JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT

SPR17-09

Title
Criminal Law: Felony Sentencing

Proposed Rules, Forms, Standards, or Statutes
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

Proposed by
Criminal Law Advisory Committee
Hon. Tricia A. Bigelow, Chair

Action Requested
Review and submit comments by April 28, 2017

Proposed Effective Date
January 1, 2018

Contact
Tara Lundstrom, Attorney
415-865-7995
tara.lundstrom@jud.ca.gov

Executive Summary and Origin

The Criminal Law Advisory Committee proposes amendments to specified criminal sentencing rules in title 4, division 5 of the California Rules of Court. Conceived as an omnibus proposal to update and simplify these rules, it encompasses a variety of proposed amendments related to changes in California's Determinate Sentencing Law and the passage of the Criminal Justice Realignment Act. Other proposed amendments seek to clarify the application of the rules to indeterminate sentences and provide further guidance to courts on (1) the referral of cases to probation for presentence investigation reports, (2) risk/needs assessments, and (3) sentencing enhancements. Lastly, the proposal contains various nonsubstantive, technical amendments to the rules.

Background

California's Determinate Sentencing Law

The Judicial Council last amended the California Rules of Court in January 1, 2008, to implement changes to California's Determinate Sentencing Law ("DSL") resulting from the U.S. Supreme Court's decision in *Cunningham v. California* (2007) 549 U.S. 270 and the legislative response to that decision (Sen. Bill 40; Stats. 2007, ch. 3). Before *Cunningham* and Senate Bill 40, the DSL and sentencing rules provided three possible terms of imprisonment for state prison commitments and for judges to impose the middle term absent aggravating or mitigating

circumstances that would justify imposing the lower or upper term. In deciding whether the circumstances of the particular case justified a departure from the middle term, the sentencing judge made factual findings based on a preponderance of the evidence.

In *Cunningham*, the U.S. Supreme Court held that 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. (*Cunningham, supra*, 549 U.S. 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.) Last year, it also amended section 1170(a)(1) to recognize that "the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice." (Sen. Bill 1016; Stats. 2016, ch. 887, § 5.3.)

Criminal Justice Realignment Act

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. (*Id.,* §§ 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.)

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).[1] Effective January 1, 2017, the council added references in various criminal rules to mandatory supervision under section 1170(h)(5), PRCS under sections 3450–3464, parole under section 3000.08, and terms of imprisonment in county jail under section 1170(h).

Risk/needs assessments

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."

The Proposal

This proposal contains proposed rule amendments intended to update the rules in title 4, division 5 of the California Rules of Court. They include further amendments related to the DSL and the Criminal Justice Realignment Act. Other proposed amendments would clarify the application of the rules to certain indeterminate sentences and would provide further guidance to courts on (1) the referral of cases to probation for investigation reports, (2) risk/needs assessments, and (3) sentencing enhancements.

The proposal includes other nonsubstantive technical amendments.

Proposed amendments related to changes to California's DSL

The committee proposes the following amendments to reflect changes to California's DSL post-*Cunningham* and provide further guidance to judges in exercising sentencing discretion under the DSL:

- Amend rule 4.405's advisory committee comment to update and shorten the historical description of California's DSL;
- Amend rule 4.406 and its advisory committee comment to provide further guidance for courts on how and when to state their reasons for exercising sentencing discretion under the DSL post-*Cunningham*;

[11] At the time, commentators raised concerns about the burdens associated with requiring reports in all cases eligible for terms of imprisonment in county jail under section 1170(h). The committee declined their invitation to amend rule 4.411(a) to allow for waivers of presentence reports in "appropriate circumstances" instead of the existing language that discourages waivers except in "unusual circumstances." The committee explained that because the proposal was "designed to apply existing requirements for presentence probation reports, including longstanding waiver requirements," the proposed amendment was unnecessary and would inadvertently cause confusion.

- Amend rule 4.408(a) to recognize that the factors listed in the rules for making discretionary sentencing determinations are not exhaustive and do not prohibit a trial judge from using additional criteria reasonably related to the sentencing decision;
- Amend rule 4.410(b) to recognize that a sentencing judge may consider any other facts and circumstances relevant to the case;
- Update rule 4.410's advisory committee comment to reflect SB 1016's amendment to section 1170(a)(1);
- Update rules 4.420 and 4.433 to reflect SB 150's amendments to sentencing triads for enhancements post-*Cunningham*;
- Amend rule 4.420's advisory committee comment to state the proper method for calculating a consecutive sentence;
- Amend rules 4.421(c) and 4.423(c) to recognize that in addition any statutory factors identified as aggravating or mitigating circumstances, the court may consider factors that reasonably relate to the defendant or the circumstances under which the crime was committed;
- Amend rule 4.421's advisory committee comment to recognize that circumstances in aggravation may justify imposition of not only the upper, but also the middle term;
- Amend rule 4.428 to identify factors that a court may consider in selecting the appropriate term for enhancements punishable by one of three terms;
- Amend rule 4.452(2) to incorporate section 1170.1(a)'s definition of "principal term" in relation to consecutive determinate sentences and to provide that "[i]f two terms of imprisonment have the same punishment, either term may be selected as the principal term"; and
- Amend rule 4.452(3) to provide with respect to consecutive determinate sentences that "if a previously designated principal term becomes a subordinate term after the resentencing, the subordinate term will be limited to one-third the middle base term as provided in section 1170.1(a)."

Proposed amendments related to the Criminal Justice Realignment Act

The committee recommends the following amendments related to statutory changes brought about by the Criminal Justice Realignment Act:

- Amend rule 4.405(2)'s definition of "base term" to recognize that the base term may be a term in county jail under section 1170(h);
- Amend rules 4.411.5(a)(10), 4.435, and 4.451(a) to add references to mandatory supervision and postrelease community supervision;
- Amend rule 4.412's advisory committee comment to reference the "term of imprisonment" instead of the "prison term";
- Amend rule 4.435(a) to 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;
- Amend rule 4.435(b) and its advisory committee comment to replace references to "probation" with "supervision"; and

- Amend rule 4.435's 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.

Proposed amendments related to indeterminate sentences

The committee proposes the following amendments to expand the application of the rules in title 4, division 5 of the California Rules of Court to certain indeterminate sentences:

- Amend the title of division 5 from "Sentencing Determinate" to "Felony Sentencing Law";
- Amend rule 4.403 to recognize that the criminal sentencing rules in title 4, division 5, apply to "an indeterminate sentence imposed under section 1168(b) only if it is imposed relative to other offenses with determinate terms or enhancements";
- Strike statement in rule 4.403's advisory committee comment that "[t]he sentencing rules do not apply to offenses carrying a life term or other indeterminate sentences for which sentence is imposed under section 1168(b)";
- Amend rule 4.405(2)'s definition of "base term" to recognize that the base term may be an indeterminate term in prison prescribed by statute; and
- Amend rule 4.451 to address sentences concurrent with an indeterminate term.

Proposed amendments related to referrals to probation for investigations and reports

The committee proposes the following amendments related to court referrals to probation for investigations and reports:

- Amend rule 4.411(a) to identify when a court must refer a case to probation for a presentence investigation report or a supplemental report;[2]
- To reflect current practices, strike the statement in rule 4.411(a) that "[w]aivers of the presentence report should not be accepted except in unusual circumstances";
- Amend rule 4.411(b) to state how parties may waive the report, to identify the criteria that a court should consider in deciding whether to consent to a waiver, and to 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;
- Move and rephrase the statement in rule 4.411(d) addressing the purpose of presentence investigation reports to the advisory committee comment;
- To reflect current practices, strike the statement in rule 4.411's advisory committee comment that waivers of the report are discouraged and should be ordered regardless of whether the defendant is eligible for probation; and
- Amend rule 4.411.5(a)(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.

[2] This proposal would also strike subdivision (c) of rule 4.411, which currently addresses supplemental reports, as no longer necessary in light of the revisions to subdivision (a).

Proposed amendments related to risk/needs assessments

The committee proposes the following amendments related to risk/needs assessments and their use by courts:

- Amend rule 4.405(12) to define the term "risk/needs assessment" as "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";
- Amend rule 4.411.5(a)(8) to provide that the probation officer's presentence investigation report must include "[t]he 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"; [3]
- Amend rule 4.413(c) to provide that a court may consider the results of a risk/needs assessment, if one was performed, in deciding whether a defendant has overcome the presumption of ineligibility for probation;[4] and
- Amend the advisory committee comments to rules 4.413 and 4.415 to reference the proposed Standard of Judicial Administration on the use of risk/needs assessments in criminal sentencing that the committee has recommended for circulation for public comment concurrent with this proposal.

Proposed amendments related to sentencing enhancements

The committee proposes the following amendments related to sentencing enhancements generally:

- 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;
- Add subdivision (b) to rule 4.447 to provide guidance to courts when a defendant is convicted of multiple enhancements of the same type; and
- Amend rule 4.447's advisory committee comment to provide that a court may stay an enhancement if section 654 applies.

Additional technical and nonsubstantive proposed amendments

The committee proposes the following technical and nonsubstantive amendments:

[3] Rule 4.411.5(a)(8) currently provides that the report must contain "[a]ny available, reliable risk/needs information."

[4] This proposed amendment mirrors proposed subdivision (d)(3)(1) of the proposed Standard of Judicial Administration on the use of risk/needs assessments in criminal sentencing that the committee has recommended for circulation for public comment concurrent with this proposal.

- Combine the definitions of "mitigation" and "circumstances in mitigation" in rule 4.405(5) with the definitions of "aggravation" and "circumstances in aggravation" in rule 4.405(4);
- Amend rules 4.408, 4.409, 4.413(c), 4.425, and 4.428, and rule 4.409's advisory committee comment to reference "factors" or "relevant factors" instead of "criteria" or "facts";
- Amend rule 4.425(a) to replace "criteria" with "facts";
- Amend advisory committee comments to rules 4.405 and 4.410 to remove unnecessary statutory references;
- Strike the first sentence of rule 4.408's advisory committee comment as redundant to the rule as revised;
- Amend the advisory committee comments to rules 4.412 and 4.420 to make nonsubstantive, technical changes;
- Amend the headings to rule 4.413 and its subdivision (b) to clarify that the rule applies to the grant of probation when a defendant is presumptively ineligible for probation;
- Amend rule 4.413(a) to recognize that a defendant is presumptively eligible for probation in most cases, presumptively ineligible in some cases, and ineligible in others;
- Strike parts of the advisory committee comments to rules 4.420 and 4.437 as unnecessary; and
- Revise the language in rule 4.447(a) for clarity.

Alternatives Considered

The committee considered the potential burdens that any rule changes may place on the courts. The committee, however, determined that these amendments are appropriate because they are necessary to conform the rules to the Penal Code and case law.

Implementation Requirements, Costs, and Operational Impacts

No implementation requirements or operational impacts are likely.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee [or other proponent] is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?
- 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?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- 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.
- Would three and a half months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed amendments to 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 9–29

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" mean 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(c) 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;

(2) ~~Imposing a prison sentence or sentence in county jail under section 1170(h) and thereby denying probation~~ Denying probation when the defendant is presumptively eligible for probation;

(3) Declining to commit an eligible juvenile found amenable to treatment to the Department of Corrections and Rehabilitation, Division of Juvenile Justice ~~an eligible juvenile found amenable to treatment~~;

(4) Selecting one of the three authorized ~~prison~~ terms in prison or county jail under section 1170(h) referred to in section 1170(b) for either ~~an offense~~ a base term or an enhancement;

(5)–(6) * * *

~~(7) Striking the punishment for an enhancement;~~

~~(8)~~(7) Waiving a restitution fine;

~~(9) Not committing an eligible defendant to the California Rehabilitation Center;~~

~~(10)~~(8) ~~Striking an enhancement or prior conviction allegation~~ Granting relief under section 1385~~(a)~~; and

~~(11)~~(9) Denying mandatory supervision in the interests of justice under section 1170(h)(5)(A).

Advisory Committee Comment

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

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

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

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

Rule 4.408. ~~Criteria~~ Listing of factors not exclusive; sequence not significant

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

(b) * * *

Advisory Committee Comment

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

Rule 4.409. Consideration of ~~criteria~~ relevant factors

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

Advisory Committee Comment

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

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

Rule 4.410. General objectives in sentencing

(a) * * *

(b) Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge must consider which objectives are of primary importance in

the particular case. The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and ~~the~~ any other facts and circumstances ~~of~~ relevant to the case.

Advisory Committee Comment

Statutory expressions of policy include:

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

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

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

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

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

Rule 4.411. Presentence investigations and reports

(a) ~~Eligible defendant~~ When required

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

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

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

(i) Is statutorily eligible for probation or a term of imprisonment in county 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.

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

When considering whether to waive a presentence investigation and report, courts should consider that probation officers' reports are used by: (1) courts in determining the appropriate

term of imprisonment in prison or county jail under section 1170(h); (2) 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; and (3) 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.

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

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

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

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

This rule does not prohibit preconviction, preplea reports as authorized by section 1203.7.

Rule 4.411.5. Probation officer's presentence investigation report

(a) Contents

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

(1)–(4) * * *

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

(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) * * *

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

Advisory Committee Comment

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

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

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

Rule 4.413. ~~Probation eligibility when probation is limited~~ Grant of probation when defendant is presumptively ineligible for probation

(a) Consideration of eligibility

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

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

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

(c) ~~Facts showing unusual case~~ Factors overcoming the presumption of ineligibility

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

(1) ~~Facts~~ Factors relating to basis for limitation on probation

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

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

(B) * * *

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

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

(A)–(C) * * *

(3) Results of risk/needs assessment

Along with all other relevant information in the case, the court may consider the results of a risk/needs assessment of the defendant, if one was performed. The weight of a risk/needs assessment is for the judge to consider in his or her sentencing discretion.

Advisory Committee Comment

Subdivision (c)(3). 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 4.415. Criteria affecting the imposition of mandatory supervision

(a)–(b)* * *

(c) Criteria affecting conditions and length of mandatory supervision

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

(1)–(7) * * *

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

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

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

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

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

~~In addition, the base term (upper, middle, or lower) for each count must be determined to arrive at an informed decision whether to make terms consecutive or concurrent; and the base term for each count must be stated in the judgment when sentences are concurrent or are fully consecutive (i.e., not subject to the one-third rule of section 1170.1(a)).~~ The proper method to calculate a consecutive sentence is to first determine the sentence for each count, including any appropriate enhancements. The principal term will be the count with the longest term selected by the court, or any count if the terms are of the same length. After the selection of the principal term, the court

must impose the sentence for any subordinate terms. The sentence for a subordinate term will generally be one-third of the middle term for that count, unless fully consecutive terms are authorized under such provisions as section 667.6.

Rule 4.421. Circumstances in aggravation

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

(a)–(b)* * *

(c) Other factors

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

Advisory Committee Comment

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

The list of circumstances in aggravation includes some facts that, if charged and found, may be used to enhance the sentence. Theis rule does not deal with the dual use of the facts; the statutory 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 "~~[I]~~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.

(a)–(b)* * *

(c) Other factors

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

Advisory Committee Comment

See comment to rule 4.421.

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

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

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

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

Rule 4.425. ~~Criteria~~ Factors affecting concurrent or consecutive sentences

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

(a) ~~Criteria~~ Facts relating to crimes

Facts relating to the crimes, including whether or not:

(1) The crimes and their objectives were predominantly independent of each other;

(2) The crimes involved separate acts of violence or threats of violence; or

(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

(b) Other ~~criteria~~ facts and limitations

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

(1) A fact used to impose the upper term;

(2) A fact used to otherwise enhance the defendant's sentence in prison or county jail under section 1170(h); and

(3) A fact that is an element of the crime may not be used to impose consecutive sentences.

Advisory Committee Comment * * *

Rule 4.428. ~~Criteria~~ Factors affecting imposition of enhancements

(a) Enhancements punishable by one of three terms

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

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

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

(b) Striking enhancements under section 1385

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

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

(a) *** * ***

(b) 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 and state circumstances that would justify imposition of one of the three authorized terms of imprisonment referred to in section 1170(b) or any enhancement, if probation is later revoked. The circumstances identified and stated by the judge must be based on evidence admitted at the trial or other circumstances properly considered under rule 4.420(b).

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

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

(2)–(5) * * *

(d) * * *

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

(1)–(2) * * *

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

Advisory Committee Comment * * *

Rule 4.435. Sentencing on revocation of probation, mandatory supervision, and postrelease community supervision

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

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

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

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

(2) * * *

Advisory Committee Comment

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

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

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

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

Rule 4.437. Statements in aggravation and mitigation

(a)–(e) * * *

Advisory Committee Comment

Section 1170(b) states in part:

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

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

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

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

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

Rule 4.447. ~~Limitations on enhancements~~ Sentencing of enhancements

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

(a) Enhancements resulting in unlawful sentences

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

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

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

Advisory Committee Comment

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

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

Rule 4.452. Determinate sentence consecutive to prior determinate sentence

If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, the court

in the current case must pronounce a single aggregate term, as defined in section 1170.1(a), stating the result of combining the previous and current sentences. In those situations:

(1) * * *

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

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

Advisory Committee Comment * * *