made. The listing of factors in these rules~~
13 ~~for making discretionary sentencing decisions is not exhaustive and does not~~
14 ~~prohibit a trial judge from using additional criteria reasonably related to the~~
15 ~~decision being made.~~ Any such additional criteria must be stated on the record by
16 the sentencing judge.
17

18 (b) * * *

19
20 **Advisory Committee Comment**
21

22 ~~Enumerations of criteria in these rules are not exclusive.~~ The variety of circumstances presented
23 in felony cases is so great that no listing of criteria could claim to be all-inclusive. (Cf.; Evid.
24 Code, § 351.)
25
26

27 **Rule 4.409. Consideration of ~~criteria~~ relevant factors**
28

29 Relevant ~~criteria~~ factors enumerated in these rules must be considered by the sentencing
30 judge, and will be deemed to have been considered unless the record affirmatively
31 reflects otherwise.
32

33 **Advisory Committee Comment**
34

35 Relevant ~~criteria~~ factors are those applicable to the facts in the record of the case; not all ~~criteria~~
36 factors will be relevant to each case. The judge's duty is similar to the duty to consider the
37 probation officer's report. Section 1203.
38

39 In deeming the sentencing judge to have considered relevant ~~criteria~~ factors, the rule applies the
40 presumption of Evidence Code section 664 that official duty has been regularly performed. (See
41 *People v. Moran* (1970) 1 Cal.3d 755, 762 [trial court presumed to have considered referring
42 eligible defendant to California Youth Authority in absence of any showing to the contrary, citing
43 Evidence Code section 664].)
44
45

1 **Rule 4.410. General objectives in sentencing**

2
3 (a) * * *

4
5 (b) Because in some instances these objectives may suggest inconsistent dispositions,
6 the sentencing judge must consider which objectives are of primary importance in
7 the particular case. The sentencing judge should be guided by statutory statements
8 of policy, the criteria in these rules, and ~~the~~ any other facts and circumstances ~~of~~
9 relevant to the case.

10
11 **Advisory Committee Comment**

12
13 Statutory expressions of policy include:

14
15 ~~Welfare and Institutions Code section 1820 et seq., which provides partnership funding for~~
16 ~~county juvenile ranches, camps, or forestry camps.~~

17
18 ~~Section 1203(b)(3), which requires that eligible defendants be considered for probation and~~
19 ~~authorizes probation if circumstances in mitigation are found or justice would be served.~~

20
21 Section 1170(a)(1), ~~which~~ expresses the policies of uniformity, proportionality of terms of
22 imprisonment to the seriousness of the offense, and the use of imprisonment as punishment. It
23 also states that “the purpose of sentencing is public safety achieved through punishment,
24 rehabilitation, and restorative justice.”

25
26 Sections 17.5, 1228, and 3450, ~~which~~ express the policies promoting reinvestment of criminal
27 justice resources to support community-based corrections programs and evidence-based practices
28 to improve public safety through a reduction in recidivism.

29
30 ~~Other statutory provisions that prohibit the grant of probation in particular cases.~~

31
32
33 **Rule 4.411. Presentence investigations and reports**

34
35 (a) ~~Eligible defendant~~ When required

36
37 ~~If the defendant is eligible for probation or a term of imprisonment in county jail~~
38 ~~under section 1170(h), the court must refer the matter to the probation officer for a~~
39 ~~presentence investigation and report. Waivers of the presentence report should not~~
40 ~~be accepted except in unusual circumstances.~~

41
42 Except as provided in subdivision (b), the court must refer the case to the probation
43 officer for:

44
45 (1) A presentence investigation and report if the defendant:

46
47 (i) Is statutorily eligible for probation or a term of imprisonment in county
48 jail under section 1170(h); or

(ii) Is not eligible for probation but a report is needed to assist the court with other sentencing issues, including the determination of the proper amount of restitution fine;

(2) A supplemental report if a significant period of time has passed since the original report was prepared.

(b) ~~Ineligible defendant~~ Waiver of the investigation and report

~~Even if the defendant is not eligible for probation or a term of imprisonment in county jail under section 1170(h), the court should refer the matter to the probation officer for a presentence investigation and report.~~

The parties may stipulate to the waiver of the probation officer's investigation and report in writing or in open court and entered in the minutes, and with the consent of the court. In deciding whether to consent to the waiver, the court should consider whether the information in the report would assist in the resolution of any current or future sentencing issues, or would assist in the effective supervision of the person. A waiver under this section does not affect the requirement under section 1203c that a probation report be created when the court commits a person to state prison.

(e) ~~Supplemental reports~~

~~The court must order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared.~~

(d) ~~Purpose of presentence investigation report~~

~~Probation officers' reports are used by judges in determining the appropriate term of imprisonment in prison or county jail under section 1170(h) and by the Department of Corrections and Rehabilitation, Division of Adult Operations in deciding on the type of facility and program in which to place a defendant. The reports are also used by courts in deciding whether probation is appropriate, whether a period of mandatory supervision should be denied in the interests of justice under section 1170(h)(5)(A), and the appropriate length and conditions of probation and mandatory supervision. Section 1203c requires a probation officer's report on every person sentenced to prison; ordering the report before sentencing in probation-ineligible cases will help ensure a well-prepared report.~~

Advisory Committee Comment

Section 1203 requires a presentence report in every felony case in which the defendant is eligible for probation. Subdivision (a) requires a presentence report in every felony case in which the defendant is eligible for a term of imprisonment in county jail under section 1170(h). Because

1 such a probation investigation and report are valuable to the judge and to the jail and prison
2 authorities, waivers of the report and requests for immediate sentencing are discouraged, even
3 when the defendant and counsel have agreed to a prison sentence or a term of imprisonment in
4 county jail under section 1170(h).

5
6 When considering whether to waive a presentence investigation and report, courts should
7 consider that probation officers' reports are used by: (1) courts in determining the appropriate
8 term of imprisonment in prison or county jail under section 1170(h); (2) courts in deciding
9 whether probation is appropriate, whether a period of mandatory supervision should be denied in
10 the interests of justice under section 1170(h)(5)(A), and the appropriate length and conditions of
11 probation and mandatory supervision; (3) the probation department in supervising the defendant;
12 and (4) the Department of Corrections and Rehabilitation, Division of Adult Operations, in
13 deciding on the type of facility and program in which to place a defendant.

14
15 ~~Notwithstanding a defendant's statutory ineligibility for probation or term of imprisonment in~~
16 ~~county jail under section 1170(h), a presentence investigation and report should be ordered to~~
17 ~~assist the court in deciding the appropriate sentence and to facilitate compliance with section~~
18 ~~1203e.~~

19
20 ~~This rule does not prohibit pre-conviction, pre-plea reports as authorized by section 1203.7.~~

21
22 Subdivision ~~(e)~~ (a)(2) is based on case law that generally requires a supplemental report if the
23 defendant is to be resentenced a significant time after the original sentencing, as, for example,
24 after a remand by an appellate court, or after the apprehension of a defendant who failed to appear
25 at sentencing. The rule is not intended to expand on the requirements of those cases.

26
27 The rule does not require a new investigation and report if a recent report is available and can be
28 incorporated by reference and there is no indication of changed circumstances. This is particularly
29 true if a report is needed only for the Department of Corrections and Rehabilitation because the
30 defendant has waived a report and agreed to a prison sentence. If a full report was prepared in
31 another case in the same or another jurisdiction within the preceding six months, during which
32 time the defendant was in custody, and that report is available to the Department of Corrections
33 and Rehabilitation, it is unlikely that a new investigation is needed.

34
35 This rule does not prohibit pre-conviction, pre-plea reports as authorized by section 1203.7.

36 37 38 **Rule 4.411.5. Probation officer's presentence investigation report**

39 40 **(a) Contents**

41
42 A probation officer's presentence investigation report in a felony case must include
43 at least the following:

44
45 (1)–(4) * * *

46
47 (5) Information concerning the victim of the crime, including:

48
49 (A) * * *

(B) Any physical or psychological injuries suffered by the victim;

~~(B)~~(C) The amount of the victim's monetary loss, and whether or not it is covered by insurance; and

~~(C)~~(D) Any information required by law.

(6)–(7) * * *

(8) ~~Any available, reliable risk/needs assessment information.~~ The defendant's relevant risk factors and needs as identified by a risk/needs assessment, if such an assessment is performed, and such other information from the assessment as may be requested by the court.

(9)–(12) * * *

(13) Information pursuant to Penal Code section 29810(c):

(A) Whether the defendant has properly complied with Penal Code section 29810 by relinquishing all firearms identified by the probation officer's investigation or declared by the defendant on the Prohibited Persons Relinquishment Form, and

(B) Whether the defendant has timely submitted a completed Prohibited Persons Relinquishment Form.

(b)–(c) * * *

Rule 4.412. Reasons—agreement to punishment as an adequate reason and as abandonment of certain claims

(a) Defendant's agreement as reason

It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it. The agreement and lack of objection must be recited on the record. This section does not authorize a sentence that is not otherwise authorized by law.

(b) Agreement to sentence abandons section 654 claim

By agreeing to a specified term in prison or county jail under section 1170(h) personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's

1 prohibition of double punishment, unless that claim is asserted at the time the
2 agreement is recited on the record.

4 **Advisory Committee Comment**

5
6 **Subdivision (a).** This subdivision is intended to relieve the court of an obligation to give reasons
7 if the sentence or other disposition is one that the defendant has accepted and to which the
8 prosecutor expresses no objection. The judge may choose to give reasons for the sentence even
9 though not obligated to do so.

10
11 Judges should also be aware that there may be statutory limitations on “plea bargaining” or on the
12 entry of a guilty plea on the condition that no more than a particular sentence will be imposed. ~~At~~
13 ~~the time this comment was drafted, s~~ Such limitations appeared, for example, in sections 1192.5
14 and 1192.7.

15
16 **Subdivision (b).** This subdivision is based on the fact that a defendant who, with the advice of
17 counsel, expresses agreement to a specified ~~prison~~ term of imprisonment normally is
18 acknowledging that the term is appropriate for his or her total course of conduct. This subdivision
19 applies to both determinate and indeterminate terms.

20 21 22 **Rule 4.413. ~~Probation eligibility when probation is limited~~ Grant of probation when** 23 **defendant is presumptively ineligible for probation**

24 25 **(a) Consideration of eligibility**

26
27 The court must determine whether the defendant is eligible for probation. In most
28 cases, the defendant is presumptively eligible for probation; in some cases, the
29 defendant is presumptively ineligible; and in some cases, probation is not allowed.

30 31 **(b) ~~Probation in unusual cases~~ cases when defendant is presumptively ineligible**

32
33 If the defendant comes under a statutory provision prohibiting probation “except in
34 unusual cases where the interests of justice would best be served,” or a
35 substantially equivalent provision, the court should apply the criteria in (c) to
36 evaluate whether the statutory limitation on probation is overcome; and if it is, the
37 court should then apply the criteria in rule 4.414 to decide whether to grant
38 probation.

39 40 **(c) ~~Facts showing unusual case~~ Factors overcoming the presumption of** 41 **ineligibility**

42
43 The following ~~facts~~ factors may indicate the existence of an unusual case in which
44 probation may be granted if otherwise appropriate:

- 45
46 (1) ~~Facts~~ Factors relating to basis for limitation on probation
47

1 A ~~fact~~ factor or circumstance indicating that the basis for the statutory
2 limitation on probation, although technically present, is not fully applicable
3 to the case, including:

4
5 (A) The ~~fact~~ factor or circumstance giving rise to the limitation on
6 probation is, in this case, substantially less serious than the
7 circumstances typically present in other cases involving the same
8 probation limitation, and the defendant has no recent record of
9 committing similar crimes or crimes of violence; and

10
11 (B) * * *

12
13 (2) ~~Facts~~ Factors limiting defendant's culpability

14
15 A ~~fact~~ factor or circumstance not amounting to a defense, but reducing the
16 defendant's culpability for the offense, including:

17
18 (A)–(C) * * *

19
20 (3) Results of risk/needs assessment

21
22 Along with all other relevant information in the case, the court may consider
23 the results of a risk/needs assessment of the defendant, if one was performed.
24 The weight of a risk/needs assessment is for the judge to consider in its
25 sentencing discretion.

26
27 **Advisory Committee Comment**

28
29 **Subdivision (c)(3).** Standard 4.35 of the California Standards of Judicial Administration provides
30 courts with additional guidance on using the results of a risk/needs assessment at sentencing.

31
32
33 **Rule 4.415. Criteria affecting the imposition of mandatory supervision**

34
35 (a)–(b) * * *

36
37 (c) **Criteria affecting conditions and length of mandatory supervision**

38
39 In exercising discretion to select the appropriate period and conditions of
40 mandatory supervision, factors the court may consider include:

41
42 (1)–(7) * * *

43
44 (8) The defendant's specific needs and risk factors identified by a validated
45 risk/needs assessment, if available; and

46
47 (9) * * *

(d) * * *

Advisory Committee Comment

* * *

Subdivision (a). * * *

Subdivisions (b)(3), (b)(4), and (c)(3). * * *

Subdivision (c)(7). * * *

Subdivision (c)(8). Standard 4.35 of the California Standards of Judicial Administration provides courts with additional guidance on using the results of a risk/needs assessment at sentencing.

Rule 4.420. Selection of term of imprisonment

(a)–(b) * * *

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing ~~the upper~~ 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) A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a ~~greater~~ particular term.

(e) * * *

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

1 same reason to deny probation and to impose the upper term. (*People v. Bowen* (1992) 11
2 Cal.App.4th 102, 106.)

3
4 ~~The rule makes it clear that a fact charged and found as an enhancement may, in the alternative,~~
5 ~~be used as a factor in aggravation.~~

6
7 *People v. Riolo* (1983) 33 Cal.3d 223, 227 (and footnote 5 ~~on p. 227~~) held that section 1170.1(a)
8 does not require the judgment to state the base term (upper, middle, or lower) and enhancements,
9 computed independently, on counts that are subject to automatic reduction under the one-third
10 formula of section 1170.1(a).

11
12 ~~Even when sentencing is under section 1170.1, however, it is essential to determine the base term~~
13 ~~and specific enhancements for each count independently, in order to know which is the principal~~
14 ~~term count. The principal term count must be determined before any calculation is made using the~~
15 ~~one-third formula for subordinate terms.~~

16
17 ~~In addition, the base term (upper, middle, or lower) for each count must be determined to arrive at~~
18 ~~an informed decision whether to make terms consecutive or concurrent; and the base term for~~
19 ~~each count must be stated in the judgment when sentences are concurrent or are fully consecutive~~
20 ~~(i.e., not subject to the one-third rule of section 1170.1(a)).~~ The proper method to calculate a
21 consecutive sentence is to first determine the sentence for each count, including any appropriate
22 enhancements. The principal term will be the count with the longest term selected by the court, or
23 any count if the terms are of the same length. After the selection of the principal term, the court
24 must impose the sentence for any subordinate terms. The sentence for a subordinate term will
25 generally be one-third of the middle term for that count, unless fully consecutive terms are
26 otherwise authorized by statute, such as by section 667.6.

29 **Rule 4.421. Circumstances in aggravation**

30
31 Circumstances in aggravation include factors relating to the crime and factors relating to
32 the defendant.

33
34 **(a)–(b) * * ***

36 **(c) Other factors**

37
38 Any other factors statutorily declared to be circumstances in aggravation or which
39 reasonably relate to the defendant or the circumstances under which the crime was
40 committed.

42 **Advisory Committee Comment**

43
44 Circumstances in aggravation may justify imposition of the middle or upper of three possible
45 terms of imprisonment. (Section 1170(b).)

46
47 The list of circumstances in aggravation includes some facts that, if charged and found, may be
48 used to enhance the sentence. ~~The~~is rule does not deal with the dual use of the facts; the statutory
49 prohibition against dual use is included, in part, in the comment to rule 4.420.

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

Facts concerning the defendant's prior record and personal history may be considered. 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. ~~This resolves whatever ambiguity may arise from the phrase "circumstances in aggravation . . . of the crime." The phrase "circumstances in aggravation or mitigation of the crime" necessarily alludes to extrinsic facts.~~

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

~~The scope of "circumstances in aggravation or mitigation" under section 1170(b) is, therefore, coextensive with the scope of inquiry under the similar phrase in section 1203.~~

~~The 1990 amendments to this rule and the comment included the deletion of most section numbers. These changes recognize changing statutory section numbers and the fact that there are numerous additional code sections related to the rule, including numerous statutory enhancements enacted since the rule was originally adopted.~~

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

Old age or youth of the victim may be circumstances in aggravation; see section 1170.85(b). Other statutory circumstances in aggravation are listed, for example, in sections 422.76, 1170.7, 1170.71, 1170.8, and 1170.85.

Rule 4.423. Circumstances in mitigation

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

1 (a)–(b) * * *

2
3 **(c) Other factors**

4
5 Any other factors statutorily declared to be circumstances in mitigation or which
6 reasonably relate to the defendant or the circumstances under which the crime was
7 committed.

8
9 **Advisory Committee Comment**

10
11 See comment to rule 4.421.

12
13 This rule applies both to mitigation for purposes of ~~motions under~~ section 1170(b) and to
14 circumstances in mitigation justifying the court in striking the additional punishment provided for
15 an enhancement.

16
17 Some listed circumstances can never apply to certain enhancements; for example, “the amounts
18 taken were deliberately small” can never apply to an excessive taking under section 12022.6, and
19 “no harm was done” can never apply to infliction of great bodily injury under section 12022.7. In
20 any case, only the facts present may be considered for their possible effect in mitigation.

21
22 See also rule 4.409; only relevant criteria need be considered.

23
24 Since only the fact of restitution is considered relevant to mitigation, no reference to the
25 defendant’s financial ability is needed. The omission of a comparable factor from rule 4.421 as a
26 circumstance in aggravation is deliberate.

27
28
29 **Rule 4.425. Criteria Factors affecting concurrent or consecutive sentences**

30
31 Criteria Factors affecting the decision to impose consecutive rather than concurrent
32 sentences include:

33
34 **(a) Criteria Facts relating to crimes**

35
36 Facts relating to the crimes, including whether or not:

- 37
38 (1) The crimes and their objectives were predominantly independent of each
39 other;
40
41 (2) The crimes involved separate acts of violence or threats of violence; or
42
43 (3) The crimes were committed at different times or separate places, rather than
44 being committed so closely in time and place as to indicate a single period of
45 aberrant behavior.
46

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

2
3 Any circumstances in aggravation or mitigation may be considered in deciding
4 whether to impose consecutive rather than concurrent sentences, except:

- 5
6 (1) A fact used to impose the upper term;
7
8 (2) A fact used to otherwise enhance the defendant's sentence in prison or county
9 jail under section 1170(h); and
10
11 (3) A fact that is an element of the crime may not be used to impose consecutive
12 sentences.

13
14 **Advisory Committee Comment * * ***
15

16
17 **Rule 4.428. Criteria Factors affecting imposition of enhancements**

18
19 **(a) Enhancements punishable by one of three terms**

20
21 ~~If the judge has statutory discretion to strike the additional term for an enhancement~~
22 ~~in the furtherance of justice under section 1385(c) or based on circumstances in~~
23 ~~mitigation, the court may consider and apply any of the circumstances in mitigation~~
24 ~~enumerated in these rules or, under rule 4.408, any other reasonable circumstances~~
25 ~~in mitigation or in the furtherance of justice.~~

26
27 ~~The judge should not strike the allegation of the enhancement.~~

28
29 If an enhancement is punishable by one of three terms, the court must, in its
30 discretion, impose the term that best serves the interest of justice and state the
31 reasons for its sentence choice on the record at the time of sentencing. In exercising
32 its discretion in selecting the appropriate term, the court may consider factors in
33 mitigation and aggravation as described in these rules or any other factor authorized
34 by rule 4.408.
35

36 **(b) Striking enhancements under section 1385**

37
38 If the court has discretion under section 1385(a) to strike an enhancement in the
39 interests of justice, the court also has the authority to strike the punishment for the
40 enhancement under section 1385(c). In determining whether to strike the entire
41 enhancement or only the punishment for the enhancement, the court may consider
42 the effect that striking the enhancement would have on the status of the crime as a
43 strike, the accurate reflection of the defendant's criminal conduct on his or her
44 record, the effect it may have on the award of custody credits, and any other
45 relevant consideration.
46
47

1 **Rule 4.433. Matters to be considered at time set for sentencing**

2
3 (a) * * *

4
5 (b) If the imposition of a sentence is to be suspended during a period of probation after
6 a conviction by trial, the trial judge must identify and state circumstances that
7 would justify imposition of one of the three authorized terms of imprisonment
8 referred to in section 1170(b) or any enhancement, if probation is later revoked.
9 The circumstances identified and stated by the judge must be based on evidence
10 admitted at the trial or other circumstances properly considered under rule 4.420(b).
11

12 (c) If a sentence of imprisonment is to be imposed, or if the execution of a sentence of
13 imprisonment is to be suspended during a period of probation, the sentencing judge
14 must:

15
16 (1) Determine, under section 1170(b), whether to impose one of the three
17 authorized terms of imprisonment referred to in section 1170(b), or any
18 enhancement, and state on the record the reasons for imposing that term;
19

20 (2)–(5) * * *

21
22 (d) * * *

23
24 (e) When a sentence of imprisonment is imposed under (c) or under rule 4.435, the
25 sentencing judge must inform the defendant:

26
27 (1)–(2) * * *

28
29 (3) Of any period of mandatory supervision imposed under section
30 1170(h)(5)(A) and (B), in addition to any period imprisonment for a violation
31 of mandatory supervision.
32

33 **Advisory Committee Comment * * ***
34
35

36 **Rule 4.435. Sentencing on revocation of probation, mandatory supervision, and**
37 **post-release community supervision**
38

39 (a) When the defendant violates the terms of probation, mandatory supervision, or
40 post-release community supervision or is otherwise subject to revocation of
41 ~~probation~~ supervision, the sentencing judge may make any disposition of the case
42 authorized by statute. In deciding whether to permanently revoke supervision, the
43 judge may consider the nature of the violation and the defendant's past
44 performance on supervision.
45

1 (b) On revocation and termination of probation supervision under section 1203.2, when
2 the sentencing judge determines that the defendant will be committed to prison or
3 county jail under section 1170(h):
4

- 5 (1) If the imposition of sentence was previously suspended, the judge must
6 impose judgment and sentence after considering any findings previously
7 made and hearing and determining the matters enumerated in rule 4.433(c).
8

9 The length of the sentence must be based on circumstances existing at the
10 time probation supervision was granted, and subsequent events may not be
11 considered in selecting the base term or in deciding whether to strike the
12 additional punishment for enhancements charged and found.
13

- 14 (2) * * *

15
16 **Advisory Committee Comment**
17

18 Subdivision (a) makes it clear that there is no change in the court's power, on finding cause to
19 revoke and terminate probation supervision under section 1203.2(a), to continue the defendant on
20 probation supervision.
21

22 The restriction of subdivision (b)(1) is based on *In re Rodriguez* (1975) 14 Cal.3d 639, 652:
23 "[T]he primary term must reflect the circumstances existing at the time of the offense."
24

25 A judge imposing imprisonment on revocation of probation will have the power granted by
26 section 1170(d) to recall the commitment on his or her own motion within 120 days after the date
27 of commitment, and the power under section 1203.2(e) to set aside the revocation of probation,
28 for good cause, within 30 days after the court has notice that execution of the sentence has
29 commenced.
30

31 Consideration of conduct occurring after the granting of probation should be distinguished from
32 consideration of preprobation conduct that is discovered after the granting of an order of
33 probation and before sentencing following a revocation and termination of probation. If the
34 preprobation conduct affects or nullifies a determination made at the time probation was granted,
35 the preprobation conduct may properly be considered at sentencing following revocation and
36 termination of probation. (See *People v. Griffith* (1984) 153 Cal.App.3d 796, 801.) While *People*
37 *v. Griffiths* refers only to probation, this rule likely will apply to any form of supervision.
38
39

40 **Rule 4.437. Statements in aggravation and mitigation**
41

- 42 (a)–(e) * * *

43
44 **Advisory Committee Comment**
45

46 Section 1170(b) states in part:
47

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

5
6 This provision means that the statement is a document giving notice of intention to dispute
7 evidence in the record or the probation officer’s report, or to present additional facts.
8 The statement itself cannot be the medium for presenting new evidence, or for rebutting
9 competent evidence already presented, because the statement is a unilateral presentation by one
10 party or counsel that will not necessarily have any indicia of reliability. To allow its factual
11 assertions to be considered in the absence of corroborating evidence would, therefore, constitute a
12 denial of due process of law in violation of the United States (14th Amend.) and California (art. I,
13 § 7) Constitutions.

14
15 ~~“[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the~~
16 ~~requirements of the Due Process Clause. Even though the defendant has no substantive right to a~~
17 ~~particular sentence within the range authorized by statute, the sentencing is a critical stage of the~~
18 ~~criminal proceeding at which he is entitled to the effective assistance of counsel The~~
19 ~~defendant has a legitimate interest in the character of the procedure which leads to the imposition~~
20 ~~of sentence” Gardner v. Florida (1977) 430 U.S. 349, 358.~~

21
22 ~~The use of probation officers’ reports is permissible because the officers are trained objective~~
23 ~~investigators. Williams v. New York (1949) 337 U.S. 241. Compare sections 1203 and 1204.~~
24 ~~People v. Peterson (1973) 9 Cal.3d 717, 727, expressly approved the holding of United States v.~~
25 ~~Weston (9th Cir. 1971) 448 F.2d 626 that due process is offended by sentencing on the basis of~~
26 ~~unsubstantiated allegations that were denied by the defendant. Cf., In re Hancock (1977) 67~~
27 ~~Cal.App.3d 943, 949.~~

28
29 The requirement that the statement include notice of intention to rely on new evidence will
30 enhance fairness to both sides by avoiding surprise and helping to ensure that the time limit on
31 pronouncing sentence is met.

32 33 34 **Rule 4.447. Limitations on enhancements Sentencing of enhancements**

35
36 ~~No finding of an enhancement may be stricken or dismissed because imposition of the~~
37 ~~term either is prohibited by law or exceeds limitations on the imposition of multiple~~
38 ~~enhancements. The sentencing judge must impose sentence for the aggregate term of~~
39 ~~imprisonment computed without reference to those prohibitions and limitations, and must~~
40 ~~thereupon stay execution of so much of the term as is prohibited or exceeds the~~
41 ~~applicable limit. The stay will become permanent on the defendant’s service of the~~
42 ~~portion of the sentence not stayed.~~

43 44 **(a) Enhancements resulting in unlawful sentences**

45
46 A court may not strike or dismiss an enhancement solely because imposition of the
47 term is prohibited by law or exceeds limitations on the imposition of multiple
48 enhancements. Instead, the court must:
49

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

(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

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 subdivision (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.)

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 4.451. Sentence consecutive to or concurrent with indeterminate term or ~~to~~ term in other jurisdiction

(a) When a defendant is sentenced under section 1170 and the sentence is to run consecutively to or concurrently with a sentence imposed under section 1168(b) in the same or another proceeding, the judgment must specify the determinate term imposed under section 1170 computed without reference to the indeterminate sentence, must order that the determinate term be served consecutively to or concurrently with the sentence under section 1168(b), and must identify the proceedings in which the indeterminate sentence was imposed. The term under section 1168(b), and the date of its completion or ~~parole~~ date of parole or postrelease community supervision, and the sequence in which the sentences are

1 deemed or served, will be determined by correctional authorities as provided by
2 law.

- 3
- 4 (b) When a defendant is sentenced under sections 1168 or 1170 and the sentence is to
5 run consecutively to or concurrently with a sentence imposed by a court of the
6 United States or of another state or territory, the judgment must specify the
7 ~~determinate~~ term imposed under sections 1168(b) or 1170 computed without
8 reference to the sentence imposed by the other jurisdiction, ~~must order that the~~
9 ~~determinate term be served commencing on the completion of the sentence~~
10 ~~imposed by the other jurisdiction, and~~ must identify the other jurisdiction and the
11 proceedings in which the other sentence was imposed, and must indicate whether
12 the sentences are imposed concurrently or consecutively. If the term imposed is to
13 be served consecutively to the term imposed by the other jurisdiction, the court
14 must order that the California term be served commencing on the completion of the
15 sentence imposed by the other jurisdiction.

16

17 **Advisory Committee Comment**

18

19 The provisions of section 1170.1(a), which use a one-third formula to calculate subordinate
20 consecutive terms, can logically be applied only when all the sentences are imposed under section
21 1170. Indeterminate sentences are imposed under section 1168(b). Since the duration of the
22 indeterminate term cannot be known to the court, subdivision (a) states the only feasible mode of
23 sentencing. (See *People v. Felix* (2000) 22 Cal.4th 651, 654-657; *People v. McGahuey* (1981)
24 121 Cal.App.3d 524, 530-532.)

25

26 On the authority to sentence consecutively to the sentence of another jurisdiction and the effect of
27 such a sentence, see *In re Helpman* (1968) 267 Cal.App.2d 307 and cases cited at ~~note 3, id. at~~
28 page 310, footnote 3. The mode of sentencing required by subdivision (b) is necessary to avoid
29 the illogical conclusion that the total of the consecutive sentences will depend on whether the
30 other jurisdiction or California is the first to pronounce judgment.

31

32

33 **Rule 4.452. Determinate sentence consecutive to prior determinate sentence**

34

35 If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more
36 determinate sentences imposed previously in the same court or in other courts, the court
37 in the current case must pronounce a single aggregate term, as defined in section
38 1170.1(a), stating the result of combining the previous and current sentences. In those
39 situations:

40

41 (1) * * *

42

- 43 (2) The judge in the current case must make a new determination of which count, in
44 the combined cases, represents the principal term, as defined in section 1170.1(a).
45 The principal term is the term with the greatest punishment imposed including
46 conduct enhancements. If two terms of imprisonment have the same punishment,
47 either term may be selected as the principal term.
- 48

- 1 (3) Discretionary decisions of the judges in the previous cases may not be changed by
2 the judge in the current case. Such decisions include the decision to impose one of
3 the three authorized terms of imprisonment referred to in section 1170(b), making
4 counts in prior cases concurrent with or consecutive to each other, or the decision
5 that circumstances in mitigation or in the furtherance of justice justified striking the
6 punishment for an enhancement. However, if a previously designated principal
7 term becomes a subordinate term after the resentencing, the subordinate term will
8 be limited to one-third the middle base term as provided in section 1170.1(a).
9

10 **Advisory Committee Comment * * ***

SPR17-09**Criminal Law: Felony Sentencing**

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

	Commentator	Position	Comment	Committee Response
1.	Attorney from Appellate Defenders, Inc.	N/I	On page 12, line 43, in the added narrative to the Advisory Committee Comment to Rule 4.406, I believe “as” should be “and,” such that the sentence should read, “The court should not use the same reason to impose a consecutive sentence and to impose an upper term of imprisonment. (Citation.)”	The committee accepts the suggestion. The sentence on page 12, line 43 of the Advisory Committee Comment to Rule 4.406 shall read as follows: “The court should not use the same reason to impose a consecutive sentence and to impose an upper term of imprisonment. (Citation.)”
2.	Curtis Harris	N/I	Comments not related to proposal.	No response required.
3.	Orange County Bar Association By: Michael L. Baroni President	A	<p>This proposal by the Criminal Law Advisory Committee contains proposed rule amendments intended to update the California Rules of Court to reflect the changes to California’s Determinate Sentencing Law (DSL) in response to <i>Cunningham v. California</i> (2007) 549 U.S. 270, and the passage of the Criminal Justice Realignment Act (Realignment). Other proposed amendments would clarify the application of the rules to certain indeterminate sentences and would provide further guidance to courts on the referral of cases to probation for investigation reports, risk/needs assessments, and sentencing enhancements.</p> <p>The proposed amendments relating to changes in California’s DSL and amendments related to statutory changes brought about by Realignment are accurate statements of law and update the rules to conform with these changes.</p> <p>The proposed amendments relating to the use of risk/needs assessments (defined as “a standardized validated evaluation tool designed to to measure an offenders actuarial risk factors and specific needs that, if successfully addressed, may reduce the</p>	<p>The committee appreciates the input from the Orange County Bar Association.</p> <p>No response required.</p> <p>No response required.</p>

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			<p>likelihood of future criminal activity”) are in line with the Legislature’s declaration that correctional practices should utilize a “data driven approach” to corrections and related criminal justice spending through evidence-based strategies “that increase public safety while holding offenders accountable.” (Pen. Code, § 17.5, subd. (a)(7).) The use of risks/needs assessments is central to this effort and they are utilized by probation departments state-wide.</p> <p>The proposed amendments related to referrals to probation for investigations and reports are correct statements of law and clarify probation’s obligations.</p> <p>The proposed amendments related to sentencing enhancements are correct statements of law and provide guidance to the trial courts on sentencing options with respect to enhancements.</p>	<p>No response required.</p> <p>No response required.</p>
4.	Superior Court of California, County of Los Angeles	A	<p>These proposals bring the rules into conformity with statutory and case law. We support the amendments.</p> <p>Effective January 1, 2018, Proposition 63 (The Safety for All Act) will require probation officers to investigate whether persons subject to the firearms and ammunition prohibitions in Penal Code sections 29800 and 29805 have relinquished those items. It also requires that probation officers report their findings to the court before sentencing. Should the new firearms and ammunition reporting requirements be included in rule 4.411.5? If so, why?</p>	<p>The committee appreciates the input from the Superior Court of California, County of Los Angeles.</p> <p>The committee accepts the recommendation to amend rule 4.411.5(a), to include the information that probation officers are required to report to the court under Penal Code section 29810(c). Specifically, the committee recommends adding the following language to rule 4.411.5, as subdivision (a)(13):</p> <p>Information pursuant to Penal Code</p>

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			<p>Rule 4.411.5 should be modified to require the probation officers pre-plea report to include the firearms and ammunition reporting requirements in every probation report to expedite court proceedings. Having the information as soon as possible will assist courts in conducting pretrial events that lead to case disposition.</p> <p>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>New CMS codes can be created to document sentencing findings, if necessary, that are ordered by the court. Our current CMS is capable of capturing the proposed revisions to sentencing terms.</p>	<p>section 29810(c):</p> <p>(A) Whether the defendant has properly complied with Penal Code section 29810 by relinquishing all firearms identified by the probation officer's investigation or declared by the defendant on the Prohibited Persons Relinquishment Form, and</p> <p>(B) Whether the defendant has timely submitted a completed Prohibited Persons Relinquishment Form.</p> <p>No response is required.</p>
5.	Superior Court of California, County of San Diego By: Mike Roddy Executive Officer	A		The committee appreciates the input from Mr. Roddy.