

Invitation to Comment

Title	Criminal Cases: Rules for Felony Sentencing in light of Senate Bill 40 (amend Cal. Rules of Court, rules 4.405, 4.406, 4.420, 4.428, 4.433, and 4.452).
Summary	The Rules of Court regarding the determinate sentencing law were recently amended to bring them into conformity with recent legislative changes (Sen. Bill 40) addressing the United States Supreme Court decision in <i>Cunningham v. California</i> . Given the urgency of the issue, they were not circulated for comment before being adopted, but rather are being circulated now to obtain public comment.
Source	Criminal Law Advisory Committee Hon. Steven Z. Perren, Chair
Staff	Joshua Weinstein, Senior Attorney, 415-865-7688, joshua.weinstein@jud.ca.gov
Discussion	<p>The United States Supreme Court found California’s determinate sentencing law (DSL) unconstitutional in <i>Cunningham v. California</i> (2007) 549 U.S. ____ [127 S.Ct. 856]. The Legislature, in response, recently amended the DSL, giving judges discretion to choose between the lower, middle, or upper term and requiring them to state the reasons for imposing a particular term on the record. (Sen. Bill 40; Stats. 2007, ch. 3 .) The <i>Cunningham</i> decision was issued on January 22, 2007 and SB 40 was effective as of March 30, 2007.</p> <p>Given these two significant changes in the law, the Rules of Court that address DSL sentences were out of date, incorrect, and unconstitutional. To alleviate that situation, on May 23, 2007, the Judicial Council amended the relevant rules. Given the need to conform the rules to current law, the Judicial Council adopted them before circulation for public comment. The rules are now being circulated and, if necessary, the advisory committee will consider further amendments.</p> <p>The amendments adopted by the Judicial Council on May 23, 2007, are shown in this document in strike-out and underline. The amendments:</p> <ul style="list-style-type: none"> Deleted the requirement that the judge (1) impose the middle term absent justification to impose the lower or upper term; and (2) find justification for deviating from the middle term by a

preponderance of the evidence. (Rule 4.420(a) and (b).)

- Clarified that the judge has discretion to impose one of the three terms authorized under Penal Code section 1170(b). In doing so, the rules provide that “the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.” (Rule 4.420(b).)
- Replaced the requirement that the judge state reasons for deviating from the middle term with a provision requiring that the judge state the reason for choosing a particular term. (See, e.g., rules 4.405(4) and (5), 4.406(b)(4), 4.420(e), 4.433(b) and (c)(1), 4.437(c)(1), and 4.452(3).)
- Deleted references to judges making factual findings, relying upon facts, or hearing evidence. (See, e.g., rules 4.405(e), 4.420(b), 4.421(a)–(c), 4.423(a) and (b), 4.433(b), and 4.437(c)(1).)
- Deleted the rule addressing enhancements with three possible terms. (Rule 4.428(b).) As it read before May 23, 2007, rule 4.428(b) provided that the middle term was to be imposed unless there were circumstances to justify imposing the lower or upper term. (*Ibid.*) Although these enhancements were not specifically addressed in *Cunningham*, the reasoning in *Cunningham* supports the argument that this sentencing scheme is similarly flawed. Although the Legislature did not address that issue in SB 40, given the strong possibility that this scheme is unconstitutional, rule 4.428(b) was deleted. (See also the advisory committee comment to rule 4.405.)
- Revised and updated the advisory committee’s comments in light of these changes.

The text of the amended rules is attached at pages 3–10.

Attachment

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

1 **Rule 4.405. Definitions**

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

4
5 (1)–(3) * * *

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

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

17
18 (6)–(10) * * *

19
20 **Advisory Committee Comment**

21
22 “Base term” is the term of imprisonment selected under section 1170(b) from the three possible terms.
23 (See section 1170(a)(3); *People v. Scott* (1994) 9 Cal.4th 331, 349.) Following the United States Supreme
24 Court decision in *Cunningham v. California* (2007) 549 U.S. , the Legislature amended the determinate
25 sentencing law. (See Sen. Bill 40; Stats. 2007, ch. 3.) To comply with those changes, these rules were also
26 amended. In light of those amendments, for clarity, the phrase “base term” in (4) and (5) was replaced
27 with “one of the three authorized prison terms.” It is an open question whether the definitions in (4) and
28 (5) apply to enhancements for which the statute provides for three possible terms. The Legislature in SB
29 40 amended section 1170(b) but did not modify sections 1170.1(d), 12022.2(a), 12022.3(b), or any other
30 section providing for an enhancement with three possible terms. The latter sections provide that “the court
31 shall impose the middle term unless there are circumstances in aggravation or mitigation.” (See, e.g.,
32 section 1170.1(d).) It is possible, although there are no cases addressing the point, that this enhancement
33 triad with the presumptive imposition of the middle term runs afoul of *Cunningham*. Because of this open
34 question, rule 4.428(b) was deleted.

35
36 “Enhancement.” The facts giving rise to an enhancement, the requirements for pleading and proving those
37 facts, and the court’s authority to strike the additional term are prescribed by statutes. See, for example,
38 sections 667.5 (prior prison terms), 12022 (being armed with a firearm or using a deadly weapon),
39 12022.5 (using a firearm), 12022.6 (excessive taking or damage), 12022.7 (great bodily injury), 1170.1(e)
40 (pleading and proof), and 1385(c) (authority to strike the additional punishment). Note: A consecutive
41 sentence is not an enhancement. (See section 1170.1(a); *People v. Tassell* (1984) 36 Cal.3d 77, 90
42 [overruled on other grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401].)
43

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

3
4 “Imprisonment” is distinguished from confinement in other types of facilities.

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

8
9
10 **Rule 4.406. Reasons**

11
12 (a) * * *

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

15
16 Sentence choices that generally require a statement of a reason include:

17
18 (1)–(3) * * *

19
20 (4) Selecting a term other than the middle one of the three authorized prison terms
21 referred to in section 1170(b) statutory term for either an offense or an
22 enhancement;

23
24 (5)–(10) * * *

25
26 **Advisory Committee Comment**

27
28 This rule is not intended to expand the statutory requirements for giving reasons, and is not an
29 independent interpretation of the statutory requirements.

30
31
32 **Rule 4.420. Selection of base term of imprisonment**

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

40
41 (b) In exercising his or her discretion in selecting one of the three authorized prison
42 terms referred to in section 1170(b), the sentencing judge may consider
43 circumstances in aggravation or mitigation, and any other factor reasonably related
44 to the sentencing decision. The relevant circumstances may be obtained from ~~in~~
45 aggravation and mitigation must be established by a preponderance of the evidence.

1 Selection of the upper term is justified only if, after a consideration of all the
2 relevant facts, the circumstances in aggravation outweigh the circumstances in
3 mitigation. The relevant facts are included in the case record, the probation officer's
4 report, other reports and statements properly received, statements in aggravation or
5 mitigation, and any further evidence introduced at the sentencing hearing. Selection
6 of the lower term is justified only if, considering the same facts, the circumstances
7 in mitigation outweigh the circumstances in aggravation.
8

9 (c) * * *

10
11 (d) A fact that is an element of the crime may not be used to impose ~~the upper~~ a greater
12 term.
13

14 (e) The reasons for selecting one of the three authorized prison terms referred to in
15 section 1170(b) the upper or lower term must be stated orally on the record, and
16 must include a concise statement of the ultimate facts that the court deemed to
17 constitute circumstances in aggravation or mitigation justifying the term selected.
18

19 Advisory Committee Comment

20
21 The determinate sentencing law authorizes the court to select any of the three possible prison terms even
22 though neither party has requested a deviation from the middle particular term by formal motion or
23 informal argument. Section 1170(b) vests the court with discretion to impose any of the three authorized
24 prison terms requires, however, that the middle term be selected unless there are circumstances in
25 aggravation or mitigation of the crime, and requires that the court stated on the record the facts and
26 reasons for imposing that the upper or lower term.
27

28 Thus, the sentencing judge has authority to impose the upper or lower term on his or her own initiative, if
29 circumstances justifying that choice appear upon an evaluation of the record as a whole.
30

31 The legislative intent is that, if imprisonment is the sentence choice, the middle term is to constitute the
32 average or usual term. The rule clarifies this intent by specifying that the presence of circumstances
33 justifying the upper or lower term must be established by a preponderance of the evidence, and that those
34 circumstances must outweigh offsetting circumstances. Proof by a preponderance of the evidence is the
35 standard in the absence of a statute or a decisional law to the contrary (Evid. Code, § 115), and appears
36 appropriate here, since there is no requirement that sentencing decisions be based on the same quantum of
37 proof as is required to establish guilt. See *Williams v. New York* (1949) 337 U.S. 241.
38

39 Determining whether circumstances in aggravation or mitigation preponderate is a qualitative, rather than
40 a quantitative, process. It cannot be determined by simply counting identified circumstances of each kind.
41

42 Present law prohibits dual punishment for the same act (or fact) but permits the same act or fact to be
43 considered in denying probation and in selecting the upper prison term. *People v. Edwards* (1976) 18
44 Cal.3d 796 (prior felony conviction, an element of the offense, also brought defendant within former
45 section 1203(d)(2) limitation on probation to person with prior felony convictions), citing *People v. Perry*
46 (1974) 42 Cal.App.3d 451, 460, and other cases.
47

1 It is not clear whether the reasons stated by the judge for selecting a particular term qualify as “facts” for
2 the purposes of the rule prohibition on dual use of facts. Until the issue is clarified, judges should avoid
3 the use of reasons that may constitute an impermissible dual use of facts. For example, the court is not
4 permitted to use a reason to impose a greater term if that reason also is either (1) the same as an
5 enhancement that will be imposed, or (2) an element of the crime. The court should not use the same
6 reason to impose a consecutive sentence as to impose an upper term of imprisonment. (People v. Avalos
7 (1984) 37 Cal.3d 216, 233.) It is not improper to use the same reason to deny probation and to impose the
8 upper term. (People v. Bowen (1992) 11 Cal.App.4th 102, 106.)

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

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

15
16 *People v. Riolo* (1983) 33 Cal.3d 223, 227 (and note 5 on 227) held that section 1170.1(a) does not
17 require the judgment to state the base term (upper, middle, or lower) and enhancements, computed
18 independently, on counts that are subject to automatic reduction under the one-third formula of section
19 1170.1(a).

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

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

30 31 32 **Rule 4.421. Circumstances in aggravation**

33
34 Circumstances in aggravation include ~~facts~~ factors relating to the crime and ~~facts~~ factors
35 relating to the defendant.

36 37 **(a) ~~Faets~~ Factors relating to the crime**

38
39 ~~Faets~~ Factors relating to the crime, whether or not charged or chargeable as
40 enhancements include ~~the fact~~ that:

41
42 (1)–(12) * * *

43 44 **(b) ~~Faets~~ Factors relating to the defendant**

45
46 ~~Faets~~ Factors relating to the defendant include ~~the fact~~ that:

47
48 (1)–(5) * * *

1
2 **(c) Other facts factors**
3

4 Any other facts factors statutorily declared to be circumstances in aggravation.
5
6

7 **Rule 4.423. Circumstances in mitigation**
8

9 Circumstances in mitigation include ~~facts~~ factors relating to the crime and ~~facts~~ factors
10 relating to the defendant.
11

12 **(a) ~~Facts~~ Factors relating to the crime**
13

14 ~~Facts~~ Factors relating to the crime include ~~the fact~~ that:
15

16 (1)–(8) * * *

17
18 (9) The defendant suffered from repeated or continuous physical, sexual, or
19 psychological abuse inflicted by the victim of the crime, and the victim of the
20 crime, who inflicted the abuse, was the defendant’s spouse, intimate
21 cohabitant, or parent of the defendant’s child; and ~~the facts concerning~~ the
22 abuse does not amount to a defense.
23

24 **(b) ~~Facts~~ Factors relating to the defendant**
25

26 ~~Facts~~ Factors relating to the defendant include ~~the fact~~ that:
27

28 (1)–(6) * * *

29
30
31 **Rule 4.428. Criteria affecting imposition of enhancements**
32

33 **~~(a) — Imposing or not imposing enhancement~~**
34

35 No reason need be given for imposing a term for an enhancement that was charged and
36 found true.
37

38 If the judge has statutory discretion to strike the additional term for an enhancement in
39 the furtherance of justice under section 1385(c) or based on circumstances in mitigation,
40 the court may consider and apply any of the circumstances in mitigation enumerated in
41 these rules or, under rule 4.408, any other reasonable circumstances in mitigation or in
42 the furtherance of justice ~~that are present~~.
43

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

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

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

7
8 The upper term may be imposed for an enhancement based on any of the
9 circumstances in aggravation enumerated in these rules or, under rule 4.408, any
10 other reasonable circumstances in aggravation that are present. The lower term may
11 be imposed based upon any of the circumstances in mitigation enumerated in these
12 rules or, under rule 4.408, any other reasonable circumstances in mitigation that are
13 present.

14
15 **Advisory Committee Comment**

16
17 Subdivision (b) is intended to apply to all enhancements punishable by three possible terms (section
18 1170.1(d)). This rule applies both to determinate and indeterminate terms.

19
20
21 **Rule 4.433. Matters to be considered at time set for sentencing**

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

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

30
31 **(c)** If a sentence of imprisonment is to be imposed, or if the execution of a sentence of
32 imprisonment is to be suspended during a period of probation, the sentencing judge
33 must:

34
35 (1) ~~Hear evidence in aggravation and mitigation, and d~~Determine, under section
36 1170(b), whether to impose one of the three authorized prison terms referred to
37 in section 1170(b) the upper, middle, or lower term; and state on the record the
38 ~~facts and reasons for imposing the upper or lower~~ that term.

39
40 (2)–(5) * * *

41
42 **(d)–(e) * * ***

43
44 **Advisory Committee Comment**

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

3
4 Subdivision (a)(2) makes it clear that probation should be considered in every case, without the necessity
5 of any application, unless the defendant is statutorily ineligible for probation.

6
7 Under subdivision (b), when imposition of sentence is to be suspended, the sentencing judge is not to
8 make any determinations as to possible length of a prison term on violation of probation (section
9 1170(b)). If there was a trial, however, the judge must ~~make findings as to circumstances justifying the~~
10 ~~upper or lower~~ state on the record the circumstances that would justify imposition of one of the three
11 authorized prison terms based on the trial evidence.

12
13 Subdivision (d) makes it clear that all sentencing matters should be disposed of at a single hearing unless
14 strong reasons exist for a continuance.

17 **Rule 4.437. Statements in aggravation and mitigation**

18
19 **(a)–(b) * * ***

21 **(c) Contents of statement**

22 A statement in aggravation or mitigation must include:

23
24 (1) A summary of facts evidence that the party relies on as circumstances
25 justifying the imposition of a particular term in aggravation or mitigation
26 justifying imposition of the upper or lower term.; and

27
28 (2) * * *

29
30 **(d)–(e) * * ***

31 **Advisory Committee Comment**

32
33
34 Section 1170(b) states in part:

35
36 “At least four days prior to the time set for imposition of judgment, either party or the victim, or the
37 family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to
38 dispute facts in the record or the probation officer’s report, or to present additional facts.”

39
40 This provision means that the statement is a document giving notice of intention to dispute facts evidence
41 in the record or the probation officer’s report, or to present additional facts.

42
43 The statement itself cannot be the medium for presenting new facts evidence, or for rebutting facts
44 competent evidence already presented by ~~competent evidence~~, because the statement is a unilateral
45 presentation by one party or counsel that will not necessarily have any indicia of reliability. To allow its
46 factual assertions to be considered in the absence of corroborating evidence would, therefore, constitute a
47 denial of due process of law in violation of the United States (14th Amend.) and California (art. I, § 7)
48 Constitutions.

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

7
8 The use of probation officers’ reports is permissible because the officers are trained objective
9 investigators. *Williams v. New York* (1949) 337 U.S. 241. Compare sections 1203 and 1204. *People v.*
10 *Peterson* (1973) 9 Cal.3d 717, 727, expressly approved the holding of *United States v. Weston* (9th Cir.
11 1971) 448 F.2d 626 that due process is offended by sentencing on the basis of unsubstantiated allegations
12 that were denied by the defendant. Cf., *In re Hancock* (1977) 67 Cal.App.3d 943, 949.

13
14 The requirement that the statement include notice of intention to rely on new evidence will enhance
15 fairness to both sides by avoiding surprise and helping to assure that the time limit on pronouncing
16 sentence is met.

17 18 19 **Rule 4.452. Determinate sentence consecutive to prior determinate sentence**

20
21 If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more
22 determinate sentences imposed previously in the same court or in other courts, the court
23 in the current case must pronounce a single aggregate term, as defined in section
24 1170.1(a), stating the result of combining the previous and current sentences. In those
25 situations:

26
27 (1)–(2) * * *

28
29 (3) Discretionary decisions of the judges in the previous cases may not be changed by
30 the judge in the current case. Such decisions include the decision ~~that a term other~~
31 ~~than the middle term was justified by circumstances in mitigation or aggravation to~~
32 impose one of the three authorized prison terms referred to in section 1170(b),
33 making counts in prior cases concurrent with or consecutive to each other, or the
34 decision that circumstances in mitigation or in the furtherance of justice justified
35 striking the punishment for an enhancement.

36 37 **Advisory Committee Comment**

38
39 The restrictions of subdivision (3) do not apply to circumstances where a previously imposed base term is
40 made a consecutive term on resentencing. If the judge selects a consecutive sentence structure, and since
41 there can be only one principal term in the final aggregate sentence, if a previously imposed full base term
42 becomes a subordinate consecutive term, the new consecutive term normally will become one-third the
43 middle term by operation of law. (section 1170.1(a).)

Item SP07-20 Response Form

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

- Agree** with proposed changes
- Agree** with proposed changes **if modified**
- Do not agree** with proposed changes

Comments: _____

Name: _____ Title: _____

Organization: _____

- Commenting on behalf of an organization

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Please **write** or **fax** or [respond using the Internet](#) to:

Address: Ms. Camilla Kieliger,
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Internet: <http://www.courtinfo.ca.gov/invitationstocomment/commentform.htm>

DEADLINE FOR COMMENT: 5:00 p.m., Friday, July 27, 2007

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

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