



Judicial Council of California · Administrative Office of the Courts

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: October 29, 2010

Title	Agenda Item Type
Criminal Procedure: Imposition of Enhancements	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Amend Cal. Rules of Court, rule 4.428	January 1, 2011
Recommended by	Date of Report
Criminal Law Advisory Committee Hon. Steven Z. Perren, Chair	October 8, 2010
	Contact
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Executive Summary

The Criminal Law Advisory Committee recommends that the Judicial Council amend rule 4.428 of the California Rules of Court to clarify that trial courts must impose prison terms for enhancements that serve the interest of justice and must state the reasons for the sentence choices on the record at the time of sentencing. The amendments are required by recently enacted legislation that eliminated presumptive middle terms for enhancements.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2011, amend rule 4.428 of the California Rules of Court to clarify that trial courts must impose prison terms for enhancements that serve the interest of justice and must state the reasons for the sentence choices on the record at the time of sentencing.

The text of the proposed rule is attached at page 4.

Previous Council Action

Rule 4.428 was adopted by the Judicial Council in 1991. To conform the rule to the United States Supreme Court ruling in *Cunningham v. California* (2007) 549 U.S. 270, the Judicial Council in 2007 deleted a provision in the rule that prescribed presumptive middle terms for enhancements. However, the first sentence of the rule remained unchanged: “No reason need be given for imposing a term for an enhancement that was charged and found true.”

Rationale for Recommendation

Senate Bill 150 (Wright; Stats. 2009, ch. 171) revised Penal Code section 1170.1(d) to eliminate presumptive middle terms for enhancements and clarify that “[i]f an enhancement is punishable by one of three middle terms, the court shall, in its discretion, impose the term that best serves the interest of justice, and state the reasons for its sentence choice on the record at the time of sentencing.”

Current rule 4.428, which generally prescribes criteria affecting the imposition of enhancements under Penal Code section 1170.1(d), contains the following obsolete provision: “No reason need be given for imposing a term for an enhancement that was charged and found true.”

The proposed amendments would conform the rule to the revised statute by clarifying that courts must impose prison terms for enhancements that best serve the interest of justice and must state the reasons for the sentence choices on the record at the time of sentencing.

Comments, Alternatives Considered, and Policy Implications

The proposed amendment was circulated for public comment during the spring 2010 cycle. A total of six comments were received. Of those, five agreed with the proposal and one agreed with the proposal if modified. A chart of comments received and committee responses is attached at page 5.

One commentator suggested that the rule should reflect the former section because the recently amended section contains a sunset provision that will reinstate the former text on January 1, 2011, in the absence of a later enacted statute. The committee declined the suggestion because:

- The former provision was deemed unconstitutional in light of the United States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. 270 (*People v. Lincoln* (2007) 157 Cal.App.4th 196, 205);
- Recently enacted legislation—Assembly Bill 2263 (Yamada; Stats. 2010, ch. 256)—has extended the amended provision to January 1, 2012; and
- The Legislature expressly acknowledges that the United States Supreme Court decision in *Cunningham v. California* (2007) 549 U.S. 270 has rendered the former section unconstitutional: “Unless legislation is enacted to extend the sunset of these statutes,

California's sentencing laws will be deemed unconstitutional as found by the United States Supreme Court in *Cunningham v. California*." (Sen. Com. on Public Safety, Analysis of Assem. Bill 2263 (2009–2010 Reg. Sess.) as amended March 22, 2010, p. H).

Implementation Requirements, Costs, and Operational Impacts

Expected costs and operational impacts would be limited to revising the California Rules of Court to reflect the proposed amendments and associated training of court staff and judicial officers.

Attachments

1. Cal. Rules of Court, rule 4.428, at page 4
2. Chart of comments, at page 5

Rule 4.428 of the California Rules of Court is amended, effective January 1, 2011, to read:

1 **Rule 4.428. Criteria affecting imposition of enhancements**

2

3 ~~No reason need be given for imposing a term for an enhancement that was charged and~~
4 ~~found true.~~ If an enhancement is punishable by one of three terms, the court must, in its
5 discretion, impose the term that best serves the interest of justice and state the reasons for
6 its sentence choice on the record at the time of sentencing.

7

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

13

14 The judge should not strike the allegation of the enhancement.

SPR10-24**Criminal Procedure: Imposition of Enhancements** (amend Cal. Rules of Court, rule 4.428)

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

	Commentator	Position	Comment	Committee Response
1.	California Judges Association Jordan Posamentier Legislative Counsel	A	We support the proposed amendments to [r]ule 4.428. Those amendments are required by recently enacted legislation that eliminated presumptive middle terms for enhancements; they appropriately conform the applicable [c]ourt [r]ule to the revised law; and they remove the obsolete provision.	No response required.
2.	Court of Appeal, Second Appellate District Katherine Lynn Managing Attorney	A	I agree with the proposed changes.	No response required.
3.	Debra Meyers Deputy Court Executive Officer/General Counsel Superior Court of San Bernardino County	AM	[R]ule 4.428 should be modified to reflect the January 1, 2011, version of Penal Code section 1170.1.	The committee declined the suggestion because: <ul style="list-style-type: none"> • The former provision was deemed unconstitutional in light of the United States Supreme Court decision in <i>Cunningham v. California</i> (2007) 549 U.S. 270 (<i>People v. Lincoln</i> (2007) 157 Cal.App.4th 196, 205); • Recently enacted legislation— Assembly Bill 2263 (Yamada; Stats. 2010; ch. 256.)—has extended the amended provision to at least January 1, 2012; and

SPR10-24**Criminal Procedure: Imposition of Enhancements** (amend Cal. Rules of Court, rule 4.428)

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	Commentator	Position	Comment	Committee Response
				<ul style="list-style-type: none"> The Legislature expressly acknowledges that the United States Supreme Court decision in <i>Cunningham v. California</i> (2007) 549 U.S. 270 has rendered the former section unconstitutional: “Unless legislation is enacted to extend the sunset of these statutes, California’s sentencing laws will be deemed unconstitutional as found by the United States Supreme Court in <i>Cunningham v. California</i>.” (Sen. Com. on Public Safety, Analysis of Assem. Bill 2263 (2009–2010 Reg. Sess.) as amended March 22, 2010, p. H).
4.	Orange County Bar Association Lei Lei Wang Ekvall President	A	No specific comment.	No response required.
5.	Superior Court of Los Angeles County	A	No specific comment.	No response required.
6.	Superior Court of San Diego County Michael M. Roddy Court Executive Officer	A	No specific comment.	No response required.