

**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,  
joshua.weinstein@jud.ca.gov

DATE: October 3, 2007

SUBJECT: Criminal Law: Compliance With the Determinate Sentencing Law  
(amend Cal. Rules of Court, rules 4.405, 4.420, 4.428, 4.433, and  
4.437) (Action Required)

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Issue Statement

Effective May 23, 2007, the Judicial Council amended the rules of court guiding judges in sentencing defendants to state prison terms under the Determinate Sentencing Law (DSL). The amendments were necessitated by monumental changes to the DSL as a result of the United States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. \_\_\_\_ [127 S.Ct. 856] and the legislative response to that decision (Sen. Bill 40; Stats. 2007, ch. 3). To ensure that the rules were in compliance with current law, the council voted by circulating order to make the amendments effective immediately without circulation for public comment. To ensure that the changes were appropriate and to gather as much input as possible from judges and practitioners, the council also directed staff to circulate the adopted rules for public comment.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2008, amend rules 4.405, 4.420, 4.428, 4.433, and 4.437 of the California Rules of Court to clarify the rules guiding judges in sentencing defendants to state prison under the Determinate Sentencing Law.

The text of the proposed rule amendments is attached at pages 6–7, followed by the rule amendments that became effective May 23, 2007 at pages 8–15.

### Rationale for Recommendation

As noted above, the Judicial Council recently amended the rules of court guiding judges in sentencing felons to state prison under the DSL. The amendments were necessary as the Legislature had modified the DSL in light of the United States Supreme Court ruling in *Cunningham v. California*. The rules as amended effective May 23, 2007, are attached at pages 8–15.

### *Cunningham* and SB 40

Before the United States Supreme Court decision in *Cunningham* and SB 40, there were three possible terms of imprisonment for state prison commitments under the DSL. The DSL and the rules of court guiding judges in sentencing under the DSL used to provide that the middle term was to be imposed unless there were circumstances justifying the lower or upper term. In determining which term to impose, the judge was to make factual findings, based on the preponderance of the evidence, and to determine whether there were sufficient circumstances justifying a departure from the middle term.<sup>1</sup>

In *Cunningham*, the United States Supreme Court found that the DSL violated the Sixth Amendment to the United States Constitution for two reasons: (1) because judges, not juries, were making factual findings to elevate a sentence beyond the maximum that could be imposed based on the findings made by the jury; and (2) the burden of proof of those findings was preponderance of the evidence and not beyond a reasonable doubt. (*Cunningham, supra*, 127 S.Ct. at p. 871.)

To address the constitutional defects, the Legislature amended the DSL to delete the presumption that the middle term would be imposed and instead provide that judges have the discretion to impose any of the three possible terms. This change addressed the first concern raised in *Cunningham* by making the upper term the maximum sentence that the judge could impose based upon the jury's finding.<sup>2</sup> The specific change was to amend Penal Code section 1170(b) to provide that "the choice of the appropriate term shall rest within the sound discretion of the court." That section goes on to state that "[t]he court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law."

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<sup>1</sup> See Penal Code section 1170 as it read before the amendments made by SB 40.

<sup>2</sup> Assuming this change satisfactorily addresses the concerns raised in *Cunningham*, the second concern (the burden of proof of the findings) is satisfied as the jury finds those facts. Some question whether SB 40 did not adequately address the concerns raised in *Cunningham*. That is a substantive legal decision about which the committee does not opine. The committee expects that it will be resolved, if at all, through litigation.

SB 40 did not address the few sentencing enhancements that have three possible terms. (*Ibid.*, Pen. Code, §§ 12022(b)(2), and 12022.2(a).) Under the DSL, the basic sentence may be elevated under specified circumstances; these circumstances are called enhancements. Usually enhancements are for a specified term. There are, however, a limited number of enhancements that have three possible terms. Under the pre-SB 40 DSL, the judge is to select between those terms in the same fashion as for the base term sentence. (Pen. Code, § 1170.1(d).)

*May 23, 2007, rule amendments*

The amendments made effective on May 23, 2007:

- Deleted the requirement that the judge (1) impose the middle term absent justification for imposing the lower or upper term; and (2) find justification for deviating from the middle term by a preponderance of the evidence. (Rule 4.420(a) and (b).)
- Clarified that the judge has discretion to impose one of the three terms authorized under Penal Code section 1170(b). In doing so, the amended rules provide that “the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.” (Rule 4.420(b).)
- Replaced the requirement that the judge state reasons for deviating from the middle term with a new provision requiring that the judge state the reason for choosing a particular term. (See, e.g., rules 4.405(4) and (5), 4.406(b)(4), 4.420(e), 4.433(b) and (c)(1), 4.437(c)(1), and 4.452(3).)
- Deleted references to judges’ making factual findings, relying upon facts, or hearing evidence. (See, e.g., rules 4.405(5), 4.420(b), 4.421(a)–(c), 4.423(a) and (b), 4.433(b), and 4.437(c)(1).)
- Deleted the rule provision addressing enhancements with three possible terms. (Rule 4.428.) The rule provided that the middle term was to be imposed unless there were circumstances to justify imposing the lower or upper term. Although these enhancements were not specifically addressed in *Cunningham*, the reasoning in *Cunningham* supports the argument that this sentencing scheme is similarly flawed. Although the Legislature did not address that issue in SB 40, given the strong possibility that this scheme is unconstitutional, rule 4.428(b) was deleted. (See also the advisory committee comment to rule 4.405.)

- Revised and updated the advisory committee’s comments in light of these changes.

In addition to amending the rules, the council directed staff to circulate the rules for public comment.

#### Alternative Actions Considered

As the council directed that the amended rules be circulated for public comment, alternatives were not considered.

#### Comments From Interested Parties

The amended rules were circulated for public comment for a nine-week period in spring 2007. Eight comments were received; two agreed with the proposal, three agreed if it was amended, and two disagreed. One comment by council member Justice Eileen C. Moore did not state a position but was generally supportive while offering proposed changes. The two commentators agreeing with the proposal did not elaborate on their position and thus did not receive a committee response.

Of the three “agree-if-amended” comments, only one, the response by the Appellate Division of the Los Angeles County District Attorney’s Office, proposed changes to the rules. The committee agreed with most of those suggested changes, which were all minor and clarifying. Another of the remaining “agree-if-amended” comments addressed the need for uniformity in sentencing (even with increased judicial discretion) and suggested that this be stressed in the advisory committee comments. The committee agreed in principle with the comment but concluded that the issue would be best addressed through judicial education. The final “agree-if-amended” comment, which was submitted by Dean Parker and Professor Vitiello of the McGeorge School of Law, “endorse[d] the changes” but “address[ed] a broader issue: The need for wholesale sentencing reform.” The committee declined to substantively respond to the comment because sentencing reform is beyond the scope of this proposal.

The first of the two commentators who disagreed with the proposal did so because “the law in the area of criminal sentencing is changing too rapidly to allow for incremental adjustments at this time.” The committee disagreed for several reasons. Penal Code section 1170 requires judges to follow the Judicial Council sentencing rules when sentencing under the DSL. *Cunningham* and SB 40 rendered those rules of court unconstitutional and contrary to statute. Moreover, SB 40 is presumed valid unless and until it is found to be unconstitutional. Thus, the committee concluded that it is better to have presumptively valid rules and to make any necessary changes when and if the need arises. The second comment was implicit criticism of SB 40, arguing that “[i]t still violates 6th Amendment concerns expressed in *Cunningham*, *Blakely*, *Apprendi* and *Booker*.” The

committee observed that while that issue may be litigated, SB 40 is presumed valid unless and until it is found to be unconstitutional.

The final comment, which did not state a position, was from council member Justice Moore. In her comment, Justice Moore was generally supportive but made several suggestions. The committee agreed with most of those suggestions and incorporated them into the rules.

As a result of circulating the May 23, 2007 amendments, there are some clarifying changes, as well as some proposed editorial improvements. These proposed changes are set forth in underline and strikeout in the text of the proposed rule amendments, which is attached at pages 6–7.

A chart summarizing the comments and the committee responses is attached at pages 16–25.

#### Implementation Requirements and Costs

The only implementation costs would be the usual costs associated with the development of a new rule.

Attachments

Rules 4.405, 4.420, 4.428, 4.433, and 4.437 of the California Rules of Court would be amended, effective January 1, 2008, to read:

1 **Rule 4.405. Definitions**

2  
3 As used in this division, unless the context otherwise requires:

4  
5 (1)–(10) \* \* \*

6  
7 **Advisory Committee Comment**

8  
9 “Base term” is the term of imprisonment selected under section 1170(b) from the three possible  
10 terms. (See section 1170(a)(3); *People v. Scott* (1994) 9 Cal.4th 331, 349.) Following the United  
11 States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. \_\_ [127 S.Ct. 856.],  
12 the Legislature amended the determinate sentencing law. (See Sen. Bill 40; Stats. 2007, ch. 3.) To  
13 comply with those changes, these rules were also amended. In light of those amendments, for  
14 clarity, the phrase “base term” in (4) and (5) was replaced with “one of the three authorized  
15 prison terms.” It is an open question whether the definitions in (4) and (5) apply to enhancements  
16 for which the statute provides for three possible terms. The Legislature in SB 40 amended section  
17 1170(b) but did not modify sections 1170.1(d), 12022.2(a), 12022.3(b), or any other section  
18 providing for an enhancement with three possible terms. The latter sections provide that “the  
19 court shall impose the middle term unless there are circumstances in aggravation or mitigation.”  
20 (See, e.g., section 1170.1(d).) It is possible, although there are no cases addressing the point, that  
21 this enhancement triad with the presumptive imposition of the middle term runs afoul of  
22 *Cunningham*. Because of this open question, rule 4.428(b) was deleted.

23  
24 \* \* \*

25  
26  
27 **Rule 4.420. Selection of term of imprisonment**

28  
29 (a) \* \* \*

30  
31 (b) In exercising his or her discretion in selecting one of the three authorized  
32 prison terms referred to in section 1170(b), the sentencing judge may  
33 consider circumstances in aggravation or mitigation, and any other factor  
34 reasonably related to the sentencing decision. The relevant circumstances  
35 may be obtained from the case record, the probation officer’s report, other  
36 reports and statements properly received, statements in aggravation or  
37 mitigation, and any ~~further~~ evidence introduced at the sentencing hearing.

38  
39 (c) \* \* \*

40  
41 (d) A fact that is an element of the crime upon which punishment is being  
42 imposed may not be used to impose a greater term.

1 (e) \* \* \*

2  
3  
4 **Rule 4.428. Criteria affecting imposition of enhancements**

5  
6 ***Imposing or not imposing enhancement***

7 No reason need be given for imposing a term for an enhancement that was charged  
8 and found true.

9  
10 If the judge has statutory discretion to strike the additional term for an  
11 enhancement in the furtherance of justice under section 1385(c) or based on  
12 circumstances in mitigation, the court may consider and apply any of the  
13 circumstances in mitigation enumerated in these rules or, under rule 4.408, any  
14 other reasonable circumstances in mitigation or in the furtherance of justice.

15  
16 The judge should not strike the allegation of the enhancement.

17  
18 **Rule 4.433. Matters to be considered at time set for sentencing**

19  
20 (a) \* \* \*

21  
22 (b) If the imposition of a sentence is to be suspended during a period of  
23 probation after a conviction by trial, the trial judge must identify and state  
24 circumstances that would justify imposition of one of the three authorized  
25 prison terms referred to in section 1170(b) if probation is later revoked. The  
26 circumstances identified and stated by the judge must be, based on evidence  
27 admitted at the trial or other circumstances properly considered under rule  
28 4.420(b).

29  
30 (c)–(e) \* \* \*

31  
32  
33 **Rule 4.437. Statements in aggravation and mitigation**

34  
35 (a)–(e) \* \* \*

36  
37 **Advisory Committee Comment**

38  
39 Section 1170(b) states in part: \* \* \*

40  
41 The requirement that the statement include notice of intention to rely on new evidence will  
42 enhance fairness to both sides by avoiding surprise and helping to ~~assure~~ ensure that the time  
43 limit on pronouncing sentence is met.

Rules 4.405, 4.406, 4.420, 4.428, 4.433, 4.437, and 4.452 of the California Rules of Court were amended, effective May 23, 2007, to read:

1 **Rule 4.405. Definitions**

2  
3 As used in this division, unless the context otherwise requires:

4  
5 (1)–(3) \* \* \*

6  
7 (4) “Aggravation” or “circumstances in aggravation” means ~~facts~~ factors that  
8 ~~justify the imposition of the upper prison term~~ the court may consider in its  
9 broad discretion in imposing one of the three authorized prison terms referred  
10 to in ~~Penal Code~~ section 1170(b).

11  
12 (5) “Mitigation” or “circumstances in mitigation” means ~~facts~~ factors that justify  
13 ~~the imposition of the lower of three authorized prison terms~~ the court may  
14 consider in its broad discretion in imposing one of the three authorized prison  
15 terms referred to in section 1170(b) or ~~facts~~ factors that may justify the court  
16 in striking the additional punishment for an enhancement when the court has  
17 discretion to do so.

18  
19 (6)–(10) \* \* \*

20  
21 **Advisory Committee Comment**

22  
23 “Base term” is the term of imprisonment selected under section 1170(b) from the three possible  
24 terms. (See section 1170(a)(3); *People v. Scott* (1994) 9 Cal.4th 331, 349.) Following the United States  
25 Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. , the Legislature amended the  
26 determinate sentencing law. (See Sen. Bill 40; Stats. 2007, ch. 3.) To comply with those changes, these  
27 rules were also amended. In light of those amendments, for clarity, the phrase “base term” in (4) and (5)  
28 was replaced with “one of the three authorized prison terms.” It is an open question whether the definitions  
29 in (4) and (5) apply to enhancements for which the statute provides for three possible terms. The  
30 Legislature in SB 40 amended section 1170(b) but did not modify sections 1170.1(d), 12022.2(a),  
31 12022.3(b), or any other section providing for an enhancement with three possible terms. The latter  
32 sections provide that “the court shall impose the middle term unless there are circumstances in aggravation  
33 or mitigation.” (See, e.g., section 1170.1(d).) It is possible, although there are no cases addressing the  
34 point, that this enhancement triad with the presumptive imposition of the middle term runs afoul of  
35 *Cunningham*. Because of this open question, rule 4.428(b) was deleted.

36  
37 “Enhancement.” The facts giving rise to an enhancement, the requirements for pleading and  
38 proving those facts, and the court’s authority to strike the additional term are prescribed by statutes. See,  
39 for example, sections 667.5 (prior prison terms), 12022 (being armed with a firearm or using a deadly  
40 weapon), 12022.5 (using a firearm), 12022.6 (excessive taking or damage), 12022.7 (great bodily injury),  
41 1170.1(e) (pleading and proof), and 1385(c) (authority to strike the additional punishment). Note: A  
42 consecutive sentence is not an enhancement. (See section 1170.1(a); *People v. Tassell* (1984) 36 Cal.3d 77,  
43 90 [overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401].)

44  
45 “Sentence choice.” Section 1170(c) requires the judge to state reasons for the sentence choice.  
46 This general requirement is discussed in rule 4.406.

1  
2 “Imprisonment” is distinguished from confinement in other types of facilities.

3  
4 “Charged” and “found.” Statutes require that the facts giving rise to all enhancements be charged  
5 and found. See section 1170.1(e).

6  
7 **Rule 4.406. Reasons**

8  
9 (a) \* \* \*

10  
11 (b) **When reasons required**

12 Sentence choices that generally require a statement of a reason include:

13 (1)–(3) \* \* \*

14  
15 (4) Selecting a term other than the middle one of the three authorized prison  
16 terms referred to in section 1170(b) statutory term for either an offense  
17 or an enhancement;

18  
19 (5)–(10) \* \* \*

20  
21  
22 **Advisory Committee Comment**

23 This rule is not intended to expand the statutory requirements for giving reasons, and is not an  
24 independent interpretation of the statutory requirements.

25  
26  
27 **Rule 4.420. Selection of base term of imprisonment**

28  
29 (a) When a sentence of imprisonment is imposed, or the execution of a sentence  
30 of imprisonment is ordered suspended, the sentencing judge must select the  
31 upper, middle, or lower term on each count for which the defendant has been  
32 convicted, as provided in section 1170(b) and these rules. ~~The middle term~~  
33 ~~must be selected unless imposition of the upper or lower term is justified by~~  
34 ~~circumstances in aggravation or mitigation.~~

35  
36 (b) In exercising his or her discretion in selecting one of the three authorized  
37 prison terms referred to in section 1170(b), the sentencing judge may  
38 consider circumstances in aggravation or mitigation, and any other factor  
39 reasonably related to the sentencing decision. The relevant circumstances  
40 may be obtained from in aggravation and mitigation must be established by a  
41 preponderance of the evidence. Selection of the upper term is justified only  
42 if, after a consideration of all the relevant facts, the circumstances in  
43 aggravation outweigh the circumstances in mitigation. The relevant facts are  
44

1 included in the case record, the probation officer's report, other reports and  
 2 statements properly received, statements in aggravation or mitigation, and  
 3 any further evidence introduced at the sentencing hearing. Selection of the  
 4 lower term is justified only if, considering the same facts, the circumstances  
 5 in mitigation outweigh the circumstances in aggravation.

6  
 7 (c) \* \* \*

8  
 9 (d) A fact that is an element of the crime may not be used to impose the upper a  
 10 greater term.

11  
 12 (e) The reasons for selecting one of the three authorized prison terms referred to  
 13 in section 1170(b) the upper or lower term must be stated orally on the  
 14 record, and must include a concise statement of the ultimate facts that the  
 15 court deemed to constitute circumstances in aggravation or mitigation  
 16 justifying the term selected.

#### 17 18 **Advisory Committee Comment**

19  
 20 The determinate sentencing law authorizes the court to select any of the three possible prison  
 21 terms even though neither party has requested a deviation from the middle particular term by formal motion  
 22 or informal argument. Section 1170(b) vests the court with discretion to impose any of the three authorized  
 23 prison terms requires, however, that the middle term be selected unless there are circumstances in  
 24 aggravation or mitigation of the crime, and requires that the court stated on the record the facts and reasons  
 25 for imposing that the upper or lower term.

26  
 27 Thus, the sentencing judge has authority to impose the upper or lower term on his or her own  
 28 initiative, if circumstances justifying that choice appear upon an evaluation of the record as a whole.

29  
 30 The legislative intent is that, if imprisonment is the sentence choice, the middle term is to  
 31 constitute the average or usual term. The rule clarifies this intent by specifying that the presence of  
 32 circumstances justifying the upper or lower term must be established by a preponderance of the evidence,  
 33 and that those circumstances must outweigh offsetting circumstances. Proof by a preponderance of the  
 34 evidence is the standard in the absence of a statute or a decisional law to the contrary (Evid. Code, § 115),  
 35 and appears appropriate here, since there is no requirement that sentencing decisions be based on the same  
 36 quantum of proof as is required to establish guilt. See *Williams v. New York* (1949) 337 U.S. 241.

37  
 38 Determining whether circumstances in aggravation or mitigation preponderate is a qualitative,  
 39 rather than a quantitative, process. It cannot be determined by simply counting identified circumstances of  
 40 each kind.

41  
 42 Present law prohibits dual punishment for the same act (or fact) but permits the same act or fact to  
 43 be considered in denying probation and in selecting the upper prison term. *People v. Edwards* (1976) 18  
 44 Cal.3d 796 (prior felony conviction, an element of the offense, also brought defendant within former  
 45 section 1203(d)(2) limitation on probation to person with prior felony convictions), citing *People v. Perry*  
 46 (1974) 42 Cal.App.3d 451, 460, and other cases.

47  
 48 It is not clear whether the reasons stated by the judge for selecting a particular term qualify as  
 49 "facts" for the purposes of the rule prohibition on dual use of facts. Until the issue is clarified, judges  
 50 should avoid the use of reasons that may constitute an impermissible dual use of facts. For example, the

1 court is not permitted to use a reason to impose a greater term if that reason also is either (1) the same as an  
 2 enhancement that will be imposed, or (2) an element of the crime. The court should not use the same  
 3 reason to impose a consecutive sentence as to impose an upper term of imprisonment. (*People v. Avalos*  
 4 (1984) 37 Cal.3d 216, 233.) It is not improper to use the same reason to deny probation and to impose the  
 5 upper term. (*People v. Bowen* (1992) 11 Cal.App.4th 102, 106.)  
 6

7 The rule makes it clear that a fact charged and found as an enhancement may, in the alternative, be  
 8 used as a factor in aggravation.  
 9

10 Note that under rule 4.425(b), a fact used to impose the upper term cannot be used to impose a  
 11 consecutive sentence.  
 12

13 *People v. Riolo* (1983) 33 Cal.3d 223, 227 (and note 5 on 227) held that section 1170.1(a) does not  
 14 require the judgment to state the base term (upper, middle, or lower) and enhancements, computed  
 15 independently, on counts that are subject to automatic reduction under the one-third formula of section  
 16 1170.1(a).  
 17

18 Even when sentencing is under section 1170.1, however, it is essential to determine the base term  
 19 and specific enhancements for each count independently, in order to know which is the principal term  
 20 count. The principal term count must be determined before any calculation is made using the one-third  
 21 formula for subordinate terms.  
 22

23 In addition, the base term (upper, middle, or lower) for each count must be determined to arrive at  
 24 an informed decision whether to make terms consecutive or concurrent; and the base term for each count  
 25 must be stated in the judgment when sentences are concurrent or are fully consecutive (i.e., not subject to  
 26 the one-third rule of section 1170.1(a)).  
 27

## 28 **Rule 4.421. Circumstances in aggravation**

29  
 30 Circumstances in aggravation include ~~facts~~ factors relating to the crime and ~~facts~~  
 31 factors relating to the defendant.  
 32

### 33 **(a) ~~Facts~~ Factors relating to the crime**

34  
 35 ~~Facts~~ Factors relating to the crime, whether or not charged or chargeable as  
 36 enhancements include ~~the fact~~ that:  
 37

38 (1)–(12) \* \* \*  
 39

### 40 **(b) ~~Facts~~ Factors relating to the defendant**

41  
 42 ~~Facts~~ Factors relating to the defendant include ~~the fact~~ that:  
 43

44 (1)–(5) \* \* \*  
 45

### 46 **(c) ~~Other facts~~ other factors**

47

1 Any other ~~facts~~ factors statutorily declared to be circumstances in  
2 aggravation.

3  
4 **Rule 4.423. Circumstances in mitigation**

5  
6 Circumstances in mitigation include ~~facts~~ factors relating to the crime and ~~facts~~  
7 factors relating to the defendant.

8  
9 **(a) ~~Facts~~ Factors relating to the crime**

10  
11 ~~Facts~~ Factors relating to the crime include ~~the fact~~ that:

12  
13 (1)–(8) \* \* \*

14  
15 (9) The defendant suffered from repeated or continuous physical, sexual, or  
16 psychological abuse inflicted by the victim of the crime, and the victim  
17 of the crime, who inflicted the abuse, was the defendant's spouse,  
18 intimate cohabitant, or parent of the defendant's child; and ~~the facts~~  
19 ~~concerning~~ the abuse does not amount to a defense.

20  
21 **(b) ~~Facts~~ Factors relating to the defendant**

22  
23 ~~Facts~~ Factors relating to the defendant include ~~the fact~~ that:

24  
25 (1)–(6) \* \* \*

26  
27 **Rule 4.428. Criteria affecting imposition of enhancements**

28  
29 **(a) ~~Imposing~~ or not imposing enhancement**

30  
31 No reason need be given for imposing a term for an enhancement that was  
32 charged and found true.

33  
34 If the judge has statutory discretion to strike the additional term for an  
35 enhancement in the furtherance of justice under section 1385(c) or based on  
36 circumstances in mitigation, the court may consider and apply any of the  
37 circumstances in mitigation enumerated in these rules or, under rule 4.408,  
38 any other reasonable circumstances in mitigation or in the furtherance of  
39 justice ~~that are present~~.

40  
41 The judge should not strike the allegation of the enhancement.

42

1 **(b) Choice from among three possible terms**

2  
3 ~~When the defendant is subject to an enhancement that was charged and found~~  
4 ~~true for which three possible terms are specified by statute, the middle term~~  
5 ~~must be imposed unless there are circumstances in aggravation or mitigation~~  
6 ~~or unless, under statutory discretion, the judge strikes the additional term for~~  
7 ~~the enhancement.~~

8  
9 The upper term may be imposed for an enhancement based on any of the  
10 circumstances in aggravation enumerated in these rules or, under rule 4.408,  
11 any other reasonable circumstances in aggravation that are present. The lower  
12 term may be imposed based upon any of the circumstances in mitigation  
13 enumerated in these rules or, under rule 4.408, any other reasonable  
14 circumstances in mitigation that are present.

15  
16 **Advisory Committee Comment**

17  
18 Subdivision (b) is intended to apply to all enhancements punishable by three possible terms  
19 (section 1170.1(d)). This rule applies both to determinate and indeterminate terms.  
20

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

22  
23 **(a) \* \* \***

24  
25 **(b)** If the imposition of a sentence is to be suspended during a period of  
26 probation after a conviction by trial, the trial judge must ~~make factual~~  
27 ~~findings as to circumstances~~ identify circumstances that would justify  
28 imposition of ~~the~~ one of the three authorized prison terms referred to in  
29 section 1170(b) upper or lower term if probation is later revoked, based on  
30 evidence admitted at the trial.

31  
32 **(c)** If a sentence of imprisonment is to be imposed, or if the execution of a  
33 sentence of imprisonment is to be suspended during a period of probation, the  
34 sentencing judge must:

35  
36 (1) ~~Hear evidence in aggravation and mitigation, and d~~Determine, under  
37 section 1170(b), whether to impose one of the three authorized prison  
38 terms referred to in section 1170(b) the upper, middle, or lower term;  
39 and state on the record the ~~facts and~~ reasons for imposing ~~the upper or~~  
40 ~~lower~~ that term.

41  
42 (2)–(5) \* \* \*

43

1 (d)–(e) \* \* \*

2  
3 **Advisory Committee Comment**

4  
5 This rule summarizes the questions that the court is required to consider at the time of sentencing,  
6 in their logical order.

7  
8 Subdivision (a)(2) makes it clear that probation should be considered in every case, without the  
9 necessity of any application, unless the defendant is statutorily ineligible for probation.

10  
11 Under subdivision (b), when imposition of sentence is to be suspended, the sentencing judge is not  
12 to make any determinations as to possible length of a prison term on violation of probation (section  
13 1170(b)). If there was a trial, however, the judge must ~~make findings as to circumstances justifying the~~  
14 ~~upper or lower~~ state on the record the circumstances that would justify imposition of one of the three  
15 authorized prison terms based on the trial evidence.

16  
17 Subdivision (d) makes it clear that all sentencing matters should be disposed of at a single hearing  
18 unless strong reasons exist for a continuance.

19  
20 **Rule 4.437. Statements in aggravation and mitigation**

21  
22 (a)–(b) \* \* \*

23  
24 (c) **Contents of statement**

25  
26 A statement in aggravation or mitigation must include:

27  
28 (1) A summary of ~~facts~~ evidence that the party relies on as circumstances  
29 justifying the imposition of a particular term in aggravation or  
30 mitigation justifying imposition of the upper or lower term. and

31  
32 (2) \* \* \*

33  
34 (d)–(e) \* \* \*

35  
36 **Advisory Committee Comment**

37  
38 Section 1170(b) states in part:

39  
40 “At least four days prior to the time set for imposition of judgment, either party or the victim, or  
41 the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to  
42 dispute facts in the record or the probation officer’s report, or to present additional facts.”

43  
44 This provision means that the statement is a document giving notice of intention to dispute ~~facts~~  
45 evidence in the record or the probation officer’s report, or to present additional facts.

46  
47 The statement itself cannot be the medium for presenting new ~~facts~~ evidence, or for rebutting ~~facts~~  
48 competent evidence already presented ~~by competent evidence~~, because the statement is a unilateral  
49 presentation by one party or counsel that will not necessarily have any indicia of reliability. To allow its

1 factual assertions to be considered in the absence of corroborating evidence would, therefore, constitute a  
 2 denial of due process of law in violation of the United States (14th Amend.) and California (art. I, § 7)  
 3 Constitutions.

4  
 5 “[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the  
 6 requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular  
 7 sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding  
 8 at which he is entitled to the effective assistance of counsel . . . . The defendant has a legitimate interest in  
 9 the character of the procedure which leads to the imposition of sentence . . . .” *Gardner v. Florida* (1977)  
 10 430 U.S. 349, 358.

11  
 12 The use of probation officers’ reports is permissible because the officers are trained objective  
 13 investigators. *Williams v. New York* (1949) 337 U.S. 241. Compare sections 1203 and 1204. *People v.*  
 14 *Peterson* (1973) 9 Cal.3d 717, 727, expressly approved the holding of *United States v. Weston* (9th Cir.  
 15 1971) 448 F.2d 626 that due process is offended by sentencing on the basis of unsubstantiated allegations  
 16 that were denied by the defendant. Cf., *In re Hancock* (1977) 67 Cal.App.3d 943, 949.

17  
 18 The requirement that the statement include notice of intention to rely on new evidence will  
 19 enhance fairness to both sides by avoiding surprise and helping to assure that the time limit on pronouncing  
 20 sentence is met.

## 21 22 **Rule 4.452. Determinate sentence consecutive to prior determinate sentence**

23  
 24 If a determinate sentence is imposed under section 1170.1(a) consecutive to one or  
 25 more determinate sentences imposed previously in the same court or in other  
 26 courts, the court in the current case must pronounce a single aggregate term, as  
 27 defined in section 1170.1(a), stating the result of combining the previous and  
 28 current sentences. In those situations:

29  
 30 (1)–(2) \* \* \*

31  
 32 (3) Discretionary decisions of the judges in the previous cases may not be  
 33 changed by the judge in the current case. Such decisions include the  
 34 decision ~~that a term other than the middle term was justified by~~  
 35 circumstances in mitigation or aggravation to impose one of the three  
 36 authorized prison terms referred to in section 1170(b), making counts in  
 37 prior cases concurrent with or consecutive to each other, or the decision  
 38 that circumstances in mitigation or in the furtherance of justice justified  
 39 striking the punishment for an enhancement.

### 40 41 Advisory Committee Comment

42  
 43 The restrictions of subdivision (3) do not apply to circumstances where a previously imposed base  
 44 term is made a consecutive term on resentencing. If the judge selects a consecutive sentence structure, and  
 45 since there can be only one principal term in the final aggregate sentence, if a previously imposed full base  
 46 term becomes a subordinate consecutive term, the new consecutive term normally will become one-third  
 47 the middle term by operation of law. (section 1170.1(a).)

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**Criminal Cases: Rules for Felony Sentencing in light of Senate Bill 40  
(amend Cal. Rules of Court, rules 4.405, 4.406, 4.420, 4.428, 4.433, 4.437, and 4.452)**

	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Appellate Division Los Angeles County District Attorney's Office	AM	Y	<p><u>Rule 4.420, subd. (d)</u> As amended, rule 4.420, subdivision (d) currently states:</p> <p>(d) A fact that is an element of a crime may not be used to impose <del>the upper</del> <u>a greater</u> term.</p> <p>The purpose of the rule is plainly to prevent double punishment for the same fact. However, as written, it also prevents a fact which is an element of a crime <i>upon which sentence is not being imposed</i> from being used to impose a greater term. Thus, if a defendant is convicted of two crimes and the court only imposes sentence on one as it finds the other to be 654, the facts from the crime on which sentence is not being imposed may not be used at all. Before <i>Cunningham v. California</i> (2007) __ U.S. __ [127 S.Ct. 856], this was insignificant. Now, it is not. The crime on which punishment is not being imposed may include factual findings made by a jury which could serve to justify a greater term. The use of factual findings for purposes other than the purpose for which they were intended in order to comply with</p>	Agree, rule amended to clarify only applicable if punishment is imposed.

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				<p><i>Cunningham</i> was approved in <i>People v. Black</i> (July 19, 2007) 2007 Cal.LEXIS 7604 [using factual component of a Pen. Code § 1203.0066 “no probation” allegation as a circumstance in aggravation justifying the upper term].</p> <p>The rule can easily be rewritten to ensure that it only prevents double punishment. Thus:</p> <p>(d) A fact that is an element of the <i>crime upon which punishment is being imposed</i> may not be used to impose <del>the upper a</del> <u>greater</u> term.</p> <p><u>Rule 4.406, Subd. (b)</u></p> <p>As amended, rule 4.406, subdivision (b) currently states:</p> <p>(b) When reasons required</p> <p>Sentence choices that generally require a statement of a reason include:</p> <p>(1)–(3) * * *</p> <p>(4) Selecting <del>term other than the middle one</del> <u>one</u></p>	<p>Disagree. While enhancements were not addressed by SB 40, there is a significant possibility that the enhancements with three terms would be unconstitutional if the mid-term is the presumptive term. Thus, the relevant statutes may be reformed in the same manner as the DSL by the Supreme Court in <i>People v. Sandoval</i> (2007) ___ Cal.4th ___ [S148917, Junly 19, 2007].</p>

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				<p>of the three authorized prison terms referred to in section 1170(b) <del>statutory term</del> for either an offense or an enhancement.</p> <p>The statute pertaining to the selection of one of three terms for enhancements is 1170.1(d), not 1170(b). 1170.1(d) has not been amended by the Legislature. Thus, the middle term does not require a statement of reasons, contrary to what this rule states. Instead, 1170.1(d) still states that the middle term is presumed, and reasons must be given if the upper or lower term is selected.</p>	
2.	Michael C. McMahon Chief Deputy Public Defender Public Defender's Office Ventura	AM	N	<p>In light of the broader discretion afforded judges under the 2007 amendments to the determinate sentence law, appellate review is essential to promote and to provide some degree of consistency in how we sentence similar individuals in similar cases. The trial court's statement of reasons should allow for meaningful appellate review of its exercise of sentencing discretion. The Judicial Council has the obligation to stress this point to sentencing judges during this critical transition to broader sentencing discretion. Rule 4.406 and its Advisory Committee Comment are the places to do so. Nothing in the legislative history of</p>	<p>Agree in principle, but this is best addressed in judicial education.</p>

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				<p>Senate Bill 40 (Stats. 2007, ch. 3) suggests that the Legislature intended to abandon the objective of uniformity in sentencing—generally, our courts should impose like sentences in like situations. The <i>Cunningham</i> decision focuses on the process used to determine the facts relevant at sentencing. A severe lack of uniformity at sentencing would be a tragic and unintended consequence of California's rush to respond to the mandates of <i>Cunningham</i>. A full and fair articulation of reasons for sentencing choices tends to promote some degree of consistency at every stage of the process. The Council should exercise more leadership and provide more guidance in Rule 4.406 while we await the likely creation of a sentencing commission.</p>	
3.	<p>Hon. Eileen C. Moore  Associate Justice of the  Court of Appeal  Fourth Appellate District  Division Three</p>			<p><u>Rule 4.420, pp. 4–5</u>  As proposed, subdivision (b) reads: “In exercising his or her discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision. The relevant circumstances may be obtained from the</p>	

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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
				<p>case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing.”</p> <p>I have two concerns:</p> <p>First, the last phrase “...and any further evidence introduced at the sentencing hearing” seems to imply that everything above that phrase also somehow came from the sentencing hearing. Perhaps the word “further” could be deleted and the problem would disappear.</p> <p>Second, the terms “the case record” and “other reports and statements properly received” are not clear to me. I would like to hear from staff what they mean.  Rule 4.433, p. 8</p> <p>As proposed, subdivision (b) reads: “If the imposition of a sentence is to be suspended during a period of probation after a conviction by trial, the trial judge must identify circumstances that would justify imposition of one of the three authorized prison terms referred to in section 1170(b) if</p>	<p>Agree, “further” deleted.</p> <p>Intentionally broad to allow flexibility.</p>

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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
				<p>probation is later revoked, based on evidence admitted at the trial.”</p> <p>These are my concerns about this language:</p> <p>First, it is not clear that this identification must be done at the time of sentencing.</p> <p>Second, the phrase “based on evidence admitted at the trial” seems to contradict the language in proposed Rule 4.420(b) which seems to indicate evidence from the case record, other reports and statements properly received and evidence taken at the sentencing hearing may be used.</p> <p>Third, there is no requirement the judge state on the record the reasons one of the three authorized prison terms was selected. The requirement for the judge to “identify circumstances” does not equate to a statement on the record because a judge could make the required analysis mentally and state nothing on the record.</p> <p>Finally, that last phrase “based on evidence admitted at the trial” is dangling. One could argue that it modifies “if probation is later revoked” or “identify circumstances that</p>	<p>The believes that the title of the rule, “Matters to be considered at time set for sentencing,” makes this clear.</p> <p>Agree. Reference to rule 4.420(b) added.</p> <p>Agree. “and state” added.</p> <p>Agree. Expanded rule into two sentences to clarify.</p>

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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
				would justify imposition of one of the three authorized prison terms referred to in section 1170(b).”	
4.	Joseph L. Chairez President Orange County Bar Association Irvine	N	Y	It is true that SB 40 directs the Judicial Council to establish sentencing criteria for the decisions of sentencing courts as to the sentencing term to impose. However, the law in the area of criminal sentencing is changing too rapidly to allow for incremental adjustments at this time. The California Supreme Court has not yet ruled upon the constitutionality of SB 40. It would therefore be prudent to wait to change the Judicial Council’s Rules of Court, since SB 40 was a very quick response to a very recent United States Supreme Court decision ( <i>Cunningham</i> ) that requires the global sentencing law changes recently enacted in SB 40.	Disagree. Rules can be modified as necessary to conform if other monumental sentencing changes occur.
5.	Dean Elizabeth Rindskopf Parker and Professor Michael Vitiello The University of Pacific McGeorge School of Law Sacramento, CA	AM	N	While we endorse the changes, we write separately to address a broader issue: The need for wholesale sentencing reform.  The United States Supreme Court’s decision in <i>Cunningham v. California</i> mandated a change in California’s sentencing law. SB 40 was a sensible response to that decision	Substantive sentencing reform is not part of this proposal.

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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
				<p>because the legislation clarifies the role of California’s sentencing judges and reduces the likelihood that their sentences will be subject to further Sixth Amendment challenges. Not surprisingly from what we have observed of Judge Steven Perren’s leadership in the past, the Criminal Advisory Committee’s changes sensibly bring the rules into conformity with the new legislation.</p> <p>That said, we hope that these revisions are not the end of sentencing reform in California. Many state court judges, lawyers, and commentators agree that criminal sentencing is far too complex, with too many sentencing enhancements. Further, the Legislature has abandoned rehabilitative goals over the past twenty-five years, leading to a system that is unthinkingly punitive. The results are a prison system bursting at its seams and unacceptably high rates of recidivism. Fortunately, an increasing number of non-partisan groups, like the Little Hoover Commission and the American Bar Association’s Kennedy Commission, have begun to advocate in favor of reform.</p>	

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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
				<p>Many of these developments are discussed in a report prepared by one of the signers of this letter and Clark Kelso, the Director of McGeorge’s Capital Center for Government Law and Policy, A Proposal for a Wholesale Reform of California’s Sentencing Practice and Procedure, 38 Loyola L.A. L. Rev. 903 (2004). We have enclosed a copy of that report.</p> <p>As these comments might indicate, our concern is that California not miss a chance to engage in wholesale sentencing reform. As necessary as was a post-<i>Cunningham</i> fix, piecemeal reform always creates a risk that it will patch up the system, allowing it to function, but still badly. We hope that interested individuals and organizations can keep sentencing reform on the Legislature’s agenda until meaningful reform occurs, and we stand ready as a community of legal scholars, teachers, and students to do our part to help in any way you think appropriate.</p>	
6.	David Philips Attorney Riverside	N	N	It still violates 6th Amendment concerns expressed in <i>Cunningham</i> , <i>Blakely</i> , <i>Apprendi</i> and <i>Booker</i> .	SB 40’s constitutionality will be resolved by the appellate courts—unless it is found unconstitutional, it is presumed

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	<b>Commentator</b>	<b>Position</b>	<b>Comment on behalf of group?</b>	<b>Comment</b>	<b>Committee Response</b>
					valid and the rules should be in conformity with it.
7.	Superior Court of California, County of Los Angeles	A	Y	No specific comments	No response required.
8.	Michael M. Roddy Executive Officer Superior Court of California, County of San Diego	A	Y	No specific comments.	No response required.