JUDICIAL COUNCIL OF CALIFORNIA

UNIFORM DETERMINATE SENTENCING ACT OF 1976

(Statutes of 1976, Chapter 1139)

Report and Recommendation

concerning

Proposed Sentencing Rules

and

Recommended Reporting System

Prepared by the

Sentencing Practices Advisory Committee

(Report approved and rules tentatively adopted by the Judicial Council on January 21, 1977)

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San Francisco

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Western Regional Office
National Center for State Courts

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PART I

Sentencing Rules

PREFACE

I. Background of the sentencing rules

On July 1, 1977, the sentencing of felons committed to prison in California will change radically. Since July 27, 1917, prison commitments have been for the indeterminate "term prescribed by law," with the actual term being set some time after sentencing by an agency within the executive branch. Originally it was set by the prison authorities, and more recently by the Adult Authority or the Women's Board of Terms and Parole.[1] Generally, a state prison inmate could be released on parole after serving the minimum term prescribed by law (if less than one year) or one-third of the minimum term (if the minimum term exceeded one year),[2] but could be kept in actual prison custody for the maximum term which, for numerous offenses, was life.[3] There has been growing dissatisfaction with the uncertainty as to actual term under the indeterminate sentencing law. In addition, there was a lack of confidence in its basic premise--that the optimum level of rehabilitation during a prisoner's term could be identified and a release date given at that time. The result is the Uniform Determinate Sentencing Act of 1976.[4]

Under the new law, all felonies except life and death sentence offenses[5] will carry possible prison sentences of one of three possible terms: for example, 16 months, 2 or 3 years; 2, 3 or 4 years; 3, 4 or 5 years; 5, 6 or 7 years. A sentence to prison must specify which of the three possible terms is being imposed. The middle term must be imposed unless the court has found circumstances in aggravation or mitigation after a hearing on a motion made by the

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1/ Pen. Code § 1168 added by Stats. 1917, Ch. 527.

2/ Pen. Code § 3049.

3/ For further details on the system in effect to July 1, 1977, see, for example, M. Oppenheim, Computing a Determinate Sentence, 51 Cal. State Bar J. 605 (1976). Cf., In re Rodriquez (1975) 14 Cal.3d 639.

4/ Stats. 1976, Ch. 1139.

5/ And a few other offenses apparently overlooked by inadvertence, but expected to be brought into conformity by a cleanup bill.

prosecution or defense. In addition to the upper, middle or lower term for the offense, called the "base term," the new law prescribes certain additional terms of imprisonment, called "enhancements," if specified facts were charged in the indictment or information and are found to be true. The facts giving rise to enhancements include service of a prior prison term (§ 667.5), having been armed with a deadly weapon (§ 12022), using a firearm (§ 12022.5), taking or damaging property of great value (§ 12022.6) and committing great bodily injury (§ 12022.7). Imposition of the additional prison terms for enhancements is mandatory unless the court finds mitigating circumstances and strikes the additional punishment.

The new law does not affect the sentencing judge's discretion to determine whether sentences on multiple convictions should run concurrently or consecutively. If he orders them to be served consecutively, however, the effect in most instances will be to enhance the base term (plus enhancements) for the most serious offense by a period of time equal to one-third of the middle term for the other offenses, rather than to add up the statutory terms for each offense considered independently.

The new law makes no change in the trial court's discretionary authority to grant probation or to make another disposition of the case, such as imposing a fine or a jail term when authorized by the substantive portion of the Penal Code.

The new law governs dispositions imposing a prison sentence. In those cases, it requires the sentencing judge to determine the term precisely, after exercising the limited discretion granted him in that regard. The judge is to be guided in the exercise of that discretion by Judicial Council rules, as provided under new Penal Code Section 1170.3 which reads:

> The Judicial Council shall seek to promote uniformity in sentencing under Section 1170, by the adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing regarding the court's decision to:
>
> (a) Grant or deny probation.
> (b) Impose the lower or upper prison term.
> (c) Impose concurrent or consecutive sentences.
> (d) Consider an additional sentence for prior prison terms.
> (e) Impose an additional sentence for being armed with a deadly weapon, using a firearm, an excessive taking or damage, or the infliction of great bodily injury.

The rules which accompany this report have been tentatively adopted by the Judicial Council in compliance with this statutory mandate. They will also furnish procedural rules covering situations that will arise for the first time under the Uniform Determinate Sentencing Act of 1976.

II. Drafting approach to the sentencing rules

A general statement of the approach taken in drafting the sentencing rules follows.

A. Prohibitions and requirements imposed by law not generally restated

In general, the sentencing rules do not restate clear mandatory requirements or prohibitions imposed on the sentencing judge by statutory or case law. For example, various sections of the Penal Code prohibit the granting of probation under specified circumstances. In such cases the sentencing judge has no power to grant probation but the rules do not restate the prohibition. Statutory cross-references are, however, provided in the comments for informational purposes.

This drafting approach has been taken to minimize the length of the rules and to avoid the necessity of frequent amendments to the rules to conform to changes in the substantive law.

Where the law is unclear, however, the sentencing rules may rephrase it. Such restatements are intended to serve as helpful interpretations of the new statute.

B. The role of the sentencing rules

Under Penal Code Section 1170.3, "The Judicial Council shall seek to promote uniformity in sentencing under Section 1170, by adoption of rules providing criteria for the consideration of the trial judge at the time of sentencing regarding the court's decision . . . ."

Although Section 1170(a)(2) states that "in sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council," Section 1170.3 makes it clear that the criteria in the rules are only for the consideration of the trial judge at the time of sentencing.

The proposed rules are based on the proposition that the criteria enumerated in the sentencing rules are not exclusive (Rule 408), and that other reasonable criteria may be applied. Each listing of criteria therefore uses a phrase

such as "include" so as to denote the nonexclusive nature of the list.

The relative significance of various criteria will vary from case to case. The sentencing judge, not the rules, determines which criteria apply and their relative weight in a given case.

C. Uniformity of sentences under Section 1170(a)(1)

Penal Code Section 1170(a)(1) contains the legislative findings and conclusions which underlie the Uniform Determinate Sentencing Act.

1. The first sentence is, "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." (Emphasis added.) This declaration is consistent with the conclusions of many that prison is not a useful rehabilitative tool. The essentially punitive nature of imprisonment has been recognized judicially in such cases as In re Lynch (1972) 8 Cal.3d 410, and In re Gault (1967) 387 U.S. 1.

The legislative choice of language is particularly significant since it does not say that the purpose of all sentencing is punishment. By preserving all existing law with respect to probation and the infliction of less severe sentences than imprisonment, the Legislature has left open a wide range of dispositions.

2. The second sentence of Section 1170(a)(1) reads, "This purpose [imprisonment as punishment] is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances." (Emphasis added.) Thus, the policy of the Act applies only when punitive imprisonment is to be imposed because the express reference is to "terms," that is, terms of imprisonment, proportionate to the seriousness of the offense.

Again, the express preservation of existing law concerning probation and other nonimprisonment dispositions reinforces the conclusion that the policy statement in question is applicable only after the disposition of imprisonment has been reached.

3. This view of the policy considerations is further reinforced by the final sentence of the paragraph, which reads, "The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute . . . to be imposed by the trial

court with specified discretion." (Emphasis added.) This sentence leaves no doubt that all of Section 1170(a)(1) is intended as an explanation of the Legislature's action in fixing the permissible prison term for all but a few felonies within a narrow range not exceeding two years' difference between the lowest and the highest permissible term.

4. Section 1170.3 also expresses a general goal of uniformity in the grant or denial of probation; the goal is to be implemented by the trial judge's consideration of the criteria set forth in the rules when exercising the discretion granted under Section 1203.

5. Although uniformity is undoubtedly desirable as to other dispositions, no statutory direction is given for the adoption or consideration of criteria concerning conditions of probation, or the imposition of fines or jail time in lieu of either probation or prison sentences. Therefore the rules do not address these matters.

Similarly, there is no statutory direction to adopt criteria for commitments to the Youth Authority, the Rehabilitation Center, or as a mentally disordered sex offender, and no rules are proposed for those possibilities.

III. Summary of major provisions

Definitions (Rule 405)

Several key words and phrases are defined in this rule, and reference to the definitions should be made before attempting to use the rules. Definitions follow the statutory language to which the rules apply.

A. Rules providing criteria

Criteria affecting probation, aggravation, mitigation

The lists of recommended criteria for consideration in deciding whether to grant or to deny probation (Rule 414) and whether there are circumstances in aggravation (Rule 421) or in mitigation (Rule 423) each include facts concerning the crime and the circumstances of its commission, and facts concerning the defendant and his personal history and background. Consideration of this broad range of facts is mandated, as to the probation decision, by Penal Code Section 1203. The same range of considerations applies, under the new sentencing law, to determining the existence of circumstances in aggravation or in mitigation.

Under the Uniform Determinate Sentencing Act, circumstances in mitigation may, if alleged in a motion and

found to be true, justify the imposition of the lower term of three possible terms. Circumstances in mitigation may also justify the sentencing judge in striking the additional term of imprisonment otherwise applicable under an enhancement charged and found. For either purpose, proposed Rule 423 contains the criteria recommended for consideration in deciding whether there are circumstances in mitigation.

Criteria affecting concurrent or consecutive sentences (Rule 425)

In the absence of circumstances indicating that consecutive sentences should be imposed, it is assumed that the sentences will be concurrent. This rule therefore addresses only criteria for the imposition of consecutive sentences.

B. Procedural rules

Matters considered at time set for sentencing (Rule 433)

This rule summarizes, in their logical sequence, the matters required to be considered at the time set for sentencing; makes it clear that all sentencing matters are to be heard and determined at a single hearing, if possible; and requires decisions to be made on whether circumstances justify imposition of the upper or lower term, striking the additional term for enhancements, or imposing consecutive terms, even when probation is to be granted.

Sentencing upon revocation of probation (Rule 435)

This rule makes the factual determinations of the sentencing judge at the time of granting probation binding on the court at the time probation is revoked. If imposition of sentence was originally suspended, however, the result will be to limit the sentence choices upon revocation, but not necessarily to dictate the exact sentence.

Hearings on motions in aggravation and mitigation (Rules 437, 439)

These rules establish the procedure for making, hearing and determining motions in aggravation or mitigation. Because the sentencing law permits a motion to be filed as late as the time set for sentencing, a party intending to rely on new evidence is required to give notice thereof in order to avoid surprise, unfair advantage, or the necessity for continuances. The evidence heard at the trial, if any, and probation reports are expected to be relied on routinely and offer no risk of surprise. There is no requirement, therefore, that notice be given of intention to rely on them.

C. Appellate Procedure (Rule 33(b)

The Uniform Determinate Sentencing Act has no express provision concerning appellate review of sentences. Apparently, however, discretionary sentencing decisions will be subject to appellate review, based on the statutory requirements of reasons for the most significant sentencing decisions, and the requirement of factual findings on motions in aggravation or mitigation.

When a direct appeal is available, Penal Code Section 1260 gives the reviewing court power to "reduce . . . the punishment imposed . . . ." Thus, a direct appeal could properly raise the validity of sentence, and the reviewing court has jurisdiction to act upon any error it finds in sentencing.

It would appear that a direct appeal is statutorily available to review alleged errors in sentencing, whether conviction was had after trial or on a plea of guilty. Penal Code Section 1237 grants a right of appeal to criminal defendants generally. Section 1237.5 sharply limits the right of appeal when conviction was on a plea of guilty or nolo contendere; but its limitations have been held not to apply to appeals which do not question the validity of the conviction, and raise only alleged errors in the sentencing proceedings. People v. Ward (1967) 66 Cal.2d 571. Rule 31(d) of the California Rules of Court provides the procedure to be followed in these cases.

The use of an extraordinary writ, such as habeas corpus, would thus appear not to be available to raise issues as to sentence since appeal is an available and adequate remedy. See generally Witkin, California Criminal Procedures Section 796; In re Brown (1973) 9 Cal.3d 679.

The only modification in the appellate rules needed to accommodate the expected appeals under the new sentencing law is to provide that either party may request the inclusion of the report of the probation officer in the clerk's transcript. Since proceedings at the time of sentencing are already a part of the normal reporter's transcript (Rule 33(a)(2)), this addition will insure a complete record of the evidence which was before the sentencing judge.

The scope of the review is not defined by these rules.

A new Division I-A of Title Two would be added to the California Rules of Court, to read as follows:

TITLE TWO. PRETRIAL AND TRIAL RULES

DIVISION I-A. SENTENCING RULES FOR THE SUPERIOR COURTS

CHAPTER I. GENERAL PROVISIONS

Rule 401. Authority
Rule 402. (Reserved)
Rule 403. Applicability
Rule 404. (Reserved)
Rule 405. Definitions
Rule 406. (Reserved)
Rule 407. Rules of construction
Rule 408. Criteria not exclusive; sequence not significant
Rule 409. (Reserved)

CHAPTER II. PROVISIONS APPLICABLE TO ALL SENTENCING DECISIONS

Rule 410. General objectives in sentencing
Rule 411. (Reserved)
Rule 412. (Reserved)
Rule 413. (Reserved)

CHAPTER III. PROBATION

Rule 414. Criteria affecting probation
Rule 415. (Reserved)
Rule 416. Criteria affecting probation in unusual cases
Rule 417. (Reserved)
Rule 418. Presentence investigations and reports
Rule 419. (Reserved)
Rule 420. (Reserved)

CHAPTER IV. AGGRAVATION, MITIGATION AND ENHANCEMENT

Rule 421. Circumstances in aggravation
Rule 422. (Reserved)
Rule 423. Circumstances in mitigation
Rule 424. (Reserved)
Rule 425. Criteria affecting concurrent or consecutive sentences
Rule 426. (Reserved)
Rule 427. (Reserved)
Rule 428. (Reserved)
Rule 429. (Reserved)
Rule 430. (Reserved)

CHAPTER V. PROCEDURAL PROVISIONS

Rule 431. Proceedings at sentencing to be reported
Rule 432. (Reserved)
Rule 433. Matters to be considered at time set for sentencing
Rule 434. (Reserved)
Rule 435. Sentencing upon revocation of probation
Rule 436. (Reserved)
Rule 437. Procedure on motions in aggravation and mitigation
Rule 438. (Reserved)
Rule 439. Hearings on motions in aggravation and mitigation: evidence and findings
Rule 440. (Reserved)
Rule 441. Dual use of facts; prohibited use of facts
Rule 442. (Reserved)
Rule 443. Reasons by sentencing judge
Rule 444. (Reserved)
Rule 445. Procedure in striking or not ordering enhancements
Rule 446. (Reserved)
Rule 447. Limitations on enhancements

TITLE TWO. PRETRIAL AND TRIAL RULES

DIVISION I-A. SENTENCING RULES FOR THE SUPERIOR COURTS

Rule 401. Authority

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

Rule 403. Applicability

These rules apply to criminal cases in superior courts in which the defendant is convicted of one or more offenses punishable as a felony by a determinate sentence imposed pursuant to Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 of the Penal Code.

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 new Section 1168.

Rule 405. Definitions

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

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

(b) "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.

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

(d) "Aggravation" or "circumstances in aggravation" means facts which justify the imposition of the upper prison term referred to in Section 1170(b).

(e) "Mitigation" or "circumstances in mitigation" means facts which justify the imposition of the lower prison term referred to in Section 1170(b) or facts which justify the court in striking or specifically not ordering, pursuant to Sections 1170(a)(2) and 1170.1a(c), any additional term of imprisonment as an enhancement under Section 667.5, 12022, 12022.5, 12022.6 or 12022.7.

(f) "Sentence choice" means the selection of any disposition of the case which does not amount to a dismissal, acquittal, or grant of a new trial. It includes the granting of probation and the suspension of imposition or execution of a sentence.

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

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

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

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

Advisory Committee Comment:

"Base term" is used in Section 1170.1a(f) to describe the term of imprisonment selected under Section 1170(b) from the three possible terms.

"Enhancement." The facts giving rise to an enhancement, the requirements for pleading and proving those facts, and the court's authority to strike or specifically not order the additional term are prescribed by statutes. See Sections 667.5 (prior prison terms), 1170.1a (consecutive prison terms), 12022 (being armed with a deadly weapon), 12022.5 (using a firearm), 12022.6 (excessive taking or damage), 12022.7 (great bodily injury), and 1170.1a(c) (pleading and proof, authority to strike the additional punishment).

Enhancement is also referred to as "additional punishment" (e.g., §§ 667.5(a) and 12022), "additional period of imprisonment" (e.g., §§ 12022 and 12022.5), "additional term (e.g., § 667.5(b)), "additional penalties" (e.g., § 667.5(d)) and "additional term of imprisonment" (e.g., § 12022.6(b)).

"Sentence choice." Section 1170.1 requires the judge to state reasons for his sentence choice. This general requirement must allude to all possible dispositions since the act specifically requires reasons for decisions as to length of prison sentences in other sections. (See, for example, §§ 1170(b), 1170.1a(c), 12022.)

"Imprisonment" is distinguished from confinement in other types of facilities.

"Charged" and "found." Statutes require that the facts giving rise to most enhancements be charged and found. See the comment to the definition of "enhancement." But the enhancement arising from consecutive sentences results from the sentencing judge's decision to impose them, and not from a charge or finding.

Rule 407. Rules of construction

As used in these rules:

(a) "Shall" is mandatory, "should" is advisory, "may" is permissive.

(b) The past, present, and future tenses include the others.

(c) The masculine gender includes the feminine gender; the singular includes the plural.

Advisory Committee Comment:

The advisory "should" is used for criteria adopted under the authority of Section 1170.3, which limits the Judicial Council's authority to adopting "rules providing criteria for the consideration of the trial judge." (Cf. Standards of Judicial Administration Recommended by the Judicial Council.) Compare the mandatory language used in rules of court administration, practice and procedure.

The fact that other sections of the act state that judges "shall apply" the rules (e.g., §§ 1170(a)(2) and 1170.1a(c) does not alter their purpose as rules intended for consideration by the sentencing judge.

Rule 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 other criteria reasonably related to the decision being made.

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

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 410. General objectives in sentencing

The sentencing judge should consider the various objectives of sentencing, including:

(a) Protecting society.

(b) Punishing the defendant.

(c) Encouraging the defendant to lead a law abiding life in the future and deterring him from future offenses.

(d) Deterring others from criminal conduct by demonstrating its consequences.

(e) Preventing the defendant from committing new crimes by isolating him for the period of incarceration.

(f) Securing restitution for the victims of crime.

(g) Achieving uniformity in sentencing.

Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge should determine 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.

Advisory Committee Comment:

Statutory expressions of policy include:

Welfare and Institutions Code Section 1820 et seq., which provides a subsidy to counties based on their reduction in prison commitments;

Section 1203(a) 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.

Rule 414. Criteria affecting probation

In deciding whether or not to grant probation the sentencing judge should consider:

(a) Statutory provisions authorizing, limiting or prohibiting the grant of probation.

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

(c) Facts relating to the crime, including:

(1) The nature, seriousness and circumstances of the crime.

(2) The vulnerability of the victim and the degree of harm or loss to the victim.

(3) Whether the defendant was armed with or used a weapon.

(4) Whether the defendant inflicted bodily injury.

(5) Whether the defendant planned the commission of the crime, whether he instigated it or was solicited by others to participate, and whether he was an active or passive participant.

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

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

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

(d) Facts relating to the defendant, including:

(1) Prior record of criminal conduct, including the recency and frequency of prior crimes, age at which first convicted as an adult or adjudicated to have committed a crime as a juvenile, age at which first confined for prior crimes, and whether the 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 and ability to comply with the terms of probation.

(4) Age, education, health, mental faculties, and family background and ties.

(5) Employment history, military service history, and financial condition.

(6) Addiction or danger of addiction to alcohol, narcotics or dangerous drugs.

(7) The likely effect of imprisonment on the defendant and his dependents.

(8) The possible effects on the defendant's life of a felony record.

(9) Whether the defendant is remorseful.

(10) Cooperation by the defendant with the police or prosecutor.

(11) Whether a financially able defendant has made restitution to the victim.

Advisory Committee Comment:

The sentencing judge's discretion to grant probation is unaffected by the Uniform Determinate Sentencing Act (§ 1170(a)(2)).

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.

"Cooperation" means the defendant's assistance in apprehending or prosecuting other criminals, and not his willingness or reluctance to admit his own guilt. The defendant's cooperation may be considered, particularly where it results in the prosecution of more serious criminals. For the protection of the defendant, this ground for decision should probably not be stated in open court or on the record.

Rule 416. Criteria affecting probation in unusual cases

When the granting of probation is prohibited by statute except in unusual cases where the interests of justice would best be served by granting probation, the court should consider all circumstances surrounding the crime and the defendant in determining whether unusual circumstances exist. The following facts may indicate the existence of unusual circumstances.

(a) If the defendant was armed with a deadly weapon at the time of the perpetration of the crime or of arrest, the fact that the crime was committed without advance planning or under circumstances of great provocation, and the defendant has no recent record of committing crimes of violence.

(b) If the defendant inflicted great bodily injury or used or attempted to use a deadly weapon in the perpetration of the crime, the fact that the crime was committed without advance planning or under circumstances of great provocation and the defendant has no recent record of committing crimes of violence.

(c) If the defendant has suffered one or more previous felony convictions, the fact that the last felony conviction and release from incarceration occurred a substantial time prior to the current crime, and during the interim the defendant led a life free from serious violation of the law.

(d) The fact that the defendant participated in the crime under circumstances of coercion or duress not amounting to a defense.

(e) The fact that the crime was committed because of psychological problems not amounting to a defense, that psychological or psychiatric treatment will be required as a condition of probation, and that the court is convinced that the treatment has a high likelihood of being successful and that the defendant will not be a danger to others.

(f) The fact that the defendant is youthful or aged, and has no significant record of prior criminal offenses.

(g) The fact that the defendant or a member of his immediate family is in extremely poor health and imprisonment of the defendant would be likely to seriously worsen that health problem.

Advisory Committee Comment:

Section 1203(d) specifies situations in which probation shall not be granted except in unusual cases where the interests of justice would best be served if the person is granted probation.

Subdivision (a) of this rule corresponds to Section 1203(d)(1), which limits the grant of probation if the defendant was armed with a deadly weapon other than a firearm either at the time of perpetration of enumerated crimes or at the time of arrest.

Subdivision (b) of the rule corresponds to Section 1203(d)(2), which applies to the use or attempted use of a deadly weapon other than a firearm in the perpetration of the current offense, and to 1203(d)(3), which applies to the willful infliction of great bodily injury or torture in the perpetration of the crime.

Subdivision (c) corresponds to Sections 1203(d)(4), 1203(d)(5) and 1203(d)(6), all of which limit the grant of probation to persons with specified prior records.

Probation should be considered in these cases only if it is indicated upon evaluation of the generally applicable criteria (Rule 414) and the case is determined to be "unusual" within the meaning of Section 1203(d).

Rule 418. Presentence investigations and reports

Regardless of the defendant's eligibility for probation, the sentencing judge should refer the matter to the probation officer for a presentence investigation and report.

Advisory Committee Comment:

Section 1203 requires a presentence report in every felony case in which the defendant is eligible for probation; but the defendant sometimes waives this requirement. This recommendation is intended to discourage acceptance of waivers, in order to assure a complete and timely investigation.

Under Sections 1203.06, 1203.07, and 1203.11 (added Stats. 1976, Ch. 1135), 12311, and Health and Safety Code Section 11370 the defendant may be wholly ineligible for probation, but a presentence investigation report would be of assistance to the judge in deciding motions in aggravation and mitigation and in determining whether a punishment added as an enhancement should be stricken.

Rule 421. Circumstances in aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, including the fact 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, whether or not charged or chargeable as an enhancement under Section 12022.7.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime, whether or not charged or chargeable as an enhancement under Section 12022 or 12022.5.

(3) The victim was particularly vulnerable.

(4) The crime involved multiple victims.

(5) 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.

(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 concurrent sentences arebeing imposed.

(8) The planning, sophistication or professionalism with which the crime was carried out, or other facts, indicated premeditation.

(9) The defendant used or involved minors in the commission of the crime.

(10) The crime involved a taking or damage of great monetary value, whether or not charged or chargeable as an enhancement under Section 12022.6.

(11) The crime involved a large quantity of contraband.

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

(b) Facts relating to the defendant, including the fact that:

(1) He has engaged in a pattern of violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or adjudications of commission of crimes as a juvenile are numerous or of increasing seriousness.

(3) The defendant has served prior prison terms whether or not charged or chargeable as an enhancement under Section 667.5.

(4) The defendant is dangerous to others because of mental abnormality.

(5) The defendant was on probation or parole when he committed the crime.

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

(7) The defendant personally admits, in open court at the time of sentencing, commission of additional crimes not charged or for which charges have been dropped, if the prosecutor has represented in the motion in aggravation that no charges will be filed against the defendant for the admitted crimes and the sentencing judge has determined that a factual basis for the admission exists.

Advisory Committee Comment:

Circumstances in aggravation may justify imposition of the upper of three possible prison terms. Section 1170(b).

This list of circumstances in aggravation includes some facts which, if charged and found, may be used to enhance the sentence. The rule does not deal with the use of the facts; the statutory prohibition against dual use is incorporated in Rule 441.

Conversely, bodily harm, being armed with or using a weapon, and great value may be circumstances in aggravation even if not meeting the definitions for enhancements in Sections 12022, 12022.5, 12022.6 or 12022.7.

Facts concerning the defendant's prior record and personal history are among those which may be considered. Section 1170(b) makes it clear that circumstances extrinsic to commission of the crime, such as prior record and simultaneous convictions of other offenses, may be considered in aggravation.

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.

Referring to specific criteria:

Under (b)(7), the defendant could clear his record by accepting an additional year's punishment for uncharged offenses.

Rule 423. Circumstances in mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

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

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

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

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

(5) A 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 he had a claim or right to the property taken, or for other reasons mistakenly believed his conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his family or himself.

(b) Facts relating to the defendant, including the fact that:

(1) He has no prior record or 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 his culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to 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.

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

(7) The defendant cooperated with the police or prosecution.

Advisory Committee Comment:

See comment to Rule 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 or specifically not ordering the additional punishment provided as 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 intentional infliction of great bodily injury under Section 12022.7. In any case, only the facts actually present may be considered for their possible effect in mitigation.

Since only the fact of restitution is considered relevant to mitigation, no reference to the defendant's financial ability is needed. Cf., Rule 414(d)(11). The omission of a comparable factor from Rule 421 as a circumstance in aggravation is deliberate.

Concerning "cooperation," see the comment to Rule 414.

Rule 425. Criteria affecting concurrent or consecutive sentences

Facts indicating that consecutive sentences should be imposed include the fact that:

(a) Any of the crimes involved great violence, great bodily harm, extreme cruelty, viciousness or callousness.

(b) Other circumstances in aggravation attended the commission of any of the crimes.

(c) The defendant has engaged in a pattern of violent conduct which indicates a serious danger to society.

(d) The defendant is dangerous to others because of mental abnormality.

(e) The crimes and their objectives were predominantly independent of each other.

(f) The crimes involved separate acts of violence or threats of violence.

(g) The defendant's prior convictions as an adult or adjudications of commission of crimes as a juvenile are numerous or of increasing seriousness.

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

(i) Any of the crimes involved multiple victims.

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

(k) The defendant was on probation or parole for a crime of similar or greater severity.

Advisory Committee Comment:

Section 669, unaffected by the new sentencing law and expressly referred to therein (§ 1170.1a(a)), provides that, unless otherwise expressly ordered, sentences on multiple convictions run concurrently. This rule therefore assumes that in the absence of circumstances indicating that consecutive sentences should be imposed, the sentences will run concurrently.

Section 654 generally proscribes imposing double punishment for one course of conduct. The possibility of imposing consecutive sentences may be addressed only after a sentencing judge has determined that a sentence on each of the convictions would be legal.

Rule 431. Proceedings at sentencing to be reported

(a) All proceedings at the time of sentencing shall be reported.

(b) Even though not required by statute or rule, the sentencing judge should order that a reporter's transcript of his pronouncement of sentence choice, statement of reasons, and any factual findings be prepared forthwith, certified by the reporter and filed with the clerk.

Advisory Committee Comment:

Reporters' transcripts of the sentencing proceedings are required on appeal (Rule 33(a)(2)), and when the defendant is sentenced to prison (§ 1203.01). In other cases the proceedings should be transcribed to assure later availability of the transcript for probation revocation proceedings or other purposes.

Rule 433. Matters to be considered at time set for sentencing

(a) In every case, at the time set for sentencing pursuant to Section 1191, the sentencing judge shall hold a hearing at which the judge shall:

(1) Hear and determine any matters raised by the defendant pursuant to Section 1201.

(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.

(b) In addition, if the imposition of sentence is to be suspended during a period of probation, the sentencing judge shall:

(1) Hear and make factual findings on any motion pursuant to Section 1170(b) in aggravation or mitigation, and determine whether the circumstances justify the imposition of the upper or lower term.

(2) Determine whether the circumstances justify striking or specifically not ordering any additional term of imprisonment provided for an enhancement charged and found.

(3) Determine whether the circumstances justify the imposition of consecutive sentences, if the defendant has been convicted of multiple crimes.

(c) In addition, 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 shall:

(1) Hear and make factual findings on any motion pursuant to Section 1170(b) in aggravation or mitigation, and determine whether to impose the upper, middle or lower term.

(2) Determine whether any additional term of imprisonment provided for an enhancement charged and found shall be stricken or specifically not ordered.

(3) Determine whether the sentences shall 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 441 and 447.

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

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

Advisory Committee Comment:

This rule summarizes the questions which 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 for probation, unless the defendant is ineligible pursuant to Sections 1203.06, 1203.07, 1203.11, 12311 or Health and Safety Code Section 11370.

Under subdivision (b), even though imposition of sentence is to be suspended, the sentencing judge shall make the same determinations as though judgment were to be pronounced with respect to (1) motions in aggravation or mitigation, (2) the striking of additional terms for enhancements, and (3) the imposition of consecutive or concurrent terms. It is important that the sentencing judge make a record of his findings and determinations on these matters so that there will be a complete record available in the event of revocation of probation. Because judgment is not being pronounced, however, the judge need not determine whether the sentence would exceed a statutory limitation if sentence were imposed on all the enhancements; and the judge need not be concerned with the possibility that the same fact has been considered both for aggravation and for the finding of an enhancement, or for more than one enhancement.

The fact is not "used" and sentence is not "imposed" in a situation described by subdivision (b). The statutory limitations on dual use of facts and on the additional terms for enhancements, as elaborated in Rules 441 and 447, need only be considered at the time sentence is pronounced under subdivision (c) of this rule or under Rule 435.

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 435. Sentencing upon revocation of probation

Upon revocation and termination of probation pursuant to Section 1203.2, when the sentencing judge determines that the defendant shall be committed to prison:

(a) If the imposition of sentence was previously suspended, the judge shall impose judgment and sentence after considering the determinations of the initial sentencing judge at the time probation was granted, as follows:

(1) If it was initially determined that the circumstances justified the imposition of the upper or lower term, the judge shall select that term or the middle term.

(2) The additional terms of imprisonment provided for enhancements charged and found shall be imposed unless it was initially determined that the circumstances justified striking or specifically not ordering an enhancement.

(3) The sentences on multiple convictions shall be concurrent unless it was initially determined that the circumstances justified the imposition of consecutive sentences or unless consecutive sentences are required by law.

(4) The judge shall determine any issues raised by statutory prohibitions on the dual use of facts and statutory limitations on enhancements, as required in Rules 441 and 447.

(b) If the execution of sentence was previously suspended, the judge shall order that the judgment previously pronounced be in full force and effect and that the defendant be committed to the custody of the Director of Corrections for the term prescribed in that judgment.

Advisory Committee Comment:

Under subdivision (a), when imposition of sentence was previously suspended, the judge imposing a prison sentence upon revocation of probation is required to consider the determinations of the original sentencing judge. The judge may be bound by those determinations or may have some flexibility in imposing the actual prison sentence, depending on those initial determinations.

Under subdivision (b), when execution of sentence was previously suspended, the determination to impose a prison sentence is accomplished by ordering the previous judgment into effect.

In either event, the judge imposing a prison sentence upon revocation of probation will have the power granted by Section 1170(c) to recall the commitment on his own motion, should he choose to do so; the 120-day period runs from the date of commitment, and not from the date judgment may have been pronounced with execution suspended.

Rule 437. Procedure on motions in aggravation and mitigation

(a) The upper or lower prison term referred to in Section 1170(b) shall be imposed only pursuant to the motion of a party made before or at the time set for sentencing pursuant to Section 1191 and conforming to the requirements of Section 1170(b) and these rules.

(b) Circumstances relied on in aggravation or mitigation shall be alleged with particularity in the motion.

(c) A moving party who intends to rely on evidence in aggravation or mitigation, other than the probation officer's report and any evidence heard at the trial, shall serve and file not less than five days prior to the time set for sentencing a notice generally setting forth the facts to be presented, unless in the interests of justice a shorter period is permitted by the sentencing judge. The notice shall include a description of any documents, and the names and expected substance of the testimony of any witnesses. No evidence in aggravation or mitigation other than the probation officer's report or that described in the notice may be introduced by the moving party except as permitted by the sentencing judge in the interests of justice.

(d) A party who has not moved in aggravation or mitigation may introduce evidence of circumstances in aggravation or mitigation for the limited purpose of establishing that the moving party's motion should not be granted.

(e) In the interests of justice and on such terms as are just the sentencing judge may permit an amendment of the motion in aggravation or mitigation to conform to the proof. The amendment may be made on the sentencing judge's own motion or on the motion of either party.

Advisory Committee Comment:

Under Section 1170(b) the court has no power to impose the upper or lower prison term on its own motion.

This follows from the statutory language, which requires that the alleged circumstances in aggravation or mitigation be set forth in a motion on which the court then holds a hearing. A motion is "an application for a rule or order . . . to a Court or Judge." People v. Ah Sam (1871) 41 Cal. 645, 650; "an application . . . by a party to an action . . . for some kind of relief," Black's Law Dictionary (3d ed. rev.). A court's power to act "on its own motion" is actually the power to act in the absence of a motion. When such authority is intended, it is given expressly by statute. See, for example, Section 1170(c) (giving the court the authority to recall a sentence and commitment on its own motion); Section 1203.2(b) (authorizing the court to modify, revoke or terminate probation).

It would be inconsistent with the statute, and incongruous, for the sentencing judge to initiate the hearing by asserting allegations on which he would be required to make factual findings.

In most cases, aggravation or mitigation will be decided on the basis of the probation officer's report and the trial evidence, if any. Should a party plan to adduce other evidence, the notice requirement will avoid surprise and help insure that the time limit on pronouncing sentence is met.

A nonmoving party may oppose the motion by rebutting the moving party's factual contentions, or by evidence of other facts which outweigh the facts relied upon by the moving party.

Rule 439. Hearings on motions in aggravation and mitigation: evidence and findings

(a) At hearings on motions in aggravation and mitigation, evidence heard at the trial may be considered, and evidence may be introduced as permitted by Sections 1203, 1204, and by the Evidence Code.

(b) The moving party has the burden of proof by a preponderance of the evidence.

(c) Factual findings required by Section 1170(b) shall be concise and shall be made orally on the record. They shall state the court's determinations as to the truth of the circumstances alleged in the motion and upon which the court relied in ruling on the motion.

(d) A finding that some or all of the alleged circumstances in aggravation are true does not require that the upper term be imposed, and a finding that some or all of the alleged circumstances in mitigation are true does not require that the lower term be imposed.

Advisory Committee Comment:

Under Evidence Code Section 300, that code applies to hearings in aggravation and mitigation, subject to the special provisions of Sections 1170(b), 1203 and 1204. Sections 1203 and 1204 make the probation officer's report admissible; and since it is required by Section 1203 to be filed as a record in the case, the report is also judicially noticeable under Evidence Code Section 452(d)(1).

Proof by a preponderance of the evidence is the standard in the absence of a statute to the contrary (Evid. Code § 115), and is statutorily established for denial of good behavior and participation credits (§ 2932(a)(6)).

The legislative history of Section 1170(b) establishes that the phrase "factual findings" was used to relieve the court of the formalities associated with civil "findings of fact." Findings are not required on every circumstance alleged.

The final subdivision makes it clear that a relatively minor circumstance in mitigation could, for example, be outweighed by serious or numerous aggravating circumstances.

Rule 441. Dual use of facts; prohibited use of facts

(a) A fact considered and used by the sentencing judge in deciding to deny probation, or in determining that the defendant is ineligible for probation, may be used in aggravation or for enhancement.

(b) A fact charged and found as an enhancement may be used in aggravation if alleged in the motion, whereupon the additional term of imprisonment prescribed for that fact as an enhancement shall be stricken or specifically not ordered. The use of the fact in aggravation is an adequate reason for striking or specifically not ordering the additional term of imprisonment.

(c) A fact used to enhance the defendant's prison sentence may not be used in aggravation.

Advisory Committee Comment:

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

As used in Section 1170(b), to "determine . . . a sentence" means to fix the total duration of a prison term, that is, impose a determinate sentence. This interpretation is consistent with the fact that throughout Section 1170, "sentence" and "sentencing" apply only to prison sentences. The phrase "other disposition" is used in Section 1170 to refer to fine, jail, probation.

If "determine a sentence" were interpreted to mean "decide to imprison," Sections 667.5, 1170.1a(a), 12022, 12022.5, 12022.6 and 12022.7 could never be applied because the sentencing judge, having considered the underlying facts in denying probation (as he is required to do under Section 1203) would be precluded from using those facts for enhancement. That interpretation would destroy a major part of the sentencing law.

The rule makes it clear that a fact charged and found as an enhancement may, in the alternative, be used in aggravation. This may work to the defendant's benefit, when the enhancement would carry an added term of three years or more, as aggravation cannot increase the term more than one year.

Note that under Sections 1170(b) and 1170.1a(e), and Rule 405 (definitions), the additional term resulting from ordering sentences to be served consecutively is an "enhancement." Section 1170(b) therefore prohibits using the same facts to decide to impose consecutive sentences and to decide to impose the upper term. Subdivision (c) applies to that case as well as to enhancements arising from facts charged and found.

Rule 443. Reasons by sentencing judge

Whenever the giving of reasons by the sentencing judge is required, he shall state in simple language the primary factor or factors affecting the exercise of his discretion or, when applicable, state that he has no discretion. The statement need not be in the language of these rules. It shall be delivered orally on the record.

Advisory Committee Comment:

Reasons are required for a sentence choice, as defined in Rule 405 (§ 1170.1). They are also required in support of the sentencing judge's decision to impose the upper or lower prison term (§ 1170(b)), and to explain the circumstances in mitigation which led the judge to strike or specifically not order an enhancement. Sections 667.5, 1170.1a(c), 12022, 12022.5, 12022.6 and 12022.7.

The phrases "striking an additional punishment" and "specifically not ordering an additional punishment" are used as equivalents (§§ 667.5(b) and 1170(a)).

Rule 445. Procedure in striking or not ordering enhancements

The sentencing judge should not strike an allegation that was charged and found under Section 667.5, 12022, 12022.5, 12022.6, or 12022.7. If he finds that there are circumstances in mitigation, he may strike or specifically not order the additional term of imprisonment provided as an enhancement by the applicable section.

Advisory Committee Comment:

Under the law in effect prior to July 1, 1977, the court had no discretion concerning the imposition of additional terms prescribed for being armed with a deadly weapon or using a firearm. The practice therefore arose of striking the allegation giving rise to those additional terms, when the sentencing judge felt the additional term would be excessive; this action was taken under Section 1385. See, for example, People v. Dorsey (1972) 28 Cal.App.3d 15.

Because the court now has discretion to strike the punishment, there is no necessity of following the old practice of striking the allegation; and by requiring that it be left intact this section should help insure that the record accurately reflects the fact found by the judge and jury in the event that defendant commits further crimes. E.g., Section 1203(d)(6) (effect on parole eligibility of prior felony while armed).

The advisory "should" is used in the first sentence and there is no intention to negate the power of the court, under Section 1385, to strike the allegation when that action is deemed necessary "in furtherance of justice," as might be the case when the circumstances are such as to make it improper to leave the enhancing facts on the defendant's record. The rule applies only when the court merely determines that the additional term of imprisonment provided as an enhancement should not be imposed.

Rule 447. Limitations on enhancements

No allegation or finding of a fact giving rise to an enhancement shall be stricken or dismissed because imposition of the additional term therefor is prohibited by Section 1170.1a(a) or 1170.1a(d), or because the aggregate for enhancements would exceed the limit established by Section 1170.1a(e), or because the overall aggregate term of imprisonment would exceed the limit established by Section 1170.1a(f). The sentencing judge shall impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and shall thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay shall become permanent upon the defendant's service of the portion of the sentence not stayed.

Advisory Committee Comment:

Section 1170.1a(a) prohibits an additional term as an enhancement under Sections 667.5, 12022, 12022.5, 12022.6, or 12022.7 being added to the term for any offense but the offense carrying the greatest term, when consecutive terms are imposed.

Section 1170.1a(d) prohibits applying more than one enhancement under Sections 12022, 12022.5 and 12022.7 to a single offense, even though more than one might have been charged and found.

Section 1170.1a(e) limits the aggregate of enhancements under Sections 667.5(b) (prior terms) and 1170.1a(a) (consecutive terms) to five years.

Section 1170.1a(f) limits the aggregate prison term (base term plus enhancements), to double the base term, with specified exceptions.

Present practice of staying execution is followed to avoid violating a statutory prohibition or exceeding the statutory maximum, 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 maximum is prohibited, and this rule provides a procedure for that situation.

Rule 33 of the California Rules of Court would be amended to read:

Rule 33. Contents of record on appeal from judgment or order on motion for new trial

(a) * * *

(b) [Request for additional record] Either party may request the inclusion in the record of any of the following:

(1) In the clerk's transcript: (a) written motions made or notices of motion given by the defendant or by the People, and affidavits filed in support of or in opposition to the motion for a new trial or any other motion; (b) any written opinion of the superior court; *(c) the report of the probation officer.*

(2) In the reporter's transcript: (a) proceedings under Section 1538.5 of the Penal Code; (b) proceedings on the voir dire examination of jurors; (c) opening statements; (d) arguments to the jury; (e) any oral opinion of the superior court, and comments on the evidence by the trial judge before the jury.

(3) To be transmitted as originals: any exhibits admitted in evidence or rejected that have not been requested by the reviewing court under subdivision (a).

If a party desires such additional record he shall file an application describing the material which he desires to have included and the points on which he intends to rely which make it proper to include it. The application shall be filed with the notice of appeal or as soon thereafter as is practicable; it shall be deemed denied if it is filed after the record on appeal is transmitted to the reviewing court. The clerk shall immediately present the request to the judge and notify the reporter. The judge, within five days after the filing of such application, shall make an order directing the inclusion in the record of as much of the additional material as, in his opinion, may be proper to present fairly and fully the points relied on by appellant in his application. Any denial of the application in the trial court shall be without prejudice to an application under rule 12. If the judge fails to make any order within five days after the application is filed, the material requested, with the exception of exhibits, shall be included in the clerk's and reporter's transcripts without such order.

(c) * * *

PART II

Sentencing Reports

Recommended Sentence Reporting System

Two sections of the new law require periodic Judicial Council reports relating to sentencing practices. Section 1170.4 requires quarterly reports[1] and Section 1170.6 requires continuing reports to the Governor and the Legislature[2] reviewing the operation of the statutory penalties and analyzing all proposed legislation affecting felony sentences.

A. Form of the quarterly report

The requirement to publish and distribute an "official reporter" to trial judges concerning sentencing practices is subject to interpretation. The advisory committee concludes that the reference can not be construed to refer to the Supreme Court's official report of appellate decisions. The appropriate interpretation appears to be that the statute mandates a quarterly Judicial Council "official reporter" that will inform trial judges and others concerning sentencing practices in this and other states. A quarterly publication on sentencing practices should be instituted by the Judicial

1/ Pen. Code § 1170.4 provides: "The Judicial Council shall collect, analyze, and quarterly distribute and publish in the official reporter relevant information to trial judges relating to sentencing practices in this state and other jurisdictions. Such information shall be taken into consideration by the Judicial Council in the adoption of rules pursuant to Section 1170.3."

2/ Pen. Code § 1170.6 provides: "The Judicial Council shall continually study and review the statutory sentences and the operation of existing criminal penalties and shall report to the Governor and to the appropriate policy committees of the Legislature its analysis regarding this subject matter and as to all proposed legislation affecting felony sentences. Such review and analysis shall take into consideration:

(a) The nature of the offense with the degree of danger the offense presents to society.

(b) The penalty of the offense as compared to penalties for offenses that are in their nature more serious.

(c) The penalty of the offense as compared to penalties for the same offense in other jurisdictions.

(d) The penalty of the offense as compared to recommendations for sentencing suggested by national commissions and other learned bodies."

Council and furnished to the judges of the state by the Judicial Council, much in the way that the A.O.C. Newsletter has been furnished to the judiciary since 1964.

The statute requires the Judicial Council to "collect" and "analyze . . . relevant information . . . relating to sentencing practices." The purpose for reporting such information, of course, is to further the statute's policy of eliminating disparity in sentencing, and the Judicial Council is directed to consider that information in adopting the rules that establish sentencing criteria.

Some persons have thought of "information," as used in this statute, primarily in connection with automated data systems for recording and retrieving felony disposition reports. That aspect of the problem is discussed below in the context of gathering statistical information relating to sentences.

It is important, however, that the word "information" be broadly defined. It should include recent developments in legislation, rulemaking and administration that affect the sentencing process. Changes in executive and correctional policies will be important, as will the research documents prepared in other states and at the national level. The "Sentencing Practices Reporter" should be a broadly-inclusive informational report containing, on a regular basis, all kinds of relevant information on state, interstate and national sentencing practices.

B. The collection of statistical information on sentencing practices

There is a substantial history underlying the present reporting of felony dispositions in California. The Department of Justice has been building a disposition reporting system that dates back to 1961. (Pen. Code §§ 11115, et seq.; added by Stats. 1961, Ch. 1025.) That statute was superseded in 1973, effective July 1, 1978. (Stats. 1973, Ch. 992, amended by Stats. 1974, Ch. 790.) 3/

The collection document for this reporting system, which will be revised as of July 1, 1978, is the Department of Justice Form JUS 8715. This document is now being submitted by most superior courts and the Department of Justice is using

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3/ The difference of opinion between the Attorney General and the Judicial Council that is reported in the 1974 Judicial Council Report at pages 16 to 21 has now been eliminated. Both offices are working toward a combined approach to disposition reporting under this 1973 statute that goes into effect on July 1, 1978.

it as the basis for the state's "criminal history system" (CHS).4/ The Judicial Council is committed to assisting in making this system operational and effective. It is, therefore, one of the systems upon which the Council's sentence reporting responsibility under Section 1170.4 could conceivable be based.

A second existing document upon which the Council's sentence collection system could be based is the Judicial Council-approved Judgment-Commitment Form CR-290.0. That form, approved for optional use effective July 1, 1976, is designed to meet the requirement of Penal Code Section 1213.5 for an abstract of judgment in superior court cases. It will have to be revised to include a report of the determinate sentences provided for in the 1976 statute, but it already includes many of the items that the Council's sentence practices reporting system should cover.

The operating difficulties involved in completing the Department of Justice criminal history system, taken together with the other demands on that system, suggest that it cannot be relied upon to meet the Council's sentence reporting needs for some time to come. Thus, even if the policy decision were made to rely upon the Attorney General's disposition reporting system in the long run, the Council would have to find an interim source for the information required by the 1976 law on July 1, 1977.

The Council-approved Judgment-Commitment Form (CR-290.0) is not centrally collected at the present time, but its use could be mandated as of July 1, 1977 and an extra copy could be required to be furnished for Judicial Council use. At that point a data input system could be created, probably starting at a low level of detail; a data storage system could be contracted for, probably with a state data center; and a reporting function could be built on the data retrieved from that system. This system could be viewed as preliminary, pending the long-range planning that ought to precede the installation of a sophisticated and automated sentence reporting system. A limited reporting of sentence information should be commenced on July 1, 1977 based upon a revised Judicial Council Form CR-290.0.

The Judicial Council intends, therefore, to adopt a revised CR-290.0 form to provide the information needed by the Department of Corrections for its purposes and by the Judicial Council for statistical reporting purposes. The form should be made mandatory for all prison commitments throughout the state. (See Attachment A, proposed Form CR-290.0.)

Sentencing reports on prison commitments, however, will account for only a little more than five percent of felony

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4/ The federal acronym for this "rap sheet" function is CCH, or "computerized criminal history" file.

dispositions.5/ Seventy-seven percent of the convicted felons receive probation. For the Judicial Council to meet its obligations under Penal Code Section 1170.4 information on probation cases must be reported to the Council.

The reporting of probation information to the Judicial Council could be accomplished by placing necessary data entries on the revised CR-290.0 form. However, such a recommendation would be in contradiction to the decision to maintain Form CR-290.0 as an abstract of the judgment sentencing an offender to state prison, which is the present practice in the superior courts. Therefore a second collection form appears to be necessary to report the probation sentence choice. Penal Code Section 1213 provides that a probationary order be sent with the offender to the executing officer.6/ If a copy of the probationary order (not including the probation report) is forwarded to the Judicial Council the probation data input could be created, probabaly at a low level of detail.

The forms of probationary orders presently range from rough minute orders to finished commitments. To provide the Judicial Council with a collection document giving sufficient data a mandatory new reporting form would be necessary.

A new Judicial Council-approved reporting form should therefore be used as the source document in reporting probation

5/ The "Crime and Delinquency in California 1975" Report, page 32, indicates that 453 defendants out of 1,000 arrested are convicted. The sentences of those convicted are described as follows:

Number Out of 453 Convicted	Sentence Choice (Judgment)	Percent of Convicted
23	Fine only	5.1
40	Jail only	8.8
189	Jail and Probation	41.7
160	Probation w/o Jail	35.3
8	CYA	1.8
1	Atascadero (MDSO)	.2
8	California Rehab. Center	1.8
24	State Prison	5.3

6/ Pen. Code § 1213 provides that "When a probationary order or a judgment, other than of death, has been pronounced, a copy of the entry of that portion of the probationary order ordering the defendant confined in a city or county jail as a condition of probation, or a copy of the entry of the judgment, or, if the judgment is for imprisonment in a state prison, an abstract thereof as provided in Section 1213.5, certified by the clerk of the court, or by the judge if there is no clerk, must be forthwith furnished to the officer whose duty it is to execute the probationary order or judgment, and no other warrant or authority is necessary to justify or require its execution."

sentence choices to the Judicial Council. (See Attachment B, proposed Form CR-290.1.)

C. Collection forms

Two new Judicial Council forms have been proposed, based upon the existing Form CR-290.0. The new forms are Form CR-290.0 (Judgment-Commitment to State Prison) and Form CR-290.1 (Report to the Judicial Council of Sentence Choices Other Than State Prison Commitment).

The proposed forms contain no provision for reporting the reasons given by sentencing judges for their sentencing decisions. There are several reasons for this approach:

1. The sentencing rules recommended by the committee contemplate that in most sentencing decisions the judge may apply a number of the listed criteria and, in all cases, may apply any other reasonable criteria. A judge delivering an oral statement of his reasons could, within the course of two or three minutes, clearly identify three to six factors in a given case which appeared most applicable and were determinative in his decision, and even note why other factors were rejected. If the same judge were required to "put an X in a box," however, he is likely to indicate a single reason which fails to reflect the multiple factors weighed and considered in reaching his decision.

2. If, moreover, the form provided a list of "stock reasons," or provided that the sentencing judge should indicate by number the sentencing rule containing the criterion applied, it seems likely that many judges would conform their oral statements of reasons to formal repetitions of the language of the rules, so as to clearly fall within one or another of the listed criteria. Using a form which might influence sentencing judges to conform their statements of reasons to specific criteria could, therefore, inhibit the statutory purpose of getting a frank explanation of the decision on the record.

3. A tally of reasons given would be meaningless unless those reasons were correlated with the information in the probation report and, where applicable, the evidence at the time of trial or the hearing in aggravation or mitigation. For example: the reason "prior record" given for denial of probation might, in one case, allude to a single prior conviction for petty theft; while in another case, it might refer to a record reflecting numerous violent felonies. There appears to be no way, however, whereby a form could collect and the Judicial Council could tabulate and correlate the actual facts reflected in the probation report for each felony disposition.

4. Since the only meaningful analysis would be one in which the statement of reasons was analyzed in the

light of the full record before the sentencing judge, it appears that the only way to produce analyses of that sort would be by special studies of sample cases. Studies of this nature should be feasible after July 1, 1977, assuming that the necessary staffing is provided. Rule 33 now requires that proceedings at the time of sentencing be transcribed and made part of the normal record on appeal, and approximately 80 percent of cases in which there was a conviction after contested trial result in an appeal. Penal Code Section 1203.01 requires that in every case of a prison commitment, the proceedings at the time of sentencing be transcribed and a copy forwarded to the Department of Corrections. The probation report will be a part of the record in every case. It should thus be feasible, without requiring extensive additional reporting, to conduct scientifically valid sample studies in which the sentencing decisions, reasons, and the background information available to the sentencing judge are all correlated.

D. Sentencing practices in other jurisdictions

The statute contemplates the collection of similar data from other jurisdictions, but it is doubtful that many of them have current data of that kind available. To the extent that such data are available, it is also doubtful that valid comparisons between states can be made except on the basis of a detailed analytical study in each instance.7/

The Western Regional Office of the National Center for State Courts has been asked to assist in this phase of the Judicial Council's responsibility. In addition to gathering such data as are currently available, the Center will be able to keep in touch with states which are developing new reporting systems for felony dispositions. This material will furnish ideas and techniques upon which continuing decisions can be based as California's sentence reporting system is created, and it will also provide relevant information for the Judicial Council's quarterly "Sentencing Practices Reporter."

7/ Several studies of judicial statistics on an interstate basis have illustrated the difficulties in making comparisons between states.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

PEOPLE OF THE STATE OF CALIFORNIA VERSUS

DEFENDANT:

AKA:

☐ PRESENT ☐ NOT PRESENT

☐ JUDGMENT OF COMMITMENT TO STATE PRISON
☐ SENTENCE MINUTE ORDER CASE NUMBER _____

ATTACHMENT A
PAGE 1

DRAFT
FORM
CR 290.0

Hearing ____ MO ____ DAY ____ YR Dept. No. ____ Judge _____ Clerk _____

Reporter _____ Counsel for People _____ Counsel for Defendant _____

Probation Number or Probation Officer _____

1. Defendant was convicted of the commission of the following crimes:
☐ Additional counts are listed on attachment 1.a.

Count	Code Section	Crime and Conrre	Date of Conviction Month Day Year	Conviction by: Jury Trial	Court Trial	Plea	Enhancements Charged and Found PC§12022	PC§12022.5	PC§12022.6	PC§12022.7	Additional term stricken due to circumstances in mitigation PC§12022	PC§12022.5	PC§12022.6	PC§12022.7

2. Defendant ☐ was arraigned ☐ waived arraignment for judgment.
3. Motions in Aggravation/Mitigation: ☐ No motions ☐ Motion in Aggravation made ☐ Motion in Mitigation made — Granted ☐ ☐ Denied ☐ ☐

The court, having read and considered the probation report, and no legal cause having been shown why judgment should not be pronounced, orders that:

If the present sentence is consecutive to a prior uncompleted sentence which included an offense more serious than any in this case, proceed to item 8, do not complete items 4, 5, 6, and 7. (See instructions.)

4. Defendant is sentenced on the most serious offense, count ____ to state prison for the ☐ lower ☐ middle ☐ upper base term of ____ years.
5. ☐ Defendant is sentenced to additional terms on that count:
   a. (1) Under Penal Code ☐ §12022 (1 year) ☐ §12022.5 (2 years) ☐ §12022.7 (3 years), for a total of ____ years.
   (2) Pursuant to Penal Code § 1170.1a(d) execution of sentence on Penal Code ☐ §12022 ☐ §12022.5 ☐ §12022.7 is stayed with the stay to become permanent when the unstayed sentence is completed, totalling ____ years stayed.
   (3) The net unstricken and unstayed additional punishment imposed under Penal Code §12022, §12022.5 or §12022.7 is ____ years.
   b. Under Penal Code ☐ §12022.6, for additional punishment of ____ years.

6. Defendant having been charged and found to have served prior prison terms:
   a. For violent felony, his present conviction also being for a violent felony, as defined in PC§667.5(c) [PC§667.5(a)]
   b. Which invoke the additional punishment as provided by PC§667.5(b)

Number of Prior Terms	Years	Additional Punishment Stricken	Net Additional Punishment
	(Terms X 3)	(Years)	(Years)
	(Terms X 1)		

7. ☐ Defendant's sentence is enhanced pursuant to PC§667.5 by the additional term of (total of net additional punishment in 6. above) ____ years.
8. The "most serious count" is determined considering this case and all counts of prior cases on which an uncompleted sentence is to run consecutively. On counts of this case which are not the "most serious count" defendant is sentenced as follows:

Pursuant to PC§1170.1a(a) execution of sentence is stayed on enhancements charged, found, and not stricken, as shown in item 1 above, on counts which are not "the most serious" and for which sentence is ordered to be served consecutively.

Count	X to Indicate Concurrent	Consecutive	Term Imposed (Incl. Enhancements (Years)	Middle Term (Years)	1/3 of Middle Term

☐ Additional counts are listed on attachment 8.a.

Total additional punishment for consecutive sentences is ____ years.

9. ☐ The term of this sentence with respect to any prior uncompleted sentence, shall run ☐ concurrently ☐ consecutively.
(Identify prior sentence in item 1d, giving jurisdiction and docket number)
If consecutive, the prison term, recomputed if necessary, for prior uncompleted sentences is ____ years.

SUBTOTAL ____ years.

10. ☐ Pursuant to the California Rules of Court, Rule 447, execution of the following number of years is stayed to comply with Penal Code §§ 1170.1a(e) and 1170.1a(f) ____ minus — ____ years.
11. ☐ The total unstayed prison term imposed by this judgment is ____ years.
12. Execution of this sentence is: ☐ Imposed ☐ Imposed after probation revoked ____ MO DAY YR

CASE NUMBER _____

ATTACHMENT A
PAGE 2

13. ☐ Court advises defendant of his appeal rights.

14. ☐ Court further orders as follows:

15. The court pronounced sentence on _____ (MO DAY YR) and defendant was held in custody through and including the date of pronouncement of sentence for _____(total number of days) as follows:

Count	Time other than Dept. of Corrections	Department of Corrections Time

16. Defendant is remanded to the custody of the Sheriff to be delivered

☐ forthwith ☐ after 48 hours, excluding Saturdays, Sundays and Holidays

into the custody of the Director of Corrections at the Reception-Guidance Center located at

☐ Calif. Institution for Women - Frontera ☐ Calif. Mens Facility - Vacaville ☐ Calif. Mens Facility - Chino

☐ Other: (specify) _____

Signature of Judge (optional). _____

(Seal)

This space provided for the Clerk's Certificate

...RIOR COURT OF CALIFORNIA, COUNTY OF _____

...PLE OF THE STATE OF CALIFORNIA VERSUS

DEFENDANT:

AKA:

☐ PRESENT ☐ NOT PRESENT

ATTACHMENT B

DRAFT

FORM

CR 290.1

REPORT TO JUDICIAL COUNCIL ON SENTENCE CHOICE OTHER THAN STATE PRISON

CASE NUMBER _____

Hearing MO DAY YR _____ Dept. No. _____ Judge _____ Clerk _____

Reporter _____ Counsel for People _____ Counsel for Defendant _____

Probation Number or Probation Officer _____

1. Defendant was convicted of the commission of the following crimes:

Count	Code Section	Crime and Degree	Date of Conviction Month Day Year	Conviction by: Jury Trial	Court Trial	Plea	Enhancements Charged and Found PC 12022	PC 12022.5	PC 12022.6	PC 12022.7

☐ Conviction of additional counts listed on attachment 1a.

2. Disposition

a. ☐ Offense was deemed a misdemeanor

1. ☐ Defendant sentenced to _____ (Number) days in county jail (a) Execution of _____ (Number) days suspended

2. ☐ Defendant fined in sum of $ _____.

b. ☐ Defendant placed on probation

1. (a) ☐ Sentence pronounced and execution of sentence was suspended; or

(b) ☐ Imposition of sentence was suspended

2. ☐ Conditions of probation included ☐ Jail Time ☐ Fine

c. Other dispositions

1. ☐ Defendant was committed to California Youth Authority
2. ☐ Proceedings suspended, and defendant was committed to California Rehabilitation Center
3. ☐ Proceedings suspended, and defendant was committed as a Mentally Disordered Sex Offender.
4. ☐ Proceedings suspended, and defendant was committed as presently insane.
5. ☐ Other [specify] _____

NOTE: Pursuant to the authority vested in him by Article VI, Section 6 of the California Constitution and Section 68505 of the Government Code, the Chairman of the Judicial Council requires that each superior court shall complete this form. The reports implement Section 1170.4 of the Penal Code and shall be mailed to: Administrative Office of the Courts, 4200 State Building, San Francisco, California 94102

Date _____ Signature of Clerk _____

END