LIST OF AMENDMENTS TO THE CALIFORNIA RULES OF COURT
Adopted by the Judicial Council on May 18, 2007, effective on May 23, 2007

Rule 4.405. Definitions

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

(1)–(3) * * *

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

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

(6)–(10) * * *

Rule 4.405 amended effective May 23, 2007; adopted as rule 405 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective July 28, 1977, January 1, 1991, July 1, 2003, and January 1, 2007.

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. , 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." 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" 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).

Rule 4.406. Reasons

(a) * * *

(b) When reasons required

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

(1)–(3) * * *

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

(5)–(10) * * *

(Subd (b) amended effective May 23, 2007; previously amended effective January 1, 2001, July 1, 2003, January 1, 2006, and January 1, 2007.)

Rule 4.406 amended effective May 23, 2007; adopted as rule 406 effective January 1, 1991; previously amended and renumbered effective January 1, 2001; previously amended effective July 1, 2003, January 1, 2006, and January 1, 2007.

Advisory Committee Comment

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

Rule 4.420. Selection of ~~base~~ term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge must select the upper, middle, or lower term on each count for which the defendant has been

convicted, as provided in section 1170(b) and these rules. ~~The middle term must be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.~~

(Subd (a) amended effective May 23, 2007; previously amended effective July 28, 1977, January 1, 1991, and January 1, 2007.)

(b) In exercising his or her discretion in selecting one of the three authorized prison terms 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 ~~in aggravation and mitigation must be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in~~ the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. ~~Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.~~

(Subd (b) amended effective May 23, 2007; previously amended effective July 28, 1977, January 1, 1991, and January 1, 2007.)

(c) *** * ***

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

(Subd (d) amended effective May 23, 2007; adopted effective January 1, 1991; previously amended effective January 1, 2007.)

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

(Subd (e) amended effective May 23, 2007; previously amended and relettered effective January 1, 1991; previously amended effective July 28, 1977, and January 1, 2007.)

Rule 4.420 amended effective May 23, 2007; adopted as rule 439 effective July 1, 1977; previously amended and renumbered as rule 420 effective January 1, 1991; previously

renumbered effective January 1, 2001; previously amended effective July 28, 1977, and January 1, 2007.

Advisory Committee Comment

The determinate sentencing law authorizes the court to select any of the three possible prison terms even though neither party has requested a ~~deviation from the middle~~ 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 ~~requires, however, that the middle term be selected unless there are circumstances in aggravation or mitigation of the crime,~~ and requires that the court state~~d~~ on the record the ~~facts and~~ reasons for imposing that ~~the upper or lower~~ term.

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

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

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

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

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.

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

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 ~~facts~~ factors relating to the crime and ~~facts~~ factors relating to the defendant.

(a) ~~Facts~~ Factors relating to the crime

~~Facts~~ Factors relating to the crime, whether or not charged or chargeable as enhancements include ~~the fact~~ that:

(1)–(12) * * *

(Subd (a) amended effective May 23, 2007; previously amended effective January 1, 1991, and January 1, 2007.)

(b) ~~Facts~~ Factors relating to the defendant

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

(1)–(5) * * *

(Subd (b) amended effective May 23, 2007; previously amended effective January 1, 1991, and January 1, 2007.)

(c) Other ~~facts~~ factors

Any other ~~facts~~ factors statutorily declared to be circumstances in aggravation.

(Subd (c) amended effective May 23, 2007; adopted effective January 1, 1991; previously amended effective January 1, 2007.)

Rule 4.421 amended effective May 23, 2007; adopted as rule 421 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective January 1, 1991, and January 1, 2007.

Rule 4.423. Circumstances in mitigation

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

(a) ~~Facts~~ Factors relating to the crime

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

(1)–(8) * * *

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

(Subd (a) amended effective May 23, 2007; previously amended effective January 1, 1991, July 1, 1993, and January 1, 2007.)

(b) ~~Facts~~ Factors relating to the defendant

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

(1)–(6) * * *

(Subd (b) amended effective May 23, 2007; previously amended effective January 1, 1991, and January 1, 2007.)

Rule 4.423 amended effective May 23, 2007; adopted as rule 423 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective January 1, 1991, July 1, 1993, and January 1, 2007.

Rule 4.428. Criteria affecting imposition of enhancements

~~(a)~~ Imposing or not imposing enhancement

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

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

The judge should not strike the allegation of the enhancement.

~~(b) Choice from among three possible terms~~

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

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

Rule 4.428 amended effective May 23, 2007; adopted as rule 428 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective January 1, 1998, July 1, 2003, and January 1, 2007.

~~Advisory Committee Comment~~

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

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

(a) * * *

(b) If the imposition of a sentence is to be suspended during a period of probation after a conviction by trial, the trial judge must ~~make factual findings as to circumstances~~ identify circumstances that would justify imposition of ~~the~~ one of the three authorized prison terms referred to in

section 1170(b) ~~upper or lower term~~ if probation is later revoked, based on evidence admitted at the trial.

(Subd (b) amended effective May 23, 2007; previously amended effective July 28, 1977, and January 1, 2007.)

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

(2)–(5) * * *

(Subd (c) amended effective May 23, 2007; previously amended effective July 28, 1977, July 1, 2003, and January 1, 2007.)

(d)–(e) * * *

Rule 4.433 amended effective May 23, 2007; adopted as rule 433 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective July 28, 1977, January 1, 1979, July 1, 2003, and January 1, 2007.

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 on violation of probation (section 1170(b)). If there was a trial, however, the judge must ~~make findings as to circumstances justifying the upper or lower~~ state on the record the circumstances that would justify imposition of one of the three authorized prison terms 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 4.437. Statements in aggravation and mitigation

(a)–(b) * * *

(c) Contents of statement

A statement in aggravation or mitigation shall include:

(1) A summary of ~~facts~~ evidence that the party relies on as circumstances justifying the imposition of a particular term ~~in aggravation or mitigation justifying imposition of the upper or lower term~~.

(2) * * *

(Subd (c) amended effective May 23, 2007; previously amended effective January 1, 2007.)

(d)–(e) * * *

Rule 4.437 amended effective May 23, 2007; adopted as rule 437 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective July 28, 1977, January 1, 1991, and January 1, 2007.

Advisory Committee Comment

Section 1170(b) states in part:

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

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

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

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

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

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

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 ~~that a term other than the middle term was justified by circumstances in mitigation or aggravation~~ to impose one of the three authorized prison terms 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 4.452 amended effective May 23, 2007; adopted as rule 452 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective July 1, 2003, and January 1, 2007.

Advisory Committee Comment

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