Title 4. Criminal Rules

Division 1. General Provisions

Rule 4.1. Title

The rules in this title may be referred to as the Criminal Rules.

Rule 4.1 adopted effective January 1, 2007.

Rule 4.2. Application

The Criminal Rules apply to all criminal cases in the superior courts unless otherwise provided by a statute or rule in the California Rules of Court.

Rule 4.2 adopted effective January 1, 2007.

Rule 4.3. Reference to Penal Code

All statutory references are to the Penal Code unless stated otherwise.

Rule 4.3 adopted effective January 1, 2007.

Division 2. Pretrial

Chapter 1. Pretrial Proceedings

Rule 4.130. Mental competency proceedings

Rule 4.100. Arraignments

At the arraignment on the information or indictment, unless otherwise ordered for good cause, and on a plea of not guilty, including a plea of not guilty by reason of insanity;

(1) The court must set dates for:

(A) Trial, giving priority to a case entitled to it under law; and

(B) Filing and service of motions and responses and hearing thereon;

(2) A plea of not guilty must be entered if a defendant represented by counsel fails to plead or demur; and

(3) An attorney may not appear specially.

Rule 4.100 amended effective January 1, 2007; adopted as rule 227.4 effective January 1, 1985; previously amended effective June 6, 1990; previously renumbered and amended effective January 1, 2001.

Advisory Committee Comment

Cross reference: Penal Code section 987.1.

Rule 4.101. Bail in criminal cases

The fact that a defendant in a criminal case has or has not asked for a jury trial must not be taken into consideration in fixing the amount of bail and, once set, bail may not be increased or reduced by reason of such fact.

Rule 4.101 amended effective January 1, 2007; adopted as rule 801 effective July 1, 1964; previously renumbered effective January 1, 2001.

Rule 4.102. Uniform bail and penalty schedules—traffic, boating, fish and game, forestry, public utilities, parks and recreation, business licensing

The Judicial Council of California has established the policy of promulgating uniform bail and penalty schedules for certain offenses in order to achieve a standard of uniformity in the handling of these offenses.

In general, bail is used to ensure the presence of the defendant before the court. Under Vehicle Code sections 40512 and 13103, bail may also be forfeited and forfeiture may be ordered without the necessity of any further court proceedings and be treated as a

conviction for specified Vehicle Code offenses. A penalty in the form of a monetary sum is a fine imposed as all or a portion of a sentence imposed.

To achieve substantial uniformity of bail and penalties throughout the state in traffic, boating, fish and game, forestry, public utilities, parks and recreation, and business licensing cases, the trial court judges, in performing their duty under Penal Code section 1269b to annually revise and adopt a schedule of bail and penalties for all misdemeanor and infraction offenses except Vehicle Code infractions, must give consideration to the Uniform Bail and Penalty Schedules approved by the Judicial Council. The Uniform Bail and Penalty Schedule for infraction violations of the Vehicle Code will be established by the Judicial Council in accordance with Vehicle Code section 40310. Judges must give consideration to requiring additional bail for aggravating or enhancing factors.

After a court adopts a countywide bail and penalty schedule, under Penal Code section 1269b, the court must, as soon as practicable, mail a copy of the schedule to the Judicial Council with a report stating how the revised schedule differs from the council's uniform traffic bail and penalty schedule, uniform boating bail and penalty schedule, uniform fish and game bail and penalty schedule, uniform forestry bail and penalty schedule, uniform public utilities bail and penalty schedule, uniform parks and recreation bail and penalty schedule, or uniform business licensing bail and penalty schedule.

The purpose of this uniform bail and penalty schedule is to:

(1) Show the standard amount for bail, which for Vehicle Code offenses may also be the amount used for a bail forfeiture instead of further proceedings; and

(2) Serve as a guideline for the imposition of a fine as all or a portion of the penalty for a first conviction of a listed offense where a fine is used as all or a portion of the penalty for such offense. The amounts shown for the misdemeanors on the boating, fish and game, forestry, public utilities, parks and recreation, and business licensing bail and penalty schedules have been set with this dual purpose in mind.

Unless otherwise shown, the maximum penalties for the listed offenses are six months in the county jail or a fine of $1,000, or both. The penalty amounts are intended to be used to provide standard fine amounts for a first offense conviction of a violation shown where a fine is used as all or a portion of the sentence imposed.

Note:
Courts may obtain copies of the Uniform Bail and Penalty Schedules by contacting:
Office of the General Counsel
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, CA 94102-3688
(415) 865-7611
Fax (415) 865-4317
www.courtinfo.ca.gov/reference

Rule 4.102 amended effective January 1, 2007; adopted as rule 850 effective January 1, 1965; previously amended effective January 1, 1970, January 1, 1971, July 1, 1972, January 1, 1973, January 1, 1974, July 1, 1975, July 1, 1979, July 1, 1980, July 1, 1981, January 1, 1983, July 1, 1984, July 1, 1986, January 1, 1989, January 1, 1990, January 1, 1993, January 1, 1995, January 1, 1997, and July 1, 2004; previously renumbered and amended effective January 1, 2001.

Rule 4.103. Notice to appear forms

(a) Traffic offenses

A notice to appear that is issued for any violation of the Vehicle Code other than a felony or for a violation of an ordinance of a city or county relating to traffic offenses must be prepared and filed with the court on *Automated Traffic Enforcement System Notice to Appear* (form TR-115) or *Traffic/Nontraffic Notice to Appear* (form TR-130), and must comply with the requirements in the current version of the Judicial Council's instructions, *Notice to Appear and Related Forms* (form TR-INST).

(Subd (a) amended effective January 1, 2007.)

(b) Nontraffic offenses

A notice to appear issued for a nontraffic infraction or misdemeanor offense that is prepared on *Nontraffic Notice to Appear* (form TR-120) or *Traffic/Nontraffic Notice to Appear* (form TR-130), and that complies with the requirements in the current version of the Judicial Council's instructions, *Notice to Appear and Related Forms* (form TR-INST), may be filed with the court and serve as a complaint as provided in Penal Code section 853.9.

(Subd (b) amended effective January 1, 2007.)

(c) Corrections

Corrections to citations previously issued on *Continuation of Notice to Appear* (form TR-106), *Continuation of Citation* (form TR-108), *Automated Traffic Enforcement System Notice to Appear* (form TR-115), *Nontraffic Notice to Appear* (form TR-120), or *Traffic/Nontraffic Notice to Appear* (form TR-130) must be made on a *Notice of Correction and Proof of Service* (form TR-100).

(Subd (c) amended effective January 1, 2007.)

Rule 4.103 amended effective January 1, 2007; adopted effective January 1, 2004.

Rule 4.104. Procedures and eligibility criteria for attending traffic violator school

(a) Purpose

The purpose of this rule is to establish uniform statewide procedures and criteria for eligibility to attend traffic violator school.

(Subd (a) amended effective January 1, 2003; previously amended effective July 1, 2001.)

(b) Authority of a court clerk to grant a request to attend traffic violator school

(1) *Eligible offenses*

Except as provided in (2), a court clerk is authorized to grant a request to attend traffic violator school when a defendant with a valid driver's license requests to attend an 8-hour traffic violator school under Vehicle Code sections 41501(a) and 42005 for any infraction under divisions 11 and 12 (rules of the road and equipment violations) of the Vehicle Code if the violation is reportable to the Department of Motor Vehicles.

(2) *Ineligible offenses*

A court clerk is not authorized to grant a request to attend traffic violator school for a misdemeanor or any of the following infractions:

(A) A violation that carries a negligent operator point count of more than one point under Vehicle Code section 12810 or one and one-half points or more under Vehicle Code section 12810.5(b)(2);

(B) A violation that occurs within 18 months after the date of a previous violation and the defendant either attended or elected to attend a traffic violator school for the previous violation (Veh. Code, § 1808.7);

(C) A violation of Vehicle Code section 22406.5 (tank vehicles);

(D) A violation related to alcohol use or possession or drug use or possession;

(E) A violation on which the defendant failed to appear under Vehicle Code section 40508(a) unless the failure-to-appear charge has been adjudicated and any fine imposed has been paid;

(F) A violation on which the defendant has failed to appear under Penal Code section 1214.1 unless the civil monetary assessment has been paid;

(G) A speeding violation in which the speed alleged is more than 25 miles over a speed limit as stated in Chapter 7 (commencing with section 22348) of Division 11 of the Vehicle Code;

(H) A violation that occurs in a commercial vehicle as defined in Vehicle Code section 15210(b); and

(I) A violation by a defendant having a class A, class B, or commercial class C driver's license.

(Subd (b) amended effective July 1, 2011; previously amended effective January 1, 2003, September 20, 2005, January 1, 2007; and January 1, 2007.)

(c) Judicial discretion

(1) A judicial officer may in his or her discretion order attendance at a traffic violator school in an individual case for diversion under Vehicle Code section 41501(a) or 42005(b); sentencing under Vehicle Code section 42005(a); or any other purpose permitted by law. A violation by a defendant having a class A, class B, or commercial class C driver's license or that occurs in a commercial vehicle, as defined in Vehicle Code section 15210(b), is not eligible for diversion under Vehicle Code sections 41501 or 42005.

(2) A defendant who is otherwise eligible for traffic violator school is not made ineligible by entering a plea other than guilty or by exercising his or her right to trial. A traffic violator school request must be considered based on the individual circumstances of the specific case. The court is not required to state on the record a reason for granting or denying a traffic violator school request.

(Subd (c) amended effective July 1, 2011; amended and relettered as part of subd (b) effective January 1, 2003; previously amended effective January 1, 1998, September 20, 2005, January 1, 2007, and January 1, 2007.)

Rule 4.104 amended effective July 1, 2011; adopted as rule 851 effective January 1, 1997; previously amended effective January 1, 1998, July 1, 2001, January 1, 2003, September 20, 2005, and January 1, 2007; previously amended and renumbered effective January 1, 2007.

Advisory Committee Comment

Subdivision (c)(2). Rule 4.104(c)(2) reflects court rulings in cases where defendants wished to plead not guilty and have the court order attendance of traffic violator school if found guilty after trial. A court has discretion to grant or not grant traffic violator school. (*People v. Schindler* (1993) 20 Cal.App.4th 431, 433; *People v. Levinson* (1984) 155 Cal.App.3d Supp. 13, 21.) However, the court may not arbitrarily refuse to consider a request for traffic violator school because a defendant pleads not guilty. (*Schindler*, supra, at p. 433; *People v. Wozniak* (1987) 197 Cal.App.3d Supp. 43, 44; *People v. Enochs* (1976) 62 Cal.App.3d Supp. 42, 44.) If a judicial officer believes that a defendant's circumstances indicate that a defendant would benefit from

attending school, such attendance should be authorized and should not be affected by the order in which the plea, explanation, and request for traffic violator school are presented. (*Enochs*, supra, at p. 44.) A court is not required to state its reasons for granting or denying traffic violator school following a defendant's conviction for a traffic violation. (*Schindler*, supra, at p. 433.)

Rule 4.110. Time limits for criminal proceedings on information or indictment

Time limits for criminal proceedings on information or indictment are as follows:

(1) The information must be filed within 15 days after a person has been held to answer for a public offense;

(2) The arraignment of a defendant must be held on the date the information is filed or as soon thereafter as the court directs; and

(3) A plea or notice of intent to demur on behalf of a party represented by counsel at the arraignment must be entered or made no later than seven days after the initial arraignment, unless the court lengthens time for good cause.

Rule 4.110 amended effective January 1, 2007; adopted as rule 227.3 effective January 1, 1985; previously amended effective June 6, 1990; previously renumbered and amended effective January 1, 2001.

Rule 4.111. Pretrial motions in criminal cases

(a) Time for filing papers and proof of service

Unless otherwise ordered or specifically provided by law, all pretrial motions, accompanied by a memorandum, must be served and filed at least 10 court days, all papers opposing the motion at least 5 court days, and all reply papers at least 2 court days before the time appointed for hearing. Proof of service of the moving papers must be filed no later than 5 court days before the time appointed for hearing.

(Subd (a) amended effective January 1, 2010; previously amended effective January 1, 2007.)

(b) Failure to serve and file timely points and authorities

The court may consider the failure without good cause of the moving party to serve and file a memorandum within the time permitted as an admission that the motion is without merit.

(Subd (b) amended effective January 1, 2007.)

Rule 4.111 amended effective January 1, 2010; adopted as rule 227.5 effective January 1, 1985; previously renumbered effective January 1, 2001; previously amended effective January 1, 2007.

Rule 4.112. Readiness conference

(a) Date and appearances

The court may hold a readiness conference in felony cases within 1 to 14 days before the date set for trial. At the readiness conference:

(1) All trial counsel must appear and be prepared to discuss the case and determine whether the case can be disposed of without trial;

(2) The prosecuting attorney must have authority to dispose of the case; and

(3) The defendant must be present in court.

(Subd (a) amended effective January 1, 2007; adopted as rule 227.6 effective January 1, 1985; previously amended and relettered effective January 1, 2001; previously amended effective January 1, 2005.)

(b) Motions

Except for good cause, the court should hear and decide any pretrial motion in a criminal case before or at the readiness conference.

(Subd (b) adopted effective January 1, 2001.)

Rule 4.112 amended effective January 1, 2007; subd (a) adopted as rule 227.6 effective January 1, 1985; subd (b) adopted as section 10.1 of the Standards of Judicial Administration effective January 1, 1985; previously amended and renumbered effective January 1, 2001; previously amended effective January 1, 2005.

Rule 4.113. Motions and grounds for continuance of criminal case set for trial

Motions to continue the trial of a criminal case are disfavored and will be denied unless the moving party, under Penal Code section 1050, presents affirmative proof in open court that the ends of justice require a continuance.

Rule 4.113 amended effective January 1, 2007; adopted as rule 227.7 effective January 1, 1985 previously renumbered effective January 1, 2001.

Rule 4.114. Certification under Penal Code section 859a

When a plea of guilty or no contest is entered under Penal Code section 859a, the magistrate must:

(1) Set a date for imposing sentence; and

(2) Refer the case to the probation officer for action as provided in Penal Code sections 1191 and 1203.

Rule 4.114 amended effective January 1, 2007; adopted as rule 227.9 effective January 1, 1985; previously amended and renumbered effective January 1, 2001.

Rule 4.115. Criminal case assignment

(a) Master calendar departments

To ensure that the court's policy on continuances is firm and uniformly applied, that pretrial proceedings and trial assignments are handled consistently, and that cases are tried on a date certain, each court not operating on a direct calendaring system must assign all criminal matters to one or more master calendar departments. The presiding judge of a master calendar department must conduct or supervise the conduct of all arraignments and pretrial hearings and conferences and assign to a trial department any case requiring a trial or dispositional hearing.

(Subd (a) lettered effective January 1, 2008; adopted as unlettered subd effective January 1, 1985.)

(b) Trial calendaring and continuances

Any request for a continuance, including a request to trail the trial date, must comply with rule 4.113 and the requirement in section 1050 to show good cause to continue a hearing in a criminal proceeding. Active management of trial calendars is necessary to minimize the number of statutory dismissals. Accordingly, courts should avoid calendaring or trailing criminal cases for trial to the last day permitted for trial under section 1382. Courts must implement calendar management procedures, in accordance with local conditions and needs, to ensure that criminal cases are assigned to trial departments before the last day permitted for trial under section 1382.

(Subd (b) adopted effective January 1, 2008.)

Rule 4.115 amended effective January 1, 2008; adopted as section 10 of the Standards of Judicial Administration effective January 1, 1985; amended and renumbered effective January 1, 2001; previously amended effective January 1, 2007.

Advisory Committee Comment

Subdivision (b) clarifies that the "good cause" showing for a continuance under section 1050 applies in all criminal cases, whether or not the case is in the 10-day grace period provided for in section 1382. The Trial Court Presiding Judges Advisory Committee and Criminal Law Advisory Committee observe that the "good cause" requirement for a continuance is separate and distinct from the "good cause" requirement to avoid dismissals under section 1382. There is case law stating that the prosecution is not required to show good cause to avoid a dismissal under section 1382 during the 10-day grace period because a case may not be dismissed for delay during that

10-day period. (See, e.g., *Bryant v. Superior Court* (1986) 186 Cal.App.3d 483, 488.) Yet, both the plain language of section 1050 and case law show that there must be good cause for a continuance under section 1050 during the 10-day grace period. (See, e.g., section 1050 and *People v. Henderson* (2004) 115 Cal.App.4th 922, 939–940.) Thus, a court may not dismiss a case during the 10-day grace period under section 1382, but the committees believe that the court must deny a request for a continuance during the 10-day grace period that does not comply with the good cause requirement under section 1050.

The decision in *Henderson* states that when the prosecutor seeks a continuance but fails to show good cause under section 1050, the trial court "must nevertheless postpone the hearing to another date within the statutory period." (115 Cal.App.4th at p. 940.) That conclusion, however, may be contrary to the plain language of section 1050, which requires a court to deny a continuance if the moving party fails to show good cause. The conclusion also appears to be dicta, as it was not a contested issue on appeal. Given this uncertainty, the rule is silent as to the remedy for failure to show good cause for a requested continuance during the 10-day grace period. The committees note that the remedies under section 1050.5 are available and, but for the *Henderson* dicta, a court would appear to be allowed to deny the continuance request and commence the trial on the scheduled trial date.

Rule 4.116. Certification to juvenile court

(a) Application

This rule applies to all cases not filed in juvenile court in which the person charged by an accusatory pleading appears to be under the age of 18, except (1) when the child has been found not a fit and proper subject to be dealt with under the juvenile court law or (2) when the prosecution was initiated as a criminal case under Welfare and Institutions Code section 602(b) or 707(d).

(Subd (a) amended effective January 1, 2007; adopted effective January 1, 2001.)

(b) Procedure to determine whether certification is appropriate

If an accusatory pleading is pending, and it is suggested or it appears to the court that the person charged was under the age of 18 on the date the offense is alleged to have been committed, the court must immediately suspend proceedings and conduct a hearing to determine the true age of the person charged. The burden of proof of establishing the age of the accused person is on the moving party. If, after examination, the court is satisfied by a preponderance of the evidence that the person was under the age of 18 on the date the alleged offense was committed, the court must immediately certify the matter to the juvenile court and state on the certification order:

(1) The crime with which the person named is charged;

(2) That the person was under the age of 18 on the date of the alleged offense;

(3) The date of birth of the person;

(4) The date of suspension of criminal proceedings; and

(5) The date and time of certification to juvenile court.

(Subd (b) amended effective January 1, 2007; adopted as untitled subd effective January 1, 1991; previously amended and lettered effective January 1, 2001.)

(c) Procedure on certification

If the court determines that certification to the juvenile court is appropriate under (b), copies of the certification, the accusatory pleading, and any police reports must immediately be transmitted to the clerk of the juvenile court. On receipt of the documents, the clerk of the juvenile court must immediately notify the probation officer, who must immediately investigate the matter to determine whether to commence proceedings in juvenile court.

(Subd (c) amended effective January 1, 2007; adopted as untitled subd effective January 1, 1991; previously amended and lettered effective January 1, 2001.)

(d) Procedure if child is in custody

If the person is under the age of 18 and is in custody, the person must immediately be transported to the juvenile detention facility.

(Subd (d) amended effective January 1, 2007; adopted as untitled subd effective January 1, 1991; previously amended and lettered effective January 1, 2001.)

Rule 4.116 amended effective January 1, 2007; adopted as rule 241.2 effective January 1, 1991; previously amended July 1, 1991; previously amended and renumbered effective January 1, 2001.

Rule 4.117. Qualifications for appointed trial counsel in capital cases

(a) Purpose

This rule defines minimum qualifications for attorneys appointed to represent persons charged with capital offenses in the superior courts. These minimum qualifications are designed to promote adequate representation in death penalty cases and to avoid unnecessary delay and expense by assisting the trial court in appointing qualified counsel. Nothing in this rule is intended to be used as a standard by which to measure whether the defendant received effective assistance of counsel.

(b) General qualifications

In cases in which the death penalty is sought, the court must assign qualified trial counsel to represent the defendant. The attorney may be appointed only if the court,

after reviewing the attorney's background, experience, and training, determines that the attorney has demonstrated the skill, knowledge, and proficiency to diligently and competently represent the defendant. An attorney is not entitled to appointment simply because he or she meets the minimum qualifications.

(c) Designation of counsel

(1) If the court appoints more than one attorney, one must be designated lead counsel and meet the qualifications stated in (d) or (f), and at least one other must be designated associate counsel and meet the qualifications stated in (e) or (f).

(2) If the court appoints only one attorney, that attorney must meet the qualifications stated in (d) or (f).

(Subd (c) amended effective January 1, 2007.)

(d) Qualifications of lead counsel

To be eligible to serve as lead counsel, an attorney must:

(1) Be an active member of the State Bar of California;

(2) Be an active trial practitioner with at least 10 years' litigation experience in the field of criminal law;

(3) Have prior experience as lead counsel in either:

(A) At least 10 serious or violent felony jury trials, including at least 2 murder cases, tried to argument, verdict, or final judgment; or

(B) At least 5 serious or violent felony jury trials, including at least 3 murder cases, tried to argument, verdict, or final judgment;

(4) Be familiar with the practices and procedures of the California criminal courts;

(5) Be familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence;

(6) Have completed within two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and

(7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

(Subd (d) amended effective January 1, 2007.)

(e) Qualifications of associate counsel

To be eligible to serve as associate counsel, an attorney must:

(1) Be an active member of the State Bar of California;

(2) Be an active trial practitioner with at least three years' litigation experience in the field of criminal law;

(3) Have prior experience as:

(A) Lead counsel in at least 10 felony jury trials tried to verdict, including 3 serious or violent felony jury trials tried to argument, verdict, or final judgment; or

(B) Lead or associate counsel in at least 5 serious or violent felony jury trials, including at least 1 murder case, tried to argument, verdict, or final judgment;

(4) Be familiar with the practices and procedures of the California criminal courts;

(5) Be familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence;

(6) Have completed within two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and

(7) Have demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases.

(Subd (e) amended effective January 1, 2007.)

(f) Alternative qualifications

The court may appoint an attorney even if he or she does not meet all of the qualifications stated in (d) or (e) if the attorney demonstrates the ability to provide competent representation to the defendant. If the court appoints counsel under this subdivision, it must state on the record the basis for finding counsel qualified. In making this determination, the court must consider whether the attorney meets the following qualifications:

(1) The attorney is an active member of the State Bar of California or admitted to practice *pro hac vice* under rule 9.40;

(2) The attorney has demonstrated the necessary proficiency, diligence, and quality of representation appropriate to capital cases;

(3) The attorney has had extensive criminal or civil trial experience;

(4) Although not meeting the qualifications stated in (d) or (e), the attorney has had experience in death penalty trials other than as lead or associate counsel;

(5) The attorney is familiar with the practices and procedures of the California criminal courts;

(6) The attorney is familiar with and experienced in the use of expert witnesses and evidence, including psychiatric and forensic evidence;

(7) The attorney has had specialized training in the defense of persons accused of capital crimes, such as experience in a death penalty resource center;

(8) The attorney has ongoing consultation support from experienced death penalty counsel;

(9) The attorney has completed within the past two years before appointment at least 15 hours of capital case defense training approved for Minimum Continuing Legal Education credit by the State Bar of California; and

(10) The attorney has been certified by the State Bar of California's Board of Legal Specialization as a criminal law specialist.

(Subd (f) amended effective January 1, 2007.)

(g) Public defender appointments

When the court appoints the Public Defender under Penal Code section 987.2, the Public Defender should assign an attorney from that office or agency as lead counsel who meets the qualifications described in (d) or assign an attorney that he or she determines would qualify under (f). If associate counsel is designated, the Public Defender should assign an attorney from that office or agency who meets the qualifications described in (e) or assign an attorney he or she determines would qualify under (f).

(Subd (g) amended effective January 1, 2007.)

(h) Standby or advisory counsel

When the court appoints standby or advisory counsel to assist a self-represented defendant, the attorney must qualify under (d) or (f).

(Subd (h) amended effective January 1, 2007.)

(i) Order appointing counsel

When the court appoints counsel to a capital case, the court must complete *Order Appointing Counsel in Capital Case* (form CR-190), and counsel must complete *Declaration of Counsel for Appointment in Capital Case* (form CR-191).

(Subd (i) amended effective January 1, 2007; adopted effective January 1, 2004.)

Rule 4.117 amended effective January 1, 2007; adopted effective January 1, 2003; previously amended effective January 1, 2004.

Rule 4.130. Mental competency proceedings

(a) Application

This rule applies to proceedings in the superior court under Penal Code section 1367 et seq. to determine the mental competency of a criminal defendant.

(b) Initiation of mental competency proceedings

(1) The court must initiate mental competency proceedings if the judge has a reasonable doubt, based on substantial evidence, about the defendant's competence to stand trial.

(2) The opinion of counsel, without a statement of specific reasons supporting that opinion, does not constitute substantial evidence. The court may allow defense counsel to present his or her opinion regarding the defendant's mental competency in camera if the court finds there is reason to believe that attorney-client privileged information will be inappropriately revealed if the hearing is conducted in open court.

(3) In a felony case, if the judge initiates mental competency proceedings prior to the preliminary examination, counsel for the defendant may request a preliminary examination as provided in Penal Code section 1368.1(a).

(c) Effect of initiating mental competency proceedings

(1) If mental competency proceedings are initiated, criminal proceedings are suspended and may not be reinstated until a trial on the competency of the defendant has been concluded and the defendant either:

(A) Is found mentally competent; or

(B) Has his or her competency restored under Penal Code section 1372.

(2) In misdemeanor cases, speedy trial requirements are tolled during the suspension of criminal proceedings for mental competency evaluation and trial. If criminal proceedings are later reinstated and time is not waived, the trial must be commenced within 30 days after the reinstatement of the criminal proceedings, as provided by Penal Code section 1382(a)(3).

(3) In felony cases, speedy trial requirements are tolled during the suspension of criminal proceedings for mental competency evaluation and trial. If criminal proceedings are reinstated, unless time is waived, time periods to commence the preliminary examination or trial are as follows:

(A) If criminal proceedings were suspended before the preliminary hearing had been conducted, the preliminary hearing must be commenced within 10 days of the reinstatement of the criminal proceedings, as provided in Penal Code section 859b.

(B) If criminal proceedings were suspended after the preliminary hearing had been conducted, the trial must be commenced within 60 days of the reinstatement of the criminal proceedings, as provided in Penal Code section 1382(a)(2).

(d) Examination of defendant after initiation of mental competency proceedings

(1) On initiation of mental competency proceedings, the court must inquire whether the defendant, or defendant's counsel, seeks a finding of mental incompetence.

(A) If the defense informs the court that the defendant is seeking a finding of mental incompetence, the court must appoint at least one expert to examine the defendant.

(B) If the defense informs the court that the defendant is not seeking a finding of mental incompetence, the court must appoint two experts to examine the defendant. The defense and the prosecution may each name one expert from the court's list of approved experts.

(2) Any court-appointed experts must examine the defendant and advise the court on the defendant's competency to stand trial. Experts' reports are to be submitted to the court, counsel for the defendant, and the prosecution.

(3) Statements made by the defendant during the examination to experts appointed under this rule, and products of any such statements, may not be used in a trial on the issue of the defendant's guilt or in a sanity trial should defendant enter a plea of not guilty by reason of insanity.

(e) Trial on mental competency

(1) Regardless of the conclusions or findings of the court-appointed expert, the court must conduct a trial on the mental competency of the defendant if the court has initiated mental competency proceedings under (b).

(2) At the trial, the defendant is presumed to be mentally competent, and it is the burden of the party contending that the defendant is not mentally competent to prove the defendant's mental incompetence by a preponderance of the evidence.

(3) In addition to the testimony of the experts appointed by the court under (d), either party may call additional experts or other relevant witnesses.

(4) After the presentation of the evidence and closing argument, the trier of fact is to determine whether the defendant is mentally competent or mentally incompetent.

(A) If the matter is tried by a jury, the verdict must be unanimous.

(B) If the parties have waived the right to a jury trial, the court's findings must be made in writing or placed orally in the record.

(f) Posttrial procedure

(1) If the defendant is found mentally competent, the court must reinstate the criminal proceedings.

(2) If the defendant is found to be mentally incompetent, the criminal proceedings remain suspended and the court must follow the procedures stated in Penal Code section 1370 et seq.

Rule 4.130 adopted effective January 1, 2007.

Advisory Committee Comment

The case law interpreting Penal Code section 1367 et seq. established a procedure for judges to follow in cases where there is a concern whether the defendant is legally competent to stand trial, but the concern does not necessarily rise to the level of a reasonable doubt based on substantial evidence. Before finding a reasonable doubt as to the defendant's competency to stand trial and initiating competency proceedings under Penal Code section 1368 et seq., the court may appoint an expert to assist the court in determining whether such a reasonable doubt exists. As noted in People v. Visciotti (1992) 2 Cal.4th 1, 34–36, the court may appoint an expert when it is concerned about the mental competency of the defendant, but the concern does not rise to the level of a reasonable doubt, based on substantial evidence, required by Penal Code section 1367 et seq. Should the results of this examination present substantial evidence of mental incompetency, the court must initiate competency proceedings under (b).

Once mental competency proceedings under Penal Code section 1367 et seq. have been initiated, the court is to appoint at least one expert to examine the defendant under (d). Under no circumstances is the court obligated to appoint more than two experts. (Pen. Code, § 1369(a).) The costs of the experts appointed under (d) are to be paid for by the court as the expert examinations and reports are for the benefit or use of the court in determining whether the defendant is mentally incompetent. (See Cal. Rules of Court, rule 10.810, function 10.)

Subdivision (d)(3), which provides that the defendant's statements made during the examination cannot be used in a trial on the defendant's guilt or a sanity trial in a not guilty by reason of sanity trial, is based on the California Supreme Court holdings in People v. Arcega (1982) 32 Cal.3d 504 and People v. Weaver (2001) 26 Cal.4th 876.

Although the court is not obligated to appoint additional experts, counsel may nonetheless retain their own experts to testify at a trial on the defendant's competency. (See People v. Mayes (1988) 202 Cal.App.4th 908, 917–918.) These experts are not for the benefit or use of the court, and their costs are not to be paid by the court. (See Cal. Rules of Court, rule 10.810, function 10.)

The expert reports, unless sealed under rule 2.550, are publicly accessible court documents.

Both the prosecution and the defense have the right to a jury trial. (See People v. Superior Court (McPeters) (1995) 169 Cal.App.3d 796.) Defense counsel may waive this right, even over the objection of the defendant. (People v. Masterson (1994) 8 Cal.4th 965, 970.)

Either defense counsel or the prosecution (or both) may argue that the defendant is not competent to stand trial. (People v. Stanley (1995) 10 Cal.4th 764, 804 [defense counsel may advocate that defendant is not competent to stand trial and may present evidence of defendant's mental incompetency regardless of defendant's desire to be found competent].) If the defense declines to present evidence of the defendant's mental incompetency, the prosecution may do so. (Pen. Code, § 1369(b)(2).) If the prosecution elects to present evidence of the defendant's mental incompetency, it is the prosecution's burden to prove the incompetency by a preponderance of the evidence. (People v. Mixon (1990) 225 Cal.App.3d 1471, 1484, fn. 12.)

Should both parties decline to present evidence of defendant's mental incompetency, the court may do so. In those cases, the court is not to instruct the jury that a party has the burden of proof. "Rather, the proper approach would be to instruct the jury on the legal standard they are to apply to the evidence before them without allocating the burden of proof to one party or the other." (People v. Sherik (1991) 229 Cal.App.3d 444, 459–460.)

Chapter 2. Change of Venue

Rule 4.150. Change of venue: application and general provisions

(a) Application

Rules 4.150 to 4.155 govern the change of venue in criminal cases under Penal Code section 1033.

(Subd (a) adopted effective January 1, 2006.)

(b) General provisions

When a change of venue has been ordered, the case remains a case of the transferring court. Except on good cause to the contrary, the court must follow the provisions below:

(1) Proceedings before trial must be heard in the transferring court.

(2) Proceedings that are not to be heard by the trial judge must be heard in the transferring court.

(3) Postverdict proceedings, including sentencing, if any, must be heard in the transferring court.

(Subd (b) amended effective January 1, 2007; adopted effective January 1, 2006.)

(c) Appellate review

Review by the Court of Appeal, either by an original proceeding or by appeal, must be heard in the appellate district in which the transferring court is located.

(Subd (c) adopted effective January 1, 2006.)

Rule 4.150 amended effective January 1, 2007; adopted as rule 840 effective March 4, 1972; previously amended and renumbered effective January 1, 2001; previously amended effective January 1, 2006.

Advisory Committee Comment

Subdivision (b)(1). This subdivision is based on Penal Code section 1033(a), which provides that all proceedings before trial are to be heard in the transferring court, except when a particular proceeding must be heard by the trial judge.

Subdivision (b)(2). This subdivision addresses motions heard by a judge other than the trial judge, such as requests for funds under Penal Code section 987.9 or a challenge or disqualification under Code of Civil Procedure section 170 et seq.

Subdivision (b)(3). Reflecting the local community interest in the case, (b)(3) clarifies that after trial the case is to return to the transferring court for any posttrial proceedings. There may be

situations where the local interest is outweighed, warranting the receiving court to conduct posttrial hearings. Such hearings may include motions for new trial where juror testimony is necessary and the convenience to the jurors outweighs the desire to conduct the hearings in the transferring court.

Subdivision (c). This subdivision ensures that posttrial appeals and writs are heard in the same appellate district as any writs that may have been heard before or during trial.

Rule 4.151. Motion for change of venue

(a) Motion procedure

A motion for change of venue in a criminal case under Penal Code section 1033 must be supported by a declaration stating the facts supporting the application. Except for good cause shown, the motion must be filed at least 10 days before the date set for trial, with a copy served on the adverse party at least 10 days before the hearing. At the hearing counterdeclarations may be filed.

(Subd (a) amended effective January 1, 2007; adopted effective January 1, 2006; formerly part of an unlettered subd.)

(b) Policy considerations in ruling on motion

Before ordering a change of venue in a criminal case, the transferring court should consider impaneling a jury that would give the defendant a fair and impartial trial.

(Subd (b) adopted effective January 1, 2006.)

Rule 4.151 amended effective January 1, 2007; adopted as rule 841 effective March 4, 1972; previously amended and renumbered effective January 1, 2001; previously amended effective January 1, 2006.

Advisory Committee Comment

Rule 4.151(b) is not intended to imply that the court should attempt to impanel a jury in every case before granting a change of venue.

Rule 4.152. Selection of court and trial judge

When a judge grants a motion for change of venue, he or she must inform the presiding judge of the transferring court. The presiding judge, or his or her designee, must:

(1) Notify the Administrative Director of the Courts of the change of venue. After receiving the transferring court's notification, the Administrative Director, in order to expedite judicial business and equalize the work of the judges, must advise the transferring court which courts would not be unduly burdened by the trial of the case.

(2) Select the judge to try the case, as follows:

(A) The presiding judge, or his or her designee, must select a judge from the transferring court, unless he or she concludes that the transferring court does not have adequate judicial resources to try the case.

(B) If the presiding judge, or his or her designee, concludes that the transferring court does not have adequate judicial resources to try the case, he or she must request that the Chief Justice of California determine whether to assign a judge to the transferring court. If the Chief Justice determines not to assign a judge to the transferring court, the presiding judge, or his or her designee, must select a judge from the transferring court to try the case.

Rule 4.152 amended effective January 1, 2006; adopted as rule 842 effective March 4, 1972; previously amended and renumbered effective January 1, 2001.

Rule 4.153. Order on change of venue

After receiving the list of courts from the Administrative Director of the Courts, the presiding judge, or his or her designee, must:

(1) Determine the court in which the case is to be tried. In making that determination, the court must consider, under Penal Code section 1036.7, whether to move the jury rather than to move the pending action. In so doing, the court should give particular consideration to the convenience of the jurors.

(2) Transmit to the receiving court a certified copy of the order of transfer and any pleadings, documents, or other papers or exhibits necessary for trying the case.

(3) Enter the order for change of venue in the minutes of the transferring court. The order must include the determinations in (1).

Rule 4.153 amended effective January 1, 2006; adopted as rule 843 effective March 4, 1972; previously amended and renumbered effective January 1, 2001.

Advisory Committee Comment

Rules 4.152 and 4.153 recognize that, although the determination of whether to grant a motion for change of venue is judicial in nature, the selection of the receiving court and the decision whether the case should be tried by a judge of the transferring court are more administrative in nature. Thus, the rules provide that the presiding judge of the transferring court is to make the latter decisions. He or she may delegate those decisions to the trial judge, the supervising judge of the criminal division, or any other judge the presiding judge deems appropriate. If, under the particular facts of the case, the latter decisions are both judicial and administrative, those decisions may be more properly made by the judge who heard the motion for change of venue.

Rule 4.154. Proceedings in the receiving court

The receiving court must conduct the trial as if the case had been commenced in the receiving court. If it is necessary to have any of the original pleadings or other papers before the receiving court, the transferring court must transmit such papers or pleadings. If, during the trial, any original papers or pleadings are submitted to the receiving court, the receiving court is to file the original. After sentencing, all original papers and pleadings are to be retained by the transferring court.

Rule 4.154 amended effective January 1, 2006; adopted as rule 844 effective March 4, 1972; previously amended and renumbered effective January 1, 2001.

Rule 4.155. Guidelines for reimbursement of costs in change of venue cases—criminal cases

(a) General

Consistent with Penal Code section 1037(c), the court in which an action originated must reimburse the court receiving a case after an order for change of venue for any ordinary expenditure and any extraordinary but reasonable-and-necessary expenditure that would not have been incurred by the receiving court but for the change of venue.

(Subd (a) amended effective January 1, 2006; previously amended effective January 1, 2001.)

(b) Reimbursable ordinary expenditures—court related

Court-related reimbursable ordinary expenses include:

(1) For prospective jurors on the panel from which the jury is selected and for the trial jurors and alternates seated:

(A) Normal juror per diem and mileage at the rates of the receiving court. The cost of the juror should only be charged to a change of venue case if the juror was not used in any other case on the day that juror was excused from the change of venue case.

(B) If jurors are sequestered, actual lodging, meals, mileage, and parking expenses up to state Board of Control limits.

(C) If jurors are transported to a different courthouse or county, actual mileage and parking expenses.

(2) For court reporters:

(A) The cost of pro tem reporters, even if not used on the change of venue trial, but not the salaries of regular official reporters who would have been paid in any event. The rate of compensation for pro tem reporters should be that of the receiving court.

(B) The cost of transcripts requested during trial and for any new trial or appeal, using the folio rate of the receiving court.

(C) The cost of additional reporters necessary to allow production of a daily or expedited transcript.

(3) For assigned judges: The assigned judge's per diem, travel, and other expenses, up to state Board of Control limits, if the judge is assigned to the receiving court because of the change of venue case, regardless of whether the assigned judge is hearing the change of venue case.

(4) For interpreters and translators:

(A) The cost of the services of interpreters and translators, not on the court staff, if those services are required under Evidence Code sections 750 through 754. Using the receiving court's fee schedule, this cost should be paid whether the services are used in a change of venue trial or to cover staff interpreters and translators assigned to the change of venue trial.

(B) Interpreters' and translators' actual mileage, per diem, and lodging expenses, if any, that were incurred in connection with the trial, up to state Board of Control limits.

(5) For maintenance of evidence: The cost of handling, storing, or maintaining evidence beyond the expenses normally incurred by the receiving court.

(6) For services and supplies: The cost of services and supplies incurred only because of the change of venue trial, for example, copying and printing charges (such as for juror questionnaires), long-distance telephone calls, and postage. A pro rata share of the costs of routine services and supplies should not be reimbursable.

(7) For court or county employees:

(A) Overtime expenditures and compensatory time for staff incurred because of the change of venue case.

(B) Salaries and benefit costs of extra help or temporary help incurred either because of the change of venue case or to replace staff assigned to the change of venue case.

(Subd (b) amended effective January 1, 2007; previously amended effective January 1, 1998, and January 1, 2006.)

(c) Reimbursable ordinary expenses—defendant related

Defendant-related reimbursable ordinary expenses include the actual costs incurred for guarding, keeping, and transporting the defendant, including:

(1) Expenses related to health care: Costs incurred by or on behalf of the defendant such as doctors, hospital expenses, medicines, therapists, and counseling for diagnosis, evaluation, and treatment.

(2) Cost of food and special clothing for an in-custody defendant.

(3) Transportation: Nonroutine expenses, such as transporting an in-custody defendant from the transferring court to the receiving court. Routine transportation expenses if defendant is transported by usual means used for other receiving court prisoners should not be reimbursable.

(Subd (c) amended effective January 1, 2006.)

(d) Reimbursable ordinary expenditures—defense expenses

Reimbursable ordinary expenses related to providing defense for the defendant include:

(1) Matters covered by Penal Code section 987.9 as determined by the transferring court or by a judge designated under that section.

(2) Payment of other defense costs in accordance with policies of the court in which the action originated, unless good cause to the contrary is shown to the trial court.

(3) Unless Penal Code section 987.9 applies, the receiving court may, in its sound discretion, approve all trial-related expenses including:

(A) Attorney fees for defense counsel and, if any, co-counsel and actual travel-related expenses, up to state Board of Control limits, for staying in the county of the receiving court during trial and hearings.

(B) Paralegal and extraordinary secretarial or office expenditures of defense counsel.

(C) Expert witness costs and expenses.

(D) The cost of experts assisting in preparation before trial or during trial, for example, persons preparing demonstrative evidence.

(E) Investigator expenses.

(F) Defense witness expenses, including reasonable-and-necessary witness fees and travel expenses.

(Subd (d) amended effective January 1, 2006; previously amended effective January 1, 1998.)

(e) Extraordinary but reasonable-and-necessary expenses

Except in emergencies or unless it is impracticable to do so, a receiving court should give notice before incurring any extraordinary expenditures to the transferring court, in accordance with Penal Code section 1037(d). Extraordinary but reasonable-and-necessary expenditures include:

(1) Security-related expenditures: The cost of extra security precautions taken because of the risk of escape or suicide or threats of, or the potential for, violence during the trial. These precautions might include, for example, extra bailiffs or correctional officers, special transportation to the courthouse for trial, television monitoring, and security checks of those entering the courtroom.

(2) Facility remodeling or modification: Alterations to buildings or courtrooms to accommodate the change of venue case.

(3) Renting or leasing of space or equipment: Renting or leasing of space for courtrooms, offices, and other facilities, or equipment to accommodate the change of venue case.

(Subd (e) amended effective January 1, 2006; previously amended effective January 1, 1998.)

(f) Nonreimbursable expenses

Nonreimbursable expenses include:

(1) Normal operating expenses including the overhead of the receiving court, for example:

(A) Salary and benefits of existing court staff that would have been paid even if there were no change of venue case.

(B) The cost of operating the jail, for example, detention staff costs, normal inmate clothing, utility costs, overhead costs, and jail construction

costs. These expenditures would have been incurred whether or not the case was transferred to the receiving court. It is, therefore, inappropriate to seek reimbursement from the transferring court.

(2) Equipment that is purchased and then kept by the receiving court and that can be used for other purposes or cases.

(Subd (f) amended effective January 1, 2006.)

(g) Miscellaneous

(1) Documentation of costs: No expense should be submitted for reimbursement without supporting documentation, such as a claim, invoice, bill, statement, or time sheet. In unusual circumstances, a declaration under penalty of perjury may be necessary. The declaration should describe the cost and state that it was incurred because of the change of venue case. Any required court order or approval of costs also should be sent to the transferring court.

(2) Timing of reimbursement: Unless both courts agree to other terms, reimbursement of all expenses that are not questioned by the transferring court should be made within 60 days of receipt of the claim for reimbursement. Payment of disputed amounts should be made within 60 days of the resolution of the dispute.

(Subd (g) amended effective January 1, 2007; previously amended effective January 1, 2006.)

Rule 4.155 amended effective January 1, 2007; adopted as section 4.2 of the Standards of Judicial Administration effective July 1, 1989; amended and renumbered as rule 4.162 effective January 1, 2001; previously amended effective January 1, 1998, and January 1, 2006.

Division 3. Trials

Rule 4.200. Pre–voir dire conference in criminal cases

(a) The conference

Before jury selection begins in criminal cases, the court must conduct a conference with counsel to determine:

(1) A brief outline of the nature of the case, including a summary of the criminal charges;

(2) The names of persons counsel intend to call as witnesses at trial;

(3) The People's theory of culpability and the defendant's theories;

(4) The procedures for deciding requests for excuse for hardship and challenges for cause;

(5) The areas of inquiry and specific questions to be asked by the court and by counsel and any time limits on counsel's examination;

(6) The schedule for the trial and the predicted length of the trial;

(7) The number of alternate jurors to be selected and the procedure for selecting them; and

(8) The procedure for making *Wheeler/Batson* objections.

The judge must, if requested, excuse the defendant from then disclosing any defense theory.

(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 2006.)

(b) Written questions

The court may require counsel to submit in writing, and before the conference, all questions that counsel requests the court to ask of prospective jurors. This rule applies to questions to be asked either orally or by written questionnaire. The *Juror Questionnaire for Criminal Cases* (form MC-002) may be used.

(Subd (b) amended effective January 1, 2006.)

Rule 4.200 amended effective January 1, 2007; adopted as rule 228.1 effective June 6, 1990; previously amended and renumbered effective January 1, 2001; previously amended effective January 1, 2006.

Advisory Committee Comment

This rule is to be used in conjunction with standard 4.30.

Rule 4.201. Voir dire in criminal cases

To select a fair and impartial jury, the judge must conduct an initial examination of the prospective jurors orally, or by written questionnaire, or by both methods. The Juror

Questionnaire for Criminal Cases (form MC-002) may be used. After completion of the initial examination, the court must permit counsel to conduct supplemental questioning as provided in Code of Civil Procedure section 223.

Rule 4.201 amended effective January 1, 2006; adopted as rule 228.2 effective June 6, 1990; previously amended and renumbered effective January 1, 2001.

Advisory Committee Comment

Although Code of Civil Procedure section 223 creates a preference for nonsequestered voir dire (*People v. Roldan* (2005) 35 Cal.4th 646, 691), a judge may conduct sequestered voir dire on questions concerning media reports of the case and on any other issue deemed advisable. (See, e.g., Cal. Stds. Jud. Admin., std. 4.30(a)(3).) To determine whether such issues are present, a judge may consider factors including the charges, the nature of the evidence that is anticipated to be presented, and any other relevant factors. To that end, a judge should always inform jurors of the possibility of sequestered voir dire if the voir dire is likely to elicit answers that the juror may believe are sensitive in nature. It should also be noted that when written questionnaires are used, jurors must be advised of the right to request a hearing in chambers on sensitive questions rather than answering them on the questionnaire. (*Copley Press Inc. v. Superior Court* (1991) 228 Cal.App.3d 77, 87.)

Rule 4.210. Traffic court—trial by written declaration

(a) Applicability

This rule establishes the minimum procedural requirements for trials by written declaration under Vehicle Code section 40902. The procedures established by this rule must be followed in all trials by written declaration under that section.

(Subd (a) amended effective January 1, 2007.)

(b) Procedure

(1) *Definition of due date*

As used in this subdivision, "due date" means the last date on which the defendant's appearance is timely.

(2) *Extending due date*

If the clerk receives the defendant's written request for a trial by written declaration by the appearance date indicated on the *Notice to Appear,* the clerk must, within 15 calendar days after receiving the defendant's written request, extend the appearance date 25 calendar days and must give or mail notice to the defendant of the extended due date on the *Request for Trial by Written Declaration* (form TR-205) with a copy of the *Instructions to Defendant* (form TR-200) and any other required forms.

(3) *Election*

The defendant must file a *Request for Trial by Written Declaration* (form TR-205) with the clerk by the appearance date indicated on the *Notice to Appear* or the extended due date as provided in (2). The *Request for Trial by Written Declaration* (form TR-205) must be filed in addition to the defendant's written request for a trial by written declaration, unless the defendant's request was made on the election form.

(4) *Bail*

The defendant must deposit bail with the clerk by the appearance date indicated on the *Notice to Appear* or the extended due date as provided in (2).

(5) *Instructions to arresting officer*

If the clerk receives the defendant's *Request for Trial by Written Declaration* (form TR-205) and bail by the due date, the clerk must deliver or mail to the arresting officer's agency *Notice and Instructions to Arresting Officer* (form TR-210) and *Officer's Declaration* (form TR-235) with a copy of the *Notice to Appear* and a specified return date for receiving the officer's declaration. After receipt of the officer's declaration, or at the close of the officer's return date if no officer's declaration is filed, the clerk must submit the case file with all declarations and other evidence received to the court for decision.

(6) *Court decision*

After the court decides the case and returns the file and decision, the clerk must immediately deliver or mail the *Decision and Notice of Decision* (form TR-215) to the defendant and the arresting agency.

(7) *Trial de novo*

If the defendant files a *Request for New Trial (Trial de Novo)* (form TR-220) within 20 calendar days after the date of delivery or mailing of the *Decision and Notice of Decision* (form TR-215), the clerk must set a trial date within 45 calendar days of receipt of the defendant's written request for a new trial. The clerk must deliver or mail to the defendant and to the arresting officer's agency the *Order and Notice to Defendant of New Trial (Trial de Novo)* (form TR-225). If the defendant's request is not timely received, no new trial may be held and the case must be closed.

(8) *Case and time standard*

The clerk must deliver or mail the *Decision and Notice of Decision* (form TR-215) within 90 calendar days after the due date. Acts for which no

specific time is stated in this rule must be performed promptly so that the *Decision and Notice of Decision* can be timely delivered or mailed by the clerk. Failure of the clerk or the court to comply with any time limit does not void or invalidate the decision of the court, unless prejudice to the defendant is shown.

(Subd (b) amended effective January 1, 2007; previously amended effective January 1, 2000, and July 1, 2000.)

(c) Due dates and time limits

Due dates and time limits must be as stated in this rule, unless changed or extended by the court. The court may extend any date, but the court need not state the reasons for granting or denying an extension on the record or in the minutes.

(Subd (c) amended effective January 1, 2007.)

(d) Ineligible defendants

If the defendant requests a trial by written declaration and the clerk or the court determines that the defendant is not eligible for a trial by written declaration, the clerk must extend the due date 25 calendar days and notify the defendant by mail of the determination and due date.
(Subd (d) amended effective January 1, 2007.)

(e) Noncompliance

If the defendant does not comply with this rule (including submitting the required bail amount, signing and filing all required forms, and complying with all time limits and due dates), the court may deny a trial by written declaration and may proceed as otherwise provided by statute and court rules.

(Subd (e) amended effective January 1, 2007.)

(f) Evidence

Testimony and other relevant evidence may be introduced in the form of a *Notice to Appear* issued under Vehicle Code section 40500; a business record or receipt; a sworn declaration of the arresting officer; and, on behalf of the defendant, a sworn declaration of the defendant.

(Subd (f) amended effective January 1, 2007.)

(g) Fines, assessments, or penalties

The statute and the rules do not prevent or preclude the court from imposing on a defendant who is found guilty any lawful fine, assessment, or other penalty, and the

court is not limited to imposing money penalties in the bail amount, unless the bail amount is the maximum and the only lawful penalty.

(Subd (g) amended effective January 1, 2007.)

(h) Additional forms and procedures

The clerk may approve and prescribe forms, time limits, and procedures that are not in conflict with or not inconsistent with the statute or this rule.

(i) Forms

The following forms are to be used to implement the procedures under this rule:

(1) *Instructions to Defendant* (form TR-200)

(2) *Request for Trial by Written Declaration* (form TR-205)

(3) *Notice and Instructions to Arresting Officer* (form TR-210)

(4) *Officer's Declaration* (form TR-235)

(5) *Decision and Notice of Decision* (form TR-215)

(6) *Request for New Trial (Trial de Novo)* (form TR-220)

(7) *Order and Notice to Defendant of New Trial (Trial de Novo)* (form TR-225)

(Subd (i) amended effective January 1, 2007; previously amended effective January 1, 2000.)

(j) Local forms

A court may adopt additional forms as may be required to implement this rule and the court's local procedures not inconsistent with this rule.

(Subd (j) amended effective January 1, 2007.)

Rule 4.210 amended and renumbered effective January 1, 2007; adopted as rule 828 effective January 1, 1999; previously amended effective January 1, 2000, and July 1, 2000.

Division 4. Sentencing

Rule 4.300. Commitments to nonpenal institutions
Rule 4.305. Notification of appeal rights in felony cases
Rule 4.306. Notification of appeal rights in misdemeanor and infraction cases

Rule 4.300. Commitments to nonpenal institutions

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

Rule 4.300 amended effective January 1, 2007; adopted as rule 453 effective July 1, 1977; previously amended and renumbered effective January 1, 2001; previously amended effective July 28, 1977, and January 1, 2006.

Advisory Committee Comment

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

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

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

Rule 4.305. Notification of appeal rights in felony cases

After imposing sentence or making an order deemed to be a final judgment in a criminal case on conviction after trial, or after imposing sentence following a revocation of probation, except where the revocation is after the defendant's admission of violation of probation, the court must advise the defendant of his or her right to appeal, of the necessary steps and time for taking an appeal, and of the right of an indigent defendant to have counsel appointed by the reviewing court. A reporter's transcript of the proceedings required by this rule must be forthwith prepared and certified by the reporter and filed with the clerk.

Rule 4.305 amended effective January 1, 2007; adopted as rule 250 effective January 1, 1972; previously amended effective July 1, 1972, and January 1, 1977; previously amended and

renumbered as rule 470 effective January 1, 1991; previously renumbered effective January 1, 2001.

Rule 4.306. Notification of appeal rights in misdemeanor and infraction cases

After imposing sentence or making an order deemed to be a final judgment in a misdemeanor case on conviction after trial or following a revocation of probation, the court must orally or in writing advise a defendant not represented by counsel of the right to appeal, the time for filing a notice of appeal, and the right of an indigent defendant to have counsel appointed on appeal. This rule does not apply to infractions or when a revocation of probation is ordered after the defendant's admission of a violation of probation.

Rule 4.306 amended effective January 1, 2007; adopted as rule 535 effective July 1, 1981; previously renumbered effective January 1, 2001.

Rule 4.310. 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 Penal Code sections 2900.5, 2933.1(c), and 2933.2(c). On referral of the defendant to the probation officer for an investigation and report under Penal Code 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 4.310 amended effective January 1, 2007; adopted as rule 252 effective January 1, 1977; previously amended and renumbered as rule 472 effective January 1, 1991; previously amended and renumbered effective January 1, 2001; previously amended effective July 1, 2004.

Rule 4.315. Setting date for execution of death sentence

(a) Open session of court; notice required

A date for execution of a judgment of death under Penal Code section 1193 or 1227 must be set at a public session of the court at which the defendant and the People may be represented.

At least 10 days before the session of court at which the date will be set, the court must mail notice of the time and place of the proceeding by first-class mail, postage prepaid, to the Attorney General, the district attorney, the defendant at the prison address, the defendant's counsel or, if none is known, counsel who most recently represented the defendant on appeal or in postappeal legal proceedings, and the executive director of the California Appellate Project in San Francisco. The clerk

must file a certificate of mailing copies of the notice. The court may not hold the proceeding or set an execution date unless the record contains a clerk's certificate showing that the notices required by this subdivision were timely mailed.

Unless otherwise provided by statute, the defendant does not have a right to be present in person.

(Subd (a) amended effective January 1, 2007; previously amended effective July 1, 1990.)

(b) Selection of date; notice

If, at the announced session of court, the court sets a date for execution of the judgment of death, the court must mail certified copies of the order setting the date to the warden of the state prison and to the Governor, as required by statute; and must also, within five days of the making of the order, mail by first-class mail, postage prepaid, certified copies of the order setting the date to each of the persons required to be given notice by (a). The clerk must file a certificate of mailing copies of the order.

(Subd (b) amended effective January 1, 2007.)

Rule 4.315 amended effective January 1, 2007; adopted as rule 490 effective July 1, 1989; previously amended effective July 1, 1990; previously renumbered effective January 1, 2001.

Rule 4.320. Records of criminal convictions (Gov. Code, §§ 69844.5, 71280.5)

(a) Information to be submitted

In addition to the information that the Department of Justice requires from courts under Penal Code section 13151, each trial court must also report, electronically or manually, the following information, in the form and manner specified by the Department of Justice:

(1) Whether the defendant was represented by counsel or waived the right to counsel; and

(2) In the case of a guilty or nolo contendere plea, whether:

(A) The defendant was advised of and understood the charges;

(B) The defendant was advised of, understood, and waived the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination; and

(C) The court found the plea was voluntary and intelligently made.

For purposes of this rule, a change of plea form signed by the defendant, defense counsel if the defendant was represented by counsel, and the judge, and filed with the court is a sufficient basis for the clerk or deputy clerk to report that the requirements of (2) have been met.

(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 2001.)

(b) Certification required

The reporting clerk or a deputy clerk must certify that the report submitted to the Department of Justice under Penal Code section 13151 and this rule is a correct abstract of the information contained in the court's records in the case.

(Subd (b) amended effective January 1, 2007.)

Rule 4.320 amended effective January 1, 2007; adopted as rule 895 effective July 1, 1998; previously amended and renumbered effective January 1, 2001.

Rule 4.325. Ignition interlock installation orders: "interest of justice" exceptions

If the court finds that the interest of justice requires an exception to the Vehicle Code sections 14601(e), 14601.1(d), 14601.4(c), or 14601.5(g) requirements for installation of an ignition interlock device under Vehicle Code section 23575, the reasons for the finding must be stated on the record.

Rule 4.325 amended and renumbered effective January 1, 2001; adopted as rule 530 effective January 1, 1995.

Rule 4.330. Misdemeanor hate crimes

(a) Application

This rule applies to misdemeanor cases where the defendant is convicted of either (1) a substantive hate crime under section 422.6 or (2) a misdemeanor violation and the facts of the crime constitute a hate crime under section 422.55.

(b) Sentencing consideration

In sentencing a defendant under (a), the court must consider the goals for hate crime sentencing stated in rule 4.427(e).

Rule 4.330 adopted effective January 1, 2007.

Division 5. Sentencing—Determinate Sentencing Law

Rule 4.401. Authority

The rules in this division are adopted under Penal Code section 1170.3 and under the authority granted to the Judicial Council by the Constitution, article VI, section 6, to adopt rules for court administration, practice, and procedure.

Rule 4.401 amended effective January 1, 2007; adopted as rule 401 effective July 1, 1977; previously renumbered effective January 1, 2001.

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).

Rule 4.403 amended effective January 1, 2007; adopted as rule 403 effective July 1, 1977; previously amended and renumbered effective January 1, 2001; previously amended effective July 1, 2003.

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 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) "These rules" means the rules in this division.

(2) "Base term" is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed.

(3) "Enhancement" means an additional term of imprisonment added to the base term.

(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 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 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) "Sentence choice" means the selection of any disposition of the case that does not amount to a dismissal, acquittal, or grant of a new trial.

(7) "Section" means a section of the Penal Code.

(8) "Imprisonment" means confinement in a state prison.

(9) "Charged" means charged in the indictment or information.

(10) "Found" means admitted by the defendant or found to be true by the trier of fact upon trial.

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.__ [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." 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) How given

If the sentencing judge is required to give reasons for a sentence choice, the judge must state in simple language the primary factor or factors that support the exercise

of discretion or, if applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It must be delivered orally on the record.

(Subd (a) amended effective January 1, 2007.)

(b) When reasons required

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

(1) Granting probation;

(2) Imposing a prison sentence and thereby denying probation;

(3) Declining to commit to the Department of Corrections and Rehabilitation, Division of Juvenile Justice an eligible juvenile found amenable for treatment;

(4) Selecting one of the three authorized prison terms referred to in section 1170(b) for either an offense or an enhancement;

(5) Imposing consecutive sentences;

(6) Imposing full consecutive sentences under section 667.6(c) rather than consecutive terms under section 1170.1(a), when the court has that choice;

(7) Striking the punishment for an enhancement;

(8) Waiving a restitution fine;

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

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

(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 4.408. Criteria not exclusive; sequence not significant

(a) The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria must be stated on the record by the sentencing judge.

(Subd (a) amended effective January 1, 2007.)

(b) The order in which criteria are listed does not indicate their relative weight or importance.

Rule 4.408 amended effective January 1, 2007; adopted as rule 408 effective July 1, 1977; previously renumbered effective January 1, 2001.

Advisory Committee Comment

Enumerations of criteria in these rules are not exclusive. The variety of circumstances presented in felony cases is so great that no listing of criteria could claim to be all-inclusive. (Cf., Evid. Code, § 351.)

The relative significance of various criteria will vary from case to case. This, like the question of applicability of various criteria, will be decided by the sentencing judge.

Rule 4.409. Consideration of criteria

Relevant criteria enumerated in these rules must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise.

Rule 4.409 amended effective January 1, 2007; adopted as rule 409 effective July 1, 1977; previously renumbered effective January 1, 2001.

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 (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) Protecting society;

(2) Punishing the defendant;

(3) Encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses;

(4) Deterring others from criminal conduct by demonstrating its consequences;

(5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration;

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

(7) Achieving uniformity in sentencing.

(Subd (a) amended effective January 1, 2007; previously amended effective July 1, 2003.)

(b) Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge must consider which objectives are of primary importance in the particular case. The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case.

(Subd (b) lettered effective July 1, 2003; adopted as part of unlettered subd effective July 1, 1977; former subd (b) amended and relettered as part of subd (a) effective July 1, 2003.)

Rule 4.410 amended effective January 1, 2007; adopted as rule 410 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective July 1, 2003.

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

Other statutory provisions that prohibit the grant of probation in particular cases.

Rule 4.411. Presentence investigations and reports

(a) Eligible defendant

If the defendant is eligible for probation, the court must refer the matter to the probation officer for a presentence investigation and report. Waivers of the presentence report should not be accepted except in unusual circumstances.

(Subd (a) amended effective January 1, 2007.)

(b) Ineligible defendant

Even if the defendant is not eligible for probation, the court should refer the matter to the probation officer for a presentence investigation and report.

(c) Supplemental reports

The court must order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared.

(Subd (c) amended effective January 1, 2007.)

(d) Purpose of presentence investigation report

Probation officers' reports are used by judges in determining the appropriate length of a prison sentence and by the Department of Corrections and Rehabilitation, Division of Adult Operations in deciding on the type of facility and program in which to place a defendant, and are also used in deciding whether probation is appropriate. Section 1203c requires a probation officer's report on every person sentenced to prison; ordering the report before sentencing in probation-ineligible cases will help ensure a well-prepared report.

(Subd (d) amended effective January 1, 2007; previously amended effective January 1, 2006.)

Rule 4.411 amended effective January 1, 2007; adopted as rule 418 effective July 1, 1977; previously amended and renumbered as rule 411 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective January 1, 2006.

Advisory Committee Comment

Section 1203 requires a presentence report in every felony case in which the defendant is eligible for probation. Because such a probation investigation and report are valuable to the judge and to the jail and prison authorities, waivers of the report and requests for immediate sentencing are discouraged, even when the defendant and counsel have agreed to a prison sentence.

Notwithstanding a defendant's statutory ineligibility for probation, a presentence investigation and report should be ordered to assist the court in deciding the appropriate sentence and to facilitate compliance with section 1203c.

This rule does not prohibit pre-conviction, pre-plea reports as authorized by section 1203.7.

Subdivision (c) is based on case law that generally requires a supplemental report if the defendant is to be resentenced a significant time after the original sentencing, as, for example, after a remand by an appellate court, or after the apprehension of a defendant who failed to appear at sentencing. The rule is not intended to expand on the requirements of those cases.

The rule does not require a new investigation and report if a recent report is available and can be incorporated by reference and there is no indication of changed circumstances. This is particularly true if a report is needed only for the Department of Corrections and Rehabilitation because the defendant has waived a report and agreed to a prison sentence. If a full report was prepared in another case in the same or another jurisdiction within the preceeding six months, during which time the defendant was in custody, and that report is available to the Department of Corrections and Rehabilitation, it is unlikely that a new investigation is needed.

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) A face sheet showing at least:

(A) The defendant's name and other identifying data;

(B) The case number;

(C) The crime of which the defendant was convicted;

(D) The date of commission of the crime, the date of conviction, and any other dates relevant to sentencing;

(E) The defendant's custody status; and

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

(2) The facts and circumstances of the crime and the defendant's arrest, including information concerning any co-defendants and the status or disposition of their cases. The source of all such information must be stated.

(3) A summary of the defendant's record of prior criminal conduct, including convictions as an adult and sustained petitions in juvenile delinquency proceedings. Records of an arrest or charge not leading to a conviction or the

sustaining of a petition may not be included unless supported by facts concerning the arrest or charge.

(4) Any statement made by the defendant to the probation officer, or a summary thereof, including the defendant's account of the circumstances of the crime.

(5) Information concerning the victim of the crime, including:

(A) The victim's statement or a summary thereof, if available;

(B) The amount of the victim's loss, and whether or not it is covered by insurance; and

(C) Any information required by law.

(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.

(7) Collateral information, including written statements from:

(A) Official sources such as defense and prosecuting attorneys, police (subsequent to any police reports used to summarize the crime), probation and parole officers who have had prior experience with the defendant, and correctional personnel who observed the defendant's behavior during any period of presentence incarceration; and

(B) Interested persons, including family members and others who have written letters concerning the defendant.

(8) An evaluation of factors relating to disposition. This section must include:

(A) A reasoned discussion of the defendant's suitability and eligibility for probation, and, if probation is recommended, a proposed plan including recommendation for the conditions of probation and any special need for supervision;

(B) If a prison sentence is recommended or is likely to be imposed, a reasoned discussion of aggravating and mitigating factors affecting the sentence length; and

(C) A discussion of the defendant's ability to make restitution, pay any fine or penalty that may be recommended, or satisfy any special conditions of probation that are proposed.

Discussions of factors affecting suitability for probation and affecting the sentence length must refer to any sentencing rule directly relevant to the facts of the case, but no rule may be cited without a reasoned discussion of its relevance and relative importance.

(9) The probation officer's recommendation. When requested by the sentencing judge or by standing instructions to the probation department, the report must include recommendations concerning the length of any prison term that may be imposed, including the base term, the imposition of concurrent or consecutive sentences, and the imposition or striking of the additional terms for enhancements charged and found.

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

(11) A statement of mandatory and recommended restitution, restitution fines, other fines, and costs to be assessed against the defendant, including chargeable probation services and attorney fees under section 987.8 when appropriate, findings concerning the defendant's ability to pay, and a recommendation whether any restitution order should become a judgment under section 1203(j) if unpaid.

(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 1991, and July 1, 2003.)

(b) Format

The report must be on paper 8-½ by 11 inches in size and must follow the sequence set out in (a) to the extent possible.

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

(c) Sources

The source of all information must be stated. Any person who has furnished information included in the report must be identified by name or official capacity unless a reason is given for not disclosing the person's identity.

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

Rule 4.411.5 amended effective January 1, 2007; adopted as rule 419 effective July 1, 1981; previously amended and renumbered as rule 411.5 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective July 1, 2003.

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

(a) Defendant's agreement as reason

It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it. The agreement and lack of objection must be recited on the record. This section does not authorize a sentence that is not otherwise authorized by law.

(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 2001.)

(b) Agreement to sentence abandons section 654 claim

By agreeing to a specified prison 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.

(Subd (b) amended effective January 1, 2007.)

Rule 4.412 amended effective January 1, 2007; adopted as rule 412 effective January 1, 1991; previously amended and renumbered effective January 1, 2001.

Advisory Committee Comment

Subdivision (a). This subdivision is intended to relieve the court of an obligation to give reasons if the sentence or other disposition is one that the defendant has accepted and to which the prosecutor expresses no objection. The judge may choose to give reasons for the sentence even though not obligated to do so.

Judges should also be aware that there may be statutory limitations on "plea bargaining" or on the entry of a guilty plea on the condition that no more than a particular sentence will be imposed. At the time this comment was drafted, such limitations appeared, for example, in sections 1192.5 and 1192.7.

Subdivision (b). This subdivision is based on the fact that a defendant who, with the advice of counsel, expresses agreement to a specified prison term normally is acknowledging that the term is appropriate for his or her total course of conduct. This subdivision applies to both determinate and indeterminate terms.

Rule 4.413. Probation eligibility when probation is limited

(a) Consideration of eligibility

The court must determine whether the defendant is eligible for probation.

(Subd (a) amended effective January 1, 2007.)

(b) Probation in unusual cases

If the defendant comes under a statutory provision prohibiting probation "except in unusual cases where the interests of justice would best be served," or a substantially equivalent provision, the court should apply the criteria in (c) to evaluate whether the statutory limitation on probation is overcome; and if it is, the court should then apply the criteria in rule 4.414 to decide whether to grant probation.

(Subd (b) amended effective January 1, 2007; previously amended effective July 1, 2003.)

(c) Facts showing unusual case

The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

(1) *Facts relating to basis for limitation on probation*

A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

(A) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and

(B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

(2) *Facts limiting defendant's culpability*

A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:

(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence;

(B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and

(C) The defendant is youthful or aged, and has no significant record of prior criminal offenses.

(Subd (c) amended effective January 1, 2007.)

Rule 4.413 amended effective January 1, 2007; adopted as rule 413 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective July 1, 2003.

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) Facts relating to the crime

Facts relating to the crime include:

(1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime;

(2) Whether the defendant was armed with or used a weapon;

(3) The vulnerability of the victim;

(4) Whether the defendant inflicted physical or emotional injury;

(5) The degree of monetary loss to the victim;

(6) Whether the defendant was an active or a passive participant;

(7) Whether the crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur;

(8) Whether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant; and

(9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.

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

(b) Facts relating to the defendant

Facts relating to the defendant include:

(1) Prior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct;

(2) Prior performance on probation or parole and present probation or parole status;

(3) Willingness to comply with the terms of probation;

(4) Ability to comply with reasonable terms of probation as indicated by the defendant's age, education, health, mental faculties, history of alcohol or other substance abuse, family background and ties, employment and military service history, and other relevant factors;

(5) The likely effect of imprisonment on the defendant and his or her dependents;

(6) The adverse collateral consequences on the defendant's life resulting from the felony conviction;

(7) Whether the defendant is remorseful; and

(8) The likelihood that if not imprisoned the defendant will be a danger to others.

(Subd (b) amended effective January 1, 2007; previously amended effective January 1, 1991, and July 1, 2003.)

Rule 4.414 amended effective January 1, 2007; adopted as rule 414 effective July 1, 1977; previously amended effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective July 1, 2003.

Advisory Committee Comment

The sentencing judge's discretion to grant probation is unaffected by the Uniform Determinate Sentencing Act (§ 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 4.420. Selection of 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.

(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 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.

(Subd (b) amended effective January 1, 2008; previously amended effective July 28, 1977, January 1, 1991, January 1, 2007, and May 23, 2007.)

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

(Subd (c) adopted effective January 1, 1991.)

(d) A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term.

(Subd (d) amended effective January 1, 2008; adopted effective January 1, 1991; previously amended effective January 1, 2007, and May 23, 2007.)

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

(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 January 1, 2008; 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, January 1, 2007, and May 23, 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 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 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) Factors relating to the crime

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

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness;

(2) The defendant was armed with or used a weapon at the time of the commission of the crime;

(3) The victim was particularly vulnerable;

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission;

(5) The defendant induced a minor to commit or assist in the commission of the crime;

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process;

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed;

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism;

(9) The crime involved an attempted or actual taking or damage of great monetary value;

(10) The crime involved a large quantity of contraband; and

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(12) The crime constitutes a hate crime under section 422.55 and:

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

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

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

(b) Factors relating to the defendant

Factors relating to the defendant include that:

(1) The defendant has engaged in violent conduct that indicates a serious danger to society;

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness;

(3) The defendant has served a prior prison term;

(4) The defendant was on probation or parole when the crime was committed; and

(5) The defendant's prior performance on probation or parole was unsatisfactory.

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

(c) Other factors

Any other 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.

Advisory Committee Comment

Circumstances in aggravation may justify imposition of the upper of three possible prison terms. (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 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) Factors relating to the crime

Factors relating to the crime include that:

(1) The defendant was a passive participant or played a minor role in the crime;

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident;

(3) The crime was committed because of an unusual circumstance, such as great provocation, that is unlikely to recur;

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense;

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime;

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim;

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal;

(8) The defendant was motivated by a desire to provide necessities for his or her family or self; and

(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 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) Factors relating to the defendant

Factors relating to the defendant include that:

(1) The defendant has no prior record, or has an insignificant record of criminal conduct, considering the recency and frequency of prior crimes;

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime;

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

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation;

(5) The defendant made restitution to the victim; and

(6) The defendant's prior performance on probation or parole was satisfactory.

(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.

Advisory Committee Comment

See comment to rule 4.421.

This rule applies both to mitigation for purposes of motions under section 1170(b) and to circumstances in mitigation justifying the court in striking the additional punishment provided for an enhancement.

Some listed circumstances can never apply to certain enhancements; for example, "the amounts taken were deliberately small" can never apply to an excessive taking under section 12022.6, and "no harm was done" can never apply to infliction of great bodily injury under section 12022.7. In any case, only the facts present may be considered for their possible effect in mitigation.

See also rule 4.409; only relevant criteria need be considered.

Since only the fact of restitution is considered relevant to mitigation, no reference to the defendant's financial ability is needed. The omission of a comparable factor from rule 4.421 as a circumstance in aggravation is deliberate.

Rule 4.424. Consideration of applicability of section 654

Before determining whether to impose either concurrent or consecutive sentences on all counts on which the defendant was convicted, the court must determine whether the proscription in section 654 against multiple punishments for the same act or omission requires a stay of execution of the sentence imposed on some of the counts.

Rule 4.424 amended effective January 1, 2011; adopted as rule 424 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective January 1, 2007.

Rule 4.425. Criteria affecting concurrent or consecutive sentences

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

(a) Criteria relating to crimes

Facts relating to the crimes, including whether or not:

(1) The crimes and their objectives were predominantly independent of each other;

(2) The crimes involved separate acts of violence or threats of violence; or

(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

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

(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) A fact used to impose the upper term;

(2) A fact used to otherwise enhance the defendant's prison sentence; and

(3) A fact that is an element of the crime may not be used to impose consecutive sentences.

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

Rule 4.425 amended effective January 1, 2007; adopted as rule 425 effective July 1, 1977; previously amended effective January 1, 1991; previously renumbered effective January 1, 2001.

Advisory Committee Comment

The sentencing judge should be aware that there are some cases in which the law mandates consecutive sentences.

Rule 4.426. Violent sex crimes

(a) Multiple violent sex crimes

When a defendant has been convicted of multiple violent sex offenses as defined in section 667.6, the sentencing judge must determine whether the crimes involved separate victims or the same victim on separate occasions.

(1) *Different victi*ms

If the crimes were committed against different victims, a full, separate, and consecutive term must be imposed for a violent sex crime as to each victim, under section 667.6(d).

(2) *Same victim, separate occasions*

If the crimes were committed against a single victim, the sentencing judge must determine whether the crimes were committed on separate occasions. In determining whether there were separate occasions, the sentencing judge must consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect on his or her actions and nevertheless resumed sexually assaultive behavior. A full, separate, and consecutive term must be imposed for each violent sex offense committed on a separate occasion under section 667.6(d).

(Subd (a) amended effective January 1, 2007.)

(b) Same victim, same occasion; other crimes

If the defendant has been convicted of multiple crimes, including at least one violent sex crime, as defined in section 667.6, or if there have been multiple violent sex crimes against a single victim on the same occasion and the sentencing court has decided to impose consecutive sentences, the sentencing judge must then determine whether to impose a full, separate, and consecutive sentence under section 667.6(c) for the violent sex crime or crimes instead of including the violent sex crimes in the computation of the principal and subordinate terms under section 1170.1(a). A decision to impose a fully consecutive sentence under section 667.6(c) is an additional sentence choice that requires a statement of reasons separate from those given for consecutive sentences, but which may repeat the same reasons. The sentencing judge is to be guided by the criteria listed in rule 4.425, which incorporates rules 4.421 and 4.423, as well as any other reasonably related criteria as provided in rule 4.408.

(Subd (b) amended effective January 1, 2007; previously amended effective July 1, 2003.)

Rule 4.426 amended effective January 1, 2007; adopted as rule 426 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective July 1, 2003.

Advisory Committee Comment

Section 667.6(d) requires a full, separate, and consecutive term for each of the enumerated violent sex crimes that involve separate victims, or the same victim on separate occasions. Therefore, if there were separate victims or the court found that there were separate occasions, no other reasons are required.

If there have been multiple convictions involving at least one of the enumerated violent sex crimes, the court may impose a full, separate, and consecutive term for each violent sex crime under section 667.6(c). (See *People v. Coleman* (1989) 48 Cal.3d 112, 161.) A fully consecutive sentence under section 667.6(c) is a sentence choice, which requires a statement of reasons. The court may not use the same fact to impose a sentence under section 667.6(c) that was used to impose an upper term. (See rule 4.425(b).) If the court selects the upper term, imposes

consecutive sentences, and uses section 667.6(c), the record must reflect three sentencing choices with three separate statements of reasons, but the same reason may be used for sentencing under section 667.6(c) and to impose consecutive sentences. (See *People v. Belmontes* (1983) 34 Cal.3d 335, 347–349.)

Rule 4.427. Hate crimes

(a) Application

This rule is intended to assist judges in sentencing in felony hate crime cases. It applies to:

(1) Felony sentencing under section 422.7;

(2) Convictions of felonies with a hate crime enhancement under section 422.75; and

(3) Convictions of felonies that qualify as hate crimes under section 422.55.

(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 as provided by section 422.7.

(c) Hate crime enhancement

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

(1) The following enhancements apply:

(A) An enhancement of a term in state prison as provided in section 422.75(a). Personal use of a firearm in the commission of the offense is an aggravating factor that must be considered in determining the enhancement term.

(B) An additional enhancement of one year in state prison for each prior felony conviction that constitutes a hate crime as defined in section 422.55.

(2) The court may strike enhancements under (c) if it finds mitigating circumstances under rule 4.423 and states those mitigating circumstances on the record.

(3) The punishment for any enhancement under (c) is in addition to any other punishment provided by law.

(d) Hate crime as aggravating factor

If the defendant is convicted of a felony, and the facts of the crime constitute a hate crime under section 422.55, that fact must be considered a circumstance in aggravation in determining the appropriate punishment under rule 4.421 unless:

(1) The court imposed a hate crime enhancement under section 422.75; or

(2) The defendant has been convicted of an offense subject to sentencing under section 1170.8.

(e) Hate crime sentencing goals

When sentencing a defendant under this rule, the judge must consider the principal goals for hate crime sentencing.

(1) The principal goals for hate crime sentencing, as stated in section 422.86, are:

(A) Punishment for the hate crime committed;

(B) Crime and violence prevention, including prevention of recidivism and prevention of crimes and violence in prisons and jails; and

(C) Restorative justice for the immediate victims of the hate crimes and for the classes of persons terrorized by the hate crimes.

(2) Crime and violence prevention considerations should include educational or other appropriate programs available in the community, jail, prison, and juvenile detention facilities. The programs should address sensitivity or similar training or counseling intended to reduce violent and antisocial behavior based on one or more of the following actual or perceived characteristics of the victim:

(A) Disability;

(B) Gender;

(C) Nationality;

(D) Race or ethnicity;

(E) Religion;

(F) Sexual orientation; or

(G) Association with a person or group with one or more of these actual or perceived characteristics.

(3) Restorative justice considerations should include community service and other programs focused on hate crime prevention or diversity sensitivity. Additionally, the court should consider ordering payment or other compensation to programs that provide services to violent crime victims and reimbursement to the victim for reasonable costs of counseling and other reasonable expenses that the court finds are a direct result of the defendant's actions.

Rule 4.427 adopted effective January 1, 2007.

Advisory Committee Comment

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

Rule 4.428. Criteria affecting imposition of enhancements

If an enhancement is punishable by one of three terms, the court must, in its discretion, impose the term that best serves the interest of justice and state the reasons for its sentence choice on the record at the time of sentencing.

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.

The judge should not strike the allegation of the enhancement.

Rule 4.428 amended effective January 1, 2011; adopted as rule 428 effective January 1, 1991; previously renumbered effective January 1, 2001; previously amended effective January 1, 1998, July 1, 2003, January 1, 2007, May 23, 2007, and January 1, 2008.

Rule 4.431. Proceedings at sentencing to be reported

All proceedings at the time of sentencing must be reported.

Rule 4.431 amended effective January 1, 2007; adopted as rule 431 effective July 1, 1977; previously renumbered effective January 1, 2001.

Advisory Committee Comment

Reporters' transcripts of the sentencing proceedings are required on appeal (rule 8.420), 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.

(Subd (a) amended effective January 1, 2007.)

(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 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).

(Subd (b) amended effective January 1, 2008; previously amended effective July 28, 1977, January 1, 2007, and May 23, 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) Determine, under section 1170(b), whether to impose one of the three authorized prison terms referred to in section 1170(b) and state on the record the reasons for imposing that term.

(2) Determine whether any additional term of imprisonment provided for an enhancement charged and found will be stricken;

(3) Determine whether the sentences will be consecutive or concurrent if the defendant has been convicted of multiple crimes;

(4) Determine any issues raised by statutory prohibitions on the dual use of facts and statutory limitations on enhancements, as required in rules 4.420(c) and 4.447; and

(5) Pronounce the court's judgment and sentence, stating the terms thereof and giving reasons for those matters for which reasons are required by law.

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

(d) All these matters must be heard and determined at a single hearing unless the sentencing judge otherwise orders in the interests of justice.

(Subd (d) amended effective January 1, 2007.)

(e) When a sentence of imprisonment is imposed under (c) or under rule 4.435, the sentencing judge must inform the defendant, 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.

(Subd (e) amended effective January 1, 2007; previously amended effective July 28, 1977, January 1, 1979, and July 1, 2003.)

Rule 4.433 amended effective January 1, 2008; 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, January 1, 2007, and May 23, 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 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 4.435. Sentencing on revocation of probation

(a) When the defendant violates the terms of probation or is otherwise subject to revocation of probation, the sentencing judge may make any disposition of the case authorized by statute.

(Subd (a) amended effective January 1, 1991.)

(b) On revocation and termination of probation under section 1203.2, when the sentencing judge determines that the defendant will be committed to prison:

(1) If the imposition of sentence was previously suspended, the judge must impose judgment and sentence after considering any findings previously made and hearing and determining the matters enumerated in rule 4.433(c).

The length of the sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term or in deciding whether to strike the additional punishment for enhancements charged and found.

(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 for the term prescribed in that judgment.

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

Rule 4.435 amended effective January 1, 2007; adopted as rule 435 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective January 1, 1991, July 1, 2003, and January 1, 2006.

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 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 4.437. Statements in aggravation and mitigation

(a) Time for filing and service

Statements in aggravation and mitigation referred to in section 1170(b) must be filed and served at least four days before the time set for sentencing under section

1191 or the time set for pronouncing judgment on revocation of probation under section 1203.2(c) if imposition of sentence was previously suspended.

(Subd (a) amended effective January 1, 2007.)

(b) Combined statement

A party seeking consideration of circumstances in aggravation or mitigation may file and serve a statement under section 1170(b) and this rule.

(Subd (b) amended effective January 1, 2007.)

(c) Contents of statement

A statement in aggravation or mitigation must include:

(1) A summary of evidence that the party relies on as circumstances justifying the imposition of a particular term; and

(2) Notice of intention to dispute facts or offer evidence in aggravation or mitigation at the sentencing hearing. The statement must generally describe the evidence to be offered, including a description of any documents and the names and expected substance of the testimony of any witnesses. No evidence in aggravation or mitigation may be introduced at the sentencing hearing unless it was described in the statement, or unless its admission is permitted by the sentencing judge in the interests of justice.

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

(d) Support required for assertions of fact

Assertions of fact in a statement in aggravation or mitigation must be disregarded unless they are supported by the record in the case, the probation officer's report or other reports properly filed in the case, or other competent evidence.

(Subd (d) amended effective January 1, 2007.)

(e) Disputed facts

In the event the parties dispute the facts on which the conviction rested, the court must conduct a presentence hearing and make appropriate corrections, additions, or deletions in the presentence probation report or order a revised report.

(Subd (e) amended effective January 1, 2007; adopted effective January 1, 1991.)

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 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 evidence, or for rebutting competent evidence already presented, 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 ensure that the time limit on pronouncing sentence is met.

Rule 4.447. Limitations on enhancements

No finding of an enhancement may be stricken or dismissed because imposition of the term either is prohibited by law or exceeds limitations on the imposition of multiple enhancements. The sentencing judge must impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and must thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay will become permanent on the defendant's service of the portion of the sentence not stayed.

Rule 4.447 amended effective January 1, 2007; adopted as rule 447 effective July 1, 1977; previously amended and renumbered effective January 1, 2001; previously amended effective July 28, 1977, January 1, 1991, and July 1, 2003.

Advisory Committee Comment

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

Present practice of staying execution is followed to avoid violating a statutory prohibition or exceeding a statutory limitation, while preserving the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence. See *People v. Niles* (1964) 227 Cal.App.2d 749, 756.

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

Rule 4.451. Sentence consecutive to indeterminate term or to term in other jurisdiction

(a) When a defendant is sentenced under section 1170 and the sentence is to run consecutively to a sentence imposed under section 1168(b) in the same or another proceeding, the judgment must specify the determinate term imposed under section 1170 computed without reference to the indeterminate sentence, must order that the determinate term be served consecutively to the sentence under section 1168(b), and must identify the proceedings in which the indeterminate sentence was imposed. The term under section 1168(b), and the date of its completion or parole date, and the sequence in which the sentences are deemed served, will be determined by correctional authorities as provided by law.

(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 1979, and July 1, 2003.)

(b) When a defendant is sentenced under section 1170 and the sentence is to run consecutively to a sentence imposed by a court of the United States or of another state or territory, the judgment must specify the determinate term imposed under section 1170 computed without reference to the sentence imposed by the other jurisdiction, must order that the determinate term be served commencing on the completion of the sentence imposed by the other jurisdiction, and must identify the other jurisdiction and the proceedings in which the other sentence was imposed.

(Subd (b) amended effective January 1, 2007.)

Rule 4.451 amended effective January 1, 2007; adopted as rule 451 effective July 1, 1977; previously renumbered effective January 1, 2001; previously amended effective January 1, 1979, and July 1, 2003.

Advisory Committee Comment

The provisions of section 1170.1(a), which use a one-third formula to calculate subordinate consecutive terms, can logically be applied only when all the sentences are imposed under section 1170. Indeterminate sentences are imposed under section 1168(b). Since the duration of the indeterminate term cannot be known to the court, subdivision (a) states the only feasible mode of sentencing. (See *People v. Felix* (2000) 22 Cal.4th 651, 654–657; *People v. McGahuey* (1981) 121 Cal.App.3d 524, 530–532.)

On the authority to sentence consecutively to the sentence of another jurisdiction and the effect of such a sentence, see *In re Helpman* (1968) 267 Cal.App.2d 307 and cases cited at note 3, *id*. at 310. The mode of sentencing required by subdivision (b) is necessary to avoid the illogical conclusion that the total of the consecutive sentences will depend on whether the other jurisdiction or California is the first to pronounce judgment.

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) The sentences on all determinately sentenced counts in all of the cases on which a sentence was or is being imposed must be combined as though they were all counts in the current case.

(2) The judge in the current case must make a new determination of which count, in the combined cases, represents the principal term, as defined in section 1170.1(a).

(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 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)).

Rule 4.453. Commitments to nonpenal institutions

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

Rule 4.453 amended effective January 1, 2007; adopted as rule 453 effective July 1, 1977; previously amended and renumbered effective January 1, 2001; previously amended effective July 28, 1977, and January 1, 2006.

Advisory Committee Comment

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

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

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

Rule 4.470. Notification of appeal rights in felony cases

After imposing sentence or making an order deemed to be a final judgment in a criminal case on conviction after trial, or after imposing sentence following a revocation of probation, except where the revocation is after the defendant's admission of violation of probation, the court must advise the defendant of his or her right to appeal, of the necessary steps and time for taking an appeal, and of the right of an indigent defendant to have counsel appointed by the reviewing court. A reporter's transcript of the proceedings required by this rule must be forthwith prepared and certified by the reporter and filed with the clerk.

Rule 4.470 amended effective January 1, 2007; adopted as rule 250 effective January 1, 1972; previously amended effective July 1, 1972, and January 1, 1977; previously amended and renumbered as rule 470 effective January 1, 1991; previously renumbered effective January 1, 2001.

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). 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 4.472 amended effective January 1, 2007; adopted as rule 252 effective January 1, 1977; previously amended and renumbered as rule 472 effective January 1, 1991; previously amended and renumbered effective January 1, 2001; previously amended effective July 1, 2003.

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 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.

Rule 4.480 amended effective January 1, 2007; adopted as section 12 of the Standards of Judicial Administration effective January 1, 1973; previously amended and renumbered effective January 1, 2001; previously amended effective July 1, 1978, July 1, 2003, and January 1, 2006.

Division 6. Postconviction and Writs

Chapter 1. Postconviction

Rule 4.510. Reverse remand

(a) Minor prosecuted under Welfare and Institutions Code section 602(b) or 707(d) and convicted of offense listed in Welfare and Institutions Code section 602(b) or 707(d) (Penal Code, § 1170.17)

If the prosecuting attorney lawfully initiated the prosecution as a criminal case under Welfare and Institutions Code section 602(b) or 707(d), and the minor is convicted of a criminal offense listed in those sections, the minor must be sentenced as an adult.

(Subd (a) amended effective January 1, 2007.)

(b) Minor convicted of an offense not listed in Welfare and Institutions Code section 602(b) or 707(d) (Penal Code, § 1170.17)

(1) If the prosecuting attorney lawfully initiated the prosecution as a criminal case and the minor is convicted of an offense not listed in Welfare and Institutions Code section 602(b) or 707(d), but one that would have raised the presumption of unfitness under juvenile court law, the minor may move the court to conduct a postconviction fitness hearing.

(A) On the motion by the minor, the court must order the probation department to prepare a report as required in rule 5.768.

(B) The court may conduct a fitness hearing or remand the matter to the juvenile court for a determination of fitness.

(C) The minor may receive a disposition hearing under the juvenile court law only if he or she is found to be fit under rule 5.772. However, if the court and parties agree, the minor may be sentenced in adult court.

(D) If the minor is found unfit, the minor must be sentenced as an adult, unless all parties, including the court, agree that the disposition be conducted under juvenile court law.

(2) If the minor is convicted of an offense not listed in Welfare and Institutions Code section 602(b) or 707(d), but one for which the minor would have been presumed fit under the juvenile court law, the minor must have a disposition hearing under juvenile court law, and consistent with the provisions of Penal Code section 1170.19, either in the trial court or on remand to the juvenile court.

(A) If the prosecuting attorney objects to the treatment of the minor as within the juvenile court law and moves for a fitness hearing to be conducted, the court must order the probation department to prepare a report as required by rule 5.768.

(B) The court may conduct a fitness hearing or remand the matter to the juvenile court for a determination of fitness.

(C) If found to be fit under rule 5.770, the minor will be subject to a disposition hearing under juvenile court law and Penal Code section 1170.19.

(D) If the minor is found unfit, the minor must be sentenced as an adult, unless all parties, including the court, agree that the disposition be conducted under juvenile court law.

(3) If the minor is convicted of an offense that would not have permitted a fitness determination, the court must remand the matter to juvenile court for disposition, unless the minor requests sentencing in adult court and all parties, including the court, agree.

(4) Fitness hearings held under this rule must be conducted as provided in title 5, division 3, chapter 14, article 2.

(Subd (b) amended effective January 1, 2007.)

Rule 4.510 amended effective January 1, 2007; adopted effective January 1, 2001.

Rule 4.530. Intercounty probation case transfer

(a) Application

This rule applies to intercounty probation case transfers under Penal Code section 1203.9. It does not apply to transfers of cases in which probation has been granted under Penal Code section 1210.1.

(b) Definitions

As used in this rule:

(1) "Transferring court" means the superior court of the county in which the probationer is supervised on probation.

(2) "Receiving court" means the superior court of the county to which transfer of the case and probation supervision is proposed.

(c) Motion

Transfers may be made only after noticed motion in the transferring court.

(d) Notice

(1) If transfer is requested by the probation officer of the transferring county, the probation officer must provide written notice of the date, time, and place set for hearing on the motion to:

(A) The presiding judge of the receiving court or his or her designee;

(B) The probation officer of the receiving county or his or her designee;

(C) The prosecutor of the transferring county;

(D) The victim (if any);

(E) The probationer; and

(F) The probationer's last counsel of record (if any).

(2) If transfer is requested by any other party, the party must first request in writing that the probation officer of the transferring county notice the motion. The party may make the motion to the transferring court only if the probation officer refuses to do so. The probation officer must notify the party of his or her decision within 30 days of the party's request. Failure by the probation officer to notify the party of his or her decision within 30 days is deemed a refusal to make the motion.

(3) If the party makes the motion, the motion must include a declaration that the probation officer has refused to bring the motion, and the party must provide written notice of the date, time, and place set for hearing on the motion to:

(A) The presiding judge of the receiving court or his or her designee;

(B) The probation officers of the transferring and receiving counties or their designees;

(C) The prosecutor of the transferring county;

(D) The probationer; and

(E) The probationer's last counsel of record (if any).

Upon receipt of notice of a motion for transfer by a party, the probation officer of the transferring county must provide notice to the victim, if any.

(4) Notice of a transfer motion must be given at least 60 days before the date set for hearing on the motion.

(5) Before deciding a transfer motion, the transferring court must confirm that notice was given to the receiving court as required by (1) and (3).

(e) Comment

(1) No later than 10 days before the date set for hearing on the motion, the receiving court may provide comments to the transferring court regarding the proposed transfer.

(2) Any comments provided by the receiving court must be in writing and signed by a judge and must state why transfer is or is not appropriate.

(3) Before deciding a transfer motion, the transferring court must state on the record that it has received and considered any comments provided by the receiving court.

(f) Factors

The transferring court must consider at least the following factors when determining whether transfer is appropriate:

(1) The permanency of the probationer's residence. As used in this subdivision, "residence" means the place where the probationer customarily lives exclusive of employment, school, or other special or temporary purpose. A probationer may have only one residence. The fact that the probationer intends to change residence to the receiving county, without further evidence of how, when, and why this is to be accomplished, is insufficient to transfer probation;

(2) The availability of appropriate programs for the offender, including substance abuse, domestic violence, sex offender, and collaborative court programs;

(3) Restitution orders, including whether transfer would impair the ability of the receiving court to determine a restitution amount or impair the ability of the victim to collect court-ordered restitution; and

(4) Victim issues, including:

(A) The residence and places frequented by the victim, including school and workplace; and

(B) Whether transfer would impair the ability of the court, law enforcement, or the probation officer of the transferring county to properly enforce protective orders.

(g) Transfer

(1) If the transferring court determines that the permanent residence of the probationer is in the county of the receiving court, the transferring court must transfer the case unless it determines that transfer would be inappropriate and states its reasons on the record.

(2) To the extent possible, the transferring court must establish any amount of restitution owed by the probationer before it orders the transfer.

(3) Upon transfer of the case, the receiving court must accept the entire jurisdiction over the case.

(4) The orders for transfer must include an order committing the probationer to the care and custody of the probation officer of the receiving county and an order for reimbursement of reasonable costs for processing the transfer to be paid to the county of the transferring court in accordance with Penal Code section 1203.1b.

(5) The transferring court must transmit any records of payments and the entire court file, except exhibits, to the receiving court within two weeks of the transfer order.

(6) The probation officer of the transferring county must transmit, at a minimum, any court orders, probation reports, case plans, and all records of payments to the probation officer of the receiving county within two weeks of the transfer order.

(7) Upon transfer of the case, the probation officer of the transferring county must notify the probationer of the transfer order. The probationer must report to the probation officer of the receiving county no later than 30 days after transfer unless the transferring court orders the probationer to report sooner.

If the probationer is in custody at the time of transfer, the probationer must report to the probation officer of the receiving county no later than 30 days after being released from custody unless the transferring court orders the probationer to report sooner. Any jail sentence imposed as a condition of probation prior to transfer must be served in the transferring county unless otherwise authorized by law.

Rule 4.530 adopted effective July 1, 2010.

Advisory Committee Comment

Subdivision (g)(5) requires the transferring court to transmit the entire court file, except exhibits, to the court of the receiving county. Before transmitting the court file, transferring courts should consider retaining copies of the court file in the event of an appeal or a writ.

Subdivision (g)(7) clarifies that any jail sentence imposed as a condition of probation before transfer must be served in the transferring county unless otherwise authorized by law. For example, Penal Code section 1208.5 authorizes the boards of supervisors of two or more counties with work furlough programs to enter into agreements to allow work-furlough-eligible persons sentenced to or imprisoned in one county jail to transfer to another county jail.

Chapter 2. Habeas Corpus

Rule 4.550. Habeas corpus application and definitions

(a) Application

This chapter applies to habeas corpus proceedings in the superior court under Penal Code section 1473 et seq. or any other provision of law authorizing relief from unlawful confinement or unlawful conditions of confinement.

(Subd (a) amended effective January 1, 2007.)

(b) Definitions

In this chapter, the following definitions apply:

(1) A "petition for writ of habeas corpus" is the petitioner's initial filing that commences a proceeding.

(2) An "order to show cause" is an order directing the respondent to file a return. The order to show cause is issued if the petitioner has made a prima facie showing that he or she is entitled to relief; it does not grant the relief requested. An order to show cause may also be referred to as "granting the writ."

(3) The "return" is the respondent's statement of reasons that the court should not grant the relief requested by the petitioner.

(4) The "denial" is the petitioner's pleading in response to the return. The denial may be also referred to as the "traverse."

(5) An "evidentiary hearing" is a hearing held by the trial court to resolve contested factual issues.

(6) An "order on writ of habeas corpus" is the court's order granting or denying the relief sought by the petitioner.

(Subd (b) amended effective January 1, 2007.)

Rule 4.550 amended effective January 1, 2007; adopted effective January 1, 2002.

Rule 4.551. Habeas corpus proceedings

(a) Petition; form and court ruling

(1) Except as provided in (2), the petition must be on the *Petition for Writ of Habeas Corpus* (form MC-275).

(2) For good cause, a court may also accept for filing a petition that does not comply with (a)(1). A petition submitted by an attorney need not be on the Judicial Council form. However, a petition that is not on the Judicial Council form must comply with Penal Code section 1474 and must contain the pertinent information specified in the *Petition for Writ of Habeas Corpus* (form MC-275), including the information required regarding other petitions, motions, or applications filed in any court with respect to the conviction, commitment, or issue.

(3)

(A) On filing, the clerk of the court must immediately deliver the petition to the presiding judge or his or her designee. The court must rule on a petition for writ of habeas corpus within 60 days after the petition is filed.

(B) If the court fails to rule on the petition within 60 days of its filing, the petitioner may file a notice and request for ruling.

(i) The petitioner's notice and request for ruling must include a declaration stating the date the petition was filed and the date of the notice and request for ruling, and indicating that the petitioner has not received a ruling on the petition. A copy of the original petition must be attached to the notice and request for ruling.

(ii) If the presiding judge or his or her designee determines that the notice is complete and the court has failed to rule, the presiding judge or his or her designee must assign the petition to a judge and calendar the matter for a decision without appearances within 30 days of the filing of the notice and request for ruling. If the judge assigned by the presiding judge rules on the petition before the date the petition is calendared for decision, the matter may be taken off calendar.

(4) For the purposes of (a)(3), the court rules on the petition by:

(A) Issuing an order to show cause under (c);

(B) Denying the petition for writ of habeas corpus; or

(C) Requesting an informal response to the petition for writ of habeas corpus under (b).

(5) The court must issue an order to show cause or deny the petition within 45 days after receipt of an informal response requested under (b).

(Subd (a) amended effective January 1, 2009; previously amended effective January 1, 2002, January 1, 2004, and January 1, 2007.)

(b) Informal response

(1) Before passing on the petition, the court may request an informal response from:

(A) The respondent or real party in interest; or

(B) The custodian of any record pertaining to the petitioner's case, directing the custodian to produce the record or a certified copy to be filed with the clerk of the court.

(2) A copy of the request must be sent to the petitioner. The informal response, if any, must be served on the petitioner by the party of whom the request is made. The informal response must be in writing and must be served and filed within 15 days. If any informal response is filed, the court must notify the petitioner that he or she may reply to the informal response within 15 days from the date of service of the response on the petitioner. If the informal

response consists of records or copies of records, a copy of every record and document furnished to the court must be furnished to the petitioner.

(3) After receiving an informal response, the court may not deny the petition until the petitioner has filed a timely reply to the informal response or the 15-day period provided for a reply under (b)(2) has expired.

(Subd (b) amended effective January 1, 2007; adopted effective January 1, 2002.)

(c) Order to show cause

(1) The court must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled to relief. In doing so, the court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.

(2) On issuing an order to show cause, the court must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel.

(3) An order to show cause is a determination that the petitioner has made a showing that he or she may be entitled to relief. It does not grant the relief sought in the petition.

(Subd (c) amended effective January 1, 2007; adopted effective January 1, 2002.)

(d) Return

If an order to show cause is issued as provided in (c), the respondent may, within 30 days thereafter, file a return. Any material allegation of the petition not controverted by the return is deemed admitted for purposes of the proceeding. The return must comply with Penal Code section 1480 and must be served on the petitioner.

(Subd (d) amended effective January 1, 2007; repealed and adopted effective January 1, 2002; previously amended effective January 1, 2004.)

(e) Denial

Within 30 days after service and filing of a return, the petitioner may file a denial. Any material allegation of the return not denied is deemed admitted for purposes of the proceeding. Any denial must comply with Penal Code section 1484 and must be served on the respondent.

(Subd (e) amended and relettered effective January 1, 2002; adopted as subd (b) effective January 1, 1982.)

(f) Evidentiary hearing; when required

Within 30 days after the filing of any denial or, if none is filed, after the expiration of the time for filing a denial, the court must either grant or deny the relief sought by the petition or order an evidentiary hearing. An evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact. The petitioner must be produced at the evidentiary hearing unless the court, for good cause, directs otherwise.

(Subd (f) amended and relettered effective January 1, 2002; adopted as subd (c) effective January 1, 1982.)

(g) Reasons for denial of petition

Any order denying a petition for writ of habeas corpus must contain a brief statement of the reasons for the denial. An order only declaring the petition to be "denied" is insufficient.

(Subd (g) amended and relettered effective January 1, 2002; adopted as subd (e) effective January 1, 1982.)

(h) Extending or shortening time

On motion of any party or on the court's own motion, for good cause stated in the order, the court may shorten or extend the time for doing any act under this rule. A copy of the order must be mailed to each party.

(Subd (h) amended and relettered effective January 1, 2002; adopted as subd (f) effective January 1, 1982.)

Rule 4.551 amended effective January 1, 2009; adopted as rule 260 effective January 1, 1982; previously renumbered as rule 4.500 effective January 1, 2001; previously amended and renumbered effective January 1, 2002; previously amended effective January 1, 2004, and January 1, 2007.

Advisory Committee Comment

The court must appoint counsel on the issuance of an order to show cause. (*In re Clark* (1993) 5 Cal.4th 750, 780 and *People v. Shipman* (1965) 62 Cal.2d 226, 231–232.) The Court of Appeal has held that under Penal Code section 987.2, counties bear the expense of appointed counsel in a habeas corpus proceeding challenging the underlying conviction. (*Charlton v. Superior Court* (1979) 93 Cal.App.3d 858, 862.) Penal Code section 987.2 authorizes appointment of the public defender, or private counsel if there is no public defender available, for indigents in criminal proceedings.

Rule 4.552. Habeas corpus jurisdiction

(a) Proper court to hear petition

Except as stated in (b) and (c), the petition must be heard and resolved in the court in which it is filed.

(Subd (a) amended effective January 1, 2007; previously amended effective January 1, 2006.)

(b) Transfer of petition—discretionary

(1) The superior court in which the petition is filed must determine, based on the allegations of the petition, whether the matter should be heard by it or in the superior court of another county.

(2) If the superior court in which the petition is filed determines that the matter may be more properly heard by the superior court of another county, it may nonetheless retain jurisdiction in the matter or, without first determining whether a prima facie case for relief exists, order the matter transferred to the other county. Transfer may be ordered in the following circumstances:

(A) If the petition challenges the terms of a judgment, the matter may be transferred to the county in which judgment was rendered.

(B) If the petition challenges the conditions of an inmate's confinement, it may be transferred to the county in which the petitioner is confined. A change in the institution of confinement that effects a change in the conditions of confinement may constitute good cause to deny the petition.

(3) The transferring court must specify in the order of transfer the reason for the transfer.

(4) If the receiving court determines that the reason for transfer is inapplicable, the receiving court must, within 30 days of receipt of the case, order the case returned to the transferring court. The transferring court must retain and resolve the matter as provided by these rules.

(Subd (b) amended effective January 1, 2006.)

(c) Transfer of petition—mandatory

If the petition challenges the denial of parole or the petitioner's suitability for parole and is filed in a superior court other than the court that rendered the underlying judgment, the court in which the petition is filed must transfer the

petition to the superior court in which the underlying judgment was rendered. The court must transfer the case before determining whether the petition states a prima facie case for relief and specify in the order of transfer the reason for the transfer.

(Subd (c) adopted effective January 1, 2006.)

(d) Single judge must decide petition

A petition for writ of habeas corpus filed in the superior court must be decided by a single judge; it must not be considered by the appellate division of the superior court.

(Subd (d) relettered effective January 1, 2006; adopted as subd (c) effective January 1, 2002.)

Rule 4.552 amended effective January 1, 2007; adopted effective January 1, 2002; previously amended effective January 1, 2006.

Advisory Committee Comment

Subdivision (c). This subdivision is based on the California Supreme Court decision in *In re Roberts* (2005) 36 Cal.4th 575, which provides that petitions for writ of habeas corpus challenging denial or suitability for parole are to be adjudicated in the court that rendered the underlying judgment.

Division 7. Miscellaneous

Rule 4.601. Judicial determination of factual innocence form

(a) Form to be confidential

Any *Certificate of Identity Theft: Judicial Finding of Factual Innocence* (form CR-150) that is filed with the court is confidential. The clerk's office must maintain these forms in a manner that will protect and preserve their confidentiality.

(Subd (a) amended effective January 1, 2007.)

(b) Access to the form

Notwithstanding (a), the court, the identity theft victim, the prosecution, and law enforcement agencies may have access to the *Certificate of Identity Theft: Judicial*

Finding of Factual Innocence (form CR-150). The court may allow access to any other person on a showing of good cause.

(Subd (b) amended effective January 1, 2007.)

Rule 4.601 amended effective January 1, 2007; adopted effective January 1, 2002.

Rule 4.700. Firearm relinquishment procedures for criminal protective orders

(a) Application of rule

This rule applies when a court issues a criminal protective order under Penal Code section 136.2 during a criminal case or as a condition of probation under Penal Code section 1203.097(a)(2) against a defendant charged with a crime of domestic violence as defined in Penal Code section 13700.

(b) Purpose

This rule is intended to:

(1) Assist courts issuing criminal protective orders to determine whether a defendant subject to such an order owns, possesses, or controls any firearms; and

(2) Assist courts that have issued criminal protective orders to determine whether a defendant has complied with the court's order to relinquish or sell the firearms under Code of Civil Procedure section 527.9.

(c) Setting review hearing

(1) At any hearing where the court issues a criminal protective order, the court must consider all credible information, including information provided on behalf of the defendant, to determine if there is good cause to believe that the defendant has a firearm within his or her immediate possession or control.

(2) If the court finds good cause to believe that the defendant has a firearm within his or her immediate possession or control, the court must set a review hearing to ascertain whether the defendant has complied with the requirement to relinquish the firearm as specified in Code of Civil Procedure section 527.9. Unless the defendant is in custody at the time, the review hearing should occur within two court days after issuance of the criminal protective order. If circumstances warrant, the court may extend the review hearing to occur within 5 court days after issuance of the criminal protective order. The court must give the defendant an opportunity to present information at the review hearing to refute the allegation that he or she owns any firearms. If the defendant is in custody at the time the criminal protective order is issued, the

court should order the defendant to appear for a review hearing within two court days after the defendant's release from custody.

(3) If the proceeding is held under Penal Code section 136.2, the court may, under Penal Code section 977(a)(2), order the defendant to personally appear at the review hearing. If the proceeding is held under Penal Code section 1203.097, the court should order the defendant to personally appear.

(d) Review hearing

(1) If the court has issued a criminal protective order under Penal Code section 136.2, at the review hearing:

(A) If the court finds that the defendant has a firearm in or subject to his or her immediate possession or control, the court must consider whether bail, as set, or defendant's release on own recognizance is appropriate.

(B) If the defendant does not appear at the hearing and the court orders that bail be revoked, the court should issue a bench warrant.

(2) If the criminal protective order is issued as a condition of probation under Penal Code section 1203.097, and the court finds at the review hearing that the defendant has a firearm in or subject to his or her immediate possession or control, the court must proceed under Penal Code section 1203.097(a)(12).

(3) In any review hearing to determine whether a defendant has complied with the requirement to relinquish firearms as specified in Code of Civil Procedure section 527.9, the burden of proof is on the prosecution.

Rule 4.700 adopted effective July 1, 2010.

Advisory Committee Comment

When issuing a criminal protective order under Penal Code section 136.2 or 1203.097(a)(2), the court is required to order a defendant "to relinquish any firearm in that person's immediate possession or control, or subject to that person's immediate possession or control . . . ." (Code Civ. Proc., § 527.9(b).) Mandatory Judicial Council form CR-160, *Criminal Protective Order—Domestic Violence*, includes a mandatory order in bold type that the defendant "must surrender to local law enforcement or sell to a licensed gun dealer any firearm owned or subject to his or her immediate possession or control within 24 hours after service of this order and must file a receipt with the court showing compliance with this order within 48 hours of receiving this order."

Courts are encouraged to develop local procedures to calendar review hearings for defendants in custody beyond the two-court-day time frame to file proof of firearms relinquishment with the court under Code of Civil Procedure section 527.9.