

# JUDICIAL COUNCIL OF CALIFORNIA

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## INVITATION TO COMMENT

**SP18-19**

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Title	Action Requested
Criminal Procedure: Multicounty Incarceration and Supervision	Review and submit comments by November 9, 2018
Proposed Rules, Forms, Standards, or Statutes	Proposed Effective Date
Amend Cal. Rules of Court, rule 4.452	April 26, 2019
Proposed by	Contact
Criminal Law Advisory Committee Hon. Tricia Ann Bigelow, Chair	Sarah Fleischer-Ihn, 415-865-7702 <a href="mailto:Sarah.Fleischer-Ihn@jud.ca.gov">Sarah.Fleischer-Ihn@jud.ca.gov</a>

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### **Executive Summary and Origin**

Senate Bill 670 (Jackson; Stats. 2017, ch. 287) amended Penal Code section 1170(h),<sup>1</sup> effective January 1, 2018, to require courts to determine the county or counties of incarceration and supervision for defendants when imposing judgments concurrent or consecutive to another judgment or judgments previously imposed under section 1170(h) in another county or counties. SB 670 also amended section 1170.3, to require the Judicial Council to adopt rules of court providing criteria for trial judges to consider at the time of sentencing when determining the county or counties of incarceration and supervision. This proposal would implement section 1170.3 by amending California Rules of Court, rule 4.452, to guide the second or subsequent court when determining the county or counties of supervision. The Criminal Law Advisory Committee proposes amendments to rule 4.452 to make it consistent with statutory changes and to incorporate further substantive changes suggested by commenters when this proposal circulated previously.

### **Background**

Under the 2011 Realignment Legislation (Realignment; Assem. Bill 109, Stats. 2011, ch. 15), when sentencing defendants eligible for county jail under section 1170(h), judges must suspend execution of a concluding portion of the term and order the defendant to be supervised by the county probation department unless the court finds, in the interests of justice, that suspension is not appropriate in a particular case. (§ 1170(h)(5)(A).) This term of supervision is referred to as

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<sup>1</sup> All further statutory references are to the Penal Code.

*The proposals have not been approved by the Judicial Council and are not intended to represent the views of the council, its Rules and Projects Committee, or its Policy Coordination and Liaison Committee. These proposals are circulated for comment purposes only.*

“mandatory supervision.” (§ 1170(h)(5)(B).) Realignment also created “postrelease community supervision,” whereby certain offenders being released from state prison are supervised by a local county supervision agency. (§§ 3450–3465.)

In 2017, the Judicial Council sponsored SB 670, requiring courts to determine the county or counties of incarceration and supervision for defendants when imposing judgments concurrent or consecutive to another judgment or judgments previously imposed pursuant to section 1170(h) in another county or counties. Although counties carry the cost and burdens of local incarceration and supervision, until SB 670, Realignment was silent on the issue of sentences from multiple jurisdictions. Section 1170.1, which governs multiple-count and multiple-case sentencing for commitments to state prison and county jail, and rule 4.452 require courts rendering second or subsequent judgments under section 1170(h) to “resentence” the defendant to a single aggregate term.

SB 670 amended section 1170 by adding subdivision (h)(6), which requires the following:

When the court is imposing a judgment pursuant to this subdivision concurrent or consecutive to a judgment or judgments previously imposed pursuant to this subdivision in another county or counties, *the court rendering the second or other subsequent judgment shall determine the county or counties of incarceration and supervision* of the defendant.

(Pen. Code, § 1170(h)(6), italics added.)

The Judicial Council must adopt rules of court to implement the new law. The rules must provide criteria for the second or subsequent court to consider when determining the counties of incarceration and supervision. (§ 1170.3(a)(7).)

### **The Proposal**

This proposal would implement section 1170.3 by amending rule 4.452 to instruct courts on multiple-county sentencing under section 1170(h) by adding the following:

1. Clarification that the second or subsequent court has the discretion to specify whether a previous sentence is to be served in custody or on mandatory supervision and the terms of such supervision, but may not:
  - a. Increase the total length of the sentence imposed by the previous court,
  - b. Increase the total length of the actual custody time imposed by the previous court,
  - c. Increase the total length of mandatory supervision imposed by the previous court, or
  - d. Impose additional, more onerous, or more restrictive conditions of release for any previously imposed period of mandatory supervision;
2. A requirement that the second or subsequent court determine the county or counties of incarceration or supervision, including the order of service of incarceration or supervision;

3. A requirement that to the extent reasonably possible, the period of mandatory supervision be served in one county and after completion of any period of incarceration;
4. A requirement that the second or subsequent court calculate the defendant's remaining custody and supervision time in accordance with rule 4.472;
5. Specific factors for the court to consider when making its sentencing determination, including factors relevant to the appropriateness of supervision and incarceration in each respective county;
6. A requirement that if the defendant is ordered to serve only a custody term without supervision in another county, the defendant must be transported at such time and under such circumstances as the court must direct to the county where the custody term is to be served;
7. A requirement that the defendant be transported with an abstract of the court's judgment as required by section 1213(a), or other suitable documentation showing the term imposed by the court and any custody credits against the sentence;
8. Discretion for the court to order the custody term to be served in another county without also transferring jurisdiction of the case in accordance with rule 4.530; and
9. A requirement that if the defendant is ordered to serve a period of supervision in another county, whether with or without a term of custody, the matter must be transferred for the period of supervision in accordance with provisions of rule 4.530.

### **Alternatives Considered**

This proposal previously circulated for comment from April 9 through June 8, 2018. The Orange County Public Defender raised concerns that the circulated proposal gave too much discretion to the second or subsequent judge, undermining the finality of judgments, and that it potentially violated defendants' constitutional rights and plea agreements and likely would result in plea withdrawals or requests for specific enforcement of previously imposed dispositions. To avoid those potential violations, the Orange County Public Defender proposed a modification to proposed paragraph (4) of rule 4.452. The committee agreed with the modification and is recirculating the proposal to allow for public comment on this proposed change, with minor editorial changes by the committee:

~~Notwithstanding paragraph (3),~~ The second or subsequent judge has the discretion to specify whether a previous sentence is to be served in custody or on mandatory supervision and the terms of such supervision, but may not without express consent of the defendant, modify the sentence on the earlier sentenced charges in any manner that will: (i) increase the total length of the sentence imposed by the previous court; (ii) increase the total length of the actual custody time imposed by the previous court; (iii) increase the total length of mandatory supervision imposed by the previous court; or (iv) impose additional, more onerous, or more restrictive conditions of release for any previously imposed period of mandatory supervision.

## **Implementation Requirements, Costs, and Operational Impacts**

As a result of SB 670, some training of judges will be necessary to implement the new requirement that courts determine the county or counties of incarceration and supervision for defendants when imposing judgments concurrent or consecutive to another judgment or judgments previously imposed pursuant to section 1170(h) in another county or counties. No additional training is anticipated as a result of amending rule 4.452.

### **Request for Specific Comments**

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would 1 month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

### **Attachments and Links**

1. Cal. Rules of Court, rule 4.452, at pages 6–7
2. Cal. Rules of Court, rule 4.530,  
[www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4\\_530](http://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_530)
3. Penal Code section 1170,  
[http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=1170.&lawCode=PEN](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1170.&lawCode=PEN)
4. Penal Code section 1170.3,  
[http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=1170.3.&lawCode=PEN](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=1170.3.&lawCode=PEN)
5. SB 670 (Stats. 2017, ch. 287),  
[http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180SB670](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB670)

Rule 4.452 of the California Rules of Court would be amended, effective April 26, 2019, to read:

1 **Rule 4.452. Determinate sentence consecutive to prior determinate sentence**

2  
3 If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more  
4 determinate sentences imposed previously in the same court or in other courts, the court  
5 in the current case must pronounce a single aggregate term, as defined in section  
6 1170.1(a), stating the result of combining the previous and current sentences. In those  
7 situations:

8  
9 (1) The sentences on all determinately sentenced counts in all of the cases on which a  
10 sentence was or is being imposed must be combined as though they were all counts  
11 in the current case.

12  
13 (2) The judge in the current case must make a new determination of which count, in  
14 the combined cases, represents the principal term, as defined in section 1170.1(a).  
15 The principal term is the term with the greatest punishment imposed including  
16 conduct enhancements. If two terms of imprisonment have the same punishment,  
17 either term may be selected as the principal term.

18  
19 (3) Discretionary decisions of the judges in the previous cases may not be changed by  
20 the judge in the current case. Such decisions include the decision to impose one of  
21 the three authorized terms of imprisonment referred to in section 1170(b), making  
22 counts in prior cases concurrent with or consecutive to each other, or the decision  
23 that circumstances in mitigation or in the furtherance of justice justified striking the  
24 punishment for an enhancement. However, if a previously designated principal  
25 term becomes a subordinate term after the resentencing, the subordinate term will  
26 be limited to one-third the middle base term as provided in section 1170.1(a).

27  
28 (4) The second or subsequent judge has the discretion to specify whether a previous  
29 sentence is to be served in custody or on mandatory supervision and the terms of  
30 such supervision, but may not, without express consent of the defendant, modify  
31 the sentence on the earlier sentenced charges in any manner that will (i) increase  
32 the total length of the sentence imposed by the previous court; (ii) increase the total  
33 length of the actual custody time imposed by the previous court; (iii) increase the  
34 total length of mandatory supervision imposed by the previous court; or (iv) impose  
35 additional, more onerous, or more restrictive conditions of release for any  
36 previously imposed period of mandatory supervision.

37  
38 (5) In cases in which a sentence is imposed under the provisions of section 1170(h) and  
39 the sentence has been imposed by courts in two or more counties, the second or  
40 subsequent court shall determine the county or counties of incarceration or  
41 supervision, including the order of service of such incarceration or supervision. To  
42 the extent reasonably possible, the period of mandatory supervision shall be served

1 in one county and after completion of any period of incarceration. In accordance  
2 with rule 4.472, the second or subsequent court shall calculate the defendant's  
3 remaining custody and supervision time.  
4

5 (6) In making the determination under paragraph (5), the court shall exercise its  
6 discretion after consideration of the following factors:

7  
8 (A) The relative length of custody or supervision required for each case;

9  
10 (B) Whether the cases in each county are to be served concurrently or  
11 consecutively;

12  
13 (C) The nature and quality of treatment programs available in each county;

14  
15 (D) The nature and extent of the defendant's current enrollment and participation  
16 in any treatment program;

17  
18 (E) The nature and extent of the defendant's ties to the community, including  
19 employment, duration of residence, family attachments, and property  
20 holdings;

21  
22 (F) The nature and extent of supervision available in each county;

23  
24 (G) The factors listed in rule 4.530(f), (g), and (h); and

25  
26 (H) Any other factor relevant to such determination.

27  
28 (7) If after the court's determination in accordance with paragraph (5) the defendant is  
29 ordered to serve only a custody term without supervision in another county, the  
30 defendant shall be transported at such time and under such circumstances as the  
31 court shall direct to the county where the custody term is to be served. The  
32 defendant shall be transported with an abstract of the court's judgment as required  
33 by section 1213(a), or other suitable documentation showing the term imposed by  
34 the court and any custody credits against the sentence. The court may order the  
35 custody term to be served in another county without also transferring jurisdiction of  
36 the case in accordance with rule 4.530.

37  
38 (8) If after the court's determination in accordance with paragraph (5) the defendant is  
39 ordered to serve a period of supervision in another county, whether with or without  
40 a term of custody, the matter shall be transferred for the period of supervision in  
41 accordance with provisions of rule 4.530.  
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