

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Criminal Law Advisory Committee
Hon. Steven Z. Perren, Chair
Joshua Weinstein, Committee Counsel, 415-865-7688,
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DATE: August 31, 2006

SUBJECT: Criminal Cases: Sentencing Rules for Hate Crime Cases (amend Cal. Rules of Court, rule 4.421; adopt rules 4.330 and 4.427) (Action Required)

Issue Statement

A judge must consider specific factors, as set forth by the Legislature, when sentencing a defendant convicted of a hate crime. As hate crime prosecutions are not common, these factors are not well-known. Moreover, Penal Code section 422.86, enacted effective January 1, 2005, provides that the Judicial Council is to “develop a rule of court guiding hate crime sentencing.” (Pen. Code, § 422.86(b).)

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2007, amend rule 4.421 and adopt rules 4.330 and 4.427 of the California Rules of Court to guide judges in sentencing defendants in hate crime cases.

The text of the proposed rules is attached at pages 4–7.

Rationale for Recommendation

Penal Code section 422.86(b) provides that the Judicial Council is to “develop a rule of court” to assist judge in hate crime sentencing and to implement the following legislative goals: (1) punishment, (2) crime and violence prevention, and (3) restorative justice for the immediate victims and the “classes of persons terrorized by the hate crimes.” (Pen. Code, § 422.86(a).)

Misdemeanor sentencing

Proposed rule 4.330 would apply in misdemeanor cases where either (1) the conviction is for a substantive hate crime or (2) the facts of the crime constitute a hate crime. In those circumstances, the rule refers the sentencing judge to the considerations stated in proposed rule 4.427(e). That subdivision, as described below, would provide guidance by stating the legislative goals in hate crime sentencing.

Felony sentencing

The proposed amendments to rule 4.421 and the proposed new rule 4.427 would address hate crime sentencing in felony cases. Rule 4.421, which lists aggravating factors in felony sentencing, would be amended. The amendments would provide that it is an aggravating factor if the crime constitutes a hate crime and (1) no hate crime sentencing enhancement is imposed and (2) the prosecution is not for a violation of Penal Code section 1170.8. These amendments reflect legislative mandates stated in Penal Code section 422.76.

Proposed rule 4.427 would specify the various sentencing options for felony hate crime violations. The rule is to assist the court in sentencing in three circumstances:

- For misdemeanor convictions that are subject to felony sentencing, when certain statutory factors are found true by the jury, as provided by Penal Code section 422.7. (Proposed rule 4.427(b).)
- For felony convictions subject to hate crime enhancements, the rule provides when the imposition of the enhancement is appropriate and the additional terms of imprisonment. (Proposed rule 4.427(c).)
- For other felony convictions that qualify as hate crimes under Penal Code section 422.55, the rule clarifies when the hate crime must be used as an aggravating factor. (Proposed rule 4.427(d).)

The proposed rule also provides guidance by stating the legislatively articulated goals in felony hate crime sentencing. (Proposed rule 4.427(e).) As noted above, those goals are (1) punishment, (2) crime and violence prevention, and (3) restorative justice for the immediate victims and the “classes of persons terrorized by the hate crimes.” (Pen. Code, § 422.86(a).)

Alternative Actions Considered

The committee considered prohibiting use of an element of the crime to impose an aggravated sentence in felony hate crime sentencing. Rule 4.420(d) prohibits the use of an element of the crime to impose an aggravated sentence. Penal Code section 422.76,

however, provides that the fact a felony constitutes a hate crime *must* be used as an aggravating factor unless (1) a hate crime enhancement is imposed or (2) the conviction is for a violation of section 1170.8. The committee concluded, therefore, that such a prohibition would most likely be inconsistent with statute. Assuming *arguendo* that such a dual use prohibition is not clearly inconsistent with statute, the committee also concluded that it be settled through litigation. Finally, the committee observed that the dual use in this situation is similar to dual use allowed by Penal Code section 12022.5(d). That section provides that use of a firearm may be used to enhance a sentence even if such use is an element in the crime (e.g., firearm used for assault with a deadly weapon conviction).

Comments From Interested Parties

The proposed hate crime sentencing rules were circulated for 10 weeks for public comment during the spring 2006 cycle. In total, 10 comments were received. Of those, 6 agreed with the proposal, 3 agreed if modified, and 1 did not agree (but offered suggestions to alleviate his concerns).

The committee adopted most of the suggestions by those who commented. One of the two suggestions that the committee did not adopt suggested making the rule consistent with the recent United States Supreme Court case of *Blakely v. Washington* (2004) 542 U.S. 296. The California Supreme Court, however, found that *Blakely v. Washington* was inapplicable to California's determinate sentencing law. (*People v. Black* (2005) 35 Cal.4th 1238.) While it is true that the United States Supreme Court is reviewing the constitutionality of California's determinate sentencing law, the committee declined to adopt the suggested changes because *Black* is still controlling law and, given that California's determinate sentencing law is presumptively valid unless *Black* is overturned, the rule should be based on current law. Moreover, if *Black* is overturned, all the sentencing rules (and indeed almost all of California's entire felony sentencing structure) are of questionable constitutionality. (The one comment that did not agree had the identical comment.) The remaining person who agreed if modified suggested that the rule be more specific regarding the court's discretion in sentencing. The committee declined to change the rule in light of this comment, as the rule referenced the relevant statutes and provided sufficient guidance on the court's discretion.

A chart summarizing the comments is attached at pages 8–17.

Implementation Requirements and Costs

Implementation would not impose any new costs.

Attachments

Rule 4.421 of the California Rules of Court would be amended and rules 4.330 and 4.427 would be adopted, effective January 1, 2007, to read:

1 **Rule 4.330. Misdemeanor hate crimes**

2
3 **(a) Application**

4
5 This rule applies to misdemeanor cases where the defendant is convicted of
6 either (1) a substantive hate crime under section 422.6 or (2) a misdemeanor
7 violation and the facts of the crime constitute a hate crime under section
8 422.55.

9
10 **(b) Sentencing consideration**

11
12 In sentencing a defendant under (a), the court must consider the goals for
13 hate crime sentencing stated in rule 4.427(e).

14
15 **Rule 4.421. Circumstances in aggravation**

16
17 Circumstances in aggravation include:

18
19 **(a)** Facts relating to the crime, whether or not charged or chargeable as
20 enhancements, including the fact that:

21
22 (1)–(11) ***

23
24 (12) The crime constitutes a hate crime under section 422.55 and:

25
26 (A) No hate crime enhancements under section 422.75 are imposed;
27 and

28
29 (B) The crime is not subject to sentencing under section 1170.8.

30
31 **(b) *****

32
33 **Rule 4.427. Hate crimes**

34
35 **(a) Application**

36
37 This rule is intended to assist judges in sentencing in felony hate crime cases. It
38 applies to:

39
40 (1) Felony sentencing under section 422.7;

1 (2) Convictions of felonies with a hate crime enhancement under section
2 422.75; and

3
4 (3) Convictions of felonies that qualify as hate crimes under section
5 422.55.

6
7 **(b) Felony sentencing under section 422.7**

8
9 If one of the three factors listed in section 422.7 is pled and proved, a
10 misdemeanor conviction that constitutes a hate crime under section 422.55 may be
11 sentenced as a felony. The punishment is imprisonment in state prison as provided
12 by section 422.7.

13
14 **(c) Hate crime enhancement**

15
16 If a hate crime enhancement is pled and proved, the punishment for a felony
17 conviction must be enhanced under section 422.75 unless the conviction is
18 sentenced as a felony under section 422.7.

19
20 (1) The following enhancements apply:

21
22 (A) An enhancement of a term in state prison as provided in section
23 422.75(a). Personal use of a firearm in the commission of the
24 offense is an aggravating factor that must be considered in
25 determining the enhancement term.

26
27 (B) An additional enhancement of one year in state prison for each
28 prior felony conviction that constitutes a hate crime as defined in
29 section 422.55.

30
31 (2) The court may strike enhancements under (c) if it finds mitigating
32 circumstances under rule 4.423 and states those mitigating
33 circumstances on the record.

34
35 (3) The punishment for any enhancement under (c) is in addition to any
36 other punishment provided by law.

37
38 **(d) Hate crime as aggravating factor**

39
40 If the defendant is convicted of a felony, and the facts of the crime constitute a
41 hate crime under section 422.55, that fact must be considered a circumstance in
42 aggravation in determining the appropriate punishment under rule 4.421 unless:

43
44 (1) The court imposed a hate crime enhancement under section 422.75; or

1 (2) The defendant has been convicted of an offense subject to sentencing
2 under section 1170.8.

3
4 **(e) Hate crime sentencing goals**

5
6 When sentencing a defendant under this rule, the judge must consider the principal
7 goals for hate crime sentencing.

8
9 (1) The principal goals for hate crime sentencing, as stated in section
10 422.86, are:

11
12 (A) Punishment for the hate crime committed;

13
14 (B) Crime and violence prevention, including prevention of
15 recidivism and prevention of crimes and violence in prisons and
16 jails; and

17
18 (C) Restorative justice for the immediate victims of the hate crimes
19 and for the classes of persons terrorized by the hate crimes.

20
21 (2) Crime and violence prevention considerations should include
22 educational or other appropriate programs available in the community,
23 jail, prison, and juvenile detention facilities. The programs should
24 address sensitivity or similar training or counseling intended to reduce
25 violent and antisocial behavior based on one or more of the following
26 actual or perceived characteristics of the victim:

27
28 (A) Disability;

29
30 (B) Gender;

31
32 (C) Nationality;

33
34 (D) Race or ethnicity;

35
36 (E) Religion;

37
38 (F) Sexual orientation; or

39
40 (G) Association with a person or group with one or more of these
41 actual or perceived characteristics.

42
43 (3) Restorative justice considerations should include community service
44 and other programs focused on hate crime prevention or diversity

1 sensitivity. Additionally, the court should consider ordering payment
2 or other compensation to programs that provide services to violent
3 crime victims and reimbursement to the victim for reasonable costs of
4 counseling and other reasonable expenses that the court finds are a
5 direct result of the defendant's actions.

6
7 **Advisory Committee Comment**

8
9 Multiple enhancements for prior convictions under subdivision (c)(1)(B) may be
10 imposed if the prior convictions have been brought and tried separately. (Pen.
11 Code, § 422.75(d).

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Criminal Cases: Sentencing Rules for Hate Crimes
(amend Cal. Rules of Court, rule 4.421; adopt rules 4.330 and 4.427)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>...</p> <p><u>(12) The crime constitutes a hate crime under section 422.55 and:</u></p> <p><u>(A) The crime is not charged as a substantive hate crime subject to sentencing under section 422.7;</u></p> <p>NOTE: but see “Additional comment” below</p> <p>Rule 4.427(a)(1)</p> <p><u>(1) Convictions of felony violations of sentencing under section 422.7 for substantive hate crimes;</u></p> <p>Rule 4.427(a)(3)</p> <p><u>(3) Convictions of felonies other than for violations of section 422.7 that nonetheless qualify as hate crimes under section 422.55.</u></p> <p>Rule 4.427(b)</p> <p><u>(b) [Substantive hate crime Sentencing under section 422.7] A misdemeanor conviction of a felony violation of a substantive hate crime is punishable may be punished as a felony under section 422.7 by imprisonment in state prison as provided by statute.</u></p> <p>Rule 4.427(d)(1)</p> <p><u>(1) The defendant is convicted of a substantive hate crime subject to sentencing under section 422.7;</u></p> <p>NOTE: but see “Additional comment” below</p>	<p>Agree.</p> <p>Agree.</p> <p>Agree that rule needs revision, but used different wording to convey the same concept.</p> <p>Agree that rule needs revision, but used different wording to convey the same concept.</p>

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				<p><i>Reasons for above modifications:</i> Penal Code section 422.7 is a penalty provision and does not describe a substantive offense; the language of the rules should so reflect. (See <i>In re M.S.</i>, <i>supra</i>, 10 Cal.4th at pp. 709, fn. 2, 724, 729, 730; <i>People v. Wallace</i>, <i>supra</i>, 109 Cal.App.4th at p. 1701.)</p> <p><i>Additional comment:</i> It is not clear that section 422.7 sentencing is properly listed as one of the three exceptions to the use of the fact of a hate crime as a factor in aggravation pursuant to Penal Code section 422.76. (See proposed rule 4.421(a)(12)(A) and proposed rule 4.427(d)(1).) Section 422.76 itself excepts only cases in which a hate crime enhancement is imposed under Penal Code section 422.75 or where the offense comes within Penal Code section 1170.8 (arson, robbery or assault committed in place of worship).</p> <p>There does not seem to be any prohibited dual use of facts in using the fact of a hate crime as a factor in aggravation in section 422.7 felony sentencing and using one of the three specified circumstances in section 422.7 (actual injury inflicted or present ability to commit a violent injury; damage to property exceeding \$500; prior section 422.6 misdemeanor conviction) to</p>	<p>Agree. Rule revised to reflect correction.</p>

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				elevate a misdemeanor to a felony. Under rule 4.420(d), an element of the offense cannot be used as a circumstance in aggravation. Section 422.7 does not describe a substantive offense and thus the fact making it a hate crime is not an element; an offense sentenced under section 422.7 thus appears to be no different from any other felony hate crime in which section 422.76 may be used. Penal Code section 1170, subdivision (b) states that the court may not impose an upper term using the fact of any enhancement on which sentence is imposed (see also rule 4.420(c)). Felony sentencing under section 422.7 is not an enhancement.	
4.	Ms. Mary Carnahan Criminal Division Program Manager Superior Court of Solano County 530 Union Ave., Ste. 200 Fairfield,	A	N	As it relates to operations.	
5.	Ms. Janice Y. Fukai Alternate Public Defender Los Angeles County 35 Hall of Records 320 W. Temple St. Los Angeles	AM	N	The proposed changes to rule 4.421 or the adoption of new rules 4.330, and 4.427, regarding sentencing rules for hate crime cases are unacceptable. Our concerns and alternative recommendations are delineated below. The proposed amendments to existing rule 4.421, and adoption of new rules 4.330 and 4.427, fail to account for United States Supreme Court's holding in <i>Blakely v. Washington</i> . <i>Blakely</i> held that a court cannot increase the	Disagree. Unless <i>People v. Black</i> is overturned, it is controlling law. As such, the current sentencing scheme in California is presumed valid. To require that only these sentencing decisions must be pled and proved would be inconsistent with the vast majority of presumptively valid California sentencing law. It is not clear that such a rule would be

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				<p>maximum sentence imposed on a defendant by relying on facts beyond the elements of the offense, unless the jury found those facts or the defendant admitted them.</p> <p>In June, 2005, the California Supreme Court issued <i>People v. Black</i>, in which the court said that <i>Blakely</i> has no application to California sentencing law. The majority in <i>Black</i> relied on the dissents in U.S. Supreme Court cases. However, the United States Supreme Court has now granted <i>certiorari</i> in <i>Cunningham v. California</i>, a case directly presenting a <i>Blakely</i> issue in a California case.</p> <p>If the United States Supreme Court holds that <i>Blakely</i> applies to California, a sentencing court could only impose the upper term based upon facts found by a jury or admitted by the defendant. There are two categories of aggravating facts: facts specific to the crime and facts related to the defendant. Facts specific to crime include the victim being particularly vulnerable or the acts disclosing a high degree of cruelty. The latter fact looks very much like the fact at issue in <i>Blakely</i> itself. Facts related to the defendant include that his prior convictions are numerous or of increasing seriousness, or that the defendant's prior performance on probation was unsatisfactory. (See California</p>	<p>within the Judicial Council's constitutionally limited authority. Regardless, there is not a valid policy reason to place such restriction on hate crime sentencing while the remainder of California sentencing law remains unchanged.</p>

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				<p>Rules of Court, Rule 4.421.)</p> <p>Rule 4.421(a): Circumstances in Aggravation <u>Current Version:</u> Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that.... (Emphasis added.)</p> <p><u>Recommended Changes:</u> Facts relating to the crime, which are pled and proved, including the fact that... –</p> <p>Rule 4.427(d): Hate Crimes <u>Current Version</u> [Hate crime as aggravating factor] If the defendant is convicted of a felony and the facts of the crime constitute a hate crime under section 422.55, that fact must be considered a circumstance in aggravation in determining the appropriate punishment under rule 4.421 unless: (Emphasis added.)</p> <p><u>Recommended Changes</u> [Hate crime as aggravating factor] If the defendant is convicted of a felony and the facts of the crime constitute a hate crime under section 422.55, <u>if that fact is proved and</u> it must be considered a circumstance in aggravation in determining the appropriate punishment under rule 4.421 unless:</p>	

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6.	Mr. Michael P. Judge Public Defender Los Angeles Public Defender's Office	N	Y	<p>My Office does not agree with the proposed changes to rule 4.421 or the adoption of new rules 4.330, and 4.427, regarding sentencing rules for hate crime cases. Our concerns are elaborated on below and we have offered recommendations in the alternative to the proposed changes.</p> <p>The proposed changes to rule 4.421 or the adoption of new rules 4.330, and 4.427, regarding sentencing rules for hate crime cases are unacceptable. Our concerns and alternative recommendations are delineated below.</p> <p>The proposed amendments to existing rule 4.421, and adoption of new rules 4.330 and 4.427, fail to account for United States Supreme Court's holding in <i>Blakely v. Washington</i>. <i>Blakely</i> held that a court cannot increase the maximum sentence imposed on a defendant by relying on facts beyond the elements of the offense, unless the jury found those facts or the defendant admitted them.</p> <p>In June, 2005, the California Supreme Court issued <i>People v. Black</i>, in which the court said that <i>Blakely</i> has no application to California sentencing law. The majority in <i>Black</i> relied on the dissents in U.S. Supreme Court cases.</p>	Disagree. Unless <i>People v. Black</i> is overturned, it is controlling law. As such, the current sentencing scheme in California is presumed valid. To require that only these sentencing decisions must be pled and proved would be inconsistent with the vast majority of presumptively valid California sentencing law. It is not clear that such a rule would be within the Judicial Council's constitutionally limited authority. Regardless, there is not a valid policy reason to place such restriction on hate crime sentencing while the remainder of California sentencing law remains unchanged.

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				<p>However, the United States Supreme Court has now granted <i>certiorari</i> in <i>Cunningham v. California</i>, a case directly presenting a <i>Blakely</i> issue in a California case.</p> <p>If the United States Supreme Court holds that <i>Blakely</i> applies to California, a sentencing court could only impose the upper term based upon facts found by a jury or admitted by the defendant. There are two categories of aggravating facts: facts specific to the crime and facts related to the defendant. Facts specific to crime include the victim being particularly vulnerable or the acts disclosing a high degree of cruelty. The latter fact looks very much like the fact at issue in <i>Blakely</i> itself. Facts related to the defendant include that his prior convictions are numerous or of increasing seriousness, or that the defendant's prior performance on probation was unsatisfactory. (See California Rules of Court, Rule 4.421.)</p> <p>Rule 4.421(a): Circumstances in Aggravation <u>Current Version:</u> Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that.... (Emphasis added.)</p> <p><u>Recommended Changes:</u> Facts relating to the crime, which are pled and</p>	

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				<p>proved, including the fact that... –</p> <p>Rule 4.427(d): Hate Crimes <u>Current Version</u></p> <p>[Hate crime as aggravating factor] If the defendant is convicted of a felony and the facts of the crime constitute a hate crime under section 422.55, that fact must be considered a circumstance in aggravation in determining the appropriate punishment under rule 4.421 unless: (Emphasis added.)</p> <p><u>Recommended Changes</u></p> <p>[Hate crime as aggravating factor] If the defendant is convicted of a felony and the facts of the crime constitute a hate crime under section 422.55, <u>if that fact is proved and</u> it must be considered a circumstance in aggravation in determining the appropriate punishment under rule 4.421 unless:</p>	
7.	Ms. Tressa S. Kentner and Ms. Debra Meyers, Executive Officer and Chief of Staff Counsel Services 172 W. 3rd Street, 2nd Floor San Bernardino	A	N		
8.	Superior Court of Los Angeles County 111 N. Hill Street Los Angeles,	A	Y		
9.	Mr. Nelson Lu	AM	N	The rule does not give sufficient clarity. I think	Disagree. The Legislature has

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	Deputy Public Defender San Joaquin County Public Defender's Office Stockton			that the court has discretion to strike the enhanced penalties, or the level of discretion that it has, or the standard of exercising such discretion. Further language on such standards would be helpful.	vested the court with discretion and the rule either identifies that discretion or references the relevant statutes.
10.	Mr. Michael M. Roddy, Executive Officer Superior Court of San Diego County	A	Y		