



## Judicial Council of California

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# INVITATION TO COMMENT

## SPR26-15

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**Title**

Criminal Procedure: Revisions to Felony Sentencing Rules

**Action Requested**

Review and submit comments by May 18, 2026, to [invitations@jud.ca.gov](mailto:invitations@jud.ca.gov)

**Proposed Rules, Forms, Standards, or Statutes**

Amend Cal. Rules of Court, rules 4.420 and 4.421

**Proposed Effective Date**

January 1, 2027

**Proposed by**

Criminal Law Advisory Committee  
Hon. Lisa Rodriguez, Chair

**Contact**

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### Executive Summary and Origin

The Criminal Law Advisory Committee recommends amending two rules of court to (1) reflect recent case law that addresses the trial court's reliance on aggravating factors to justify the imposition of an upper term sentence and (2) clarify the scope of the trial court's discretion in the context of imposing an upper term sentence.

### Background

In California, criminal trial courts use a determinate sentencing framework that specifies three possible terms of imprisonment for most felony offenses, with the middle term being the maximum term unless aggravating factors have been proven beyond a reasonable doubt, stipulated to by the defendant, or established by a certified record of conviction, as specified.<sup>1</sup> The Judicial Council, in turn, holds delegated authority to adopt rules that promote uniformity in sentencing, including rules that specify the circumstances that a trial court may consider in exercising its discretion to impose one of the terms.<sup>2</sup> To that end, the council has adopted rule 4.420, Selection of term of imprisonment, rule 4.421, Circumstances in aggravation, and rule 4.423, Circumstances in mitigation, among other rules. Rule 4.420 outlines the factors that a trial

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<sup>1</sup> See Pen. Code, § 1170 et seq. All further statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> § 1170.3(a).

*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 It is circulated for comment purposes only.*

court must consider in exercising its discretion to choose a term of imprisonment. Rule 4.421 lists twelve aggravating factors “relating to the crime” in subdivision (a) and five aggravating factors “relating to the defendant” in subdivision (b). Since 2018, rule 4.421 has also included a catchall “residual clause” in subdivision (c) that provides that factors in aggravation include “[a]ny other factors . . . that reasonably relate to the defendant or the circumstances under which the crime was committed.”

From 2007 to 2021, former Penal Code section 1170(b) provided that the trial court could impose the upper, middle or lower term as a matter of discretion so long as the court justified its reasons for the selection of the term on the record. In 2022, however, Senate Bill 567 (Stats. 2021, ch. 731) amended the triad sentencing scheme to provide that the trial court “shall, in its sound discretion, order imposition of a sentence not to exceed the middle term,” except that

[t]he court may impose a sentence exceeding the middle term only when there are circumstances in aggravation of the crime that justify the imposition of a term of imprisonment exceeding the middle term and the facts underlying those circumstances have been stipulated to by the defendant or have been found true beyond a reasonable doubt at trial by the jury or by the judge in a court trial.<sup>3</sup>

In effect, SB 567 imposed a requirement that the jury or the court find the existence of an aggravating factor that has been proven beyond a reasonable doubt before the court can exercise its discretion to select the upper term.<sup>4</sup> The court must then weigh the aggravating factors and mitigating factors in that exercise of discretion. If selecting the middle term, however, the court can consider aggravating factors that have not been proven beyond a reasonable doubt. The council amended several rules of court to implement SB 567, including rules 4.420 and 4.421.<sup>5</sup>

Appellate courts have recently weighed in on how to interpret and apply the sentencing rules in light of these statutory changes and constitutional requirements. In *Lovelace v. Superior Court* (2025) 108 Cal.App.5th 1081, 1089, the First Appellate District of the Court of Appeal held that by effectively giving prosecutors—and ultimately juries—the power to define aggravating factors justifying imposition of the upper term on an ad hoc basis, the residual clause in rule 4.421(c) exceeds the council’s delegated authority to adopt rules that promote uniformity in sentencing and therefore violates the separation of powers clause in article III, section 3 of the California Constitution. The court noted that while the residual clause was appropriate under the pre-SB 567 statutory scheme in which triad choices were governed purely by sentencing court

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<sup>3</sup> § 1170(b)(1), (2). Further, “the court may consider the defendant’s prior convictions in determining sentencing based on a certified record of conviction without submitting the prior convictions to a jury.” (§ 1170(b)(3).)

<sup>4</sup> The pre- and post-SB 567 sentencing frameworks each represent an alternative means of bringing California’s determinate sentencing laws into conformity with *Cunningham v. California* (2007) 549 U.S. 270, in which the United States Supreme Court held that under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury and established beyond a reasonable doubt.

<sup>5</sup> See Judicial Council of Cal., Advisory Com. Rep., *Criminal Law: Felony Sentencing* (Mar. 2, 2022), [jcc.legistar.com/View.ashx?M=F&ID=10566334&GUID=AE5CCF01-1CB3-4E7E-B2F9-9650015238D0](https://jcc.legistar.com/View.ashx?M=F&ID=10566334&GUID=AE5CCF01-1CB3-4E7E-B2F9-9650015238D0).

discretion, “[t]oday it no longer is.”<sup>6</sup> The court suggested that the Legislature could enact amendatory legislation authorizing the use of an undefined catchall aggravating factor; or that absent such curative legislation, the council might consider revising rule 4.421(c) to provide more guidance for the use of unenumerated aggravating sentencing factors.<sup>7</sup>

Separately, in *People v. Wiley* (2025) 17 Cal.5th 1069, 1086, the California Supreme Court interpreted United States Supreme Court precedent and clarified that “a defendant is entitled to a jury trial on all aggravating facts, other than the bare fact of a prior conviction and its elements, that expose the defendant to imposition of a sentence more serious than the statutorily provided midterm.” California’s high court thus concluded that the aggravating facts of whether a defendant’s prior convictions were of “increasing seriousness”<sup>8</sup> and whether the defendant’s “performance on probation” was “unsatisfactory”<sup>9</sup> must be submitted to a jury, absent waiver or stipulation.<sup>10</sup>

## The Proposal

This proposal would amend rules 4.420 and 4.421 to reflect the First Appellate District’s decision in *Lovelace* and the California Supreme Court’s decision in *Wiley*. Specifically, the proposal would:

- Update the advisory committee comments in rule 4.420 and 4.421 to reflect *Wiley*’s holding and clarify that consideration of the fact of a defendant’s prior convictions based on a certified record of conviction (absent the defendant’s stipulation or having been found true beyond a reasonable doubt by a jury or the judge in a court trial) is limited to consideration of the “bare fact of the prior conviction and its elements”; and
- Update the advisory committee comment in rule 4.421 to clarify that although *Lovelace* prohibits courts from relying on the residual clause in subdivision (c) to justify the imposition of an upper term, the residual clause may still be relied upon to justify the imposition of a middle term or in making other discretionary decisions.

The proposal would also add a new subdivision (d) to rule 4.420 and an accompanying update to the advisory committee comment to clarify that the court retains the discretion to determine what weight, if any, an aggravating factor merits, even if the aggravating factor has been properly pled and proved. The committee recommends adding this new subdivision to the rule to emphasize that after SB 567, a properly pled and proven aggravating factor does not require the court to

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<sup>6</sup> *Lovelace, supra*, 108 Cal.App.5th at p. 1099.

<sup>7</sup> *Lovelace, supra*, 108 Cal.App.5th at pp. 1104–1105.

<sup>8</sup> Cal. Rules of Court, rule 4.421(b)(2). All further rule references are to the California Rules of Court unless otherwise specified.

<sup>9</sup> Rule 4.421(b)(5).

<sup>10</sup> *Wiley, supra*, 17 Cal.5th at p. 1076.

impose an upper term sentence—and ultimately the court still determines the weight to be given to any aggravating factor when the court exercises its sentencing discretion.<sup>11</sup>

## Alternatives Considered

The committee considered several different ways of responding to *Lovelace*, including (1) removing the residual clause in its entirety from rule 4.421(c), (2) revising the language of the residual clause to include a carve-out so that it cannot be relied upon when imposing the upper term, (3) revising the language of the residual clause to include more definitional content and guidance so that it passes constitutional muster under *Lovelace*, and (4) taking no immediate action and allowing the Legislature to address the issue first.

The committee concluded that it would be premature at this stage to remove or revise rule 4.421(c)'s residual clause for two reasons. First, although all trial courts are bound by *Lovelace*, the Courts of Appeal are not, and there is a possibility that a different Court of Appeal could issue a contrary decision.<sup>12</sup> Second, the committee understands *Lovelace* to have prohibited reliance on aggravating factors based on the residual clause as to upper term sentences but not as to middle term sentences and other discretionary sentencing decisions.<sup>13</sup> Additionally, the committee decided against taking no action because, as noted, all trial courts are bound by published decisions of the Courts of Appeal, and trial courts should at the least be made aware that they are bound by *Lovelace*.<sup>14</sup>

The committee considered recommending that new subdivision (d) be added to rule 4.421 rather than rule 4.420, but the committee determined that rule 4.420 was a more appropriate place for the new provision given the structure of the sentencing rules.

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<sup>11</sup> See § 1170(b); *Wiley, supra*, 17 Cal.5th at p. 1086 (if aggravating facts are properly proven, the court may take them into account and exercise its discretion under section 1170(b) to determine what sentence to impose); *People v. Lynch* (2024) 16 Cal.5th 730, 767 (discussing “the distinction between the requirement of properly proven facts and the court’s exercise of its discretion when determining the significance of those facts” and stating that section 1170(b) in its current form “preserves the trial court’s discretion to determine whether an upper term sentence is in fact justified”).

<sup>12</sup> See *Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187, 1193, 85 Cal.Rptr.3d 506 (“there is no horizontal stare decisis in the California Court of Appeal”). By way of example, in December 2025—10 months after the First Appellate District decided *Lovelace*—the Third Appellate District issued an unpublished opinion, *People v. Sandusky* (Cal. Ct. App., Dec. 3, 2025, No. C098754) 2025 WL 3469499, that assumes the validity of rule 4.421(c)'s residual clause and does not discuss *Lovelace*.

<sup>13</sup> See rules 4.420(d) (“In selecting between the middle and lower terms of imprisonment, the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision”) and 4.408(a) (“The listing of factors in these rules for making discretionary sentencing decisions is not exhaustive and does not prohibit a trial judge from using additional criteria reasonably related to the decision being made”); see also rule 4.405(7) (definition of “circumstances in aggravation” includes “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”).

<sup>14</sup> See *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.

The committee considered whether rule 4.408(a) should also be amended in light of *Lovelace*, given that the concurring opinion in *Lovelace* observes that rule 4.408 is functionally similar to rule 4.421’s residual clause and that prior to the council’s adoption of the residual clause in 2018, “[c]onsideration of unenumerated aggravating factors was already contemplated by rule 4.408.”<sup>15</sup> The committee concluded that rule 4.408(a) does not present the same concerns as rule 4.421(c)’s residual clause and is not recommending that rule 4.408 be amended in response to *Lovelace* because (1) the *Lovelace* majority opinion does not mention rule 4.408(a), (2) rule 4.408(a) applies to discretionary sentencing decisions generally and not only to upper term sentences, and (3) rule 4.408(a) is directed toward what a trial judge (as opposed to a prosecutor) can and cannot do and thus is not an improper subdelegation of power as described in *Lovelace*.

The committee considered whether to amend rule 4.421 in light of Assembly Bill 352 (Stats. 2025, ch. 554), which added a new statutory aggravating factor to Penal Code section 422.<sup>16</sup> The committee concluded that amending rule 4.421 to refer to this new statutory aggravating factor is unnecessary because rule 4.421(c) already incorporates by reference “[a]ny other factors statutorily declared to be circumstances in aggravation.”

The committee considered whether to undertake a more substantial revision of rule 4.421 in response to public comments received by the Advisory Committee on Criminal Jury Instructions.<sup>17</sup> The committee is not recommending additional revisions to rule 4.421 at this time because, notwithstanding the council’s delegated authority to adopt rules on aggravating factors, the committee views the promulgation of aggravating factors as a policy determination that is

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<sup>15</sup> See *Lovelace*, *supra*, 108 Cal.App.5th at p. 1107 (conc. opn. of Goldman, J.); see also *People v. Bulkin* (Cal. Ct. App., Nov. 6, 2025, No. F086463) 2025 WL 3099330 (“Although it was not an issue in *Lovelace*, rule 4.408(a) is similar enough to rule 4.421(c) that we must question whether it too is on equally shaky constitutional foundations”).

<sup>16</sup> Effective January 1, 2026, subdivision (b) of section 422 provides: “In sentencing a person convicted of a felony violation of subdivision (a), the court may consider, as a factor in aggravation, that the defendant willfully threatened to commit a crime that would result in the death or great bodily injury of a person the defendant knew was a state constitutional officer, a Member of the Legislature, or a judge or court commissioner, as defined in subdivisions (a), (b), (c), (n), and (q) of Section 7920.500 of the Government Code.”

<sup>17</sup> More specifically, in October 2025, the Advisory Committee on Criminal Jury Instructions circulated an invitation to comment on additions, revisions, and revocations to jury instructions, including proposed bench note changes to Nos. 3224 to 3234 and proposed adoption of new aggravating factor instruction Nos. 3235 and 3238. (See Judicial Council of Cal., Invitation to Com., *Criminal Jury Instructions: Additions, Revisions, and Revocations*, pp. 278, 285, [courts.ca.gov/system/files/itc/calcrim-2025-02.pdf](https://courts.ca.gov/system/files/itc/calcrim-2025-02.pdf).) The advisory committee received two comments from the same commenter that expressed concerns over the constitutionality of the aggravating factor instructions and rule 4.421 in general, noting that the aggravating factors in the rule were designed for a judge’s determination but are now being used by juries. The comments further suggested that rule 4.421 should be rewritten in its entirety and the proposed amendments should be withdrawn. (See Judicial Council of Cal., Advisory Com. Rep., *Jury Instructions: Criminal Jury Instructions (2026 Edition)* (Jan. 27, 2026), pp. 307–309, [jcc.legistar.com/View.ashx?M=F&ID=15149920&GUID=77587213-4480-41EE-AF98-4EF002AE56E0](https://jcc.legistar.com/View.ashx?M=F&ID=15149920&GUID=77587213-4480-41EE-AF98-4EF002AE56E0).) The Advisory Committee on Criminal Jury Instructions declined to withdraw the proposed instructions but forwarded the comments to the Criminal Law Advisory Committee for consideration. (*Ibid.*)

fundamentally a legislative function.<sup>18</sup> The committee also believes that it may not be appropriate to further define the parameters of certain aggravating factors in rule 4.421(a) and (b) because community standards likely vary from county to county, and the imposition of new statewide standards may result in unintended consequences or be otherwise undesirable.

## **Fiscal and Operational Impacts**

No implementation or operational impacts are likely.

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<sup>18</sup> The committee acknowledges that, as noted, the council holds delegated authority under section 1170.3 to adopt rules that promote uniformity in sentencing, including rules that specify the circumstances under which a trial court may impose an upper or lower term sentence. However, nothing in the Legislature’s delegation of authority to the council precludes the Legislature from adding its own statutory aggravating factors. (See, e.g., §§ 422(b), 422.76, 1170.7, 1170.71, 1170.8, 1170.85.) The committee further notes that in other states with a determinate sentencing framework, aggravating factors are typically listed in statute rather than in agency or court rules. (See, e.g., [Ariz. Rev. Stat. Ann. § 13-701\(D\)](#); [Ind. Code § 35-38-1-7.1\(a\)](#); [Kan. Stat. Ann. §§ 21-6815\(c\)\(2\), 21-6816](#); [Minn. Stat. § 244.10\(5a\)](#); [N.C. Gen. Stat. § 15A-1340.16\(d\)](#); [Wash. Rev. Code § 9.94A535\(3\)](#).)

Additionally, the committee observes that the delegation of authority to the council occurred in 1977 in the context of the enactment of California’s determinate sentencing law (see *Chavez Zepeda v. Superior Court* (2023) 97 Cal.App.5th 65, 73), and the leading California Supreme Court case exploring this delegation and what is now rule 4.421 was decided in 1982 (see *People v. Wright* (1982) 30 Cal.3d 705)—well before the United States Supreme Court’s decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Cunningham v. California* (2007) 549 U.S. 270, cases that shifted the sentencing landscape by affirming that the Sixth Amendment requires that facts that expose a defendant to a greater potential sentence must be found by a jury beyond a reasonable doubt. The aftereffects of *Apprendi* and *Cunningham* are still being felt, as evidenced by the SB 567 provisions that in 2022 placed aggravating factor fact-finding in the hands of the jury. The committee believes that unilaterally revising the existing aggravating factors in rule 4.421 at this juncture would not be helpful and expects that the precise contours of the aggravating factors will continue to be elucidated in the case law as needed. (See *Chavez Zepeda, supra*, 97 Cal.App.5th at pp. 88–91 [aggravating factors are not unconstitutional merely because they use qualitative standards, and such standards can be further explained and defined in the case law].)

### **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?
- Would the addition of new subdivision (d) to rule 4.420 cause confusion as to whether the court retains discretion in the context of weighing mitigating circumstances or selecting the middle or lower terms of imprisonment?

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

### **Attachments and Links**

1. Cal. Rules of Court, rules 4.420 and 4.421, at pages 8–13

Rules 4.420 and 4.421 of the California Rules of Court would be amended, effective January 1, 2027, to read:

1 **Title 4. Criminal Rules**

2  
3 **Division 5. Felony Sentencing Law**

4  
5  
6  
7 **Rule 4.420. Selection of term of imprisonment**

8  
9 **(a)** When a judgment of imprisonment is imposed, or the execution of a judgment of  
10 imprisonment is ordered suspended, the sentencing judge must, in their sound  
11 discretion, order imposition of a sentence not to exceed the middle term, except as  
12 otherwise provided in paragraph (b).

13  
14 **(b)** The court may only choose an upper term when (1) there are circumstances in  
15 aggravation of the crime that justify the imposition of an upper term, and (2) the  
16 facts underlying those circumstances have been (i) stipulated to by the defendant,  
17 (ii) found true beyond a reasonable doubt at trial by a jury, or (iii) found true  
18 beyond a reasonable doubt by the judge in a court trial.

19  
20 **(c)** Notwithstanding paragraphs (a) and (b), the court may consider the fact of the  
21 defendant's prior convictions based on a certified record of conviction without it  
22 having been stipulated to by the defendant or found true beyond a reasonable doubt  
23 at trial by a jury or the judge in a court trial. This exception does not apply to the  
24 use of the record of a prior conviction in selecting the upper term of an  
25 enhancement.

26  
27 **(d)** The court retains the discretion to determine what weight, if any, an aggravating  
28 circumstance merits, even if the facts underlying that circumstance have been  
29 properly pled and proved.

30  
31 ~~**(d)**~~**(e)** In selecting between the middle and lower terms of imprisonment, the sentencing  
32 judge may consider circumstances in aggravation or mitigation, and any other  
33 factor reasonably related to the sentencing decision. The court may consider factors  
34 in aggravation and mitigation, whether or not the factors have been stipulated to by  
35 the defendant or found true beyond a reasonable doubt at trial by a jury or the judge  
36 in a court trial. The relevant circumstances may be obtained from the case record,  
37 the probation officer's report, other reports and statements properly received,  
38 statements in aggravation or mitigation, and any evidence introduced at the  
39 sentencing hearing.

40  
41 ~~**(e)**~~**(f)** Notwithstanding section 1170(b)(1), and unless the court finds that the aggravating  
42 circumstances outweigh the mitigating circumstances such that imposition of the  
43 lower term would be contrary to the interests of justice, the court must order

1 imposition of the lower term if any of the following was a contributing factor in the  
2 commission of the offense:

- 3  
4
- 5 (1) The defendant has experienced psychological, physical, or childhood trauma,  
6 including, but not limited to, abuse, neglect, exploitation, or sexual violence;  
7
  - 8 (2) The defendant is a youth, or was a youth as defined under section 1016.7(b)  
9 at the time of the commission of the offense; or
  - 10
  - 11 (3) Prior to the instant offense, or at the time of the commission of the offense,  
12 the defendant is or was a victim of intimate partner violence or human  
13 trafficking.  
14

15 ~~(f)~~(g) Paragraph ~~(e)~~(f) does not preclude the court from imposing the lower term even if  
16 there is no evidence of the circumstances listed in paragraph ~~(e)~~(f).

17  
18 ~~(g)~~(h) To comply with section 1170(b)(5), a fact charged and found as an enhancement  
19 may be used as a reason for imposing a particular term only if the court has  
20 discretion to strike the punishment for the enhancement and does so. The use of a  
21 fact of an enhancement to impose the upper term of imprisonment is an adequate  
22 reason for striking the additional term of imprisonment, regardless of the effect on  
23 the total term.  
24

25 ~~(h)~~(i) A fact that is an element of the crime on which punishment is being imposed may  
26 not be used to impose a particular term.  
27

28 ~~(i)~~(j) The reasons for selecting one of the three authorized terms of imprisonment  
29 referred to in section 1170(b) must be stated orally on the record.  
30

### 31 **Advisory Committee Comment**

32  
33 It is not clear whether the reasons stated by the judge for selecting a particular term qualify as  
34 “facts” for the purposes of the rule prohibition on dual use of facts. Until the issue is clarified,  
35 judges should avoid the use of reasons that may constitute an impermissible dual use of facts. For  
36 example, the court is not permitted to use a reason to impose a greater term if that reason also is  
37 either (1) the same as an enhancement that will be imposed, or (2) an element of the crime. The  
38 court should not use the same reason to impose a consecutive sentence as to impose an upper  
39 term of imprisonment. (*People v. Avalos* (1984) 37 Cal.3d 216, 233.) It is not improper to use the  
40 same reason to deny probation and to impose the upper term. (*People v. Bowen* (1992) 11  
41 Cal.App.4th 102, 106.)  
42

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

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

8  
9 Even when sentencing is under section 1170.1, however, it is essential to determine the base term  
10 and specific enhancements for each count independently, in order to know which is the principal  
11 term count. The principal term count must be determined before any calculation is made using the  
12 one-third formula for subordinate terms.

13  
14 In addition, the base term (upper, middle, or lower) for each count must be determined to arrive at  
15 an informed decision whether to make terms consecutive or concurrent; and the base term for  
16 each count must be stated in the judgment when sentences are concurrent or are fully consecutive  
17 (i.e., not subject to the one-third rule of section 1170.1(a)).

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

29  
30 **Subdivision (c).** Consideration of the fact of a defendant’s prior conviction under subdivision (c)  
31 is limited to consideration of the bare fact of the prior conviction and its elements. (See *People v.*  
32 *Wiley* (2025) 17 Cal.5th 1069, 1085–1086.)

33  
34 **Subdivision (d).** This subdivision is based on existing statutory and decisional authority and is  
35 not intended to expand or limit the scope of the court’s discretion in sentencing. (See Pen. Code,  
36 § 1170(b); *People v. Wiley* (2025) 17 Cal.5th 1069, 1086; *People v. Lynch* (2024) 16 Cal.5th 730,  
37 767.)

38  
39  
40 **Rule 4.421. Circumstances in aggravation**

41  
42 Circumstances in aggravation include factors relating to the crime and factors relating to  
43 the defendant.

1  
2 **(a) Factors relating to the crime**

3  
4 Factors relating to the crime, whether or not charged or chargeable as  
5 enhancements include that:

- 6  
7 (1) The crime involved great violence, great bodily harm, threat of great bodily  
8 harm, or other acts disclosing a high degree of cruelty, viciousness, or  
9 callousness;
- 10  
11 (2) The defendant was armed with or used a weapon at the time of the  
12 commission of the crime;
- 13  
14 (3) The victim was particularly vulnerable;
- 15  
16 (4) The defendant induced others to participate in the commission of the crime or  
17 occupied a position of leadership or dominance of other participants in its  
18 commission;
- 19  
20 (5) The defendant induced a minor to commit or assist in the commission of the  
21 crime;
- 22  
23 (6) The defendant threatened witnesses, unlawfully prevented or dissuaded  
24 witnesses from testifying, suborned perjury, or in any other way illegally  
25 interfered with the judicial process;
- 26  
27 (7) The defendant was convicted of other crimes for which consecutive sentences  
28 could have been imposed but for which concurrent sentences are being  
29 imposed;
- 30  
31 (8) The manner in which the crime was carried out indicates planning,  
32 sophistication, or professionalism;
- 33  
34 (9) The crime involved an attempted or actual taking or damage of great  
35 monetary value;
- 36  
37 (10) The crime involved a large quantity of contraband; and
- 38  
39 (11) The defendant took advantage of a position of trust or confidence to commit  
40 the offense.
- 41  
42 (12) The crime constitutes a hate crime under section 422.55 and:  
43

1 (A) No hate crime enhancements under section 422.75 are imposed; and

2  
3 (B) The crime is not subject to sentencing under section 1170.8.

4  
5 **(b) Factors relating to the defendant**

6  
7 Factors relating to the defendant include that:

- 8  
9 (1) The defendant has engaged in violent conduct that indicates a serious danger  
10 to society;
- 11  
12 (2) The defendant's prior convictions as an adult or sustained petitions in  
13 juvenile delinquency proceedings are numerous or of increasing seriousness;
- 14  
15 (3) The defendant has served a prior term in prison or county jail under section  
16 1170(h);
- 17  
18 (4) The defendant was on probation, mandatory supervision, postrelease  
19 community supervision, or parole when the crime was committed; and
- 20  
21 (5) The defendant's prior performance on probation, mandatory supervision,  
22 postrelease community supervision, or parole was unsatisfactory.

23  
24 **(c) Other factors**

25  
26 Any other factors statutorily declared to be circumstances in aggravation or that  
27 reasonably relate to the defendant or the circumstances under which the crime was  
28 committed.

29  
30 **Advisory Committee Comment**

31  
32 Courts may not impose a sentence greater than the middle term except when aggravating factors  
33 justifying the imposition of the upper term have been stipulated to by the defendant or found true  
34 beyond a reasonable doubt at trial by the jury or the judge in a court trial. These requirements do  
35 not apply to consideration of aggravating factors for the lower or middle term. If the court finds  
36 that any of the factors listed in section 1170(b)(6)(A–C) were a contributing factor to the  
37 commission of the offense, the court must impose the lower term (see rule 4.420~~(e)~~(f)) unless the  
38 court finds that the aggravating factors outweigh the mitigating factors to such a degree that  
39 imposing the lower term would be contrary to the interests of justice. In this instance, since the  
40 court is not addressing the imposition of the upper term, the court may consider factors in  
41 aggravation that have not been stipulated to by the defendant or found true beyond a reasonable  
42 doubt at trial by the jury or the judge in a court trial.

1 In determining whether to impose the upper term for a criminal offense, the court may consider as  
2 an aggravating factor that a defendant has suffered one or more prior convictions, based on a  
3 certified record of conviction—but in doing so may not consider more than the bare fact of the  
4 prior conviction and its elements. 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 Refusal to consider the personal characteristics of the defendant in imposing sentence may raise  
11 serious constitutional questions. The California Supreme Court has held that sentencing decisions  
12 must take into account “the nature of the offense and/or the offender, with particular regard to the  
13 degree of danger both present to society.” (In re Rodriguez (1975) 14 Cal.3d 639, 654, quoting In  
14 re Lynch (1972) 8 Cal.3d 410, 425.) In *Rodriguez* the court released petitioner from further  
15 incarceration because “it appears that neither the circumstances of his offense *nor his personal*  
16 *characteristics* establish a danger to society sufficient to justify such a prolonged period of  
17 imprisonment.” (*Id.* at p. 655, fn. omitted, italics added.) “For the determination of sentences,  
18 justice generally requires . . . that there be taken into account the circumstances of the offense  
19 together with the character and propensities of the offender.” (*Pennsylvania ex rel. Sullivan v.*  
20 *Ashe* (1937) 302 U.S. 51, 55, quoted with approval in *Gregg v. Georgia* (1976) 428 U.S. 153,  
21 189.)

22  
23 Other statutory factors in aggravation are listed, for example, in sections 422.76, 1170.7, 1170.71,  
24 1170.8, and 1170.85, and may be considered to impose the upper term if stipulated to by the  
25 defendant or found true beyond a reasonable doubt at trial by a jury or the judge in a court trial.

26  
27 **Subdivision (c).** Under *Lovelace v. Superior Court* (2025) 108 Cal.App.5th 1081, 1096–1105,  
28 only factors in aggravation statutorily declared or enumerated in subdivision (a) or (b) may be  
29 relied upon to justify the imposition of an upper term. *Lovelace* does not, however, prevent the  
30 court from relying upon nonenumerated factors in aggravation under the residual clause of  
31 subdivision (c) that “reasonably relate to the defendant or the circumstances under which the  
32 crime was committed” to justify the imposition of a middle term or in making other discretionary  
33 sentencing decisions. (*Ibid.*; rules 4.420(e), 4.408(a).)