JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
www.courts.ca.gov/policyadmin-invitationstocomment.htm

INVITATION TO COMMENT

SPR16-13

Title
Criminal Law: Criminal Realignment and Military Service

Action Requested
Review and submit comments by June 14, 2016

Proposed Rules, Forms, Standards, or Statutes
Amend Cal. Rules of Court, rules 4.403, 4.405, 4.406, 4.409, 4.410, 4.411.5, 4.412, 4.414, 4.415, 4.420, 4.421, 4.423, 4.425, 4.427, 4.431, 4.433, 4.435, 4.452, 4.472, and 4.480

Proposed Effective Date
January 1, 2017

Contact
Adrienne Toomey, 415-865-7977
Adrienne.toomey@jud.ca.gov

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

Executive Summary and Origin

The Criminal Law Advisory Committee proposes amendments to specified criminal sentencing rules of the California Rules of Court to (1) reflect statutory amendments enacted as part of the Criminal Justice Realignment Act, which made significant changes to the sentencing and supervision of persons convicted of felony offenses; (2) facilitate the court's determinations under Penal Code section 1170.9 for defendants with military service;[1] and (3) make nonsubstantive technical amendments.[2] The proposed amendments respond, in part, to recent legislation directing the Judicial Council to amend the rules to promote uniformity in sentencing under the realignment act.[3]

[1] All statutory references are to the Penal Code unless otherwise specified.

[2] The committee is currently developing and will separately propose other sentencing-related amendments to title 4, division 5 of the California Rules of Court.

[3] Assembly Bill 1156 (Brown; Stats. 2015, ch. 378).

Realignment-related amendments

Background

The Criminal Justice Realignment Act (realignment act) applied several amended sentencing and supervision provisions to persons convicted of felony offenses and sentenced on or after October 1, 2011. Many defendants convicted of felonies and not granted probation now serve their incarceration term in county jail instead of state prison. (Pen. Code, § 1170(h).) When sentencing defendants eligible for county jail under section 1170(h), judges must suspend execution of a concluding portion of the 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. (Pen. Code, § 1170(h)(5)(A).) This term of supervision is referred to as "mandatory supervision." (Pen. Code, § 1170(h)(5)(B).)

The realignment act also created "postrelease community supervision," whereby certain offenders being released from state prison are no longer supervised by the state parole system, but instead supervised by a local county supervision agency. (Pen. Code, §§ 3450–3465.) Postrelease community supervision 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. (Pen. Code, § 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 instead adversarial judicial proceedings conducted in county superior courts. (Pen. Code, § 1203.2.)

In addition, the realignment legislation amended section 4019, governing entitlement to custody credits applicable to sentences served in county jail, where the underlying crime occurred on or after October 1, 2011.

Finally, Assembly Bill 1156, effective January 1, 2016, amended section 1170.3 to direct the Judicial Council to adopt rules providing criteria for trial judge consideration in sentencing under the realignment act.

The Proposal

The considerable changes to felony sentencing and supervision proceedings engendered by the realignment act require amendments to several rules relating to felony sentencing in title 4, division 5, of the California Rules of Court. This proposal updates the rules and corresponding advisory committee comments to reflect the current statutory sentencing provisions by including reference, where appropriate, to:

- Mandatory supervision under section 1170(h)(5), and the exception to the presumption of mandatory supervision under section 1170(h)(5)(A);
- Postrelease community supervision under sections 3450–3465;
- Parole under section 3000.08;

- Terms of imprisonment in county jail under section 1170(h); and
- Custody credits under section 4019.

The proposal is also designed to incorporate into the rules the legislative policies underlying the realignment act of promoting reinvestment of criminal justice resources to support community-based corrections programs and evidence-based practices to improve public safety, where appropriate. (See, e.g., Pen. Code, §§ 17.5, 3450.)

The specific propose amendments are as follows:

- Amend the following rules and/or the corresponding advisory committee comments to incorporate reference to imprisonment in county jail under section 1170(h), mandatory supervision under section 1170(h)(5), postrelease community supervision under sections 3450–3465, parole under section 3000.08, and/or local county correctional administrator or sheriff, where appropriate: 4.403, 4.405, 4.406, 4.410, 4.412, 4.414, 4.420, 4.421, 4.423, 4.425, 4.427, 4.433, 4.435, 4.452, and 4.480.

- Further amend rule 4.405 and the advisory committee comment as follows:

  - To the rule, add list items (11)–(16), to read:
    (11) "Mandatory supervision" means the period of supervision defined in section 1170(h)(5)(A), (B).
    (12) "Postrelease community supervision" means the period of supervision governed by section 3451 et seq.
    (13) "Evidence-based practices" means supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or postrelease supervision.
    (14) "Community-based corrections program" means a program consisting of a system of services for felony offenders under local supervision dedicated to the goals stated in section 1229(c)(1)–(5).
    (15) "Local supervision" means the supervision of an adult felony offender on probation, mandatory supervision, or postrelease community supervision.
    (16) "County jail" means local county correctional facility.

  - To the advisory committee comment:
    - At the end of the comment, add "Item (13), see sections 17.5(a)(9) and 3450(b)(9). [¶] Item (15), see section 1229(e)."
    - At the end of the third sentence in the first paragraph, add the following sentence to conform comment with proposed amendment to the rule: "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.)"

        - Make specified nonsubstantive amendments.

- Further amend rule 4.406 by adding paragraph (b)(11): "(11) Denying mandatory supervision in the interests of justice under section 1170(h)(5)(A)."

- Further amend rule 4.410 and the corresponding advisory committee comment as follows:

    - To the rule, add paragraph (a)(8): "(8) Increasing public safety by reducing recidivism through community-based corrections programs and evidence-based practices."
    - To the advisory committee comment, before the last sentence of the comment, add: "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."

- Further amend rule 4.433 as follows:

    - Add paragraph (a)(3), to read: "Determine whether to deny a period of mandatory supervision in the interests of justice under section 1170(h)(5)(A)."
    - Create paragraphs (e)(1)–(3) as follows:
        - Break current subdivision (e) into an introduction and a paragraph, to read:
            (e) When a sentence of imprisonment is imposed under (c) or under rule 4.435, the sentencing judge must inform the defendant:
            (1) Under section 1170(c), of the parole period provided by section 3000 to be served after expiration of the sentence, in addition to any period of incarceration for parole violation;
        - Add subdivision (e)(2) to read:
            (2) Of the period of postrelease community supervision provided by section 3456 to be served after expiration of the sentence, in addition to any period of incarceration for a violation of postrelease community supervision; or
        - Add subdivision (e)(3) to read:
            (3) Of any period of mandatory supervision under section 1170(h)(5)(A) and (B), in addition to any period of imprisonment for a violation of mandatory supervision.

- Amend rule 4.472 by adding "4019" after "2933.2(c), and" in the first sentence.

- Make nonsubstantive amendments to the following rules and/or relevant portions of advisory committee comments: 4.403, 4.405, 4.409, 4.414, 4.421, 4.427, 4.431, and 4.433.

Presumption of mandatory supervision, rule 4.415

Background

Section 1170(h)(5)(A) was amended, effective January 1, 2015, to require courts to impose mandatory supervision for all felony terms of imprisonment in county jail unless the court finds, in the interests of justice, that mandatory supervision is not appropriate in a particular case. Section 1170.3(a) was amended at the same time to require the Judicial Council to adopt rules of court to prescribe criteria for the court to consider in deciding whether to deny a period of mandatory supervision "in the interests of justice" under section 1170(h)(5)(A) and in determining the appropriate period and conditions of mandatory supervision. The Judicial Council adopted rule 4.415, effective July 1, 2015, in response.

The appellate court's recent opinion in *People v. Borynack* (2015) 238 Cal.App.4th 958, review denied October 21, 2015, held that courts may not impose mandatory supervision when the defendant is statutorily ineligible for a suspension of part of the sentence.

The Proposal

The committee proposes amending rule 4.415 as follows to clarify this exception to the presumption of mandatory supervision:

- To the rule, add the following to the beginning of subdivision (a): "Except where the defendant is statutorily ineligible for suspension of any part of the sentence."
- To the advisory committee comment, add the following after the last line of the second paragraph: "Under *People v. Borynack* (2015) 238 Cal.App.4th 958, review denied, courts may not impose mandatory supervision when the defendant is statutorily ineligible for a suspension of part of the sentence."

Military information in probation officer's presentence investigation report, rule 4.411.5

Background

Section 1170.9 directs that if a defendant convicted of a criminal offense alleges that he or she committed the offense as a result of sexual trauma, traumatic brain injury, posttraumatic stress disorder, substance abuse, or mental health problems stemming from service in the U.S. military, the court shall, before sentencing, make a determination about the allegations. If the court determines the allegations are true and the defendant is otherwise eligible for probation, the court must consider these circumstances as a factor in favor of granting probation. (Pen. Code, § 1170.9(a), (b)(1).)

The Proposal

The proposal would amend rule 4.411.5 to require probation presentence reports to include relevant information about the defendant's military service to facilitate the court's

determinations under section 1170.9 by adding the following to the end of subdivision (a)(6): "Such facts include those relevant to whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her U.S. military service."

Alternatives Considered

The committee considered not proposing any changes to the rules at this time. But it determined that these amendments are appropriate because they are necessary to conform the rules with the Penal Code and in some cases required by recent legislation.

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 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.
- Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?

Attachments and Links

1. Proposed amendments to Cal. Rules of Court, rules 4.403, 4.405, 4.406, 4.409, 4.410, 4.411.5, 4.412, 4.414, 4.415, 4.420, 4.421, 4.423, 4.425, 4.427, 4.431, 4.433, 4.435, 4.452, 4.472, and 4.480, at pages 7–20.

The California Rules of Court, rules 4.403, 4.405, 4.406, 4.409, 4.410, 4.411.5, 4.412, 4.414, 4.415, 4.420, 4.421, 4.423, 4.425, 4.427, 4.431, 4.433, 4.435, 4.452, 4.472, and 4.480, would be amended, effective January 1, 2017, to read:

Rule 4.403. Application

These rules apply only to criminal cases in which the defendant is convicted of one or more offenses punishable as a felony by a determinate sentence imposed under Penal Code part 2, title 7, chapter 4.5 (commencing with section 1170).

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. ~~Criteria dealing with jail sentences, fines, or jail time and fines as conditions of probation, would substantially exceed the mandate of the legislation.~~

Rule 4.405. Definitions

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

(1)–(3) * * *

(4) "Aggravation" or "circumstances in aggravation" means factors that the court may consider in its broad discretion in imposing one of the three authorized ~~prison~~ terms of imprisonment referred to in section 1170(b).

(5) "Mitigation" or "circumstances in mitigation" means factors that the court may consider in its broad discretion in imposing one of the three authorized ~~prison~~ 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)–(7) * * *

(8) "Imprisonment" means confinement in a state prison or county jail under section 1170(h).

(9)–(10) * * *

(11) "Mandatory supervision" means the period of supervision defined in section 1170(h)(5)(A), (B).

(12) "Postrelease community supervision" means the period of supervision governed by section 3451 et seq.

(13) "Evidence-based practices" means supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole, or postrelease supervision.

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

(15) "Local supervision" means the supervision of an adult felony offender on probation, mandatory supervision, or postrelease community supervision.

(16) "County jail" means local county correctional facility.

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 ~~[127 S.Ct. 856.]~~, the Legislature amended the determinate sentencing law. (See Sen. Bill 40; Stats. 2007, ch. 3.) 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) * * *

(b) When reasons required

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

(1) Granting probation;

(2) Imposing a prison sentence or sentence in county jail under section 1170(h) and thereby denying probation;

(3)–(8) * * *

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

(10) Striking an enhancement or prior conviction allegation under section 1385(a).; and

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

Rule 4.409. Consideration of criteria

* * *

Advisory Committee Comment

Relevant criteria are those applicable to the facts in the record of the case; not all criteria 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, 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) General objectives of sentencing include:

(1)–(5) * * *

(6) Securing restitution for the victims of crime; ~~and~~

(7) Achieving uniformity in sentencing~~.~~; and

(8) Increasing public safety by reducing recidivism through community-based corrections programs and evidence-based practices.

(b) * * *

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 ~~prison~~ terms of imprisonment to the seriousness of the offense, and the use of imprisonment as punishment.

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 4.411.5. 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)–(5) * * *

(6) Any relevant facts concerning the defendant's social history, including those categories enumerated in section 1203.10, organized under appropriate subheadings, including, whenever applicable, "Family," "Education," "Employment and income," "Military," "Medical/psychological," "Record of substance abuse or lack thereof," and any other relevant subheadings. This includes facts relevant to whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of his or her U. S. military service.

(7)–(12) * * *

(b)–(c) * * *

Rule 4.412. Reasons—agreement to punishment as an adequate reason and as abandonment of certain claims

(a) * * *

(b) Agreement to sentence abandons section 654 claim

By agreeing to a specified term in prison or county jail under section 1170(h) ~~term~~ 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.

Rule 4.414. Criteria affecting probation

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

(a) * * *

(b) Facts relating to the defendant

Facts relating to the defendant include:

(1) * * *

(2) Prior performance and present status on probation, mandatory supervision, postrelease community supervision, or parole ~~and present probation or parole status~~;

(3)–(8) * * *

Advisory Committee Comment

The sentencing judge's discretion to grant probation is unaffected by the Uniform Determinate Sentencing Act (section ~~§~~ 1170(a)(3)).

The decision whether to grant probation is normally based on an overall evaluation of the likelihood that the defendant will live successfully in the general community. Each criterion points to evidence that the likelihood of success is great or small. A single criterion will rarely be determinative; in most cases, the sentencing judge will have to balance favorable and unfavorable facts.

Under criteria (b)(3) and (b)(4), it is appropriate to consider the defendant's expressions of willingness to comply and his or her apparent sincerity, and whether the defendant's home and work environment and primary associates will be supportive of the defendant's efforts to comply with the terms of probation, among other factors.

Rule 4.415. Criteria affecting the imposition of mandatory supervision

(a) Presumption

Except where the defendant is statutorily ineligible for suspension of any part of the sentence, when imposing a term of imprisonment in county jail under section 1170(h), the court must suspend execution of a concluding portion of the term to be served as a period of mandatory supervision unless the court finds, in the interests of justice, that mandatory supervision is not appropriate in a particular case. Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, denials of a period of mandatory supervision should be limited.

(b)–(d) * * *

Advisory Committee Comment

Penal Code section 1170.3 requires the Judicial Council to adopt rules of court that prescribe criteria for the consideration of the court at the time of sentencing regarding the court's decision to "[d]eny a period of mandatory supervision in the interests of justice under paragraph (5) of subdivision (h) of Section 1170 or determine the appropriate period of and conditions of mandatory supervision."

Subdivision (a). Penal Code section 1170(h)(5)(A): "Unless the court finds, in the interests of justice, that it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2) of this subdivision, shall suspend execution of a concluding portion of the term for a period selected at the court's discretion." Under *People v. Borynack* (2015) 238 Cal.App.4th 958, review denied, courts may not impose mandatory supervision when the defendant is statutorily ineligible for a suspension of part of the sentence.

Subdivisions (b)(3), (b)(4), and (c)(3) * * *

Subdivision (c)(7). * * *

Rule 4.420. Selection of term of imprisonment

(a) * * *

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

(c)-(d) * * *

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

Advisory Committee Comment

The determinate sentencing law authorizes the court to select any of the three possible ~~prison~~ 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 ~~prison~~ 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 note 5 on 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)).

Rule 4.421. Circumstances in aggravation

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

(a) * * *

(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1)–(2) * * *

(3) The defendant has served a prior <u>term in</u> prison <u>or county jail under section 1170(h)</u> ~~term~~;

(4) The defendant was on probation<u>, mandatory supervision, postrelease community supervision,</u> or parole when the crime was committed; and

(5) The defendant's prior performance on probation<u>, mandatory supervision, postrelease community supervision,</u> or parole was unsatisfactory.

(c) * * *

Advisory Committee Comment

Circumstances in aggravation may justify imposition of the upper of three possible ~~prison~~ terms <u>of imprisonment</u>. (Section 1170(b).)

The list of circumstances in aggravation includes some facts that, if charged and found, may be used to enhance the sentence. The rule does not deal with the dual use of the facts; the statutory prohibition against dual use is included, in part, in 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.

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 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]t 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 655.) (Footnote omitted, emphasis 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 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 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, ~~1170.75,~~ 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) Factors relating to the defendant

Factors relating to the defendant include that:

(1)–(5) * * *

(6) The defendant's prior performance on probation, mandatory supervision, postrelease community supervision, or parole was satisfactory.

Rule 4.425. Criteria affecting concurrent or consecutive sentences

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

(a) * * *

(b) Other criteria and limitations

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

(1) * * *

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

(3) * * *

Rule 4.427. Hate crimes

(a) * * *

(b) Felony sentencing under section 422.7

If one of the three factors listed in section 422.7 is pled and proved, a misdemeanor conviction that constitutes a hate crime under section 422.55 may be sentenced as a felony. The punishment is imprisonment in state prison or county jail under section 1170(h) as provided by section 422.7.

(c)–(e) * * *

Rule 4.431. Proceedings at sentencing to be reported

* * *

Advisory Committee Comment

Reporters' transcripts of the sentencing proceedings are required on appeal (rule ~~8.420~~ 8.320, except in certain cases under subdivision (d) of that rule), and when the defendant is sentenced to prison (section 1203.01).

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

(a) In every case, at the time set for sentencing under section 1191, the sentencing judge must hold a hearing at which the judge must:

(1) Hear and determine any matters raised by the defendant under section 1201; ~~and~~

(2) Determine whether a defendant who is eligible for probation should be granted or denied probation, unless consideration of probation is expressly waived by the defendant personally and by counsel~~.~~; and

(3) Determine whether to deny a period of mandatory supervision in the interests of justice under section 1170(h)(5)(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 ~~prison~~ terms of imprisonment referred to in section 1170(b) 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 ~~prison~~ terms of imprisonment referred to in section 1170(b) 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) Under section 1170(c), of the parole period provided by section 3000 to be served after expiration of the sentence, in addition to any period of incarceration for parole violation~~.~~;

(2) Of the period of postrelease community supervision provided by section 3456 to be served after expiration of the sentence, in addition to any period of incarceration for a violation of postrelease community supervision; or

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

Advisory Committee Comment

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

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

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

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

Rule 4.435. Sentencing on revocation of probation

(a) * * *

(b) On revocation and termination of probation 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) * * *

(2) If the execution of sentence was previously suspended, the judge must order that the judgment previously pronounced be in full force and effect and that the defendant be committed to the custody of the Secretary of the Department

of Corrections and Rehabilitation or local county correctional administrator or sheriff for the term prescribed in that judgment.

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 under section 1203.2(a), to continue the defendant on probation.

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 ~~a prison sentence~~ 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.)

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) * * *

(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 ~~prison~~ 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.

Rule 4.472. Determination of presentence custody time credit

At the time of sentencing, the court must cause to be recorded on the judgment or commitment the total time in custody to be credited on the sentence under sections 2900.5, 2933.1(c), ~~and~~ 2933.2(c) and 4019. On referral of the defendant to the probation

officer for an investigation and report under section 1203(b) or 1203(g), or on setting a date for sentencing in the absence of a referral, the court must direct the sheriff, probation officer, or other appropriate person to report to the court and notify the defendant or defense counsel and prosecuting attorney within a reasonable time before the date set for sentencing as to the number of days that defendant has been in custody and for which he or she may be entitled to credit. Any challenges to the report must be heard at the time of sentencing.

Rule 4.480. Judge's statement under section 1203.01

A sentencing judge's statement of his or her views under section 1203.01 respecting a person sentenced to the Department of Corrections and Rehabilitation, Division of Adult Operations is required only in the event that no probation report is filed. Even though it is not required, however, a statement should be submitted by the judge in any case in which he or she believes that the correctional handling and the determination of term and parole should be influenced by information not contained in other court records.

The purpose of a section 1203.01 statement is to provide assistance to the Department of Corrections and Rehabilitation, Division of Adult Operations in its programming and institutional assignment and to the Board of Parole Hearings with reference to term fixing and parole release of persons sentenced indeterminately, and parole and postrelease community supervision waiver of persons sentenced determinately. It may amplify any reasons for the sentence that may bear on a possible suggestion by the Secretary of the Department of Corrections and Rehabilitation or the Board of Parole Hearings that the sentence and commitment be recalled and the defendant be resentenced. To be of maximum assistance to these agencies, a judge's statements should contain individualized comments concerning the convicted offender, any special circumstances that led to a prison sentence rather than local incarceration, and any other significant information that might not readily be available in any of the accompanying official records and reports.

If a section 1203.01 statement is prepared, it should be submitted no later than two weeks after sentencing so that it may be included in the official Department of Corrections and Rehabilitation, Division of Adult Operations case summary that is prepared during the time the offender is being processed at the Reception-Guidance Center of the Department of Corrections and Rehabilitation, Division of Adult Operations.