

JUDICIAL COUNCIL OF CALIFORNIA

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INVITATION TO COMMENT SP22-02

Title

Criminal Law: Felony Sentencing

Proposed Rules, Forms, Standards, or Statutes

Amend Cal. Rules of Court, rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447; repeal rules 4.300 and 4.453

Proposed by

Criminal Law Advisory Committee
Hon. Brian. M. Hoffstadt, Chair

Action Requested

Review and submit comments by February 14, 2022

Proposed Effective Date

March 14, 2022

Contact

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Executive Summary and Origin

The Criminal Law Advisory Committee proposes amendments to specified felony sentencing rules of the California Rules of Court to reflect several major legislative changes were made to sentencing of felony offenses and enhancements, which went into effect January 1, 2022. The recommended amendments will reflect statutory changes (1) requiring aggravated factors to be stipulated to by the defendant or found true beyond a reasonable doubt when imposing the upper term of a felony offense or enhancement; (2) allowing courts to consider as an aggravating factor that a defendant has suffered one or more prior convictions, based on certified official records, but that this exception may not be used to select the upper term of an enhancement; (3) discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice; (4) regarding mitigating circumstances requiring imposition of the lower term; (5) identifying specified mitigating circumstances for consideration in sentencing; (6) allowing an act or omission that is punishable in different ways by different laws to be punished under either of those provisions; and (7) amending dismissal of enhancements due to specified mitigating circumstances. The proposal would also clarify that courts may consider aggravating factors in exercising discretion in imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to Penal Code section 1385(c) and make nonsubstantive technical amendments.

This proposal has not been approved by the Judicial Council and is not intended to represent the views of the council, its Rules Committee, or its Legislation Committee. It is circulated for comment purposes only.

Background

Effective January 1, 2022, several major legislative changes were made to sentencing of felony offenses and enhancements.

Penal Code section 1170(b)(1)–(3) and 1170.1(d) were added to state that a court may impose an upper term of custody if aggravating factors were found true beyond a reasonable doubt or stipulated to by the defendant, except when a prior conviction is used as an aggravating factor to impose the upper base term, but not for the upper term of an enhancement (Sen. Bill 567; Stats. 2021, ch. 731).

Penal Code section 1170(b)(6) was added to require the imposition of the low term of custody in specified circumstances, except if imposition of the low term would not be in the interests of justice if aggravating factors outweigh mitigating factors. The specified circumstances are (1) if the person has experienced psychological, physical, or childhood trauma, including, but not limited to, abuse, neglect, exploitation, or sexual violence; (2) the person was a youth (defined as any person under 26 years of age) at the time of the commission of the offense; or (3) prior to the instant offense, or at the time of the commission of the offense, the person is or was a victim of intimate partner violence or human trafficking (Assem. Bill 124; Stats. 2021, ch. 695).

Penal Code section 1385 was amended to direct the exercise of judicial discretion in striking enhancements in specified circumstances, unless the court finds that dismissal would endanger public safety (Sen. Bill 81; Stats. 2021, ch 721). The specified circumstances are as follows:

- Application of the enhancement would result in a discriminatory racial impact as described in paragraph (4) of subdivision (a) of section 745.
- Multiple enhancements are alleged in a single case. In this instance, all enhancements beyond a single enhancement shall be dismissed.
- The application of an enhancement could result in a sentence of over 20 years. In this instance, the enhancement shall be dismissed.
- The current offense is connected to mental illness.
- The current offense is connected to prior victimization or childhood trauma.
- The current offense is not a violent felony as defined in subdivision (c) of section 667.5.
- The defendant was a juvenile when they committed the current offense or any prior juvenile adjudication that triggers the enhancement or enhancements applied in this case.
- The enhancement is based on a prior conviction that is over five years old.
- Though a firearm was used in the current offense, it was inoperable or unloaded.

Along with amendments to reflect changes to Penal Code sections 1170, 1170.01, and 1385, the proposed amendments reflect the committee’s conclusion that the new statutory requirements for imposition of an upper term of an offense or enhancement do not apply when the court is imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to section 1385(c). (See *People*

v. Black (2007) 41 Cal.4th 799, 815-816 (*Black II*) [aggravating circumstances serve two analytically distinct functions in California’s current determinate sentencing scheme; one function is to raise the maximum permissible sentence from the middle term to the upper term, and the other function is to serve as a consideration in the trial court’s exercise of its discretion in selecting the appropriate term from among those authorized for the defendant’s offense.]

Finally, Penal Code section 654 was amended to allow an act or omission that is punishable in different ways by different laws to be punished under either of those provisions. (Assem. Bill 518; Stats. 2021, ch. 441).

The committee also recommends amendments reflecting statutory changes discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (Sen. Bill 92; Stats. 2021, ch. 18).

The Proposal

This proposal would amend several sentencing rules to reflect the statutory changes described above and provide additional clarification and guidance on felony sentencing:

1. Repeal rule 4.300 to reflect changes discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice;
2. Amend rule 4.405 to clarify the definition of “base term,” and add definitions of “principal term,” “subordinate term,” and “offense;”
3. Amend renumbered rule 4.405(7) to modify the definition of “aggravation” to apply to factors that justify the imposition of the upper prison term or factors that the court may consider in exercising discretion authorized by statute and under these rules including imposing the middle term instead of a low term, denying probation, ordering consecutive sentences, or determining whether to exercise discretion pursuant to section 1385(c);
4. Update rule 4.405’s advisory committee comment to reflect changes regarding sentencing triads;
5. Delete rule 4.406(b)(3), which required the court to state reasons for declining to commit an eligible juvenile found amenable to treatment to the Department of Corrections and Rehabilitation, Division of Juvenile Justice, to reflect the repeal of Welfare and Institutions Code section 707.2;
6. Amend renumbered rule 4.406(b)(3) to require a court to state reasons for selecting a term for either an offense or an enhancement;
7. Update rule 4.408’s advisory committee comment to reflect changes regarding sentencing triads;
8. Amend rule 4.411.5(a) to require the contents of a probation officer’s presentence investigation report to include: whether factors in aggravation were proven beyond a reasonable doubt or stipulated; specific factors in mitigation that may require imposition of a low term; and discussion of both aggravating and mitigating factors related to

- disposition;
9. Amend rule 4.411.5(a) to require the contents of a probation officer's presentence investigation report to include any mitigating factors pursuant to Penal Code section 1385(c);
 10. Amend rule 4.411.5(a) to delete references to chargeable probation services and attorney fees under Penal Code section 987.8, to reflect the repeal of these fees by Assembly Bill 1869 (Stats. 2020, ch. 92);
 11. Amend rule 4.414 to state that a court may consider factors in aggravation and mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt, when determining a defendant's suitability for probation;
 12. Update the title of rule 4.420 to clarify that it addresses offenses, and not enhancements;
 13. Amend rule 4.420 to reflect changes regarding sentencing triads, including under what circumstances the court may impose the upper term;
 14. Amend rule 4.420 to reflect changes regarding mandatory imposition of the low term under specified circumstances;
 15. Update rule 4.420's advisory committee comment to reflect changes regarding sentencing triads and to include a definition of "interests of justice";
 16. Update rule 4.421's advisory committee comment to reflect changes regarding sentencing triads and nonsubstantive technical amendments;
 17. Amend rule 4.423 to add mitigating factors specified in Penal Code section 1385(c);
 18. Amend rule 4.424 to reflect changes allowing the court to use its discretion regarding which act or omission to punish under Penal Code section 654;
 19. Amend rule 4.425 to clarify that a court may consider any circumstances in aggravation or mitigation, whether or not the factors have been stipulated to by the defendant or found true beyond a reasonable doubt, when considering whether to impose consecutive or concurrent sentences, with specified exceptions;
 20. Amend rule 4.427 to reflect changes to Penal Code section 1385(c) regarding dismissal of enhancements;
 21. Update rule 4.427's advisory committee comment to reflect changes to Penal Code sections 1170.1, regarding requirements to impose the upper term of an enhancement, and 1385(c), regarding dismissal of enhancements;
 22. Amend rule 4.428 to reflect changes regarding enhancements with triads and include a new section on dismissal of enhancements under Penal Code section 1385(c);
 23. Amend rule 4.428's advisory committee comment to include definitions of "furtherance of justice" and "great weight;"
 24. Amend rule 4.428's advisory committee comment to state that the legislative history on Senate Bill 81 states that the presumption created by Penal Code section 1385(c) does not apply to alternative sentencing schemes;
 25. Update rule 4.437's advisory committee comment to state that the requirement that a statement in aggravation or mitigation include notice of intention to rely on new evidence may include either party's intention to provide evidence to prove or contest the existence of a factor in mitigation that would require imposition of the low term for the underlying offense or dismissal of an enhancement;

26. Amend rule 4.447 and the advisory committee comment to refer to Penal Code section 1385(c); and
27. Repeal rule 4.453 to reflect changes discontinuing commitments of juveniles to the Department of Corrections and Rehabilitation, Division of Juvenile Justice.

Alternatives Considered

The committee did not consider alternatives, determining that the rule amendments were needed to reflect the legislative changes.

Fiscal and Operational Impacts

No implementation or operational impacts are likely.

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

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?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Cal. Rules of Court, rules 4.300, 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, 4.447, 4.453, at pages 6–24

Rules 4.405, 4.406, 4.408, 4.411.5, 4.414, 4.420, 4.421, 4.423, 4.424, 4.425, 4.427, 4.428, 4.437, and 4.447 would be amended, and rules 4.300 and 4.453 would be repealed, effective March 14, 2022, to read:

1 **Rule 4.300. Commitments to nonpenal institutions**

2
3 ~~When a defendant is convicted of a crime for which sentence could be imposed under~~
4 ~~Penal Code section 1170 and the court orders that he or she be committed to the~~
5 ~~California Department of Corrections and Rehabilitation, Division of Juvenile Justice~~
6 ~~under Welfare and Institutions Code section 1731.5, the order of commitment must~~
7 ~~specify the term of imprisonment to which the defendant would have been sentenced. The~~
8 ~~term is determined as provided by Penal Code sections 1170 and 1170.1 and these rules,~~
9 ~~as though a sentence of imprisonment were to be imposed.~~

10
11 **Advisory Committee Comment**

12
13 ~~Commitments to the Department of Corrections and Rehabilitation, Division of Juvenile Justice~~
14 ~~(formerly Youth Authority) cannot exceed the maximum possible incarceration in an adult~~
15 ~~institution for the same crime. (See *People v. Olivas* (1976) 17 Cal.3d 236.)~~

16
17 ~~Under the indeterminate sentencing law, the receiving institution knew, as a matter of law from~~
18 ~~the record of the conviction, the maximum potential period of imprisonment for the crime of~~
19 ~~which the defendant was convicted.~~

20
21 ~~Under the Uniform Determinate Sentencing Act, the court's discretion as to length of term leaves~~
22 ~~doubt as to the maximum term when only the record of convictions is present.~~

23
24 **Rule 4.405. Definitions**

25
26 As used in this division, unless the context otherwise requires:

27
28 (1) * * *

29
30 (2) “Base term” is the determinate or indeterminate sentence imposed for the
31 commission of a crime, not including any enhancements that carry an additional
32 term of imprisonment, determinate term in prison or county jail under section
33 1170(h) selected from among the three possible terms prescribed by statute; the
34 determinate term in prison or county jail under section 1170(h) prescribed by
35 statute if a range of three possible terms is not prescribed; or the indeterminate term
36 in prison prescribed by statute.

37
38 (3) When a person is convicted of two or more felonies, the “principal term” is the
39 greatest determinate term of imprisonment imposed by the court for any of the
40 crimes, including any term imposed for applicable count-specific enhancements.

- 1
2 (4) When a person is convicted of two or more felonies, the “subordinate term” is the
3 determinate term imposed for an offense, plus any count-specific enhancements
4 applicable to the offense ordered to run consecutively to the principal term.
5
6 ~~(3)~~ (5) “Enhancement” means an additional term of imprisonment added to the base term.
7
8 (6) “Offense” means the offense of conviction unless a different meaning is specified
9 or is otherwise clear from the context. The term “instant” or “current” is used in
10 connection with “offense” or “offense of conviction” to distinguish the violation for
11 which the defendant is being sentenced from an enhancement, prior or subsequent
12 offense, or from an offense before another court.
13
14 ~~(4)~~ (7) “Aggravation,” or “circumstances in aggravation” “mitigation,” or “circumstances
15 in mitigation” means factors that justify the imposition of the upper prison term
16 referred to in Penal Code section 1170(b) and 1170.1, or factors that the court may
17 consider in exercising discretion authorized by statute and under these rules
18 including imposing the middle term instead of a low term, denying probation,
19 ordering consecutive sentences, or determining whether to exercise discretion
20 pursuant to Penal Code section 1385(c), that the court may consider in its broad
21 sentencing discretion authorized by statute and under these rules.
22
23 (8) “Mitigation” or “circumstances in mitigation” means factors that the court may
24 consider in its broad sentencing discretion authorized by statute and under these
25 rules.
26
27 ~~(5)~~ (9) “Sentence choice” means the selection of any disposition of the case that does not
28 amount to a dismissal, acquittal, or grant of a new trial.
29
30 ~~(6)~~ (10) “Section” means a section of the Penal Code.
31
32 ~~(7)~~ (11) “Imprisonment” means confinement in a state prison or county jail under section
33 1170(h).
34
35 ~~(8)~~ (12) “Charged” means charged in the indictment or information.
36
37 ~~(9)~~ (13) “Found” means admitted by the defendant or found to be true by the trier of fact
38 upon trial.
39
40 ~~(10)~~ (14) “Mandatory supervision” means the period of supervision defined in section
41 1170(h)(5)(A), (B).
42

1 (11) (15) “Postrelease community supervision” means the period of supervision governed
2 by section 3451 et seq.

3
4 (12) (16) “Risk/needs assessment” means a standardized, validated evaluation tool
5 designed to measure an offender’s actuarial risk factors and specific needs that, if
6 successfully addressed, may reduce the likelihood of future criminal activity.

7
8 (13) (17) “Evidence-based practices” means supervision policies, procedures, programs,
9 and practices demonstrated by scientific research to reduce recidivism among
10 individuals under probation, parole, or postrelease supervision

11
12 (14) (18) “Community-based corrections program” means a program consisting of a
13 system of services for felony offenders under local supervision dedicated to the
14 goals stated in section 1229(c)(1)–(5).

15
16 (15) (19) “Local supervision” means the supervision of an adult felony offender on
17 probation, mandatory supervision, or postrelease community supervision.

18
19 (16) (20) “County jail” means local county correctional facility.
20

21 **Advisory Committee Comment**

22
23 ~~Following the United States Supreme Court decision in *Cunningham v. California* (2007) 549~~
24 ~~U.S. 270, the Legislature amended the determinate sentencing law to remove the presumption that~~
25 ~~the court is to impose the middle term on a sentencing triad, absent aggravating or mitigating~~
26 ~~circumstances. (See Sen. Bill 40; Stats. 2007, ch. 3.) It subsequently amended sections 186.22,~~
27 ~~186.33, 1170.1, 12021.5, 12022.2, and 12022.4 to eliminate the presumptive middle term for an~~
28 ~~enhancement. (See Sen. Bill 150; Stats. 2009, ch. 171.) Instead of finding facts in support of a~~
29 ~~sentencing choice, courts are now required to state reasons for the exercise of judicial discretion~~
30 ~~in sentencing.~~

31
32 The Legislature amended the determinate sentencing law to require courts to order imposition of
33 a sentence or enhancement not to exceed the middle term unless factors in aggravation justify
34 imposition of the upper term and are stipulated to by the defendant or found true beyond a
35 reasonable doubt at trial by the jury or by the judge in a court trial. (See Sen. Bill 567; Stats.
36 2021, ch. 731.) However, in determining whether to impose the upper term for a criminal offense,
37 the court may consider as an aggravating factor that a defendant has suffered one or more prior
38 convictions, based on certified official records. This exception may not be used to select the
39 upper term of an enhancement.

40
41 The court may exercise its judicial discretion in imposing the middle term or low term and must
42 state the facts and reasons on the record for choosing the sentence imposed. In exercising this
43 discretion between the middle term and the low term, the court may rely on aggravating factors

1 that have not been stipulated to by the defendant or proven beyond a reasonable doubt. (*People v.*
2 *Black* (2007) 41 Cal.4th 799.)

3
4 The Legislature also amended the determinate sentencing law to require courts to order
5 imposition of the low term when the court finds that certain factors contributed to the commission
6 of the crime unless the court finds that it would not be in the interests of justice to do so because
7 the aggravating factors outweigh the mitigating factors. (See Sen. Bill 567; Stats. 2021, ch. 731.)
8

9 **Rule 4.406. Reasons**

10
11 (a) * * *

12
13 (b) **When reasons required**

14
15 Sentence choices that generally require a statement of a reason include, but are not
16 limited to:

- 17
18 (1) Granting probation when the defendant is presumptively ineligible for
19 probation;
20
21 (2) Denying probation when the defendant is presumptively eligible for
22 probation;
23
24 ~~(3) Declining to commit an eligible juvenile found amenable to treatment to the~~
25 ~~Department of Corrections and Rehabilitation, Division of Juvenile Justice;~~
26
27 (4) ~~(3) Selecting a term for either an offense or an enhancement one of the three~~
28 ~~authorized terms in prison or county jail under section 1170(h) referred to in~~
29 ~~section 1170(b) for either a base term or an enhancement;~~
30
31 ~~(5) (4) Imposing consecutive sentences;~~
32
33 ~~(6) (5) Imposing full consecutive sentences under section 667.6(c) rather than~~
34 ~~consecutive terms under section 1170.1(a), when the court has that choice;~~
35
36 ~~(7) (6) Waiving a restitution fine;~~
37
38 ~~(8) (7) Granting relief under section 1385; and~~
39
40 ~~(9) (8) Denying mandatory supervision in the interests of justice under section~~
41 ~~1170(h)(5)(A).~~
42

43 **Advisory Committee Comment**

1
2 * * *

3
4 **Rule 4.408. Listing of factors not exclusive; sequence not significant**

5
6 (a)–(b) * * *

7 **Advisory Committee Comment**

8
9 The variety of circumstances presented in felony cases is so great that no listing of criteria could
10 claim to be all-inclusive. (Cf., Evid. Code, § 351.)

11
12 The court may impose a sentence or enhancement exceeding the middle term only if the facts
13 underlying the aggravating factor were stipulated to by the defendant or found true beyond a
14 reasonable doubt at trial by the jury or by the judge in a court trial. (Pen. Code, § 1170(b)(2).)

15
16 However, in determining whether to impose the upper term for a criminal offense, the court may
17 consider as an aggravating factor that a defendant has suffered one or more prior convictions,
18 based on certified official records. This exception may not be used to select the upper term of an
19 enhancement. (Pen. Code, § 1170(b)(3).)

20
21 **Rule 4.411.5. Probation officer’s presentence investigation report**

22
23 (a) **Contents**

24
25 A probation officer’s presentence investigation report in a felony case must include
26 at least the following:

27
28 (1) A face sheet showing at least:

29
30 (A) The defendant’s name and other identifying data;

31
32 (B) The case number;

33
34 (C) The crime of which the defendant was convicted, and any
35 enhancements which were found true;

36
37 (D) Any factors in aggravation including whether the factors were
38 stipulated to by the defendant, found true beyond a reasonable doubt at
39 trial by a jury, or found true beyond a reasonable doubt by a judge in a
40 court trial;

41
42 ~~(D)~~ (E) The date of commission of the crime, the date of conviction, and any
43 other dates relevant to sentencing;

1
2 ~~(E)~~ (F) The defendant’s custody status; and

3
4 ~~(F)~~ (G) The terms of any agreement on which a plea of guilty was based.

5
6 (2)–(5) * * *

7
8 (6) Any relevant facts concerning the defendant’s social history, including those
9 categories enumerated in section 1203.10, organized under appropriate
10 subheadings, including, whenever applicable, “Family,” “Education,”
11 “Employment and income,” “Military,” “Medical/psychological,” “Record of
12 substance abuse or lack thereof,” and any other relevant subheadings. This
13 includes:

14
15 ~~(A)~~ (A) ~~f~~Factors relevant to whether the defendant may be suffering from sexual
16 trauma, traumatic brain injury, posttraumatic stress disorder, substance
17 abuse, or mental health problems as a result of his or her U.S. military
18 service; and

19
20 ~~(B)~~ (B) Factors listed in Penal Code section 1170(b)(6) and whether the current
21 offense is connected to those factors.

22
23 (7)–(9) * * *

24
25 (10) Any mitigating factors pursuant to Penal Code section 1385(c).

26
27 ~~(10)~~ (11) The probation officer's recommendation. When requested by the
28 sentencing judge or by standing instructions to the probation department, the
29 report must include recommendations concerning the length of any prison or
30 county jail term under section 1170(h) that may be imposed, including the
31 base term, the imposition of concurrent or consecutive sentences, ~~and~~ the
32 imposition or striking of the additional terms for enhancements charged and
33 found.

34
35 ~~(11)~~ (12) Detailed information on presentence time spent by the defendant in
36 custody, including the beginning and ending dates of the period or periods of
37 custody; the existence of any other sentences imposed on the defendant
38 during the period of custody; the amount of good behavior, work, or
39 participation credit to which the defendant is entitled; and whether the sheriff
40 or other officer holding custody, the prosecution, or the defense wishes that a
41 hearing be held for the purposes of denying good behavior, work, or
42 participation credit.

1 ~~(12)~~ (13) A statement of mandatory and recommended restitution, restitution fines,
2 other fines, and costs to be assessed against the defendant; ~~including~~
3 ~~chargeable probation services and attorney fees under section 987.8 when~~
4 ~~appropriate, findings concerning the defendant's ability to pay, and a~~
5 recommendation whether any restitution order should become a judgment
6 under section 1203(j) if unpaid; ~~and, when appropriate, any finding~~
7 concerning the defendant's ability to pay.
8

9 ~~(13)~~ (14) Information pursuant to Penal Code section 29810(c):

10 (A)–(B) * * *

11 (b)–(c) * * *

12
13 **Rule 4.414. Criteria affecting probation**

14
15 Criteria affecting the decision to grant or deny probation include facts relating to the
16 crime and facts relating to the defendant.
17

18 (a)–(b) * * *

19
20 **(c) Suitability for probation**

21 In determining the suitability of the defendant for probation, the court may consider
22 factors in aggravation and mitigation, whether or not the factors have been
23 stipulated to by the defendant or found true beyond a reasonable doubt at trial by a
24 jury or the judge in a court trial.
25
26
27

28 **Advisory Committee Comment**

29 * * *

30
31 **Rule 4.420. Selection of term of imprisonment for offense**

32
33 (a) When a ~~sentence~~ judgment of imprisonment is imposed, or the execution of a
34 ~~sentence~~ judgment of imprisonment is ordered suspended, the sentencing judge
35 must, in their sound discretion, order imposition of a sentence not to exceed the
36 middle term, except as otherwise provided in paragraph (b). ~~select the upper,~~
37 ~~middle, or lower term on each count for which the defendant has been convicted, as~~
38 ~~provided in section 1170(b) and these rules.~~
39

40 (b) The court may only choose an upper term when (1) there are circumstances in
41 aggravation of the crime that justify the imposition of an upper term, and (2) the
42
43

1 facts underlying those circumstances have been (i) stipulated to by the defendant,
2 (ii) found true beyond a reasonable doubt at trial by a jury, or (iii) found true
3 beyond a reasonable doubt by the judge in a court trial.

4
5 **(c)** Notwithstanding paragraphs (a) and (b), the court may consider the fact of
6 defendant's prior convictions based on a certified record of conviction without it
7 having been stipulated to by the defendant or found true beyond a reasonable doubt
8 to a jury at trial or the judge in a court trial. This exception does not apply to the
9 use of the record of a prior conviction in selecting the upper term of an
10 enhancement.

11
12 ~~**(b)**~~ **(d)** In selecting between the middle and lower terms of imprisonment, exercising his
13 or her discretion in selecting one of the three authorized terms of imprisonment
14 referred to in section 1170(b), the sentencing judge may consider circumstances in
15 aggravation or mitigation, and any other factor reasonably related to the sentencing
16 decision. The court may consider factors in aggravation and mitigation, whether or
17 not the factors have been stipulated to by the defendant or found true beyond a
18 reasonable doubt at trial by a jury or the judge in a court trial. The relevant
19 circumstances may be obtained from the case record, the probation officer's report,
20 other reports and statements properly received, statements in aggravation or
21 mitigation, and any evidence introduced at the sentencing hearing.

22
23 **(e)** Notwithstanding section 1170(b)(1), and unless the court finds that the aggravating
24 circumstances outweigh the mitigating circumstances such that imposition of the
25 lower term would be contrary to the interests of justice, the court must order
26 imposition of the lower term if any of the following was a contributing factor in the
27 commission of the offense:

- 28
29 (1) The defendant has experienced psychological, physical, or childhood
30 trauma, including, but not limited to, abuse, neglect, exploitation, or
31 sexual violence;
32
33 (2) The defendant is a youth, or was a youth as defined under subdivision
34 (b) of section 1016.7 at the time of the commission of the offense; or
35
36 (3) Prior to the instant offense, or at the time of the commission of the
37 offense, the defendant is or was a victim of intimate partner violence or
38 human trafficking.

39
40 **(f)** Paragraph (e) does not preclude the court from imposing the lower term even if
41 there is no evidence of the circumstances listed in paragraph (e).
42

1 (e) (g) To comply with section 1170(b)(5), a fact charged and found as an enhancement
2 may be used as a reason for imposing a particular term only if the court has
3 discretion to strike the punishment for the enhancement and does so. The use of a
4 fact of an enhancement to impose the upper term of imprisonment is an adequate
5 reason for striking the additional term of imprisonment, regardless of the effect on
6 the total term.

7
8 (d) (h) A fact that is an element of the crime on which punishment is being imposed may
9 not be used to impose a particular term.

10
11 (e) (i) The reasons for selecting one of the three authorized terms of imprisonment
12 referred to in section 1170(b) must be stated orally on the record.

13 14 **Advisory Committee Comment**

15
16 ~~The determinate sentencing law authorizes the court to select any of the three possible terms of~~
17 ~~imprisonment even though neither party has requested a particular term by formal motion or~~
18 ~~informal argument. Section 1170(b) vests the court with discretion to impose any of the three~~
19 ~~authorized terms of imprisonment and requires that the court state on the record the reasons for~~
20 ~~imposing that term.~~

21
22 It is not clear whether the reasons stated by the judge for selecting a particular term qualify as
23 “facts” for the purposes of the rule prohibition on dual use of facts. Until the issue is clarified,
24 judges should avoid the use of reasons that may constitute an impermissible dual use of facts. For
25 example, the court is not permitted to use a reason to impose a greater term if that reason also is
26 either (1) the same as an enhancement that will be imposed, or (2) an element of the crime. The
27 court should not use the same reason to impose a consecutive sentence as to impose an upper
28 term of imprisonment. (*People v. Avalos* (1984) 37 Cal.3d 216, 233.) It is not improper to use the
29 same reason to deny probation and to impose the upper term. (*People v. Bowen* (1992) 11
30 Cal.App.4th 102, 106.)

31
32 The rule makes it clear that a fact charged and found as an enhancement may, in the alternative,
33 be used as a factor in aggravation.

34
35 *People v. Riolo* (1983) 33 Cal.3d 223, 227 (and note 5 on 227) held that section 1170.1(a) does
36 not require the judgment to state the base term (upper, middle, or lower) and enhancements,
37 computed independently, on counts that are subject to automatic reduction under the one-third
38 formula of section 1170.1(a).

39
40 Even when sentencing is under section 1170.1, however, it is essential to determine the base term
41 and specific enhancements for each count independently, in order to know which is the principal
42 term count. The principal term count must be determined before any calculation is made using the
43 one-third formula for subordinate terms.

1
2 In addition, the base term (upper, middle, or lower) for each count must be determined to arrive at
3 an informed decision whether to make terms consecutive or concurrent; and the base term for
4 each count must be stated in the judgment when sentences are concurrent or are fully consecutive
5 (i.e., not subject to the one-third rule of section 1170.1(a)).
6

7 Case law suggests that in determining the “interests of justice” the court should consider the
8 constitutional rights of the defendant and the interests of society represented by the people; the
9 defendant’s background and prospects, including the presence or absence of a record; the nature
10 and circumstances of the crime and the defendant’s level of involvement; the factors in
11 aggravation and mitigation including the specific factors in mitigation of Penal Code section
12 1170(b)(6); and the factors that would motivate a “reasonable judge” in the exercise of their
13 discretion. The court should not consider whether the defendant has simply pled guilty, factors
14 related to controlling the court’s calendar, or antipathy toward the statutory scheme. (See *People*
15 *v. Romero* (1996) 13 Cal.4th 947; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v.*
16 *Kessel* (1976) 61 Cal.App.3d 322; *People v. Orin* (1975) 13 Cal.3d 937.)
17

18 **Rule 4.421. Circumstances in aggravation**

19
20 Circumstances in aggravation include factors relating to the crime and factors relating to
21 the defendant.
22

23 **(a)–(c) * * ***
24

25 **Advisory Committee Comment**

26
27 ~~Circumstances in aggravation may justify imposition of the middle or upper of three possible~~
28 ~~terms of imprisonment. (Section 1170(b).)~~
29

30 ~~The list of circumstances in aggravation includes some facts that, if charged and found, may be~~
31 ~~used to enhance the sentence.~~
32

33 Courts may not impose a sentence greater than the middle term except when aggravating factors
34 justifying the imposition of the upper term have been stipulated to by the defendant or found true
35 beyond a reasonable doubt at trial by the jury or the judge in a court trial. These requirements do
36 not apply to consideration of aggravating factors for the lower or middle term. If the court finds
37 that any of the factors listed in section 1170(b)(6)(A–C) were a contributing factor to the
38 commission of the offense, the court must impose the lower term (see rule 4.420(e)) unless the
39 court finds that the aggravating factors outweigh the mitigating factors to such a degree that
40 imposing the lower term would be contrary to the interests of justice. In this instance, since the
41 court is not addressing the imposition of the upper term, the court may consider factors in
42 aggravation that have not been stipulated to by the defendant or found true beyond a reasonable
43 doubt at trial by the jury or the judge in a court trial.

1
2 In determining whether to impose the upper term for a criminal offense, the court may consider as
3 an aggravating factor that a defendant has suffered one or more prior convictions, based on
4 certified official records. This exception may not be used to select the upper term of an
5 enhancement.

6
7 This rule does not deal with the dual use of the facts; the statutory prohibition against dual use is
8 included, in part, in the comment to rule 4.420.

9
10 ~~Conversely, such facts as infliction of bodily harm, being armed with or using a weapon, and a~~
11 ~~taking or loss of great value may be circumstances in aggravation even if not meeting the~~
12 ~~statutory definitions for enhancements or charged as an enhancement.~~

13
14 ~~Facts concerning the defendant's prior record and personal history may be considered.~~ By
15 providing that the defendant's prior record and simultaneous convictions of other offenses may
16 not be used both for enhancement and in aggravation, section 1170(b) indicates that these and
17 other facts extrinsic to the commission of the crime may be considered in aggravation in
18 appropriate cases.

19
20 Refusal to consider the personal characteristics of the defendant in imposing sentence may raise
21 serious constitutional questions. The California Supreme Court has held that sentencing decisions
22 must take into account "the nature of the offense and/or the offender, with particular regard to the
23 degree of danger both present to society." (*In re Rodriguez* (1975) 14 Cal.3d 639, 654, quoting *In*
24 *re Lynch* (1972) 8 Cal.3d 410, 425.) In *Rodriguez* the court released petitioner from further
25 incarceration because "it appears that neither the circumstances of his offense *nor his personal*
26 *characteristics* establish a danger to society sufficient to justify such a prolonged period of
27 imprisonment." (*Id.* at p. 655, fn. omitted, italics added.) "For the determination of sentences,
28 justice generally requires . . . that there be taken into account the circumstances of the offense
29 together with the character and propensities of the offender." (*Pennsylvania ex rel. Sullivan v.*
30 *Ashe* (1937) 302 U.S. 51, 55, quoted with approval in *Gregg v. Georgia* (1976) 428 U.S. 153,
31 189.)

32
33 ~~Former subdivision (a)(4), concerning multiple victims, was deleted to avoid confusion. Some of~~
34 ~~the cases that had relied on that circumstance in aggravation were reversed on appeal because~~
35 ~~there was only a single victim in a particular count.~~

36
37 ~~Old age or youth of the victim may be circumstance in aggravation; see section 1170.85(b).~~ Other
38 statutory ~~circumstances~~ factors in aggravation are listed, for example, in sections 422.76, 1170.7,
39 1170.71, 1170.8, and 1170.85, and may be considered to impose the upper term if stipulated to by
40 the defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court
41 trial.

1 **Rule 4.423. Circumstances in mitigation**

2
3 Circumstances in mitigation include factors relating to the crime and factors relating to
4 the defendant.

5
6 **(a) Factors relating to the crime**

7
8 Factors relating to the crime include that:

9
10 (1)–(9) * * *

11
12 (10) If a firearm was used in the commission of the offense, it was unloaded or
13 inoperable.

14
15 **(b) Factors relating to the defendant**

16
17 Factors relating to the defendant include that:

18
19 (1)–(2) * * *

20
21 (3) The defendant experienced psychological, physical, or childhood trauma,
22 including, but not limited to, abuse, neglect, exploitation, or sexual violence
23 and it was a factor in the commission of the crime;

24
25 (4) The commission of the current offense is connected to the defendant’s prior
26 victimization or childhood trauma, or mental illness as defined by 1385(c);

27
28 (5) The defendant is or was a victim of intimate partner violence or human
29 trafficking at the time of the commission of the offense, and it was a factor in
30 the commission of the offense;

31
32 (6) The defendant is under 26 years of age, or was under 26 years of age at the
33 time of the commission of the offense;

34
35 (7) The defendant was a juvenile when they committed the current offense;

36
37 ~~(3)~~ (8) The defendant voluntarily acknowledged wrongdoing before arrest or at an
38 early stage of the criminal process;

39
40 ~~(4)~~ (9) The defendant is ineligible for probation and but for that ineligibility would
41 have been granted probation;

42
43 (10) Application of an enhancement could result in a sentence over 20 years;

- 1
2 (11) Multiple enhancements are alleged in a single case;
3
4 (12) Application of an enhancement could result in a discriminatory racial impact;
5
6 (13) An enhancement is based on a prior conviction that is over five years old;
7
8 ~~(5)~~ (14) The defendant made restitution to the victim; and
9
10 ~~(6)~~ (15) The defendant’s prior performance on probation, mandatory supervision,
11 postrelease community supervision, or parole was satisfactory.
12

13 (c) * * *

14
15 **Advisory Committee Comment**

16
17 * * *

18
19 **Rule 4.424. Consideration of applicability of section 654**

20
21 Before determining whether to impose either concurrent or consecutive sentences on all
22 counts on which the defendant was convicted, the court must determine whether the
23 proscription in section 654 against multiple punishments for the same act or omission
24 requires a stay of execution of the sentence imposed on some of the counts. If a stay of
25 execution is required due to the prohibition against multiple punishments for the same
26 act, the court has discretion to choose which act or omission will be punished and which
27 will be stayed.
28

29 **Rule 4.425. Factors affecting concurrent or consecutive sentences**

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

33
34 (a) * * *

35
36 (b) **Other facts and limitations**

37
38 Any circumstances in aggravation or mitigation, whether or not the factors have
39 been stipulated to by the defendant or found true beyond a reasonable doubt at trial
40 by a jury or the judge in a court trial, may be considered in deciding whether to
41 impose consecutive rather than concurrent sentences, except:

- 42
43 (1) A fact used to impose the upper term;

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- (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 4.427. Hate crimes

(a)–(b) * * *

(c) Hate crime enhancement

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

- (1) The following enhancements apply:
 - (A) An enhancement of a term in state prison as provided in section 422.75(a). Personal use of a firearm in the commission of the offense is an aggravating factor that must be considered in determining the enhancement term.
 - (B) An additional enhancement of one year in state prison for each prior felony conviction that constitutes a hate crime as defined in section 422.55.
- (2) The court may strike enhancements under (c) if it finds mitigating circumstances under rule 4.423, or pursuant to Penal Code section 1385(c) and states those mitigating circumstances on the record.
- (3) The punishment for any enhancement under (c) is in addition to any other punishment provided by law.

(d)–(e) * * *

Advisory Committee Comment

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

3
4 In order to impose the upper term based on Penal Code section 422.75, the fact of the
5 enhancement pursuant to Penal Code sections 422.55 or 422.6 must be stipulated to by the
6 defendant or found true beyond a reasonable doubt at trial by the jury or the judge in a court trial.

7
8 Any enhancement alleged pursuant to this section may be dismissed pursuant to Penal Code
9 section 1385(c).

10
11 **Rule 4.428. Factors affecting imposition of enhancements**

12
13 **(a) Enhancements punishable by one of three terms**

14
15 If an enhancement is punishable by one of three terms, the court must, in its sound
16 discretion, order imposition of a sentence not to exceed the middle term, unless
17 there are circumstances in aggravation that justify the imposition of a term of
18 imprisonment exceeding the middle term, and the facts underlying those
19 circumstances have been stipulated to by the defendant, or have been found true
20 beyond a reasonable doubt at trial by the jury or by the judge in a court trial.
21 ~~, in its discretion, impose the term that best serves the interest of justice and state~~
22 ~~the reasons for its sentence choice on the record at the time of sentencing. In~~
23 ~~exercising its discretion in selecting the appropriate term, the court may consider~~
24 ~~factors in mitigation and aggravation as described in these rules or any other factor~~
25 ~~authorized by rule 4.408.~~

26
27 **(b) Striking enhancements under section 1385**

28
29 If the court has discretion under section 1385(a) to strike an enhancement in the
30 interests of justice, the court also has the authority to strike the punishment for the
31 enhancement under section 1385(eb). In determining whether to strike the entire
32 enhancement or only the punishment for the enhancement, the court may consider
33 the effect that striking the enhancement would have on the status of the crime as a
34 strike, the accurate reflection of the defendant's criminal conduct on his or her
35 record, the effect it may have on the award of custody credits, and any other
36 relevant consideration.

37
38 **(c) Dismissing enhancements under section 1385(c)**

39
40 (1) The court shall exercise the discretion to dismiss an enhancement if it is in
41 the furtherance of justice to do so, unless the dismissal is prohibited by
42 initiative statute.

- 1 (2) In exercising its discretion under section 1385(c), the court must consider and
2 afford great weight to evidence offered by the defendant to prove that any of
3 the mitigating circumstances in section 1385(c) are present.
4
5 (A) Proof of the presence of one or more of these circumstances weighs
6 greatly in favor of dismissing the enhancement, unless the court finds
7 that dismissal of the enhancement would endanger public safety.
8
9 (B) The circumstances listed in 1385(c) are not exclusive.
10
11 (C) “Endanger public safety” means there is a likelihood that the dismissal
12 of the enhancement would result in physical injury or other serious
13 danger to others.
14
15 (3) If the court dismisses the enhancement pursuant to 1385(c), then both the
16 enhancement and its punishment must be dismissed.
17

Advisory Committee Comment

18
19
20 Case law suggests that in determining the “furtherance of justice” the court should consider the
21 constitutional rights of the defendant and the interests of society represented by the people; the
22 defendant’s background and prospects, including the presence or absence of a record; the nature
23 and circumstances of the crime and the defendant’s level of involvement; the factors in
24 aggravation and mitigation including the specific factors in mitigation of Penal Code section
25 1170(b)(6); and the factors that would motivate a “reasonable judge” in the exercise of their
26 discretion. The court should not consider whether the defendant has simply pled guilty, factors
27 related to controlling the court’s calendar, or antipathy toward the statutory scheme. (See *People*
28 *v. Romero* (1996) 13 Cal.4th 947; *People v. Dent* (1995) 38 Cal.App.4th 1726; *People v.*
29 *Kessel* (1976) 61 Cal.App.3d 322; *People v. Orin* (1975) 13 Cal.3d 937.)
30

31 How to afford great weight to a mitigating circumstance is not further explained in section 1385.
32 The court is not directed to give conclusive weight to the mitigating factors, and must still engage
33 in a weighing of both mitigating and aggravating factors. A review of case law suggests that the
34 court can find great weight when there is an absence of “substantial evidence of countervailing
35 considerations of sufficient weight to overcome” the presumption of dismissal when the
36 mitigating factors are present. (*People v. Martin* (1996) 42 Cal.3d 437.) In exercising this
37 discretion, the court may rely on aggravating factors that have not been stipulated to by the
38 defendant or proven beyond a reasonable doubt at trial by a jury or a judge in a court trial.
39 (*People v. Black* (2007) 41 Cal.4th 799.)
40

41 The legislative history on Senate Bill 81 states that the presumption created by Penal Code
42 section 1385(c) does not apply to alternative sentencing schemes such as One Strike, Two Strikes,
43 or Three Strikes. (See Assem. Com. Pub. Safety, Report on Sen. Bill 81 (2021–2022 Reg. Sess.)

1 June 29, 2021, pp. 5–6.) Unlike an offense specific enhancement, an alternative sentencing
2 scheme does not add an additional term of imprisonment to the base term; instead, it provides for
3 an alternate sentence for the underlying felony itself when it is proven that certain conditions
4 specified in the statute are true. (See *People v. Anderson* (2009) 47 Cal.4th 92, 102; *People v.*
5 *Superior Court (Romero)* (1996) 13 Cal.4th 497, 527.)

6
7 **Rule 4.437. Statements in aggravation and mitigation**

8
9 **(a)–(e) * * ***

10
11 **Advisory Committee Comment**

12
13 Section 1170(b)(4) states in part:

14
15 “At least four days prior to the time set for imposition of judgment, either party or the victim, or
16 the family of the victim if the victim is deceased, may submit a statement in aggravation or
17 mitigation to dispute facts in the record or the probation officer’s report, or to present additional
18 facts.”

19
20 This provision means that the statement is a document giving notice of intention to dispute
21 evidence in the record or the probation officer’s report, or to present additional facts.

22
23 The statement itself cannot be the medium for presenting new evidence, or for rebutting
24 competent evidence already presented, because the statement is a unilateral presentation by one
25 party or counsel that will not necessarily have any indicia of reliability. To allow its factual
26 assertions to be considered in the absence of corroborating evidence would, therefore, constitute a
27 denial of due process of law in violation of the United States (14th Amend.) and California (art. I,
28 § 7) Constitutions.

29
30 The requirement that the statement include notice of intention to rely on new evidence will
31 enhance fairness to both sides by avoiding surprise and helping to ensure that the time limit on
32 pronouncing sentence is met. This notice may include either party’s intention to provide evidence
33 to prove or contest the existence of a factor in mitigation that would require imposition of the low
34 term for the underlying offense or dismissal of an enhancement.

35
36 **Rule 4.447. Sentencing of enhancements**

37
38 **(a) Enhancements resulting in unlawful sentences**

39
40 Except pursuant to section 1385(c), Aa court may not strike or dismiss an
41 enhancement solely because imposition of the term is prohibited by law or exceeds
42 limitations on the imposition of multiple enhancements. Instead, the court must:
43

- 1 (1) Impose a sentence for the aggregate term of imprisonment computed without
2 reference to those prohibitions or limitations; and
3
4 (2) Stay execution of the part of the term that is prohibited or exceeds the
5 applicable limitation. The stay will become permanent once the defendant
6 finishes serving the part of the sentence that has not been stayed.
7

8 **(b) Multiple enhancements**
9

10 Notwithstanding section 1385(c), if a defendant is convicted of multiple
11 enhancements of the same type, the court must either sentence each enhancement
12 or, if authorized, strike the enhancement or its punishment. While the court may
13 strike an enhancement, the court may not stay an enhancement except as provided
14 in (a) or as authorized by section 654.
15

16 **Advisory Committee Comment**
17

18 **Subdivision (a).** Statutory restrictions may prohibit or limit the imposition of an enhancement in
19 certain situations. (See, for example, sections 186.22(b)(1), 667(a)(2), 667.61(f), 1170.1(f) and
20 (g), 12022.53(e)(2) and (f), and Vehicle Code section 23558.)
21

22 Penal Code section 1385(c) requires that in the furtherance of justice certain enhancements be
23 dismissed unless dismissal is prohibited by any initiative statute.
24

25 Present practice of staying execution is followed to avoid violating a statutory prohibition or
26 exceeding a statutory limitation, while preserving the possibility of imposition of the stayed
27 portion should a reversal on appeal reduce the unstayed portion of the sentence. (See *People v.*
28 *Gonzalez* (2008) 43 Cal.4th 1118, 1129–1130; *People v. Niles* (1964) 227 Cal.App.2d 749, 756.)
29

30 Only the portion of a sentence or component thereof that exceeds a limitation is prohibited, and
31 this rule provides a procedure for that situation. This rule applies to both determinate and
32 indeterminate terms.
33

34 **Subdivision (b).** A court may stay an enhancement if section 654 applies. (See *People v. Bradley*
35 (1998) 64 Cal.App.4th 386; *People v. Haykel* (2002) 96 Cal.App.4th 146, 152.)
36

37 **Rule 4.453. Commitments to nonpenal institutions**
38

39 ~~When a defendant is convicted of a crime for which sentence could be imposed under~~
40 ~~Penal Code section 1170 and the court orders that he or she be committed to the~~
41 ~~California Department of Corrections and Rehabilitation, Division of Juvenile Justice~~
42 ~~under Welfare and Institutions Code section 1731.5, the order of commitment must~~
43 ~~specify the term of imprisonment to which the defendant would have been sentenced. The~~

1 term is determined as provided by Penal Code sections 1170 and 1170.1 and these rules,
2 as though a sentence of imprisonment were to be imposed.

3
4 **Advisory Committee Comment**

5
6 ~~Commitments to the Department of Corrections and Rehabilitation, Division of Juvenile Justice~~
7 ~~(formerly Youth Authority) cannot exceed the maximum possible incarceration in an adult~~
8 ~~institution for the same crime. (See *People v. Olivas* (1976) 17 Cal.3d 236.)~~

9
10 ~~Under the indeterminate sentencing law, the receiving institution knew, as a matter of law from~~
11 ~~the record of the conviction, the maximum potential period of imprisonment for the crime of~~
12 ~~which the defendant was convicted.~~

13
14 ~~Under the Uniform Determinate Sentencing Act, the court's discretion as to length of term leaves~~
15 ~~doubt as to the maximum term when only the record of convictions is present.~~

16