I am pleased to restore the Los Angeles County District Attorney's Legal Policies Manual (LPM) that was in place in November 2020, a version recently revised so that it conforms to current California law. The LPM will continue to be updated periodically as new policies are implemented and to reflect evolving changes in the law. Modifications to the LPM will be announced in forthcoming Special Directives.

Continuing familiarity with the policies set forth in the LPM, and close adherence to these policies, is critical to the mission of our Office: dedication to the fair and ethical pursuit of justice. Consistent with that overriding concern, if a deputy believes that application of a policy or directive included in the LPM would result in an injustice, the deputy is to inform a supervisor so the matter at issue can be reviewed.

The Los Angeles County District Attorney's Office is dedicated to protecting and serving our community and safeguarding the rights of the accused and crime victims alike through an unrelenting pursuit of justice. That pursuit of justice will ensure that not just the result but the process itself reflects the highest standards of fairness, impartiality, and integrity. This Office will seek to be a leader in bringing safety to our community while steadfastly upholding its legal and ethical obligations to each member of our community.

Special thanks to Head Deputy Kellyjean Chun and Head Deputy Alva Lin, whose invaluable work on the November 2020 LPM laid the foundation for the updated version you can now find online.

Nathan J. Hochman
District Attorney

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CHAPTER 1

OFFICE ORGANIZATION

1.01 THE DISTRICT ATTORNEY

The District Attorney is the public prosecutor. The District Attorney attends the courts, and within discretion initiates and conducts on behalf of the People all prosecutions for public offenses. (Gov. Code § 26500.) The District Attorney draws all indictments and informations. (Gov. Code § 26502.)

The District Attorney prosecutes criminal and civil actions on behalf of the People of the State of California. The District Attorney is a non-partisan official who is elected every four years.

The District Attorney, as a constitutional officer and the public prosecutor acting on behalf of the People, is vested with the independent power to conduct prosecutions for public offenses, detect crime and to investigate criminal activity. The District Attorney advises the Grand Jury in its investigations. The District Attorney sponsors and participates in programs to reduce crime and improve the administration of justice.

The remainder of this chapter is under revision.

CHAPTER 2

CRIME CHARGING - GENERALLY

2.01 EVIDENTIARY SUFFICIENCY

Crime charging is one of the most important functions a deputy district attorney (deputy) can perform. A deputy's primary responsibility is to determine whether there is sufficient credible evidence to warrant the filing of charges and to convict the accused of the charges. Deputies shall be familiar with the Uniform Crime Charging Manual to perform this critical function.

All felony and misdemeanor cases shall be reviewed by a deputy before filing.

Only a law enforcement officer with actual knowledge, or information and belief, of the truth of the facts stated in the complaint may sign a felony complaint.

2.01.01 BASIC CRITERIA FOR CHARGING

A deputy may file criminal charges only if the following four requirements are satisfied:

- There is legally sufficient, admissible evidence of all of the elements of the crime(s) to be charged;
- There is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime(s) to be charged;
- The deputy, based on a complete investigation and a thorough consideration of all pertinent facts readily available, is satisfied the evidence proves the accused is guilty of the crime(s) to be charged; and
- The deputy has determined that the admissible evidence is of such convincing force that it would warrant conviction of the crime(s) charged by a reasonable and objective fact finder after hearing all the evidence available to the deputy at the time of charging and after considering the most plausible, reasonably foreseeable defense(s) inherent in the prosecution's evidence.

Commentary

Filing deputies are expected to go through this four-step process in evaluating a case even though these steps are integrally related and the issues often overlap. This evaluation will help prevent filing inappropriate charges because of a failure to consider one or more of these requirements.

2.01.02 IMPROPER BASES FOR CHARGING

The following factors constitute improper bases for charging:

- The race, color, religion, ancestry, national origin, sex, sexual orientation, occupation, economic class or political association or position of the victim, witness or the accused;

- The mere request to charge by a police agency, private citizen or public official when any of the four basic filing criteria are not met;
- Public or media pressure to charge;
- To facilitate an investigation; or
- To intentionally assist or impede the efforts of any public official, candidate or prospective candidate for elective or appointed public office.

2.02 CASE INVESTIGATION AND EVALUATION

Before deciding whether to charge, a deputy shall insist on a complete investigation.

2.02.01 INITIAL INVESTIGATION

All material witnesses should be interviewed, preferably in person and by trained police investigators. Statements obtained from witnesses who might be likely to change or forget them should be taped, handwritten or typed and signed, or otherwise recorded. However memorialized, all witness statements should be clear and detailed so they can be used later in court to refresh the witness's memory or for impeachment purposes, if necessary.

As a general rule, an attempt should be made to obtain a legally admissible statement from the accused. The statement should be taped, handwritten or typed and dated and signed, or otherwise recorded. The police reports should reflect if the accused refused to make a statement.

When the accused makes a statement that if true, in whole or in part, negates criminal liability, the statement should be investigated, if possible, no matter how implausible it may seem. Also, statements of potential defense witnesses should be obtained, documented and investigated.

Scientific examinations should be completed as expeditiously as possible, especially when there is some doubt as to the outcome of the examination. Attempts should be made to lift fingerprints and make comparison tests whenever relevant, even if it is unlikely the attempt will prove fruitful. Any request made to a law enforcement agency for a scientific examination should be noted in the file with the date of the request.

With the advent of technology, many law enforcement agencies have equipped officers and patrol vehicles with audio and video recording devices to record suspects and witnesses for criminal and civil liability purposes. In addition, many law enforcement officers are using personal audio and video recording devices during the course of an investigation, often times for employment-related reasons.

It is incumbent upon deputies to determine whether such recordings exist. When presented with either a misdemeanor or felony case for filing consideration, deputies should inquire of the filing officer whether any such audio or video recordings exist. If recordings exist, a request for copies of the recordings shall be made. A notation of the inquiry and response, including the date and name of the filing officer, shall be written in the file.

2.02.02 SUBSEQUENT INVESTIGATION

If the initial case investigation appears significantly incomplete for any reason, a deputy shall insist that the law enforcement agency conduct further investigation prior to filing to resolve any major deficiencies. This policy shall be observed even if it means the accused must be released from custody and rearrested after the investigation is completed. However, if the investigating officer knows of specific, articulable facts to support a firm belief that the accused will not be readily available for later arrest, a complaint may be filed if there is a reasonable likelihood of conviction based on the evidence available to the deputy.

If the initial investigation is sufficient for filing, but additional investigation is needed, the request for such an investigation shall be made on the "Further Investigation/Case Preparation Checklist" form. A deputy shall set a reasonable deadline for the completion of the investigation, preferably before the preliminary hearing. If the result of the supplemental investigation leads a deputy to believe there is a reasonable doubt as to the defendant's guilt, the deputy shall promptly initiate the process for dismissal.

The responsibility for carrying out subsequent investigation lies with the investigating law enforcement agency. If that agency has inadequate resources to carry out such an investigation, a deputy should ask the Bureau of Investigation for assistance.

Commentary

Deputies shall make every effort to encourage thorough investigations. Investigations should include attempts to obtain probative evidence (such as admissions or fingerprints) even though these attempts may be unsuccessful. Unless there is no reasonable possibility of, for example, lifting or identifying prints, defense attorneys are free to comment on the deputy's failure to try. Such arguments are difficult to rebut.

Reliance on post-filing investigations to correct deficiencies is strongly discouraged since the deputy has not had the opportunity to thoroughly evaluate all the facts of a case. Furthermore, a deputy shall not request the issuance of an arrest warrant unless the deputy has evaluated the case.

2.02.03 ADMISSIBLE EVIDENCE

Before deciding whether to charge, a deputy shall thoroughly evaluate all available evidence whether such evidence is admissible in court or not.

Before deciding whether to charge, a deputy shall:

- Review all available police reports and the accused's background and prior record; the fact that the accused's alleged conduct is consistent or inconsistent with prior proven conduct may remove or create a reasonable doubt;
- Review all written reports on relevant scientific examinations unless the result would not affect the charging decision; while a prosecutor may rely on an oral report of test results from law enforcement personnel to file a case, a deputy shall request all written reports to confirm the initial conclusions;

- Review all defense statements; and
- If possible, personally interview witnesses whose later cooperation is doubtful or whose demeanor and credibility are crucial to the outcome of the case. Such interviews should be recorded. Some examples of situations in which witnesses should be interviewed are:
  - Domestic violence victims;
  - Sexual assault victims;
  - Minor victims and witnesses;
  - Eyewitnesses who provide the only evidence of identity;
  - Accomplices who are key witnesses for the prosecution;
  - Informants who are key witnesses for the prosecution.

Commentary

Personally interviewing witnesses enables a deputy to: (1) establish a personal rapport with the witness; (2) evaluate the likelihood of future cooperation; (3) evaluate the witness's demeanor; (4) anticipate and consider problems which might develop on cross-examination; and (5) assist the witness in preparing for the various problems likely to be encountered in court.

2.02.04 INADMISSIBLE EVIDENCE

A deputy may also consider the following types of evidence in deciding whether to charge, regardless of their admissibility in court:

- Evidence which may be suppressed;
- Inadmissible statements by an accused;
- Polygraph evidence.

2.02.05 DIRECT EVIDENCE CASES

After evaluating all available, relevant evidence a deputy shall be satisfied that the evidence warrants conviction of the crime(s) to be charged.

In evaluating direct evidence cases, a deputy shall consider potential witness problems relating to:

- Eyewitness identification;
- Motive to fabricate;
- Ability to recall and communicate.
-

2.02.06 CIRCUMSTANTIAL EVIDENCE CASES

In evaluating circumstantial evidence cases, a deputy shall consider all reasonable interpretations of the uncontested facts. A deputy shall consider the validity of every reasonable defense and whether, under the uncontested facts, the defense might be true.

2.03 EVIDENCE OF A CORPUS DELICTI

2.03.01 EXISTENCE OF A CRIME

A deputy shall be reasonably certain a crime has been committed before charging. In cases posing novel or unclear questions of law as to whether an act is a crime, a deputy may file charges if the following requirements are satisfied:

- There is a reasonable possibility that a court will later rule that a crime has been committed;
- The act is a substantial one affecting significant personal or property rights of others; and
- A prosecutor can reasonably argue that a crime has in fact been committed.

Commentary

Questions involving the existence of a crime will rarely arise in practice. However, a deputy may do the Office, the victim, and the accused a service by obtaining a judicial resolution of novel or unclear issues. Unlike cases in which the issues involved are factual, the resolution of legal issues affects not only the outcome of the present case, but also future conduct and charging decisions.

2.03.02 EVIDENCE TO PROVE THE ELEMENTS OF A CRIME

A deputy shall be reasonably certain there is legally sufficient evidence to prove each element of the crime alleged. A deputy is responsible for knowing the relevant case law interpreting criminal statutes so that a correct and informed filing decision can be made. In cases posing novel or unclear questions of law as to whether legally sufficient evidence to prove any element of a crime exists, a deputy may charge if the basic criteria for charging set forth above are satisfied.

In cases in which an admissible confession clearly shows a crime has been committed, but it appears difficult to prove the existence of a corpus delicti as required by case law, a deputy should charge if the following requirements are satisfied:

- There is enough independent evidence from which a deputy can reasonably argue that the corpus delicti has been established; and
- A deputy believes there is a reasonable possibility the court will rule that a corpus delicti has been independently established.

Commentary

Only slight evidence is required to prove the existence of a corpus delicti independent of a confession. Corpus delicti problems are most difficult with crimes in which a negative must be proven as an element of the crime (e.g., making a false report) and special caution should be exercised in these cases.

2.03.03 ADMISSIBILITY OF EVIDENCE OF A CORPUS DELICTI

A deputy shall be reasonably certain that a court would rule that the evidence necessary to establish a corpus delicti is admissible under current statutory, case or constitutional law. The standard of reasonable certainty applies to both issues of law and fact relating to admissibility of evidence.

The standard of reasonable certainty should be based on an informed judgment of how the highest court entitled to decide the issue would rule if confronted with it. The fact that a local court frequently rules contrary to current appellate law should not be considered in deciding whether to charge.

Commentary

As with other legal issues, a deputy owes a duty to society, the victim, the accused, the police and the prosecution to obtain a prompt resolution of unclear constitutional issues so there will be greater certainty of action by all in the future. However, if it is reasonably clear there is not enough admissible evidence to establish a corpus delicti, a deputy shall not file a case. A deputy has a responsibility to abide by constitutional principles as defined by appellate courts regardless of a deputy's opinion of the correctness of the definition.

2.04 EVIDENCE OF IDENTITY

A deputy shall be satisfied there is legally sufficient, admissible evidence of the accused's identity as the perpetrator of the crime(s) to be charged. When an eyewitness identification involves a live or photographic lineup, adherence or nonadherence to the requirements of PC § 859.7 shall be considered when evaluating the weight of that identification.

2.04.01 DIRECT EVIDENCE CASES

In cases resting primarily on direct evidence of identity, a deputy shall be reasonably certain the available evidence, standing alone, would result in a finding of guilt. Because of the nature of direct evidence, it will generally be clear whether this requirement has been satisfied. When identity is in issue and the proof of identity rests solely on the testimony of a single independent witness without further corroboration, a deputy shall only charge when one of the following is present:

- The witness knows the accused so there is no reasonable possibility of mistake;
- The opportunity to observe was substantial so there is no reasonable possibility of mistake;
- The perpetrator of the crime possessed unique physical characteristics similar to those possessed by the accused.

2.04.02 SINGLE PHOTOGRAPHIC IDENTIFICATION

When identity is in issue, a deputy shall not charge based solely on a single photographic identification without further corroboration. In rare and unusual circumstances, the Head Deputy may authorize a deviation from this policy.

Commentary

In certain situations, a lineup may be required before filing. The purpose of requiring a lineup is to: (1) assess the ability of an eyewitness to make an identification in court; (2) enhance the convincing force of a subsequent in-court identification; and (3) reduce the possibility of a mistaken identification. If the eyewitness is acquainted with the accused or if there is independent corroborative evidence of identification, no useful purpose is served by requiring a lineup.

2.04.03 CIRCUMSTANTIAL EVIDENCE CASES

In cases resting primarily on circumstantial evidence of identity, a deputy should not simply consider whether the evidence presented is legally sufficient to convict, but whether, in view of all reasonably foreseeable defenses relating to identity, the evidence is of such convincing force that an appellate court would sustain a conviction on appeal regardless of the defense raised at trial.

Commentary

There is a distinction between mere probable cause to arrest and legally sufficient evidence to convict. This distinction is most meaningful in circumstantial evidence cases where the evidence might warrant a strong suspicion of guilt but not a finding of guilt beyond a reasonable doubt. While a deputy is legally justified in charging based on mere probable cause, a deputy serves no useful, legitimate purpose in doing so.

2.04.04 ADMISSIBILITY OF EVIDENCE OF IDENTITY

A deputy should believe there is a reasonable possibility that a court would rule that the evidence necessary to establish identity is admissible under current statutory, case or constitutional law. The standard of reasonable possibility applies to both issues of law and fact relating to admissibility of evidence.

The standard of reasonable possibility should be based on an informed judgment of how the highest court entitled to decide the issue would rule if confronted with it. The fact that a local court frequently rules contrary to current law should not be considered in deciding whether to charge.

Commentary

The same principles that apply to the admissibility of evidence of the corpus delicti apply to the admissibility of evidence of identity. If there is a reasonable possibility that evidence of identity is admissible under current constitutional, case or statutory law, a deputy should assume, for charging purposes that it will be ruled admissible.

2.05 PROBABILITY OF CONVICTION

A deputy shall consider the probability of conviction by an objective fact finder after hearing the admissible evidence and after considering the most plausible, reasonably foreseeable defense(s) inherent in the prosecution evidence.

2.05.01 JURY PANELS

A deputy should not decline to charge because local juries, due to political or social attitudes, may unreasonably refuse to convict. A deputy's responsibility to enforce the law is a responsibility owed to the People of the State of California. The standard of reasonableness must inevitably be a statewide standard based upon an ideal jury drawn from a representative cross section of the community who will obey the oath of jurors to follow the court's instructions and the law and not be affected by any biases that, if revealed, would subject them to challenge for cause.

Commentary

Unreasonable jurors pose a continuing problem for prosecutors. A deputy shall not permit the likelihood of unreasonable actions by jurors to deter a deputy from carrying out the Office's assigned duty to prosecute violations of the law.

2.06 AFFIRMATIVE DEFENSES

A deputy should not decline to charge because of an alleged affirmative defense unless:

- The affirmative defense, if established, would result in the accused's complete exoneration; and
- The affirmative defense cannot be refuted by substantial evidence currently available to the prosecution.

Only if these two requirements have been satisfied should a deputy decline to charge.

Commentary

Affirmative defenses are treated differently because the facts necessary to establish them are usually unavailable at the time of filing and because the accused has the burden of raising them at trial. The most common affirmative defenses are insanity, entrapment and double jeopardy. Self-defense and defense of third parties, while technically affirmative defenses, should be carefully evaluated at the charging stages as corpus issues. Alibi and the statute of limitations are not affirmative defenses and should be treated as identity and corpus issues respectively.

2.07 CHARGE SELECTION

The filing deputy has the responsibility to select the charge or charges that appropriately describe the crime(s) committed and provide for an adequate sentence if the accused is convicted.

2.07.01 MISUSE OF CHARGE SELECTION PROCESS

The filing deputy shall not use the charging process to obtain leverage to induce a guilty plea to a lesser charge. There must be a reasonable expectation of conviction on the filed charge(s).

Commentary

The use of the charging process simply to obtain leverage without any reasonable expectation of conviction of the filed charge(s) cannot be reconciled with any legitimate prosecutorial goal.

2.07.02 OVERLAPPING STATUTES - DIFFERENT PENALTIES

When identical criminal conduct may be punished under two or more similar statutes providing significantly different penalties, a deputy should select the most appropriate charge after considering the following factors:

- Which charge most adequately and fully describes the accused's conduct;
- Which charge provides the most appropriate penalty for the accused in view of the nature of the offense and the accused's prior criminal record;
- Whether there is a specific evidentiary or prosecutorial function to be served by selecting a particular charge; and
- Whether case law or legislative intent suggests the selection of a particular charge.

Commentary

This policy applies to criminal conduct punishable under two or more statutes that provide substantially different penalties. It does not apply to special statutes that, under the law, preclude the use of general statutes.

2.07.03 OVERLAPPING STATUTES - SIMILAR PENALTIES

Alternative charges providing similar penalties may be filed when there is a specific evidentiary or prosecutorial function to be served.

2.07.04 EFFECT OF AFFIRMATIVE DEFENSES

Nothing in this section should be interpreted to preclude the filing of a greater offense when the final determination of the appropriate offense or degree of offense depends in significant part on possible affirmative defense(s).

Commentary

A common example is the filing of a murder charge even when a possible affirmative defense exists which could result in a conviction of manslaughter. However, if the evidence clearly shows the accused committed manslaughter and not murder, the lesser charge should be filed.

2.08 CHARGING MULTIPLE COUNTS

A deputy has the authority to charge all crimes committed. However, reasonable limitations, as defined below, should be placed on the exercise of this authority to avoid unwieldy prosecutions and conserve judicial resources.

2.08.01 JOINDER OF MISDEMEANORS WITH FELONIES

Misdemeanors should not be joined with felonies except in the following situations:

- The evidence relating to the misdemeanor directly or indirectly strengthens the evidence relating to the felony;
- It is necessary to charge the misdemeanor in order to adequately describe the accused's conduct;
- Conviction of the misdemeanor carries significant punitive consequences in addition to the likely consequences of a felony conviction;
- The misdemeanor involves a significant invasion of another's rights and cannot be prosecuted independently based upon *Kellett v. Superior Court* (1966) 63 Cal.2d 822 and *People v. Flint* (1975) 51 Cal.App.3d 333; or
- There is a reasonable possibility that a jury might not convict on the felony count even though the policies relating to evidentiary sufficiency set forth above have been satisfied.

Commentary

Unless one of the above exceptions applies, joining a misdemeanor with a felony typically does not benefit the prosecution. Proving a misdemeanor can waste limited resources and divert attention from the more serious felony. The above exceptions implicitly recognize that some misdemeanors carry greater penalty or stigma than some felonies, may increase punishment for future crimes or vindicate a victim's rights.

Including misdemeanor charges in a felony complaint may preclude a defendant from eligibility for mandatory drug treatment under Proposition 36, the Substance Abuse and Crime Prevention Act of 2000. (PC § 1210.1b(2).) Precluding Proposition 36 drug treatment is an inappropriate reason to join a misdemeanor with a felony.

This policy is not intended to discourage the filing of a misdemeanor separately when not precluded by Kellett v. Superior Court (1966) 63 Cal.2d 822.

2.08.02 NUMBER OF COUNTS

A deputy shall not file a case with more than 15 counts without the approval of the Head Deputy or Deputy-in-Charge.

Commentary

The purpose of this policy is to avoid unmanageable cases and over-filing. However, it should be applied in a flexible manner and should not preclude filing more than 15 counts when appropriate.

Related Crimes

Notwithstanding the multiple punishment limitations of Penal Code § 654, a deputy should file all appropriate charges relating to a single course of conduct when:

- The policies on evidentiary sufficiency have been satisfied as to each count;
- The policies relating to the appropriate charge level have been satisfied; and
- The charge is not merely a technical one but accurately describes separate criminal conduct or a separate theory of culpability.

Unrelated Crimes

Unless the number of counts is patently excessive, a deputy should not limit the number of counts filed except as provided above. The counts charged must, of course, comply with the rules of joinder.

Exceptions can be made for certain crimes against property, such as forgery, when multiple counts stem from a single initial violation of law (e.g., theft, burglary or robbery). A deputy may restrict the number of counts filed to avoid the use of an excessive number of witnesses provided the counts charged adequately describe the accused's conduct.

Commentary

Since at least one charge will be filed, mere multiplicity of charges does not prejudice the rights of the accused. On the other hand, a deputy's case could be prejudiced by arbitrarily limiting the number of counts filed. Because consecutive sentences for charges relating to a single event are rare, there is little danger of wrongfully inducing a guilty plea. Penal Code § 654 provides adequate protection to the accused and should be applied at the time of plea or sentence.

2.08.03 NEW CHARGES AGAINST ACCUSED WITH CHARGES PENDING

If the basic requirements for charging are met, a new complaint shall be filed against an accused who has a pending case:

- If the new crime was committed while the accused was on bail or own recognizance on a pending charge; or
- If the new charge is willful failure to appear after being released on bail or own recognizance on the pending charge.

If it appears that other felonies the accused has committed are being investigated by other agencies, a deputy shall endeavor to consolidate these cases in one place for filing.

2.08.04 CONSOLIDATION OF CASES

When there is a pending felony case in Los Angeles County, a deputy shall try to consolidate, whenever possible, the new felony filing with the pending case and add a Penal Code § 12022.1 enhancement (commission of a new crime while on bail or own recognizance).
Whenever a new felony is filed against an accused who is already being prosecuted by the Office for a felony offense, the filing deputy shall prepare a "Memorandum of Related or Pending Felony Case(s)." A copy of the memorandum should be placed in the new case file and a copy should be forwarded to the office or division handling the pending case.

In addition to preparing the "Memorandum of Related or Pending Felony Case(s)," the deputy filing the new case should contact the deputy handling the pending case in order to facilitate consolidation. In taking steps to consolidate cases, deputies should consider where the most serious offense occurred, and which location will be best for the prosecution of the case and will best serve the convenience of the witnesses and the police agencies. In all cases in which consolidation is under consideration, a deputy shall confer with the appropriate supervisor.

Whenever a deputy handling a pending case becomes aware of the possibility of new felony charges against the defendant but has not received a "Memorandum of Related or Pending Felony Case(s)," the deputy should attempt to determine the status and nature of the new case and document the findings in the pending case file.

2.09 ALTERNATIVE FELONY/MISDEMEANOR CRIMES

An alternative felony/misdemeanor crime (i.e., a wobbler) shall be charged as a felony unless a deputy believes that a misdemeanor sentence is warranted under all the circumstances. The current Penal Code § 17(b)(4) Operational Agreement Schedule I delineates when a wobbler may be directly filed with a local prosecutorial agency.

2.09.01 PRESUMPTIVE FELONY FILINGS

The following factors normally warrant a felony prosecution:

Prior Record

A misdemeanor prosecution should not normally be considered if the defendant:

- Has been committed to a Secure Youth Treatment Facility (formerly known as the Division of Juvenile Justice (DJJ)) or camp or suffered more than one felony sustained petition within the previous five years; or
- Has a record of charges and/or convictions for any type of criminal conduct within the past five years demonstrating the defendant's habitual criminality.

When the present crime involves domestic violence or child abuse, prior similar crimes or a past history of violent behavior shall be considered, even if the prior incidents were not brought to the

attention of the criminal justice system. It is important to remember that crimes of domestic violence and child abuse are frequently repetitive and escalating in degree.

Severity of the Crime

A misdemeanor prosecution should not normally be considered if the defendant:

- Attempted to injure another with the use of a deadly weapon or instrument, whether successfully or not;
- Regardless of the means used, caused permanent injuries, temporary injuries requiring hospitalization, or temporary injuries substantially incapacitating another for a significant period. In mutual combat situations, all circumstances should be considered including the relationship between the parties and any prior criminal history of the parties;
- Physically attacked and injured in any significant way a child, an elderly or disabled person, in the commission of the crime;
- Possessed a loaded firearm at the time of the commission of the crime, and the crime is such that a loaded firearm could be used to facilitate its commission;
- Committed a battery on a police officer inflicting other than minor injuries; or
- Was engaged in bookmaking related to an extensive bookmaking operation or to organized crime.

Probability of Continued Criminal Conduct

Because a probability of continued criminal conduct may be inferred from the following factors, a misdemeanor prosecution should not normally be considered if the defendant:

- Has demonstrated that the defendant is a professional criminal by modus operandi, the tools used in the commission of the crime, the defendant's criminal associations, or other similar circumstances; or
- Has committed a crime related to gang activities or organized crime.

Eligibility for Probation

Except in unusual cases when the interests of justice demand a departure, if the accused is statutorily ineligible for probation, a felony charge should be filed.

Commentary

Penal Code § 17(b)(4) gives a prosecutor a unique crime charging tool. These policies provide a framework for considering the application of Penal Code § 17(b)(4). This framework can be systematic without being rigid. Most cases do clearly and properly fall into a felony or misdemeanor category. However, the use of the words "should not normally be considered" leave a prosecutor with the discretion necessary for reaching a proper decision in those cases that cannot be easily categorized.

The factors stated are proper factors to consider in determining whether a particular accused appears to deserve a felony or misdemeanor sentence. Factors which should not be considered include (1) the attitude of the victim, witnesses, or law enforcement toward the

decision (unless it illuminates the legitimate factors for consideration), and (2) the accused's family, economic, immigration or professional status.

In applying these policies, a deputy shall consider the threatened or potential provable loss as well as the actual loss. For example, if an accused is arrested at the scene of a commercial burglary before having the opportunity to steal, a deputy shall consider what the provable loss might have been considering the nature of the premises, the time, the modus operandi, and the nature of the objects available for theft.

2.09.02 PRESUMPTIVE MISDEMEANOR FILINGS

A misdemeanor prosecution pursuant to Penal Code § 17(b)(4) should normally be considered regardless of the provisions set forth above, if the case meets the criteria delineated in the current Penal Code § 17(b)(4) Operational Agreement Schedule I.

Commentary

The criteria for direct filing delineated in the current Penal Code § 17(b)(4) Operational Agreement provide guidance when determining whether a crime should be classified as a felony or a misdemeanor. However, there are exceptions when a felony sentence may be warranted, even if the crime otherwise meets the criteria. The exceptions are difficult to define legislatively and are frequently applicable. It is, therefore, not suggested that any of these crimes be reduced by the legislature from alternate felony/misdemeanors to simple misdemeanors.

However, these crimes should not be treated as misdemeanors when the gravamen of the crime is something other than the taking of property or possession of contraband (e.g., burglary, where the gravamen of the crime may be invasion of privacy or the intent to cause a greater loss).

2.09.03 OTHER FACTORS THAT WARRANT CONSIDERATION

In close decisions regarding the use of Penal Code § 17(b)(4), a deputy may consider the following additional factors in weighing the propriety of a felony sentence:

- The defendant's cooperation as demonstrated by a voluntary confession, assistance in the recovery of property, information regarding other criminal activity of the accused or others, voluntary restitution, or other like factors; or
- The defendant's age if it may result in a commitment to a Secure Youth Treatment Facility (formerly known as the Division of Juvenile Justice (DJJ)) rather than to state prison.

2.09.04 MULTIPLE DEFENDANTS

When multiple defendants can be charged with a felony, and at least one appears to deserve a felony sentence for the crime(s), all should be charged initially with a felony. The legislature has expressed a preference for joining defendants as evidenced by article I § 30 of the California Constitution, and Penal Code § 1050.1.

Commentary

The use of separate felony and misdemeanor prosecutions for codefendants would waste judicial resources, unnecessarily inconvenience witnesses, and should be avoided. Misdemeanor dispositions are still possible for the eligible codefendant(s) under Penal Code § 17(b)(5).

2.10 CHARGING SPECIAL ALLEGATIONS

When a complaint is filed, a deputy shall charge all applicable special allegations that enhance the penalty or result in the mandatory denial of probation (e.g., all prior serious or violent felony convictions, possession or use of weapons and the infliction of great bodily injury) whenever the policies on evidentiary sufficiency have been satisfied.

2.10.01 CHARGING STANDARD

A deputy shall charge a special allegation and not delay filing a complaint or information if there is sufficient evidence to establish probable cause to believe that the particular allegation is applicable. If further supporting documentation concerning the allegation is needed, the deputy shall fill out a "Further Investigation/Case Preparation Checklist" form. Such investigations should be completed before the preliminary hearing.

2.10.02 UNRESOLVED LEGAL ISSUES

If the application of a special allegation presents a novel or unclear question of law, a deputy shall allege the special allegation when there is a reasonable possibility that a court will later rule that the allegation is applicable and the evidence in support of the allegation is such that a deputy can reasonably argue that the allegation is applicable.

Commentary

Care in charging is necessary to prevent the prosecution of innocent individuals and to promote the proper and effective allocation of prosecutorial and judicial resources. Once the decision to charge has been made, however, neither purpose is served by limiting the use of special allegations when there is sufficient admissible evidence to believe the allegation is applicable. Special allegations exist to provide for the imposition of additional punishment. The choice of the appropriate penalty among a range of possible penalties should be deferred to the sentencing stage. The accused is not prejudiced by this policy. A contrary policy would prevent the later determination of an appropriate sentence and prejudice the People's case.

2.10.03 SUPPORTING DOCUMENTATION FOR CERTAIN SPECIAL ALLEGATIONS

If a prior conviction is necessary to establish the corpus delicti in a felony case (e.g., PC §§ 666, 25400(c)(1), 25850(c)(1), and 290), it is the investigating officer's responsibility to order and secure the necessary certified documentation before the preliminary hearing.

2.10.04 GREAT BODILY INJURY ALLEGATIONS

Great bodily injury allegations can greatly increase punishment for certain felonies. Accordingly, the use of such allegations should be limited to situations in which the accused:

- Has inflicted a permanent bodily injury (other than a minor scar); or
- Has inflicted serious bodily injury causing hospitalization or incapacitation for a significant period of time.

Commentary

The law defines "great bodily injury" as a significant or substantial physical injury, language that is somewhat vague. This policy is intended to avoid overcharging when the injuries are minor or temporary.

2.10.05 SERIOUS FELONY ALLEGATIONS

A filing deputy shall allege the five-year enhancement under Penal Code § 667(a)(1) when the accused has a prior serious felony conviction and the current charge is also a serious felony. This five-year enhancement must be served in addition to any term imposed under the Three Strikes law. A court may strike this allegation pursuant to the provision of Penal Code § 1385. (PC § 1385(b).) Penal Code § 1192.7(c) defines "serious felony."

2.11 JURISDICTION

Penal Code §§ 777 et seq. set forth the laws concerning the jurisdiction of criminal offenses. Jurisdiction to charge an offense may exist in more than one jurisdictional territory when the offense, among others, is committed in multiple jurisdictional territories (PC §§ 778, 778a, and 781); is committed near a boundary of multiple jurisdictional territories (PC § 782); is committed on a vessel, train, motor vehicle, common carrier or aircraft (PC § 783); is committed in a park that is situated in more than one county (PC § 783.5); or the offense charged is failure to provide (PC § 777a), perjury (PC § 777b), kidnapping, seizure for slavery, abduction or enticing/taking away a person for prostitution (PC § 784); child abduction (PC § 784.5); an enumerated sex offense, domestic violence, stalking, human trafficking, stalking, or child abuse (PC § 784.7); incest or bigamy (PC § 785), identity theft (PC § 786(b)), theft or receiving stolen property (PC § 786.5 and PC § 789), terrorist attacks (PC § 787); treason (PC § 788), homicide (PC § 790), or involves property being taken from jurisdictional territory into another (PC § 786(a)).

2.11.01 CRIMES CHARGEABLE IN MORE THAN ONE COUNTY

Whenever the jurisdiction for a crime is proper in another county as well as Los Angeles County, the filing deputy shall notify the deputy's Bureau Director, through the chain of command, prior to filing. If, after a review of the facts and a consideration of the factors listed below, there remains some doubt whether charges should be filed in Los Angeles County, an explanatory memorandum with attached police reports should be prepared and submitted as rapidly as

possible to the Bureau Director. Notification by e-mail or fax is acceptable. The Bureau Director will consult with the appropriate person(s) in the other county.

If the decision is made to file the case in Los Angeles County, the filing deputy shall send a letter to the appropriate prosecutorial office in the other county notifying them of the facts of the case and the decision to charge. The investigating officer shall be instructed to notify the other law enforcement agencies involved.
Inquiries received from other counties regarding jurisdiction in a particular case shall be referred to the Director of the bureau which would prosecute the case should it be filed in Los Angeles County. If more than one bureau might be affected, the inquiry shall be referred to the Chief Deputy.

2.11.02 FACTORS TO BE CONSIDERED

In selecting the appropriate county or counties in which to prosecute a particular case, the following factors should be considered:

- The relative ability to prove that the crime was committed in whole or in part in each of the counties;
- If multiple crimes are involved, the relative ability to prove that the crimes were committed within each of the counties should be weighed against the relative seriousness of the crimes;
- The convenience of prosecution witnesses;
- The ability to consolidate and successfully prosecute the greatest number of significant appropriate charges within each county;
- The ability to consolidate and prosecute cases against multiple suspects within each county; and
- The location of the place where the most serious crime was committed.
    - In cases involving thefts when stolen property is moved from one county to another, the county where the property is recovered is the appropriate county to file charges unless it can be proven that the accused committed the theft and can be successfully prosecuted in the county where the theft took place.
    - In cases involving escapes from penal institutions, the county where the escape actually occurred is generally the appropriate county to file charges, other factors being relatively equal.

Commentary
Because of the many variables involved in the prosecution of multi-jurisdictional cases, it is impossible to formulate exact rules. Certain preferences are set forth above.
Multi-jurisdiction cases can be complex. Each of the above-described factors should be carefully considered in such cases.

2.12 HARRIS REPORT - CRIME CHARGING POLICY AND PROCEDURE

Deputies shall follow a uniform approach to writing the Statement of Facts at the time of filing. The Statement of Facts shall include the defendant's complete criminal history, facts surrounding

the offense(s), and any strengths, weaknesses and possible defenses. In the event a pre-filing interview was conducted, the Statement of Facts shall include the filing deputy's impressions of the victim and the level of danger, if any, posed to the victim.

The deputy filing the case shall complete a protective order form at the time of filing a VIP-category case. Protected parties should include any appropriate victim or witness in any case falling within one of the VIP categories. The deputy assigned to appear at the arraignment is responsible for presenting the protective order application to the court and shall be prepared to argue good cause for issuance of the order.
Legal Policies Manual Chapter 11, Felony Case Management, and Chapter 12, Felony Case Settlement Policy, also incorporate changes in policy effected as a result of the Harris Report.

2.13 MARSY'S LAW RIGHTS

Proposition 9, The Victims' Bill of Rights Act of 2008, also known as "Marsy's Law," was added to the California Constitution by the voters on November 4, 2008. It amended Article I, § 28 enumerating crime victims' rights. Pursuant to Article I, § 28(b)(17), victims have a constitutional right to be informed of their "Marsy's Rights" as enumerated in Article I, § 28(b), of the California Constitution. To that end, Penal Code § 679.026(c)(1), requires:

> [e]very law enforcement agency investigating a criminal act and every agency prosecuting a criminal act shall, . . . at the time of initial contact with a crime victim, during follow-up investigation, or as soon thereafter as deemed appropriate by investigating officers or prosecuting attorneys, provide or make available to each victim of the criminal act . . . a "Marsy's Rights" card.

The California Constitution defines "victim" as ". . .a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act. The term 'victim' also includes the person's spouse, parents, children, siblings, or guardian, and includes a lawful representative of a crime victim who is deceased, a minor, or physically or psychologically incapacitated." (Cal. Const. Art. I, § 28(e).)

It is the policy of this Office that **all** victims who have suffered direct or threatened physical or financial harm shall be notified of their Marsy's Law rights in **all felony, misdemeanor and juvenile filings.** In most cases prosecuted by our Office where there is a crime victim, PIMS requires that the victim be named in the Complaint, Indictment, Information or Petition. Some charges, however, such as evading (VC § 2800.2 and § 2800.3), hit and run (VC § 20002 and VC § 20003), arson (PC § 451 et seq.), child pornography (PC § 311 et seq.), pimping and pandering (PC § 266 et seq.), and solicitation for prostitution (PC § 653.22) do not prompt for a victim's name.
Special Procedures for Child Pornography/Exploitation cases

The Child Victim Identification Program (CVIP) of the National Center for Missing and Exploited Children (NCMEC) serves as the central repository in the U.S. for information relating to child victims depicted in sexually exploitive images and videos.

http://www.missingkids.com/home Information regarding many child pornography victims is in the NCMEC database. Some child pornography victims and/or their attorneys have requested to be notified when their images are discovered. Some victims have indicated that they never want to be informed when their images are discovered. Some victims and/or their attorneys have filed a Victim Impact Statement and have requested that this Victim Impact Statement be submitted in all cases where their images are found. Victims and/or their attorneys have made these requests via NCMEC. Prosecutors in the Cyber Crimes Division can provide direction on how to read NCMEC reports for this purpose.

In all child exploitation cases, in which a victim or victim's attorney requests notification of any defendant who possessed a specific image of child pornography depicting their client, the victim or attorney shall be sent a Marsy's Law letter. The names of victims who have requested notification shall be entered into PIMS to receive notifications of future court hearings, etc. Notification will only be provided if:

> (1) a formal written request on letterhead by a licensed attorney with a specific series and named victim seeks information from our Office on a child pornography defendant possessing a named series of images of their client; and/or
>
> (2) a NCMEC CVIP report states the attorney's name and contact information and a request for the name of a defendant who possessed the named series of images.

Victims of child pornography are rarely called to testify. When it is anticipated that a victim will not be required to come to court to testify, the filing prosecutor is reminded to mark this on the filing worksheet so that the victim does not receive a subpoena to appear for court hearings.

Warrant or Extradition Cases

Victims in cases filed for Warrant or Extradition shall be sent a notification packet by support staff, except in cases where it is determined by the filing deputy that sending notification may endanger a victim or witness or jeopardize the prosecution of a case. In those cases, the packet shall remain in the DA file until the first court appearance at which time the notification packet will be mailed.

Office Personnel Responsibilities

In homicide cases, all personnel shall ensure that the check box indicates "deceased" after the victim's name on the Victim/Witness screen in PIMS. Checking "deceased" ensures that letters are not addressed to and/or issued for a deceased victim. A contact name for next of kin should be entered, when known, so that the next of kin will receive notification. PIMS allows for more than one contact person to be entered.

Filing Prosecutor: It is the responsibility of the filing prosecutor to ensure that all victims are listed with the correct "witness type" code on the Felony, Misdemeanor and Juvenile Filing Worksheets regardless of whether PIMS prompts for a victim's name. When the victim is a minor or a dependent adult, filing prosecutors are reminded to also include the minor's parent or guardian and the dependent adult's caretaker or conservator as a witness. When it is anticipated that a victim will not be required to come to court to testify, the filing prosecutor is reminded to

mark this on the filing worksheet so that the victim does not receive a subpoena to appear for court hearings.

Head Deputies and Deputies-in-Charge: Head Deputies and Deputies-in-Charge at each office shall designate clerical support staff to send Victim Notification packets via U.S. mail on the day the case is filed. In offices that do not have a full-time Victim Service Representative (VSR), the Head Deputy and Deputy-in-Charge shall designate a primary and back up clerical support who will be responsible for forwarding all Victim Request Response forms received via FAX and U.S. mail to the assigned deputy.

Support Staff: Support staff are responsible for sending initial victim notification packets to victims when a case is filed, checking PIMS daily and sending out Marsy's Law Notice letters when victims have requested notification.

All employees: If a notification packet is returned as "non-deliverable" the assigned deputy, Head Deputy or Deputy-in-Charge shall be notified so that they can take necessary steps to locate the victim.

2.13.01 VICTIMS' RIGHTS TO NOTIFICATION AND TO REASONABLY CONFER

Pursuant to California Constitution Article I, § 28(b)(17), victims have an automatic right to be informed of all of their Marsy's Law rights as defined in §§ 28(b)(1) – (16). For the purposes of Marsy's Law, a victim is defined in California Constitution article I, § 28(e). Upon the filing of criminal charges, the Office shall notify victims, and any identified next of kin or guardians, of these rights. Furthermore, upon request by the victim, or identified next of kin or guardian, the Office shall provide the requestor with reasonable notice of and the opportunity to reasonably confer with the prosecuting attorney regarding the arrest of the defendant, if known by the prosecutor, the charges filed, and the determination of whether to extradite the defendant. (Cal. Const. Art I., § 28(b)(6).)

2.13.02 VICTIMS' RIGHTS ASSISTANCE UNIT (VRA)

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art, I § 28(b)(1).) (See LPM § 24.02.04)

2.14 ALTERNATIVE MISDEMEANOR/INFRACTION CRIMES

Under the provisions of Penal Code §§ 19.8 and 17(d), specified misdemeanor offenses may be handled as infractions upon action by a prosecutor or by the court. These offenses are commonly referred to as "wobblettes." A misdemeanor offense enumerated in Penal Code § 19.8 may be prosecuted as an infraction when the prosecutor files the offense as an infraction (unless the defendant objects at the time of arraignment), or when the court, with the consent of the defendant, reduces the offenses to an infraction.

2.14.01 PRESUMPTIVE MISDEMEANOR FILINGS

Under Vehicle Code § 40000.10, a violation of Vehicle Code § 12500(a) is punishable as an infraction. A violation of Vehicle Code § 12500(a) is punishable as a misdemeanor or infraction when there are two or more prior convictions of Vehicle Code § 12500 or if the person has a prior driver's license suspension or revocation as specified in Vehicle Code § 40000.1(b)

If the Vehicle Code § 40000.10(a) criteria for charging a misdemeanor violation of Vehicle Code § 12500(a) are met, the following circumstances warrant a misdemeanor prosecution:

- When the defendant has been convicted of three or more violations of Vehicle Code § 12500(a) or two or more violations of Vehicle Code § 14601 et seq. within the past five years;
- When the offense is committed in conjunction with another misdemeanor or felony offense (See also LPM § 2.08.01, *ante*, on Joinder of Misdemeanors with Felonies).

Law enforcement requests for charge evaluation shall be accompanied by a standard filing packet that includes a written narrative establishing the facts of the offense and the probable cause for the arrest, as well as documents containing the defendant's CLETS, CCHRS and DMV criminal history.

2.14.02 PRESUMPTIVE REFERRALS FOR PROSECUTION AS INFRACTIONS

The following circumstances warrant a referral for handling as an infraction:

- Violations of Vehicle Code § 12500(a), where the defendant does not have any prior convictions for violations of Vehicle Code § 12500(a) or Vehicle Code § 14601 et seq.; and
- Violations of Vehicle Code § 12500(a), where the defendant is not concurrently charged with another misdemeanor or felony offense.

If both of the above circumstances exist, a law enforcement officer may issue the citation as an infraction and file the matter in traffic court for processing and adjudication.

The above policy regarding first-time Vehicle Code § 12500(a) offenses is presumptive. If circumstances exist that appear to justify a misdemeanor charge, a law enforcement officer may issue a citation as a misdemeanor and submit the offense to the Office for charge evaluation. Deputies reviewing requests for charge evaluation shall determine the appropriate charge, as well as whether an offense should be appropriately prosecuted as a misdemeanor or referred for handling as an infraction.

2.15 SUBMISSION OF LAW ENFORCEMENT REPORTS TO THE COURT

Penal Code § 964 requires that prosecutors and the courts ensure the protection of confidential personal information regarding any witness or victim contained in police, arrest or investigative

reports if submitted by the prosecutor in support of a criminal complaint, indictment, or information.

For purposes of Penal Code § 964, "confidential personal information" is defined as including, but not limited to, an address, telephone number, driver's license number, California Identification Card number, Social Security number, date of birth, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number.

In order to meet the requirements of Penal Code § 964**,** the Office will not provide police reports to the courts upon the filing of a complaint, indictment or information unless the case is filed for warrant. Upon filing a case for felony or misdemeanor warrant, redacted copies of police reports shall be submitted to the court. It is the responsibility of the filing deputy to ensure that all "confidential personal information" is redacted from the reports before they are submitted to the court in the filing package.

In all cases other than those filed for felony or misdemeanor warrant, if a situation arises necessitating the submission of police reports to the court, the deputy submitting the reports shall ensure that all "confidential personal information" concerning witnesses and victims is redacted prior to submission of the reports. Should the court order the submission of unredacted reports, the deputy submitting the reports in compliance with this order should request on the record that the court issue a protective order prohibiting the release of the reports to anyone not authorized by the court.

2.16 PROSECUTION OF LOCAL CITY ORDINANCES

There are 88 incorporated cities in the County of Los Angeles. Many of these cities have adopted local city ordinances creating offenses for conduct not otherwise prohibited by state law or county ordinance. These offenses can be punished as either misdemeanors or infractions. Some of the cities retain their own city attorney or city prosecutor to pursue violations of these ordinances. Others, however, rely on the Office to prosecute violations of these ordinances on behalf of the city. These cities have contracted with the County of Los Angeles for this service at standard contract rates and must reimburse the county for the cost incurred by Office staff in prosecuting these ordinances.

Whenever one of the cities with established contracts with the county asks the Office to file a criminal complaint for a violation of a city ordinance, the code for Contract Cities (CC) shall be entered in the box at the bottom of the Misdemeanor Filing Worksheet by the filing deputy. This information shall then be entered into PIMS by support staff assigned to complete the filing paperwork and prepare the case file.

In preparing the misdemeanor case file in a Contract Cities case, support staff shall attach the Contract Cities Billing Sheet to the file in lieu of the standard Misdemeanor Filing Worksheet Comments page. The Billing Sheet shall be placed in the file behind the Misdemeanor Filing Worksheet. Whenever any Office employee, including an attorney, investigator, support staff or

hearing officer, handles one of these cases, the employee shall write the amount of time the employee spent handling the case, in 15-minute increments, on the Billing Sheet.

When the case is closed, a copy of the Billing Sheet shall be forwarded to Bureau of Administrative Services, Budget and Fiscal Services Division, Attention: Cost Accounting Unit. Accounting will calculate the charges and bill the city for Office services.

All filing documents referenced above can be located in the **DA Filing Forms** icon in Lotus Notes and in PIMS.

2.17 CASE PROCESSING IN PIMS

The utility of eFolder is enhanced when more deputies create documents electronically in PIMS. (See LPM § 26.20 eFolder.) In order to maximize eFolder and move toward an electronic filing system, it is necessary that all deputies who file cases learn how to electronically decline cases and create felony statements of facts in PIMS. All deputies transferred into a filing assignment shall be trained on how to electronically decline and create statements of facts within one month of the transfer. See Filing Resources on LADAnet for instructional manuals and guides to electronically file and decline cases. The Filing Deputy Training Team is able to assist with on-site training if requested.

In addition to the above training requirements, all deputies shall abide by the following filing protocols:

- All felony filings shall contain a basic statement of facts, either created using PIMS or uploaded into eFolder immediately after filing. All felony statements of facts shall contain a summary of the defendant's criminal history (including the defendant's status on probation, parole or Post Release Community Supervision), a brief summary of the facts, a list of key witnesses and the name of the Investigating Officer. Managers may require more detail in the statement of facts, depending on the needs of the office.
- Special units may choose to upload a more comprehensive opening memorandum, in addition to the statement of facts. If the memorandum contains sensitive or confidential information, it should be uploaded to the restricted Z Folder within eFolder.
- Deputies who have cases specially assigned to them, especially cases assigned for vertical prosecution, should ensure that PIMS is updated to reflect this assignment.

2.18 PLEADING AGGRAVATING FACTORS TO ALLOW FOR A HIGH-TERM PRISON SENTENCE

Effective January 1, 2022, Senate Bill No. 567 amended Penal Code §§ 1170 and 1170.1. Under the new law, a court may only impose a sentence exceeding the mid-term of a triad when one or more circumstances in aggravation related to the crime or to the defendant exist and have been proven.

In order to establish the availability of the full range of sentencing options in a felony matter, any circumstance in aggravation that is supported by the available evidence should be alleged in the

charging document. Charge evaluation deputies should consider which, if any, of the circumstances in aggravation exist, based on the available evidence, at the time of filing as to each of the offenses and enhancements to be charged. Charge evaluation deputies should ensure that circumstances in aggravation are alleged when supported by sufficient evidence and in light of the circumstances of the case. In addition, pursuant to California Rules of Court (CRC) 4.421(c), any factor statutorily declared to be circumstances in aggravation or that reasonably relate to the defendant or the circumstances under which the crime was committed should also be alleged. The UCC Manual and PIMS have been updated to reflect the specific language of the circumstances in aggravation, including some of the more common aggravating factors established by other statutes. (See GOM 22-013.)
Circumstances in aggravation are set forth in CRC Rule 4.421, which is expressly non-exclusive. CRC Rule 4.423 provides factors in mitigation. Importantly, a fact that is an element of a charged offense may not concurrently be used as an aggravating factor to impose a high-term sentence. (CRC Rule 4.420(d), cited in *Cunningham v. California* (2007) 549 U.S. 270, 279.)

See LPM 11.28 and 12.04.01 for guidance on post-filing pleading, proving circumstances in aggravation and sentencing.

CHAPTER 3

CRIME CHARGING - SPECIAL POLICIES

3.01 MAJOR CRIMES AND SIGNIFICANT CASES

Major crimes and significant cases of public interest require special handling. This section defines these offenses and outlines the procedures to be followed in charging, declining to charge and prosecuting them. Cases meeting the criteria of a major crime/significant case may arise anywhere in the county. The procedures delineated in this section pertain to the handling of a major crime/significant case prosecuted anywhere within the Office.

3.01.01 MAJOR CRIMES/SIGNIFICANT CASES DEFINED

A major crime is a particularly aggravated felony offense. A significant case is any crime, felony or misdemeanor, of significant public interest. In most cases, it will be clear at the time of charging whether a case falls into one of these two categories. However, if during the pendency of a case, circumstances arise or change such that the case meets the criteria of a major crime, or begins to generate significant public interest, the case shall be treated as a major crime/significant case and the procedures set forth herein shall be followed. Major crimes and significant cases include the following:

- Crimes that are particularly serious, brutal or heinous, such as multiple murders, serial killings, kidnappings, and violent or bizarre crimes against the person;
- Crimes capable of arousing widespread public interest or concern;
- Crimes offending public sensibilities;
- Extraordinary white collar crimes;
- Negligent deaths or serious bodily injuries to workers;
- Environmental crimes that may have serious consequences to the public;
- Crimes involving any prominent person, including public officials and law enforcement officers;
- The killing or serious injury of a law enforcement officer or firefighter while on duty; and
- The maiming or killing of any animal or serious animal attacks on humans.

3.01.02 PROCEDURES

Most major crimes/significant cases understandably arouse widespread public concern. These procedures are designed to enable the Office to respond appropriately to that concern.

3.01.03 PRIOR TO CHARGING OR DECLINING TO CHARGE

Before charging or declining to charge a major crime/significant case, it is mandatory that the Bureau Director be notified. The deputy handling the case shall apprise their Head Deputy or Deputy-in-Charge who shall then notify the Bureau Director.

The Head Deputy or Deputy-in-Charge shall be responsible for making a recommendation to the Bureau Director whether the case should be processed by the Grand Jury. The Chief Deputy shall make the final decision regarding which cases should be presented to the Grand Jury.

3.01.04 AFTER CHARGING OR DECLINING TO CHARGE

When a major crime/significant case is filed or an indictment returned, the filing deputy/assigned deputy shall prepare a confidential memorandum to be forwarded through the chain of command to the Assistant District Attorney. The memorandum shall contain:

- The names of all accused;
- The number of the case and the name of the filing office and prosecutor;
- The counts filed;
- A concise factual summary of the case including the reason why it is a major crime/significant case; and
- A description of any notable or unusual legal problems which might arise in the case.

A copy of the memo shall also be forwarded to the Chief Deputy and Media Relations Division.

In the event of a declination, a copy of the written declination shall be transmitted through the chain of command to the Bureau Director.

3.01.05 NOTIFICATION TO THE CHIEF DEPUTY AND DISTRICT ATTORNEY

It shall be the responsibility of the Bureau Director to bring major crimes/significant cases submitted for charging or declination to the immediate attention of the Chief Deputy and to forward, as soon as it is available, a copy of the confidential memorandum or declination to the Chief Deputy and Assistant District Attorney.

The District Attorney shall be kept informed by the Chief Deputy. The Chief Deputy shall assign such personnel as are deemed necessary to the processing of such cases. In appropriate cases, the Chief Deputy shall assign these cases to the Major Crimes Division for prosecution.

If a special circumstances case meets the definition of a major crime/significant case, the procedures in this section are applicable as well as the specific procedures for handling cases involving special circumstances covered in the *Special Circumstances Cases* chapter.
Any proposed disposition of a major crime/significant case shall conform to the provisions of the felony and misdemeanor case settlement policies set forth elsewhere in this manual. The proposed disposition shall be brought promptly to the attention of the Bureau Director. At the conclusion of a trial in a major crime/significant case, the result of the trial shall be brought promptly to the attention of the Bureau Director.

3.02 THREE STRIKES

The Three Strikes law, Penal Code §§ 1170.12(a)-(d), provides a powerful tool for obtaining life sentences in cases involving habitual criminal offenders. However, unless used judiciously, it also has the potential for injustice and abuse in the form of disproportionately harsh sentences for relatively minor crimes. The Three Strikes statutory scheme appropriately authorizes the use of prosecutorial discretion in its implementation. Deputies have a legal and ethical obligation to exercise this discretion in a manner that assures proportionality, evenhanded application, predictability and consistency. Moreover, the potential for coercive plea bargaining must be avoided.

3.02.01 CHARGING POLICY

In all instances in which a third strike case is pursued as a second strike case, Penal Code § 667.5(b) priors shall be plead and proved or admitted only when the priors are for sexually violent offenses as defined in Welfare and Institution Code § 6600(b).

For Three Strikes case settlement rules, see the Three Strikes section of Chapter 12, Felony Case Settlement Policy.

3.03 JUVENILE CRIME CHARGING

The Juvenile Division prosecutes all crimes committed by minors countywide. The charging standards and guidelines used in juvenile cases are the same as for adult prosecutions. Deputies should refer to the most recent edition of the *Juvenile Delinquency Practice Manual* published by the Office for detailed descriptions of juvenile law and procedures. In any case where a person under the age of 18 is accused of a crime, and law enforcement is seeking charges, the case shall be presented to the appropriate Juvenile Division Office for filing consideration.

The provisions of Proposition 21 involving the discretionary direct filing of juveniles in adult court under certain circumstances were abrogated by Proposition 57. Pursuant to Proposition 57 (Prop 57), only juvenile offices may consider filing charges in cases in which a minor is accused of a crime.

In order to charge a minor in adult court, the prosecution shall make a "Motion to Transfer Minor from Juvenile Court to a Court of Criminal Jurisdiction" in the appropriate juvenile court. (WIC § 707(a).) The approval of the Head Deputy of the Juvenile Division is required to authorize a Motion to Transfer.

The Juvenile Division Head Deputy shall consider the following factors:

- Degree of criminal sophistication exhibited by the minor;
- Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction;
- The minor's previous delinquent history;
- Success of previous attempts by the juvenile court to rehabilitate the minor;

- The circumstances and gravity of the offense alleged in the petition to have been committed by the minor;
- Existence of a companion adult defendant; and,
- Any special consideration for victims and witnesses.

The first five factors listed above are based on the statutory criteria set forth in Welfare and Institutions Code § 707 (a)(3)(A-E). The last two factors represent additional significant considerations that might warrant transfer of the minor from juvenile court to a court of criminal jurisdiction. If the Juvenile Division Head Deputy determines that a Motion to Transfer is appropriate, the Juvenile Division Head Deputy shall consult with the Head Deputy of the office responsible for prosecution in adult court.

3.03.01 CASES CERTIFIED TO ADULT COURT

If, after a transfer hearing, the juvenile court certifies the minor to adult court, the adult court filing deputy shall file the case. The adult court filing deputy may not reject the case or deviate from the juvenile court charges without prior approval of the Head Deputy. Juvenile court filing deputies use the same charging standards as those used in adult cases. Therefore, unless the facts or the law have changed, the same charges should be filed in adult court. Prior filing errors or omissions may justify deviating from the original juvenile charges.

3.03.02 CASES CERTIFIED TO JUVENILE COURT

Whenever a case is pending in adult court and it is suggested or appears to the judge that the defendant was under 18 years of age at the time of the offense, the adult court must immediately suspend proceedings and "examine into the age of the person." (WIC § 604.)

A deputy confronted with a defendant who challenges the adult court's jurisdiction should not necessarily concede the issue. Adult defendants sometimes lie about their age to get their cases transferred to the juvenile court in order to avoid what they perceive to be the harsher penalties of adult prosecution. If a claim of minority appears untruthful, the adult court deputy shall present any available evidence to counter the claim (such as the date of birth given by the defendant to police in this or other cases) and make appropriate arguments on the issue. The accused has the burden of proof to establish minority by a preponderance of evidence. (*People v. Nguyen* (1990) 222 Cal.App.3d 1612.)

If after hearing the evidence, the adult court finds the defendant was a minor at the time of commission of the offense, the adult court shall immediately certify the matter to the juvenile court. The adult prosecution should be suspended, but not dismissed. The juvenile court is the final arbiter regarding the accused's age. If the juvenile court, after a hearing, finds that the accused has not proven minority by a preponderance of the evidence, it can certify the case back to the adult court. In addition, the juvenile court has the option, under appropriate circumstances, to hear a motion to transfer jurisdiction from the juvenile court and certify the case back to the adult court. In either event, the case would then resume at whatever stage was reached before the defendant's certification to juvenile court.

3.04 DISCLOSURE OF INFORMANTS

If an informant was involved in a case investigation, a deputy should assume that a motion will be made seeking disclosure of the informant's identity. In bringing this motion, the defendant has the burden of showing a "reasonable possibility" that the informant can offer exonerating evidence or evidence that tends to benefit the defendant's case. The adequacy of such a showing depends largely on the theory of exoneration proffered by the defendant (e.g., "the informant will say it's not my heroin"). In many cases, oral argument and case law alone will be sufficient to successfully oppose the motion. The prosecution can argue, if appropriate, that the accused has not made a prima facie showing that the informant is "material." This argument is usually buttressed by citing case law that held against disclosure in similar factual situations.

If a judge rules that a prima facie showing has been made, then disclosure may be opposed by the use of the in camera hearing procedure set forth in Evidence Code §§ 1042 and 913 et seq. At this hearing, a judge must determine whether there is a reasonable possibility that nondisclosure of the informant's identity would deprive the defendant of a fair trial.

If, at the time of filing, it appears that a judge might, after an in camera hearing, grant a motion to disclose the informant's identity, then no charges shall be filed unless:

- The investigating agency agrees to disclose the informant's identity if the motion is granted; and
- The investigating agency agrees to make reasonable efforts to keep track of the informant's whereabouts.

If it appears that it will be necessary for the informant to testify at the in camera hearing, the filing deputy shall obtain the assurance of the investigating agency that the informant will be made available for that hearing.

The investigating agency must be told that charges will not be filed without this assurance unless the failure to disclose the informant will not require a dismissal. The police should not be required to agree to produce the informant at an in camera hearing if it appears reasonably possible that the motion can be successfully opposed without the hearing or if other witnesses available for an in camera hearing can clearly show that the informant cannot exonerate the accused or benefit the accused's case.

3.04.01 HOBBS ATTACHMENTS

The use of confidential informants by law enforcement is an important investigative tool. In *People v. Hobbs* (1994) 7 Cal.4th 948, the California Supreme Court held that all or part of the information in a search warrant affidavit furnished by an informant may be sealed to protect the informant's identity where the informant's only relevance is supplying probable cause. Evidence Code §§ 1040 to 1042 provide additional authorization regarding the privilege. In *People v. Acevedo* (2012) 209 Cal. App.4th 1040, the ruling in *Hobbs* was extended to apply to wiretap affidavits. Inadvertent disclosure of information found in *Hobbs* attachments could endanger the lives of confidential informants and law enforcement personnel as well as jeopardize ongoing

investigations. The Office will make every effort to legally protect the identities of confidential informants and limit access to confidential information. In order to make informed filing decisions, meet discovery obligations, as well as fulfill the obligation to disclose potential impeachment or exculpatory information (see also LPM § 14.06.03), Office policy requires that deputies review a copy of the sealed *Hobbs* attachments of search warrant affidavits when reviewing cases for filing consideration.

Responsibility of the Filing Deputy at Time of Filing

1. When a case presented for filing is dependent on evidence seized pursuant to a search warrant with a sealed *Hobbs* attachment, oral representations by the investigating agency of its contents without reviewing the sealed *Hobbs* attachment is unacceptable.
2. The sealed *Hobbs* attachment shall be reviewed and assessed for the following determinations:
    a. The likelihood that a court would require disclosure of the informant;
    b. Whether any portion of the sealed *Hobbs* attachment is discoverable under Penal Code §§ 1054.1 et. seq.;
    c. Whether any portion of the sealed *Hobbs* attachment needs to be disclosed in order to comply with the obligation to disclose potential impeachment or exculpatory information.

Protocol When No Discoverable Information is Contained in the Sealed Hobbs Attachment

1. If after reviewing the entire affidavit, the filing deputy determines that no discoverable and/or potential impeachment or exculpatory information exists in the sealed *Hobbs* attachment, the deputy shall, at the time of filing, return the sealed *Hobbs* attachment to the investigating agency.
2. The filing deputy's Statement of Facts, Attorney Notes and/or Filing Memorandum shall note the existence of any portion of a sealed *Hobbs* attachment that was reviewed and assessed and any conclusions reached. However, the filing deputy's documents shall not reveal the contents of any portion of a sealed *Hobbs* attachment.
3. No physical copies of any portion of a sealed *Hobbs* attachment will be retained by the Office. The filing deputy shall ensure that no copies of the sealed *Hobbs* attachment are placed in a case file or provided to defense, probation or other unauthorized individuals.

Protocol When Discoverable Information is Contained in the Sealed Hobbs Attachment

1. If the filing deputy believes that discoverable and/or potential impeachment or exculpatory information exists in the sealed *Hobbs* attachment, the deputy shall consult with the Head Deputy or Deputy-in-Charge to determine whether any or all of the sealed *Hobbs* attachment requires disclosure to the defense. Using the likelihood standard of Legal Policies Manual § 3.05 stated above, if it appears that a judge might require disclosure of the informant's identity or if any portion of the *Hobbs* attachment is determined discoverable or to contain potential impeachment or exculpatory information, no charges shall be filed unless:

a. The investigating agency agrees to disclose the informant's identity and/or information contained in the sealed *Hobbs* attachment; and
b. The investigating agency agrees to make reasonable efforts to keep track of the informant's whereabouts, if applicable; and
c. The investigating agency agrees to request the issuing judge to unseal that portion of the sealed *Hobbs* attachment that contains the discoverable and/or potential impeachment and/or potential exculpatory information in order to provide it to the defense.

2. If the investigating agency is not willing to agree to the above conditions, it will be given the option of withdrawing its case for filing consideration or receiving a case filing declination.
3. The filing deputy's Statement of Facts, Attorney Notes and/or Filing Memorandum shall note the existence of any portion of a sealed *Hobbs* attachment that was reviewed and assessed and any conclusions reached. However, the filing deputy's documents shall not reveal the contents of any portion of the *Hobbs* attachment that remains sealed. Furthermore, the filing deputy shall note when any portion of a previously sealed *Hobbs* attachment is provided to the defense as discovery.
4. No physical copies of any portion of a sealed *Hobbs* attachment will be retained by the Office. The filing deputy shall ensure that no copies of the sealed *Hobbs* attachment are placed in the case file or provided to the defense, probation or other unauthorized individuals.
5. Unsealed portions of any *Hobbs* attachment shall be retained inside the case file.

Access to the Sealed Portion of the *Hobbs* Attachment by the Assigned Courtroom Deputy

1. If a physical copy of any portion of a sealed *Hobbs* attachment is needed for litigation of the search warrant (motions to quash or traverse), the affiant shall be directed to provide a copy to the assigned deputy for that purpose. Procedures for responding to motions to quash or traverse search warrants containing sealed *Hobbs* attachment or set forth in the Office's *Search Warrant Manual*.
2. This policy does not preclude deputies handling testimonial hearings, other than motions challenging the search warrant, from reviewing *Hobbs* attachments in possession of law enforcement or being briefed on its contents when information contained within the attachment may be relevant to the hearing.

Protocol for Wiretaps with Hobbs Attachments

1. The Major Narcotics Division (MND) is responsible for coordinating the approval, preparation and execution of all wiretaps issued by the office.
2. Accordingly, the MND receives the entire affidavit, which includes any sealed *Hobbs* attachments.
3. Wiretaps are ordered sealed by the court and kept in the custody of the law enforcement agencies with copies maintained by the MND.
4. When another division or office files a case derived from any wiretap, the MND shall be immediately contacted for assistance with discovery obligations and wiretap-related litigation.

5. Disclosure of any portion of a wiretap to anyone outside of the Office requires approval from the Head Deputy or Assistant Head Deputy of the MND.

Notifying Law Enforcement When Requesting Unsealing of *Hobbs* Attachment

Any deputy who seeks to have any portion of a *Hobbs* attachment in a search warrant or wiretap affidavit unsealed shall notify the affiant or a supervisor of the law enforcement agency that executed the warrant/wiretap prior to requesting authorization from a court to unseal the *Hobbs* attachment.

Commentary

When it is clear at the time of filing that disclosure of the informant's identity will be required, the filing deputy shall not file charges if the investigating agency has stated that it will not permit such disclosure.

3.05 CRIMINAL MISCONDUCT BY MEMBERS OF THE JUSTICE SYSTEM

JSID is the clearinghouse for all felony criminal cases against persons who are integral to the justice system. All cases alleging criminal misconduct that could support a felony filing against a member of the criminal justice system must be initially presented to JSID. Thus, if law enforcement initially presents a case alleging potential felony activity against a person integral to the justice system to a unit other than JSID, the Head Deputy (HD), Assistant Head Deputy (AHD), or Deputy-in-Charge (DIC) of that unit shall contact JSID and provide copies of the report(s) to JSID for review. JSID will assign a tracking number and conduct an initial evaluation of all cases presented. If it is determined that the case need not remain in JSID, the HD or AHD of JSID will contact the appropriate HD, AHD or DIC of the division, office, or unit where the case will be transferred for filing evaluation and prosecution. JSID will either direct the investigating officer to compile a second set of investigative materials to present to the receiving unit or will forward the original materials to that unit.

When JSID determines that the case is better handled by another division, office, or unit within the Office, it will be the independent responsibility of the receiving unit to determine if sufficient evidence exists to file a criminal case, to prosecute the matter, and to make the appropriate notifications to the BPSO's DCU, whether or not a criminal case is filed. It is important to note that just because a case has been transferred out of JSID does not mean that the evidence is insufficient to support a criminal filing, only that it has been determined that the alleged criminal misconduct does not show such a close nexus to the subject's official duties so as to require evaluation and prosecution by JSID.

3.05.01 PENDING CASES

If during the pendency of a case, a deputy becomes aware of possible criminal misconduct by any member of the justice system, the deputy shall immediately notify their Head Deputy or Deputy-in-Charge. The deputy shall prepare a memorandum detailing the information and/or evidence suggesting possible criminal misconduct. The memorandum shall be forwarded through the Head Deputy or Deputy-in-Charge to the Head Deputy of JSID. The deputy shall

attach a copy of relevant reports, transcripts or other written material. All information in the possession of the deputy pertaining to the alleged misconduct shall be delivered to JSID as soon as possible. If the deputy is aware of additional facts that support or mitigate the allegation(s), that information shall be included in the required memorandum.

The Head Deputy or Deputy-in-Charge shall also prepare a separate memorandum setting forth an analysis of the alleged misconduct. The Head Deputy or Deputy-in-Charge shall forward copies of both memoranda to the Head Deputy of JSID and, through chain of command, to the Chief Deputy District Attorney.

The deputy shall re-evaluate the sufficiency of the evidence in the pending case. If the allegations affect the integrity of the prosecution, significantly weaken the case or are material to the guilt or innocence of the accused, the deputy shall immediately discuss the matter with their Head Deputy or Deputy-in-Charge who will then determine the appropriate course of action for the pending prosecution.

At the conclusion of the case, a separate closing memorandum shall be forwarded to JSID that shall include the final disposition. A copy of this memorandum shall also be forwarded through the chain of command to the Chief Deputy.

JSID shall conduct a review of the submitted memoranda and notify the involved person's employer. JSID may choose to conduct an independent investigation, request the agency initiate its own investigation or conduct a parallel or joint investigation with the involved person's agency.

3.05.02 CASES PRESENTED FOR FILING

Whenever a law enforcement agency presents a felony or wobbler case for filing consideration against any member of the justice system, either on-duty or off-duty, to a division, office, or unit, the HD, AHD, or DIC of that office shall contact the HD of JSID and provide copies of the report(s) to JSID for review. JSID will assign a tracking number and conduct an initial evaluation of the felony or wobbler case presented. If it is determined that the case will not be handled by JSID, the HD or AHD of JSID will notify the appropriate HD, AHD, or DIC of the division, office, or unit where the case originated. If the felony or wobbler case is handled by the division, office, or unit, notification of a filing or declination shall be made to the BPSO's DCU by the handling deputy.

<u>Felonies</u>

Whenever a member of the justice system is accused of a felony, the deputy to whom the case is presented for filing shall immediately notify their Head Deputy or Deputy-in-Charge. The Head Deputy or Deputy-in-Charge shall then immediately notify the Head Deputy of JSID. The filing deputy shall send a copy of the reports to the Head Deputy of JSID. The filing deputy shall also send a copy of the reports, through chain of command, to the Chief Deputy. JSID will then assume responsibility for review and prosecution unless the matter is deemed more appropriately

handled by the office or division it was presented to or another office or division within the Office.

Misdemeanors

Cases that cannot legally support a felony filing (straight misdemeanors) may be presented directly to the division, office, or unit that has geographical or subject matter jurisdiction. If the division evaluating the misdemeanor misconduct finds that the alleged criminal acts directly impact the criminal justice rights of an individual, the HD, AHD or DIC may contact JSID to discuss if the misdemeanor matter is more appropriately handled by JSID.

If the misdemeanor filing remains with the division, office, or unit, notification of the filing or declination shall be made to the BPSO's DCU by the handling deputy.

3.05.03 CRIMINAL MISCONDUCT BY ATTORNEYS - NOTIFICATION TO STATE BAR

Business and Professions Code § 6101(b) requires the District Attorney to notify the State Bar of the pendency of a criminal action against an attorney charging a felony or misdemeanor immediately upon obtaining information that the defendant is an attorney. All such notifications shall be made by the Chief Deputy. Section 6101(b) also requires the prosecuting agency to notify the clerk of the court in which the action is pending that the defendant is an attorney. This notification shall be made by the deputy who appears in court on the case.

Business and Professions Code § 6101(b) provides as follows:

> The district attorney, city attorney, or other prosecuting agency shall notify the Office of the State Bar of California of the pendency of an action against an attorney charging a felony or misdemeanor immediately upon obtaining information that the defendant is an attorney. The notice shall identify the attorney and describe the crimes charged and the alleged facts. The prosecuting agency shall also notify the clerk of the court in which the action is pending that the defendant is an attorney, and the clerk shall record prominently in the file that the defendant is an attorney.

3.06 DNA DATA BANK MATCH CASES

A deputy who is reviewing a case for filing involving a DNA data bank match shall determine whether there is sufficient admissible evidence to warrant the filing of charges and to convict the accused of the charges. A DNA profile match alone does not necessarily provide sufficient evidence to meet filing requirements. A DNA data bank match or "cold hit" which provides a suspect's name and other identifying information is considered an investigative lead and does not, in and of itself, constitute proof beyond a reasonable doubt. (See *People v. Johnson* (2006) 139 Cal.App.4th 1135.) The four charging criteria set forth in § 2.01.01 of the Legal Policies Manual must still be met, whether or not DNA evidence is involved.

3.06.01 NEW DNA REFERENCE SAMPLE SHALL BE OBTAINED

When evidence of identity is established via a database match or "cold hit," a new reference sample for DNA shall be obtained and analyzed in any case presented for filing. A reference sample may be legally obtained through consent, search warrant, court order or abandonment. It is not always possible to complete the DNA analysis on the new reference sample before filing. Therefore, the following guidelines should be considered when determining whether to file a case before the DNA analysis on the new reference sample has been completed.

3.06.02 IDENTITY OF PERPETRATOR DEPENDS UPON DNA

When identity of the perpetrator depends upon DNA, a complaint may be filed, with Head Deputy or Deputy-in-Charge approval, if the following requirements are satisfied:

- A new reference sample is collected from the accused at or prior to the time of filing, and
- The law enforcement agency guarantees that the DNA reference sample will be transported to the crime laboratory for DNA analysis within 24 hours of the arrest of the accused, or on the next business day. The timely delivery of the reference sample to the laboratory will ensure that lab personnel have adequate time to complete the DNA analysis and generate a report within 10 court days. The timing may be critical in cases where it is necessary to present the DNA results at the preliminary hearing.

3.06.03 IDENTITY OF PERPETRATOR DEPENDS UPON DNA AND WHEREABOUTS UNKNOWN

When it is not possible to obtain a reference sample because the suspect's whereabouts are unknown, cases involving a violent felony (PC § 667.5(c)) may be filed for warrant based on a DNA database match. If a filing for warrant is necessary to ensure public safety and the filing deputy obtains Head Deputy or Deputy-in-Charge approval, a case involving at least one violent felony charge may be filed. The remaining charging criteria listed in Legal Policies Manual § 2.01.01 must be met.

3.06.04 IDENTITY OF PERPETRATOR DOES NOT DEPEND UPON DNA

In these circumstances, a complaint may be filed, if there is legally sufficient, admissible evidence, other than DNA, to prove the charges beyond a reasonable doubt, as set forth in Legal Policies Manual § 2.01.01. As in any database match or "cold hit" case, a new reference sample must be obtained and tested. The fact that the identity of the perpetrator does not depend upon DNA does not relieve law enforcement of their obligation to obtain a new reference sample. However, the inability of law enforcement to guarantee that the new reference sample will be delivered to the lab within 24 hours of arrest or on the next business day and/or the fact that the

DNA analysis on the new reference sample has not yet been completed, shall not be a bar to filing.

3.06.05 LAW ENFORCEMENT REQUESTS FOR DNA FAMILIAL SEARCHES

In 2008, the California Department of Justice began using DNA Familial Searching. Familial Searching expands a traditional DNA bank search and provides law enforcement with a powerful tool to aid their investigation of cold cases. Any requests or inquiries for Familial Searching by law enforcement should be referred to the Office's Forensic Science Section.

3.07 POSSESSION OF CONCEALED/LOADED FIREARMS BY GANG MEMBERS

Commentary

Gang members are responsible for many of the serious and violent felonies, including more than half of all murders, committed in Los Angeles County. Handguns are used to commit most of these crimes. In order to reduce the impact and magnitude of gang violence, it shall be the policy of the Office to vigorously prosecute all provable incidents of illegal possession of firearms by gang members as felonies and to seek state prison sentences. This policy shall apply to the prosecution of Penal Code § 25400 and § 25850 violations. For the impact of this policy on Felony Case Settlement Policy, refer to Chapter 12, Felony Case Settlement Policy, subsection 12.07.04, Possession of Concealed or Loaded Firearms by Gang Members.

A violation of Penal Code § 25400 (carrying firearm concealed within a vehicle or concealed upon a person) or § 25850 (carrying a loaded firearm) is punishable as a felony under certain circumstances, e.g.:

- The person has a prior felony conviction. (PC §§ 25400(c)(1) and PC § 25850(c)(1).)
- The firearm was stolen and the person knew or had reasonable cause to know that it was stolen. (PC §§ 25400(c)(2) and 25850(c)(2).)
- The person is an active participant in a criminal street gang as defined in Penal Code § 186.22(a). (PC §§ 25400(c)(3) and 25850(c)(3).)
- The person is not in lawful possession of the firearm. (PC §§ 25400(c)(4) and 25850(c)(4).) Lawful possession is defined as lawfully owning the firearm or having the consent or permission of the lawful owner to possess the firearm. A person who takes the firearm without permission does not have lawful possession. (PC §§ 16750(a) and 16750(b).)
- The person in possession of the firearm had the ammunition in their possession or the ammunition was readily accessible to that person and that person is not the registered owner of the firearm (PC § 25400(c)(6)) or the person is not the registered owner of the loaded firearm. (PC § 25850(c)(6).)

3.07.01 ACTIVE PARTICIPANT IN A CRIMINAL STREET GANG

A person who is in possession of a concealed or loaded firearm and who is an active participant in a criminal street gang as defined in Penal Code § 186.22(a) is guilty of a felony. To prove a

violation of Penal Code §§ 25400(c)(3) or 25850(c)(3), the People must prove that the person who possessed a concealed or loaded firearm:

- Actively participates in a criminal street gang;
- With knowledge that its members engage in or have engaged in a pattern of criminal gang activity; and,
- Willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang. (See *People v. Robles* (2000) 23 Cal.4th 1106.)

Deputies should carefully review the evidence in determining whether PC § 186.22(a) (substantive gang crime), PC § 25400(c)(3) (gang member with a concealed firearm), or PC § 25850(c)(3) (gang member with a loaded firearm) as stand-alone charges can be proved beyond a reasonable doubt. In *People v. Rodriguez* (2012) 55 Cal.4th 1125, the California Supreme Court held that the People must prove that at least two gang members willfully promoted, furthered, or assisted in felonious criminal conduct by gang members for the substantive crime of PC §186.22(a) to be committed. A single defendant acting alone will not suffice. In *People v. Lamas* (2007) 42 Cal.4th 516, the California Supreme Court held that the People must prove the defendant promoted, furthered, or assisted in felonious conduct by gang members that was separate and distinct from the offense of carrying a firearm in public. The mere carrying of the firearm itself is insufficient.

Deputies should file all appropriate substantive charges and allegations that can be proved. For example, possession of a firearm by a felon (PC § 29800(a)(1)), possession of a concealed firearm with accessible ammunition by a person who is not the registered owner (PC § 25400(c)(6)), possession of a loaded firearm by a person who is not the registered owner (PC § 25850(c)(6)), or the appropriate underlying felony crime(s), all with a gang allegation (PC § 186.22(b)(1)(A), (b)(1)(B), (b)(1)(C), (b)(4), or (b)(5)), are easier to prove and have more significant penalties.

Deputies should also be mindful of PC § 667(e)(2)(C)(iii) and PC § 1170.12(c)(2)(C)(iii) ("armed with a firearm" by a defendant with two or more prior strikes) and *People v. Frutoz* (2017) 8 Cal.App.5th 171 (holding that a defendant in possession of a firearm can be charged and sentenced as a third-strike offender). The correct allegation under the Uniform Crime Charging Manual is PC § 1170.12, Form 2, and "armed with a firearm" is the variable language."

3.07.02 OTHER FIREARM POSSESSION CHARGES BY A GANG MEMBER AND GANG ENHANCEMENTS

In addition to the felony firearm charge of possession when an active participant in a criminal street gang, there are additional felony charges listed in Penal Code §§ 25400(c) and 25850(c). In cases in which *all* the elements of Penal Code § 186.22(a) cannot be proven, but there is sufficient evidence for purposes of sentencing to demonstrate that the person in possession of a firearm actively participates in a criminal street gang, felony charges and a state prison sentence should be pursued under any of the other provable felony sections. For example, a firearm possessed by an active gang member may not be registered to that gang member pursuant to

Penal Code §§ 25400(c)(6) and 25850(c)(6) or may be stolen pursuant to Penal Code §§ 25400(c)(2) and 25850(c)(2).

If the conduct at issue can be charged under multiple sections, allege all applicable sections regardless of whether punishment ultimately may be pronounced under only one section pursuant to Penal Code § 654. Since Penal Code § 186.22(a) has been held to be a necessarily included offense of § 25850(c)(3), and, therefore, of § 25400(c)(3), a defendant cannot be *convicted* of both charges. (See *People v. Flores* (2005) 129 Cal.App.4th 174, 184 [A defendant "convicted of street terrorism in violation of section 186.22, subdivision (a) . . . and of carrying a firearm while he was an active participant in a criminal street gang, in violation of section 12031, subdivision (a)(2)(C*)[now Penal Code § 25850(c)(3)*] . . . could not have committed . . . [the 12031(a)(2)(C) [*now Penal Code § 25850(c)(3)*]] charge without necessarily committing [the 186.22(a) charge] at the same time. He cannot be convicted of both crimes."] (*Italics added*.)

Deviation from this policy requires prior Head Deputy approval.

3.08 NARCOTICS ASSET FORFEITURE CASES

Under California's Narcotics Asset Forfeiture law (H&S § 11470 et seq.), in contested civil forfeiture cases involving less than $25,000 in cash or cash equivalents, a conviction of one of the drug trafficking charges enumerated in Health and Safety Code § 11470 in an underlying or related criminal case is mandated to support a judgment of forfeiture.
In any case in which it appears that a forfeiture action might be filed, the filing deputy should be aware that the success of the forfeiture action depends upon the charge being filed. A contested civil asset forfeiture case involving less than $25,000 in cash or cash equivalents requires the conviction "of a defendant" for violating Health and Safety Code §§ 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, 11383, or a felony violation of 11366.8, or for a conspiracy to violate one of these sections. It is the policy of the Office that the evaluation of the criminal matter must not be dictated by the forfeiture case.

3.09 JOHN DOE DNA ARREST WARRANTS

A John Doe DNA arrest warrant identifies the defendant by a unique DNA profile rather than by name, date of birth or other identifying information. In *People v. Robinson, (2010) 47 Cal.4th 1104*, the California Supreme Court held that the issuance of a John Doe DNA arrest warrant will commence a criminal prosecution thereby satisfying the statute of limitations.

It shall be the policy of the Office to use John Doe DNA arrest warrants to commence a prosecution and thereby satisfy the statute of limitations only in appropriate circumstances where there is reasonable certainty that the DNA isolated from the crime scene evidence belongs to the perpetrator of the crime. All other charging criteria included in this manual must also be met. A DNA profile match alone does not necessarily provide sufficient evidence to meet these requirements.

3.09.01 STATUTE OF LIMITATIONS

Penal Code § 804(d) provides that prosecution for an offense is commenced when an arrest or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information or complaint. If the warrant is issued before the statute of limitations runs, the statute is satisfied. In *Robinson*, the California Supreme Court held that an unknown suspect's unique DNA profile satisfies the particularity requirement for an arrest warrant. The statute of limitations is satisfied if the prosecution is commenced by the filing of a John Doe DNA arrest warrant within the limitations period.

Filing a John Doe arrest warrant necessarily involves unusual circumstances. The complaint will contain the perpetrator's genetic profile rather than a name, date of birth, or other common identifying information. A sample complaint and warrant is available on LADAnet, as an attachment to SD 10-01. Filing deputies shall record the John Doe Warrant case category code (DOE) on the Felony Filing worksheet. The decision to file criminal charges via a John Doe arrest warrant must be approved by the Head Deputy, after consultation with their Bureau Director.

Note that when a cold hit occurs and the defendant's true name and other identifying information is discovered, the complaint and warrant **must be amended immediately** to reflect this information. Deputies shall follow up to ensure that John Doe warrants are promptly served once the suspect's identity has been established.

3.09.02 FACTORS TO CONSIDER IN FILING A JOHN DOE DNA ARREST WARRANT

- Statute of Limitations

Determine the appropriate statute of limitations. If the statute of limitations is set to expire shortly, the filing of a John Doe arrest warrant may be the only means to pursue a prosecution. If the statute of limitations is not in danger of expiring, compelling circumstances may exist which justify the filing of charges.

- Nature of the Offense

Consider the seriousness of the charges, nature of loss or injury, and/or the impact the crime has had on the community. It may be appropriate to file a serious or violent felony, such as sexual assault or kidnapping, while it may not be appropriate to file an auto burglary. Consider the potential sentence as well.

- DNA Evidence

The profile must be of a single source, with the locus designations and alleles listed in the complaint and warrant. The random match probability rarity statistics of the profile must be listed in the complaint and warrant. Because the crime labs typically do not generate these statistics until after a suspect is identified via a reference sample, the filing deputy shall contact

the DNA analyst to ensure that the statistics are available at the time of filing. The filing deputy must be confident that the DNA profile belongs to the perpetrator of the crime and not a victim, witness or some other innocent party.

- Need for a Reference Sample

As with any cold hit case, a new DNA reference sample is required once the suspect is located and identified by name. Be sure that buccal swabs or other DNA samples have been taken from victims and witnesses for elimination purposes, if necessary.

- Case Preparation

It is quite possible that a warrant could remain in the system for months or years before the suspect is identified and arrested. The case should be prepared at the time of filing in such a way that it can be picked up at a later time without the need for further investigation or preparation. Complete victim/witness identifying information should be obtained, including date of birth, driver's license number, Social Security number, current address and phone, employment information, and family contact information. Materials such as witness statements, crime scene photos, business records, medical records, etc., should be obtained, and steps taken to ensure that police reports and physical evidence will not be destroyed. Often, important investigative work cannot be completed until the suspect's identity is fully established. Filing a John Doe warrant may mean that the opportunity to conduct this type of further investigation will be lost, e.g., conducting a pretext phone call or eliminating an alibi.

- Preliminary Hearing Time Limits Penal Code § 859(b)

Once the suspect is identified, the suspect may be arrested and brought to court quickly, triggering statutory time limits. Witnesses may have moved or died. Police officers may have transferred or retired. Consider the time that will be needed to locate the witnesses and prepare the case for preliminary hearing. Ensure that evidence can be located and is available for presentation in court.

- Speedy Trial Issues

It may be necessary to justify a post-filing delay in the arrest and prosecution of the suspect. If the suspect is arrested on another charge, the suspect will not be linked to the John Doe warrant until the suspect gives a DNA sample, the sample is forwarded to the Department of Justice, a profile is developed, the profile is entered into CODIS, and a match is made. This process can take months. During this time, the suspect may resolve the case for which the suspect was arrested and may be released from custody prior to the discovery of the John Doe warrant.

The John Doe Warrant Filing Guidelines set forth below were created to assist deputies and investigators in properly preparing and evaluating cases submitted for filing consideration based on a DNA profile. Deputies shall refer to these guidelines and the factors listed above when reviewing a John Doe case for filing.

3.09.03 FILING GUIDELINES - JOHN DOE DNA WARRANTS

John Doe warrants are used when a DNA profile of the perpetrator has been obtained from evidence but the defendant's identity is unknown. The defendant is identified in the complaint and the warrant by the DNA profile. Filing a John Doe warrant will toll the statute of limitations until the defendant is identified by a CODIS hit. Consider the following when reviewing a case for a John Doe warrant.

- Statute of Limitations
  - What is the length of the statute of limitations?
  - When does the statute of limitations expire?

- Nature of the Offense
  - What is the seriousness of the offense, the nature of the injury or loss, the impact on the community, and the possible sentence?

- DNA Evidence
  - Is the DNA from a single source?
  - Is the laboratory report that describes the DNA profile, including locus designations and corresponding alleles, available to list in the complaint?
  - Is the laboratory report with the random match probability rarity statistics available to list in the complaint? This report must be specifically requested from the crime lab.
  - Are there buccal swabs, or other DNA samples, from the victims/witnesses? Samples must be submitted to the lab to eliminate them as contributors to the DNA evidence.

Commentary

A John Doe warrant case must be fully prepared at the time of filing; it must be ready to prosecute without delay once the suspect is identified by a CODIS hit. All investigation must be completed and evidence preservation ensured. The list below specifies necessary steps.

- Case Preparation
  - Conduct Victim/Witness Follow-up
    - Obtain information for victims and witnesses for future contact: DOB, CDL, SSN, address, phone numbers, employment information, family member contact.
    - Request to be informed of any changed information.
    - Interview/Re-interview. Conduct recorded detailed interviews, documented in reports, with all victims/witnesses, including discussion of the following:
      - All details regarding the crime
      - Statements victims made to others, e.g., fresh complaint. Obtain statements from these witnesses also
      - Detailed report of stolen/damaged items and their value
      - Detailed information regarding biological evidence (initial location of item, movement of item, alteration of item, who had access to item, etc.)
    - Obtain Necessary Reports
      - Preliminary reports
      - Police and lab reports involving biological evidence

        - Property reports
        - All supplemental and other relevant reports
        - DNA analysis reports, including random match probability report.
    - Secure Evidence
        - Ensure that all evidence will be preserved (physical evidence, photographs, audio/video CDs/DVDs, etc.)
        - Ensure that all reports, notes, investigative documents, etc., are retained.

- Next Steps
    - Law Enforcement
        - Submit Case to District Attorney's Office.
        - Personally submit copies of all reports.
        - Walk warrant through court.
        - When notified of hit, notify District Attorney's Office immediately.
        - Provide District Attorney's Office with information on case that put defendant into the offender database.
        - Due Diligence.
        - Check CHOP quarterly for hit information.
        - Contact victims/witnesses annually to maintain current contact information.
        - Provide District Attorney's Office with any follow-up information in a written report.
        - Serve warrant immediately once defendant is identified by name.
    - District Attorney
        - Consider preliminary hearing time limits.
        - Consider speedy trial issues.
        - Obtain Head Deputy and Bureau Director approval before filing.
        - Use the sample John Doe complaint and warrant templates on LADAnet and attached to Special Directive 10-01.
        - Apply the "John Doe Warrant" case category code (DOE) on complaint worksheet.
        - Amend the complaint and warrant to reflect defendant's name immediately upon identification.

3.10 PROPOSITION 47 AND SUBSEQUENT MODIFICATIONS

Proposition 47 (Prop 47), which became effective on November 5, 2014, mandated misdemeanor charging of nearly all cases of theft, receiving stolen property, forgery, or non-sufficient funds if the amount involved in the commission of any of these crimes is $950 or less, and misdemeanor charging of all simple possession of controlled substances offenses.

Under Prop 47, theft of a firearm committed prior to November 9, 2016, and in which the firearm is valued at $950 or less, must ordinarily be charged and prosecuted as a misdemeanor petty theft, unless the defendant has previously been convicted of a superseding prior. As added by Proposition 63, theft of a firearm committed on or after November 9, 2016, shall be charged and prosecuted as felony grand theft, regardless of the value of the firearm. A theft of a firearm committed on or after November 9, 2016, cannot be reduced to a misdemeanor by Prop 47.

On November 5, 2024, the voters passed Proposition 36 (Prop 36), which further modified some of the changes enacted by Prop 47. Prop 36's provisions become effective, at the latest, on December 18, 2024. (See GOM 24-087) for a discussion of the effective date.)

Prop 36 created a new wobbler offense, petty theft or shoplifting with two prior theft-related convictions or after a prior PC § 666.1 conviction. The prior theft-related convictions may predate the effective date of Prop 36 and include both felony and misdemeanor convictions for specified crimes.

Under Prop 47, all simple possession of controlled substance offenses (excluding marijuana) in California were punishable only as misdemeanors with a maximum of sentence of 364 days in county jail. For offenses committed after Prop 36's effective date, possession of specified controlled substances is a wobbler offense if the defendant has two or more qualifying convictions under Health and Safety Code § 11359(b)(1).

See GOM 24-087 for a full summary of the new and amended sections added by Prop 36.

3.10.01 SUPERSEDING PRIORS

Defendants who have been previously convicted of specified felonies, cumulatively known as "superseding priors," may still be charged with a felony upon the commission of any theft-related or drug offense affected by Prop 47. A superseding prior is a crime listed in Penal Code § 667(e)(2)(C)(iv), or any sex offense requiring registration under Penal Code § 290(c).

Deputies responsible for reviewing cases for filing consideration shall allege all appropriate superseding priors. Deputies shall be prepared to prove superseding priors at the preliminary hearing and at trial.

3.10.02 PROVING VALUE

Prop 47 provides that the listed theft related crimes are misdemeanors when the value of the money or property involved is $950 or less. This includes crimes such as grand theft property, grand theft auto, receiving stolen property, forgery, and non-sufficient funds checks which previously did not require proof of value. It also includes a "taking" theory of Vehicle Code § 10851 under Supreme Court precedent, even though not expressly listed or called "theft." If the value of the money or property involved is over $950, the crime can still be charged as a felony. It will be necessary to prove the value of a loss over $950 at preliminary hearing and at trial. In the case of forgery and non-sufficient funds checks, the dollar amount of the check(s) will usually determine whether the crime is a felony or misdemeanor. In the case of receiving stolen property and grand theft, deputies shall be prepared to prove at preliminary hearing and at trial that the value of the property involved is greater than $950.

3.11 *PERKINS* OPERATIONS – FILING PROCEDURES

When reviewing a case for filing, the filing deputy shall inquire of the law enforcement officer if a *Perkins* Operation was conducted. If a *Perkins* Operation was conducted, the filing deputy

shall follow the specific procedures for handling cases involving *Perkins* Operations as described in Chapter 27.

3.12 COLD CASE UNIT

The Cold Case Unit (CCU) shall operate under the supervision of the Major Crimes Division (MCD) and shall review cases in consultation with designees from other units as needed. Any deviations from this protocol require approval from the Head Deputy of the MCD.

3.12.01 MISSION STATEMENT/PURPOSE

The Office is dedicated to protecting our community through the fair and ethical pursuit of justice and the safeguarding of crime victims' right. The Office's dedication to the community and victims of crime is borne out through the prosecution of those responsible for committing these crimes. Violent crimes may not be solved immediately and sometimes prove difficult to resolve. The mission of the CCU is to unite skilled deputies with law enforcement investigators to work collaboratively to identify, investigate, solve, and successfully prosecute unsolved homicides in Los Angeles County. These skilled deputies have substantial homicide trial experience and specialized training in cold case legal and forensic issues. The ultimate goal of this collaborative effort is to hold perpetrators of cold case homicides accountable and to provide a measure of justice for families of those who have been slain. In order to optimize the use of limited resources, except in unusual situations, the CCU will only review and prosecute homicide cases.

3.12.02 COLD CASE MURDERS

The following types of homicides are defined by the CCU as cold cases and shall be *presumptively* assigned to the CCU for investigative assistance and prosecution, or for potential referral to another unit:

1. Cases which were initially investigated by a law enforcement agency, were unsolved with all known leads exhausted, and in which one (or more) of the following has/have occurred:
   - New or different witness statements have been obtained;
   - Previously unknown leads have been uncovered;
   - New scientific, forensic, or physical evidence has been developed; or
   - Five or more years after the homicide, a suspect has made incriminating statements.
2. Cases in which the victim was missing for five or more years and the disappearance remained unsolved during that period.
3. Cases over five years old that were not previously submitted for prosecution.

The following cases may be assigned to the CCU for investigative assistance and prosecution at the discretion of the Head Deputy of the MCD:

1. Cases in which the investigating agency has requested the assistance of CCU deputies.

2. Cases in which the investigating agency has requested advice or assistance on a cold case from non-CCU deputies.
3. Cases which have been previously submitted to a non-CCU division, branch, or unit for review where the case has been rejected or returned to the agency for additional follow-up investigation. Prior to declining or returning a case that qualifies as a cold case, the non-CCU reviewing deputy shall consider consulting with a CCU deputy. If no such consultation is made at the time of the declination or return, the law enforcement agency may contact the CCU directly for additional review.
4. Cases in which the victim has been missing for fewer than five years.
5. Cases more than two years old but less than five years old that were not previously submitted for filing.
6. Case investigations that are initiated with the discovery of skeletal human remains.
7. Cases originally filed and dismissed where significant new evidence has been developed.

The following cases are presumptively not cold cases and will not be handled by the CCU absent unusual circumstances:

1. Cases pending review or filed cases in which there is an outstanding arrest warrant for the suspect.
2. Cases which have been tried and resulted in a mistrial (or a motion for a new trial was granted).
3. Cases which were filed and then dismissed where no significant new evidence has been developed.

The types of cases assigned to the CCU may deviate from those defined herein in unusual circumstances and at the discretion of the Head Deputy of the MCD.

3.12.03 COLD CASE FILINGS

Prior to the filing a cold case homicide, the CCU prosecutors shall discuss the case with the Head Deputy of the MCD, or in the absence of the Head Deputy, the Assistant Head Deputy of the MCD. The discussion shall include a review of the evidence, availability of witnesses, legal issues, sentencing issues, and other pertinent information before a filing decision is made. Cold cases that are not handled by the CCU shall be referred to the appropriate branch, division, or unit for review and assignment. All Office policies concerning the filing of murder charges, including special circumstance allegations, also apply to cold case prosecutions.

3.12.04 COLD CASE DEPUTY ASSIGNMENTS

A decision shall be made at the time of filing as to whether a CCU deputy will continue to handle the case. Vertical prosecution of cold cases shall be the preferred method. However, depending on available resources, vertical prosecution may not always be possible. The first priority of the CCU shall be to retain and to prosecute cold cases that require the special expertise of CCU deputies in the areas of DNA, forensics, and complex legal issues inherent with cold cases.

3.12.05 ROLE OF THE FORENSIC SCIENCE SECTION

It is anticipated that DNA will play a major role in solving and effectively prosecuting many of the cases presented to the CCU. Thus, the Deputy-in-Charge (DIC) of the Forensic Science Section (FSS) will play a significant role in these cases. The following protocol shall be followed:

1. When a case is presented for initial evaluation, the Head Deputy of the MCD, or in the absence of the Head Deputy, the Assistant Head Deputy of the MCD, shall determine whether DNA evidence will be a significant factor in solving and/or prosecuting the case.
2. If complex DNA technology will be a significant factor in the case, the reviewing deputy shall contact and advise the DIC of the FSS.
3. In any case assigned to the CCU, a deputy may consult with the DIC of the FSS to discuss the possibility of utilizing DNA analysis, Familial Searching, or Investigative Genetic Genealogy to generate further leads.
4. If the investigating agency requests Familial Searching or Investigative Genetic Genealogy testing, the DIC of the FSS shall be consulted. No case may be submitted for Familial Searching or Investigative Genetic Genealogy testing without the approval of the DIC of the FSS.
5. The investigating agency may contact the DIC of the FSS directly about any cold case. If the DIC of the FSS is contacted directly, the DIC shall decide whether the case should be referred to the CCU for further investigation or assistance.

3.12.06 LIAISON WITH LAW ENFORCEMENT

CCU deputies shall work with those agencies seeking a collaborative approach to case investigation. CCU deputies can lend insight into the development of case theories and evidence geared toward a grounded and successful courtroom presentation. District Attorney Investigators (DAIs) shall be assigned to the CCU to assist deputies when the original agency does not have sufficient resources to re-investigate the case. However, primary investigative responsibility shall remain with the original agency.

Requests by victims' next of kin made to CCU deputies to re-investigate a case or open a case as a cold case investigation should be communicated to the original investigating agency or to DAIs assigned to assist the CCU. Cold case deputies shall maintain the ability to work objectively with members of law enforcement in the investigation of these cases. However, CCU deputies shall remain cognizant of the distinction between the role of marshalling evidence as an advocate versus acting in an investigative capacity.

3.12.07 GENERAL PROCEDURES

Cases shall be presented to the Head Deputy of the MCD, or in the absence of the Head Deputy, the Assistant Head Deputy of the MCD, for initial evaluation to determine whether to file the case or whether there is the potential to solve the case. If the Head Deputy or Assistant Head Deputy of the MCD determines the case should be reviewed by another division, section, or unit, the Head Deputy or Assistant Head Deputy shall consult with a designee from that division,

section, or unit regarding whether or not the case should be referred. If the Head Deputy or Assistant Head Deputy of the MCD determines the case should be reviewed further by the CCU, the Head Deputy or Assistant Head deputy shall assign the case to a CCU deputy for a more detailed review. The assigned CCU deputy shall work collaboratively with detectives to make recommendations, develop investigative strategies, provide legal advice, and determine whether biological evidence suitable for testing exists.

Cases that meet the definition of a cold case in which the investigating agency is only requesting a filing determination, and is not requesting assistance or advice, need not be submitted to the CCU.

3.12.08 CCU ADMINISTRATIVE MATTERS

The MCD shall supervise CCU support staff and maintain all CCU files.

3.12.09 CONCLUSION

There is a critical need for the resolution of thousands of unsolved homicides in Los Angeles County. No killer should escape justice simply because of the passage of time. The victims and their surviving families, as well as the general public, deserve to have these cases investigated as thoroughly as possible and prosecuted when the evidence allows.

CHAPTER 4

CRIME CHARGING - SPECIFIC CRIMES

4.01 SEX CRIMES

Victims of sex crimes often suffer severe trauma, both physical and emotional. Deputies shall make every effort to be sensitive to the victim's needs and emotional state at all stages of a case. The assignment of a specially trained vertical prosecutor and the use of a Victim Services Representative (VSR) help achieve this objective. Whether a case is filed or declined, sexual assault victims shall be referred to a VSR for assistance with counseling referrals, medical bills, and court support.

4.01.01 VERTICAL PROSECUTION

Vertical prosecution should begin at the time of filing. The Sex Crimes deputy who initially interviews the victim should handle the case through conclusion whenever possible.

Vertical prosecution of sex crimes cases minimizes further trauma and unnecessary interviews of victims. Vertical prosecution allows a trust relationship to build between the victim and prosecutor. This trust relationship allows a victim to feel comfortable in providing as many facts as possible.

4.01.02 PRE-FILING INTERVIEW

Pre-filing interviews shall be conducted prior to making a filing decision to the extent possible. The investigating officer and, if the victim would like, a support person, shall be present for the pre-filing interview. Pre-filing interviews help to:

- Evaluate the victim's credibility;
- Evaluate the victim's memory and ability to recall the facts;
- Evaluate the victim's competency to testify (young child or elder or disabled adult);
- Evaluate the victim's ability to articulate the details of the assault (number and type of acts, date, time, location) and to withstand direct and cross-examination;
- Evaluate any potential defenses (e.g. if consent or a reasonable belief that the victim consented is a possible defense to the crime being considered);
- Establish a rapport with the victim/family;
- Explain the court process to the victim; and
- Provide an opportunity for the victim/family to meet with a VSR.

A deputy shall always be sensitive to, and aware of, the initial investigation that law enforcement conducted and any medical examinations or procedures a victim has experienced before the pre-filing interview.

A decision not to conduct a pre-filing interview shall be made after consideration of the following factors:

1. The availability of the victim/family within the statutory period for filing, if the suspect has been arrested;
2. The sufficiency of the evidence to prove the case beyond a reasonable doubt based only upon the reports presented at filing (the victim's credibility is not an issue, or the state of the evidence is of such convincing force that the case, as presented, satisfies Office crime charging standards); and
3. The ability to prove the case without the testimony of the victim.

Approval of the Assistant Head Deputy or Head Deputy of the Sex Crimes Division, or the Deputy-in-Charge of the Juvenile office, is required prior to filing a case without a pre-filing interview. If a case is filed without a pre-filing interview, an interview with the victim shall be conducted as soon as possible prior to the preliminary hearing or adjudication.

All efforts shall be made to accommodate the victim of a sex crime. The assigned deputy shall meet the victim at the victim's location (e.g., home, hospital, school or place of business) when an interview at the Office would create an unreasonable hardship.

A deputy shall interview a victim in the presence of an investigator. The investigator shall prepare a report documenting the interview. The deputy shall provide a copy of the report to the defense.

Especially where the victim is a young child (12 or younger) or a person with a disability, deputies shall attempt to have a forensic interviewer conduct a pre-filing interview of the victim at the earliest possible opportunity. Often victims, both adults and children, develop a reticence to discuss these incidents and may forget details, all of which can occur due to the passage of time as well as the traumatic and emotional nature of these crimes. This forensic interview can serve in lieu of a pre-filing interview conducted by a deputy; however, the assigned deputy shall meet with the victim as soon as possible to establish rapport.

See VIP Manual Chapter VII "Child Interviews and Testimony;" LPM § 24.02.06 (Measures to Minimize Trauma to Children); and LPM § 24.03 (Preference for Victim and Witness Interviews) for multi-disciplinary team coordination of child interviews and forensic interviews.

4.01.03 EVALUATING THE VICTIM'S CREDIBILITY

In evaluating the victim's credibility and the sufficiency of the evidence to support a filing, a deputy shall consider the following factors:

- Whether the victim has a motive to lie or has been manipulated to lie;
- Whether a young victim's report has been unduly suggested;
- Whether there exists any corroborative evidence to support the victim's allegations such as physical injury, damage to clothing, forensic evidence (e.g., DNA, hair, etc.);

- Whether additional witnesses corroborate the victim's account of the assault (including fresh complaint witnesses);
- The defendant's prior record for committing sexual assaults (EC §§ 1108 and 1101(b)); and
- Any legally admissible statements made by the defendant (including pretext phone calls).

4.01.04 SEXUAL ABUSE OF A CHILD UNDER 14 YEARS OF AGE

There is an overlap among the various statutes that apply to sexual abuse of a child under the age of 14 years. Felony violations include the following:

- Penal Code § 288(a) - lewd or lascivious act upon a child under 14 years of age;
- Penal Code § 288(b) - lewd or lascivious act upon a child under 14 years of age; with force, violence, duress, menace or fear of immediate or unlawful bodily injury to the victim or another;
- Penal Code § 288.5 - continuous sexual abuse of a child under 14 years;
- Penal Code § 288.7 - sexual acts between an adult and a child age 10 and under;
- Penal Code § 269 - aggravated sexual assault of a child; and
- Penal Code §§ 286(c)(1), 288a(c)(1) and 289(j) - sodomy, oral copulation and sexual penetration of a victim under 14 years by a person more than 10 years older.

Whenever possible, separate counts of Penal Code § 288(a) or (b) should be filed rather than one count of Penal Code § 288.5 when multiple incidents of sexual abuse occurred. Penal Code §§ 667.61 and 667.71 sentence enhancements may be applied to violations of Penal Code §§ 288(a) and (b), as well as to Penal Code § 288.5.

A jury will not be permitted to return guilty verdicts on alternative charges covering the same time period if both Penal Code § 288.5 and multiple counts of Penal Code §§ 288 (a) or (b) are charged. Therefore, in cases where a victim cannot recall the specific time frame when the offenses occurred, deputies should consider filing one count of Penal Code § 288(a) or (b) for the first incident, another Penal Code § 288(a) or (b) count for the last incident and one Penal Code § 288.5 count for the incidents which occurred between the first and last offenses to avoid overlapping charges.

Felony sexual abuse charges shall be filed if any of the following apply:

- The abuse included an act of sexual intercourse, oral copulation, sodomy, sexual penetration of the genitals or anus with a foreign or unknown object, masturbation, or fondling of the skin of the genitals, anus or breast;
- The abuse was committed by restraint, force, violence, duress, menace or fear of immediate threat or unlawful bodily injury to the victim or another;
- The victim was very young;
- Multiple victims were involved;
- The defendant held a position of trust;
- The sexual abuse lasted more than a brief duration;
- The sexual abuse occurred repeatedly over an extended period of time; or

- The defendant has a prior record of child sexual abuse or other related offenses.

Misdemeanor sexual abuse of a child under 14 years is defined in Penal Code § 647.6 (annoying or molesting a child under 18 years).

Misdemeanor charges or a referral to the appropriate city attorney or city prosecutor for misdemeanor prosecution should be considered only when the sexual abuse involved fondling over the clothing and none of the above circumstances apply.

4.01.05 UNCOOPERATIVE VICTIM

Every reasonable effort shall be made to secure a sexual assault victim's cooperation. However, should the victim refuse to testify and be found in contempt for refusing to testify, the court may not place the victim in custody. (CCP § 1219(b).)

4.01.06 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art, I § 28(b)(1).) (See LPM § 24.02.04)

4.02 DOMESTIC VIOLENCE

Deputies shall vigorously prosecute misdemeanor and felony domestic violence cases with or without victim cooperation, as long as there is legally sufficient evidence to support a conviction. Same sex relationships are included in this policy. (*See* Penal Code §§ 13700(a) and 13700(b) for definitions of abuse and domestic violence, respectively.) The filing decision in a domestic violence case shall not rest on whether a victim is cooperative. When a victim is uncooperative, the filing deputy shall look for other independent, corroborative evidence to support the charges, such as:

- Other witnesses to the crime or injuries;
- Medical reports of traumatic injury;
- A 911 tape with the victim's spontaneous statements;
- Videotape of the crime being committed;
- A victim's prior inconsistent statements;
- Physical evidence (e.g., photos, torn clothing, evidence of a physical altercation);
- A suspect's prior acts of domestic violence with any partner;
- A suspect's admission or confession; and
- Evidence of motive, especially reported and/or witnessed threats involving the victim.

A pre-filing interview of the domestic violence victim shall be conducted when, in the judgment of the filing deputy, it is necessary to establish the appropriate charges. When the domestic violence case also involves allegations of sexual assault, a pre-filing interview shall be conducted. However, the inability to conduct an interview because the victim is unavailable or uncooperative shall not delay a filing if the facts warrant prosecution.

In domestic violence cases in which a child was present, deputies may wish to interview the child to determine if the child is a victim of child endangerment or a witness to the crime(s). See VIP Manual Chapter VII "Child Interviews and Testimony;" LPM § 24.02.06 (Measures to Minimize Trauma to Children); and LPM § 24.03 (Preference for Victim and Witness Interviews) for multi-disciplinary team coordination of child interviews and forensic interviews.

Successful domestic violence prosecutions depend heavily on the cooperation of victims. A deputy shall explain to an uncooperative victim that in the state of California, the victim does not "press charges" or "drop charges." That decision rests solely with the Office. The victim's duty to appear in court as a witness and testify truthfully shall be explained in a positive light rather than in a way that may dissuade or discourage a victim from accepting this duty.

Where available, a VSR from the Bureau of Victim Services serves as an important resource to victims: both to encourage them to cooperate with the prosecution and to lessen the trauma caused by participation in the judicial process. These services shall be made available to victims as soon as possible. When a felony domestic violence case is filed, copies of the police reports shall be forwarded to the VSR.

A domestic violence victim shall be notified of the victim's right to have both a counselor and a support person present during a law enforcement, District Attorney or defense interview. (PC § 679.05.) A domestic violence victim also has the right to have two persons of the victim's own choosing for support in the courtroom. (PC § 868.5(a).)

4.02.01 INFLICTION OF CORPORAL INJURY - CHARGING CRITERIA

Penal Code § 273.5(a) defines an alternative felony/misdemeanor offense for the infliction of a corporal injury resulting in a traumatic condition. Traumatic condition is defined as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force. When a traumatic condition cannot be proved, a deputy should consider charging a violation of Penal Code § 243(e)(1), spousal battery.

4.02.02 PRESUMPTIVE FELONY FILINGS

Absent unusual circumstances, violations of Penal Code § 273.5 shall be filed as a felony if the accused:

- Personally used a gun or other deadly weapon;
- Inflicted serious bodily injury;
- Has a prior serious or violent felony conviction ("Strikes") within the last 10 years, or 290 registration requirement;
- Has a prior felony or misdemeanor conviction involving violence, threats of violence or weapons within the last 10 years.

4.02.03 DISCRETIONARY FELONY FILINGS

If either a felony or misdemeanor charge would be appropriate to file, a felony filing is warranted when:

- The accused has been previously convicted of a violation of one or more of the following (or the equivalent if the act occurred out of state):
  - Penal Code § 273.5 - spousal abuse;
  - Penal Code § 262 - spousal rape;
  - Penal Code § 245 - assault with a deadly weapon;
  - Penal Code § 273 - child abuse;
  - Penal Code § 422 - criminal threats;
  - Penal Code § 417 - exhibiting a weapon;
  - Penal Code § 136 - witness intimidation; or
- The accused has another case pending with one or more of the charges listed above.

4.02.04 PRESUMPTIVE MISDEMEANOR FILINGS

Penal Code § 243(e)(1), misdemeanor spousal battery, shall be filed if the victim suffered no injuries constituting a traumatic condition.

4.02.05 REFERRAL TO CITY ATTORNEY

Referral to a city attorney or city prosecutor pursuant to Penal Code § 17(b)(4) is appropriate if the case meets the criteria delineated in the current Penal Code § 17(b)(4) Operational Agreement Schedule I. If a deputy city attorney or police officer questions the appropriateness of a referral, the Head Deputy or Deputy-in-Charge shall review the referral.

4.02.06 UNCOOPERATIVE VICTIM

Once a domestic violence case is filed, it shall not be dismissed because the victim is uncooperative. As long as there remains legally sufficient evidence to support a conviction, the prosecution shall proceed until the defendant either pleads guilty or guilt is determined by the trier of fact.

Every reasonable effort shall be made to secure the cooperation of the domestic violence victim. When a domestic violence victim has been properly served with a subpoena or ordered to return by the court, and the victim fails to appear, the deputy should consult with the Head Deputy. After obtaining the Head Deputy's approval to request a body attachment, the deputy should request the court to issue a body attachment for the domestic violence victim so that the investigating officer can locate the victim and have the victim brought directly to court for testimony.

If the domestic violence victim refuses to testify, the court may refer the victim for consultation with a domestic violence counselor before finding that victim in contempt. All communications between the victim and the domestic violence counselor that occur as a result of that referral

shall remain confidential under § 1037.2 of the Evidence Code. However, should the victim refuse to testify and be found in contempt for refusing to testify, the court may not place the victim in custody. (CCP § 1219(b).)

"Domestic violence" as used above is defined in Family Code § 6211.

Commentary

Crimes of violence in domestic settings should be treated no less seriously than crimes of violence committed by strangers. These crimes are often repetitive and escalate in seriousness. The defendant is in a position to exert continuing influence over the victim, taking full advantage of the complex social, economic, and psychological pressures inherent in the situation.

A victim's reluctance to cooperate is usually born of factors extraneous to the merits of the case and, by itself, should not be a reason for a dismissal. All available resources such as Victim Services Representatives should be used to counsel victims and foster cooperation. As in all crimes of violence, an objective assessment of the defendant's culpability and propensity for violence should dictate the ultimate case disposition.

4.02.07 DOMESTIC VIOLENCE CRIMINAL PROTECTIVE ORDERS

Criminal protective orders may provide victims with a sense of security, often facilitating their roles as witnesses. Additionally, these orders place defendants on notice that further contact with victims or witnesses will result in criminal consequences.

- Pre-trial

Penal Code § 136.2 governs the issuance of pretrial criminal protective orders. PC § 136.2(h)(1) allows the court to find good cause to issue the protective order based solely on the current charge(s) and the defendant's criminal history without an additional showing of intimidation or dissuasion for the following crimes:

- PC §§ 261, 261.5, 262;
- Any crime that requires the defendant to register pursuant to PC § 290(c);
- Any crime involving domestic violence as defined in PC § 13700 or FC § 6211.

The filing or arraignment deputy shall obtain a criminal protective order in any pending domestic violence case that merits protection for the victim or witnesses but particularly in the following circumstances:

- There has been a violent confrontation between the victim and the defendant that could recur without court intervention;
- The victim has received a threat of violence or retaliation against the victim, a person close to the victim or a pet;
- There is a likelihood that the defendant will attempt to dissuade the victim or witness from testifying truthfully or at all.

The deputy shall use the most recent edition of the state-issued domestic violence protective order, form CR-160. The most recent version of the form can be found on the California Courts website at Form CR-160.

If a victim seeks to maintain confidentiality pursuant to Marsy's Law (Cal. Const. art I § 28(b)(4)), or PC § 293.5 (the right for victims of sexual assaults to use the moniker, Jane Doe, to protect privacy), the deputy should identify the victim by first name and first initial of the last name on the protective order and complete the CLETS-001 form with the victim's full name and identifying information.

The sole purpose for the CLETS-001 is to provide information to the data processor who inputs the protective warrant into the automated Domestic Violence Restraining Order System (DVROS) maintained in CLETS. Unless the judicial assistant is prepared to enter the protective order into CLETS, the CLETS-001 should not be provided to the court or placed in the court file because that file is a public record and the victim's identity could be disclosed inadvertently. If the judicial assistant is ordered to enter the protective order into CLETS, the deputy should request an order that the CLETS-001 be destroyed once the data entry is completed.

The defendant shall be served with the order and a copy provided to the victim, police agency and the DA file. If the court's judicial assistant is not prepared to enter the protective order into CLETS, it is the deputy's responsibility to ensure that the law enforcement agency does so.

Court Notification

Per PC § 273.75 and Los Angeles Superior Court Rule 8.34, in all cases involving domestic violence as defined in PC § 13700 or Family Code § 6203/6211, deputies shall advise the court of the existence of any current civil or criminal protective/restraining orders using the protective and restraining order worksheet. Deputies should be aware that there are many other kinds of restraining orders than the criminal protective order including emergency protective orders (FC §§ 6240, 6274, PC § 646.91), domestic violence prevention orders (FC § 6300 et seq.), civil harassment orders (CCP § 527.6), and others. In the event there are two competing orders, the criminal protective order generally takes precedence but great weight will be given to specific orders made in the Family or Dependency Courts regarding child visitation and exchange of children.

Personal Presence of Defendant

Per PC § 977(a)(2), if defendant is charged with a misdemeanor domestic violence crime as defined in FC § 6211 or PC § 273.6, the defendant must be present for arraignment and sentencing and at any time during the proceedings when ordered by the court for the purpose of being advised of the conditions of a pretrial criminal protective order.

Firearms

If there is reason to believe that the defendant has access to a firearm, the deputy shall request an order that it be relinquished to a licensed gun dealer or law enforcement under PC § 136.2/CCP § 527.9 and that subsequent proof of relinquishment be filed with the court. Firearms conditions are now included on the CR-160.

- Post-Conviction

A criminal protective order issued during the pendency of the case is no longer valid post-conviction. Upon conviction of certain crimes, the court may issue a criminal protective order as a condition of probation or pursuant to a non-probationary jail or prison sentence. The deputy must prepare a new order that specifies the authority for its issuance. The box in the upper middle of the CR-160 lists the various options for post-conviction orders.

Probation

Upon conviction of any crime, the court can issue a protective order as a probationary condition under PC § 1203.1(j) (the court may impose any reasonable condition on probationer). *People v. Selga* (2008) 162 Cal.App.4th 113, 119.

- PC § 1203.097 – In cases where the defendant is sentenced to probation for a crime in which the victim is a person defined in Family Code § 6211, the court must issue a protective order as a condition of probation;
- PC § 273a – For a misdemeanor or felony conviction, the court shall issue a criminal court protective order as a condition of probation unless waived by the court in the interests of justice;
- PC § 273d – The court shall issue a criminal court protective order as condition of probation unless waived by the court in the interests of justice.

State Prison, Local Prison and Split Sentences

In most cases there is no provision for issuing a criminal court protective order when the defendant is sentenced to state or local prison. *People v. Ponce* (2009) 173 Cal.App.4th 378. The limited exceptions include:

- PC § 273.5 – Upon conviction of PC § 273.5(a), the court may issue an order for up to ten years whether the defendant is sent to prison, county jail, or placed on probation (PC § 273.5(j));
- PC § 136.2(i)(1) – Upon conviction of a crime involving domestic violence defined in PC § 13700 or FC § 6211, the court may issue an order for up to ten years whether the defendant is sentenced to prison, jail, or placed on probation;
- PC § 646.9 – Upon conviction of PC § 646.9, the court can issue an order for up to ten years whether the defendant is sentenced to state prison, county jail, or placed on probation (PC § 646.9(k)(1) and (2));

- PC § 136.2(i)(1) – Upon conviction of PC §§ 261, 261.5, 262, or any offense requiring registration under PC § 290, the court may issue order for up to ten years whether defendant is sentenced to prison, jail, or placed on probation;
- PC § 1201.3(a) – Upon conviction of sexual offense involving a minor victim, the court may issue an order for up to ten years;
- PC § 1202.05(a) – Upon conviction of PC §§ 261, 264.1, 266c, 285, 286, 288, 288a, 288.5, or 289, where defendant is sent to prison and the victim is a child under the age of 18 years, the court shall prohibit all visitation between the defendant and the child victim. See *People v. Scott* (2012) 203 Cal.App.4th 1303 (PC § 1202.05 does not apply to minor victim who has reached age 18 at the time of proposed visitation).

A deputy who is handling a post-conviction domestic violence case shall complete a new order, using the Confidential CLETS Information form (CLETS-001) to protect the victim's privacy. The defendant shall be served with the order and a copy provided to the victim, the police agency and the DA file. If the court's judicial assistant is not prepared to enter the protective order into CLETS, it is the deputy's responsibility to ensure that the law enforcement agency does so.

If the order terminates by operation of law because the case is dismissed, probation terminates, or the defendant is sent to state prison AND the court has no jurisdiction to issue the order under any statutory exception, the deputy shall submit a protective order termination form (CR-165) to the court. The deputy must provide one copy to the protected person, another to law enforcement and retain one copy in the file.

- Modification of Criminal Protective Order

Only the court can change the terms of the criminal protective order pursuant to PC § 13710(b). In any case involving a request to modify or terminate the protective order in a case involving domestic violence as defined in FC § 6211, the prosecution is entitled to five days, written notice and an opportunity to be heard. PC § 1203.3(b)(1).

If the victim requests modification or termination of the criminal protective order the deputy should ask the victim to make the request on the record in open court and make arguments, as necessary, to protect the victim and the case.

4.02.08 VIOLATION OF A COURT ORDER - PENAL CODE § 166(A)(4)

Violations of domestic violation criminal protective orders are punishable under both Penal Code §§ 166(a)(4) and 273.6.

Under Penal Code § 273.6(a), a violation of the domestic violence protective order is punishable as a misdemeanor by imprisonment in a county jail for up to one year. Under § 273.6(b), a violation that results in physical injury is punishable for a minimum of 30 days in jail, although the court can reduce or eliminate that minimum sentence in the interest of justice. Penal Code § 273.6(d) provides that a subsequent conviction of violation of a protective order involving violence or threat of violence, occurring within seven years of a prior conviction for violating a

protective order is punishable as a wobbler of up to one year in jail or imprisonment in local prison pursuant to Penal Code § 1170(h).

A violation of *any* written process of court or court order may be punished under Penal Code § 166(a)(4) as a six-month misdemeanor. However, Penal Code § 166(c)(1) provides that violation of a *domestic violence protective order* is a misdemeanor punishable by one year in county jail. Furthermore, Penal Code § 166(c)(2) requires a minimum of 48 hours of custody regardless of the ultimate sentence imposed. There is no provision for reducing this minimum sentence.

Finally, Penal Code § 166(c)(4) makes a violation of a protective order involving an act of violence or threat of violence, occurring within seven years of a prior conviction for violating a protective order, punishable as a wobbler of up to one year in county jail or 16 months, 2, or 3 years in *state* prison. It is Office policy to file violations of domestic violence restraining orders under Penal Code § 166(a)(4), not under Penal Code § 273.6.

4.02.09 DEATH RESULTING FROM DOMESTIC VIOLENCE

All cases in which a death occurs as a result of domestic violence or abuse (as defined in PC § 13700) which are not prosecuted by the Family Violence Division shall be prosecuted vertically.

Upon presentation of all such cases for filing review, a deputy shall notify the Family Violence Division Head Deputy District Attorney.

4.02.10 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art, I § 28(b)(1).) (See LPM § 24.02.04)

4.03 CHILD ABUSE

Child abuse may be charged as a felony or misdemeanor pursuant to Penal Code §§ 273a(a) or 273d. To a large extent, these two statutes overlap and it is a matter of prosecutorial discretion, rather than a matter of law, which charge shall be filed and whether a particular charge shall be filed as a felony or misdemeanor.

Child endangerment, whether it results in physical injury or not, may be charged as a felony under Penal Code § 273a(a) or a misdemeanor under Penal Code § 273a(b). In addition to Penal Code §§ 273a and 273d, filing deputies shall consider other child abuse charges and special allegations, including, but not limited to:

- Penal Code § 206 – torture;
- Penal Code § 273ab - assault on a child under 8 causing death;
- Penal Code § 273.4 - female genital mutilation;
- Penal Code § 647.6 – annoying or molesting a child under 18; and
- Penal Code § 12022.95 – child endangerment resulting in death allegation.

4.03.01 CHARGING CRITERIA

Child abuse cases shall be thoroughly reviewed and processed as expeditiously as possible. It is the responsibility of the filing deputy to determine whether, based upon all available evidence, charges can be proven beyond a reasonable doubt and whether prosecution is warranted.

The filing decision shall be made by a deputy thoroughly familiar with the applicable criminal laws and procedures concerning child abuse. Documents that shall be reviewed in the filing decision, include, but are not limited to:

- Investigative reports that include property reports and statements from the victim(s), percipient witnesses, fresh complaint witnesses, mandated reporters, the suspect;
- The suspect's complete criminal history;
- Any prior reports of past abusive or assaultive conduct committed by any of the involved parties;
- Medical records prepared by paramedics, doctors, nurses, or other medical professionals;
- Expert witness reports concerning the cause of injuries suffered, the results of any examinations performed, and any opinions reached;
- Results of any examinations or interviews of siblings;
- Forensic reports (e.g., blood, hair or DNA);
- Photos of the crime scene, weapons, other criminal instruments, injuries, the suspect's appearance, or the victim body;
- Relevant documentary evidence such as birth certificates, consent to search forms, school records, Suspected Child Abuse Reports (SCARs), dependency records, any Department of Children and Family Services records, and search warrants; and
- Any current or prior protective orders concerning the victim or other family or household members.

If some reports are not included, the filing deputy shall determine whether there is sufficient evidence to file or whether further investigation is necessary.
In appropriate cases, the filing deputy shall interview the child or consider scheduling a forensic interview to ensure that the child is competent to testify and can recall and recount the details of the event, determine if there is any additional evidence not previously identified, and establish rapport with the child.

See *VIP Manual* *Chapter VII* "Child Interviews and Testimony;" LPM § 24.02.06 (Measures to Minimize Trauma to Children); and LPM § 24.03 (Preference for Victim and Witness Interviews) for multi-disciplinary team coordination of child interviews and forensic interviews.

4.03.02 MISDEMEANOR VERSUS FELONY FILINGS

In reviewing child abuse allegations, a felony filing is warranted in circumstances that caused or were likely to cause great bodily injury or death. The appropriate charge level will depend upon whether the perpetrator caused, permitted or inflicted unjustifiable physical pain or mental suffering, or inflicted cruel or inhuman punishment, or inflicted actual injury, and the degree of injury inflicted.

4.03.03 SUSPECTED CHILD ABUSE REPORTS (SCARS)

When a case is presented for filing, the deputy reviewing the case shall access the Electronic Suspected Child Abuse Report System (ESCARS) in any case where a child is a victim of child abuse and in some cases where a child is the witness to a crime. The deputy shall run the name of the child, the child's parents or guardians and/or the perpetrator of any offense in ESCARS to determine if a SCAR was created. It is expected that a SCAR has been generated in all child physical and sexual abuse cases. SCARs may also be generated in cases involving child endangerment, such as driving under the influence with a child in the car, possessing, selling, or manufacturing narcotics while a child is present, or shoplifting in the company of a minor. In many domestic violence cases, a SCAR may have been generated if a minor was present and a witness to abuse.

In some drive-by shootings, SCARs have been generated because the child's parents or guardians knew the minor was a gang member and failed to protect the child from congregating with known gang associates. However, one would not expect to see a SCAR if a minor was a victim of a random robbery. There is no expectation that a parent or guardian had failed to protect a child from harm in this type of situation.

If, at the time of filing, a SCAR is located in ESCARS, deputies shall follow the procedures described below for redacting and including the document in the DA case file. If a SCAR is not found, the filing deputy shall request the law enforcement personnel presenting the case for filing to call DCFS to determine if a SCAR was generated. If it was not, law enforcement must cross-report the allegations to DCFS. The resulting SCAR can be downloaded after the cross-report is made. In order to satisfy due diligence requirements and fulfill discovery obligations, the filing deputy shall make a note in the Statement of Facts detailing the steps that have been initiated to generate a SCAR. A note shall also be entered on the Attorney Notes form in the case file for the deputy in court to retrieve the SCAR when it is available and provide the document as part of the discovery process.

Data Entry into ESCARS

Deputies, or their designees, who file cases that have related SCARs, are responsible for entering the court case number of all felony cases in ESCARS. If the case is vertically prosecuted, the assigned deputy's name must also be entered into ESCARS at the time of filing.

Procedures Reconciling Discovery Obligations and Confidentiality

In the event the filing deputy determines that a SCAR contains exculpatory information or information which might be used to impeach a witness, the filing deputy shall prepare a redacted version of the SCAR containing only the 19-digit DCFS referral number, the defendant's name, the first name and last initial of the child victim/witness and an appropriately redacted narrative deleting all identifying information for the reporting party to give to the defense at the time of arraignment.

In the event the filing deputy determines that the SCAR does not contain any exculpatory information or information that might impeach a witness, the filing deputy shall include a redacted copy of the SCAR in the DA case file.

Sensitive SCARs

Occasionally a SCAR is designated as "Sensitive". The circumstances of the sensitive designation include, but are not limited to, one or more of the following: the incident has garnered media attention or one of the involved parties is either a celebrity or member of law enforcement, the LADA, or DCFS. A SCAR is also marked sensitive when there is a child fatality or near fatality and the family has a history with DCFS. The SCAR is marked sensitive to protect the confidentiality of the victims and other involved parties. Once marked sensitive, access to the SCAR on ESCARS is limited to the staff of the ESCARs unit and a select few members of law enforcement. Deputies cannot update sensitive ESCARS with their name, contact information or case number as mandated, nor can they enter any comments.

Upon reviewing a case that may be associated with a sensitive SCAR, the filing or assigned deputy or their supervisor shall contact the ESCARS unit (ESCARS@da.lacounty.gov). The ESCARS Unit will distribute a sensitive SCAR only after receiving an email or phone call from the filing DDA or assigned DDA or their supervisor reviewing the case associated with the sensitive SCAR. The ESCARS Unit will then email the sensitive SCAR to the filing or assigned DDA (or supervisor). The ESCARS Unit will only distribute the sensitive SCAR when necessary. Upon receipt of the sensitive SCAR request, a paralegal from the ESCARS Unit will update the system with the name of the filing or assigned DDA, their phone number, and the case number.

4.03.04 ACCESS TO CHILD DEATH RECORDS

Welfare and Institutions Code (WIC) § 10850.4 provides that the Department of Children and Family Services (DCFS) shall release the records of a child death when DCFS, a law enforcement agency, or the coroner has determined that the death was a result of abuse or neglect (with certain limitations - see WIC §§ 826.7 and 827). WIC § 10850.4 creates presumption in favor of public disclosure of these records unless there is information that would jeopardize a criminal investigation or proceeding, or other statutory grounds for non-disclosure exist.

Ten-Day Time Limit

Within 10 business days after a request has been received by DCFS, or after a determination has been made that the death was a result of child abuse or neglect, whichever is later, DCFS shall release the records of the child death to the public after redacting names, addresses, telephone numbers, ethnicity, religion and other identifying information. (See WIC § 10850.4(c) and (e).) Information that would jeopardize a criminal investigation or proceeding shall also be redacted after consultation with the District Attorney. (WIC § 10850.4(e)(1)(B).)

District Attorney's Office Responsibilities

The Office shall review all requests submitted by DCFS involving any child death in Los Angeles County. The Office has centralized all WIC § 10850.4 inquiries from DCFS in the Family Violence Division (FVD).

All WIC § 10850.4 requests for child death records on any case that has not been filed by the Office must be submitted to DCFS or Los Angeles County Counsel. If a criminal complaint has been filed, a request for information submitted to the Office should be handled like any other request under the Public Records Act and Media Relations should be notified.

No later than the fourth day of the 10-day period, DCFS will send a copy of the request and the redacted and unredacted copies of the records to the FVD Head Deputy/designee for review. The deadline is not extended if DCFS fails to provide the records timely. The Office has the responsibility to inform DCFS if it objects to the release of information that would jeopardize a criminal investigation or proceeding.

Upon receipt by FVD, the WIC § 10850.4 request will be logged into the SB 39/WIC § 827 database. This database includes all WIC § 10850.4 requests as well as public requests made pursuant to WIC § 827. FVD will promptly notify Media Relations Division and ascertain the jurisdiction where the alleged crime occurred.

When the jurisdiction has been ascertained, FVD will notify the Head Deputy of the Branch Office responsible for that jurisdiction, via e-mail, that a request for review of child death records has been received from DCFS and that the records are available for review in the SB 39/WIC § 827 database. If the case has been filed or is being reviewed for filing consideration, the filing/reviewing deputy will also be notified that the records are available for review in the database. If the jurisdiction cannot be ascertained, the FVD Head Deputy/designee will review the records.

No later than the sixth day of the 10-day period, the deputy tasked with reviewing the records shall decide whether the release of the records as redacted by DCFS would jeopardize a criminal investigation or proceeding. The deputy shall consult with law enforcement when making this decision. Consideration should be given to further redacting any identifying suspect information, highly sensitive material or any specific details of the crime that have not been made public.

No Objection to Release of Records

If there is no objection to the release of the records, the deputy shall complete the required fields in the database; the FVD Head Deputy will be notified via e-mail automatically. The deputy shall place a copy of the records in the case file and shall note the deputy's decision on the Attorney Notes page.

Objection to Release of Records

If there is an objection to the release of the records, i.e., the deputy concludes that the release would jeopardize a criminal investigation or proceeding, the deputy shall:

1. Bates stamp the records;
2. Further redact the records if necessary;
3. Scan the redacted records into the database;
4. Fill in the action section of the database; and
5. Include in the comments section of the database the reasons the additional redactions were made.

The FVD Head Deputy will be notified via the database of the action taken by the deputy. A copy of all records, memos and correspondence shall be placed or noted in the case file.

Notification to DCFS

On the seventh day of the 10-day period, the FVD Head Deputy will send, via the database, the Office's response to DCFS. The FVD Head Deputy will update the SB 39/WIC § 827 database.

Additional Requests for Records

FVD will maintain the SB 39/WIC § 827 database for all cases. Additional WIC § 10850.4 requests for information on a particular case may be received in the future. The assigned deputy shall review the records each time that a request is received to determine whether the reasons for the initial response have changed. If the reasons for the response have changed, the deputy shall notify the FVD Head Deputy so Head Deputy may inform DCFS, County Counsel, or Dependency Court. If the reasons remain the same, the assigned deputy shall respond accordingly.

Deputy District Attorney Requests to Use Records

It is important to note that all documents received from DCFS through a WIC § 10850.4 request for release are considered confidential. If at a later time a deputy wishes to use the record(s) in criminal court and these records could not be obtained through independent means, a copy of the records shall be submitted to the Court under a protective order and the deputy shall petition the Juvenile Court pursuant to WIC § 827 for permission to use the records. In any subsequent prosecution, defense counsel should be made aware that these records exist. The defense attorney must petition the Juvenile Court for permission to review the records and use the information pursuant to WIC § 827. There are potential criminal sanctions for the improper use or release of confidential juvenile records.

The procedures set forth above are limited to requests received pursuant to WIC § 10850.4 or the public's request for records pursuant to WIC § 827. They do not apply to WIC § 827 petitions which are often generated by deputies in child abuse or child homicide prosecutions. WIC § 827

petitions are routinely filed by deputies to gather additional information about a victim or suspect and this policy in no way modifies or changes this practice.

4.03.05 COMPLEX CHILD ABUSE CASES

The Complex Child Abuse Section (CCAS) in the Family Violence Division handles all cases involving suspected abusive head trauma in a child under the age of eight, whether or not resulting in death. Additionally, the section handles any death of a child under the age of eight involving medically complex causes of death or timing of death issues. A complex case includes a child beaten about the body who died from internal injuries, such as lacerated liver, ruptured bowels, etc. In such a case, there is often no external sign of injury and no witness to explain how the child's injuries occurred.

In cases when the cause of death is obvious, (e.g. gunshot wound, stabbing, fatal car wreck), there is no need for complex medical analysis and the case may remain in line operations.

4.03.06 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art, I § 28(b)(1).) (See LPM § 24.02.04)

4.04 CHILD ABDUCTION

4.04.01 CRIMINAL PROCEEDINGS

When a California resident is lawfully entitled to custody of a child, a criminal filing will be considered when an individual maliciously takes or conceals the child. This filing will be considered regardless of the accused's location. Similarly, a California resident may be prosecuted for maliciously taking or concealing a child in California in violation of a custody decree from another state.

A criminal filing will be considered when a child is abducted from Department of Children and Family Services (DCFS) placement, whether by a parent or non-parent. In these cases, DCFS has actual custody of the child and is the named victim for filing purposes.

All child abduction cases, whether committed by a family member or non-family member, shall be referred to the Deputy-in-Charge of the Child Abduction Section. The Child Abduction Section prosecutes all child abduction cases in Los Angeles County. All matters related to child abduction, including law enforcement inquires, shall be handled exclusively by the Child Abduction Section.

4.04.02 CIVIL PROCEEDINGS

Private citizens seeking enforcement of Los Angeles Superior Court custody orders in which child abduction is alleged may contact the Child Abduction Section directly whether or not law

enforcement notification has been made. The California Family Code mandates that the Child Abduction Section enforce custodial orders by assisting in the service of civil documents and, in some cases, locating and returning a child to a lawful custodian.

4.04.03 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art, I § 28(b)(1).) (See LPM § 24.02.04)

4.05 ASSAULTS ON PEACE OFFICERS

To ensure the Office uniformly handles assaults on peace officers, a comprehensive policy addressing the filing, prosecution and disposition of these cases shall be followed.

The most serious assaults on peace officers shall be vertically prosecuted by experienced deputies. These cases shall be filed as felonies in all appropriate cases and deputies shall seek appropriate custody time in every case.

The Crimes Against Peace Officers Division (CAPOS) prosecutes the most serious crimes perpetrated against peace officers in the performance of their duties. CAPOS vertically prosecutes all cases in which a peace officer is killed, shot or seriously injured as well as selected other cases involving the use or threat of deadly force or violence on a peace officer. Deputies in line operations shall notify CAPOS as soon as possible of any felony assault involving a peace officer victim. The Head Deputy of CAPOS will determine whether the case should be handled by CAPOS or line operations.

4.05.01 CHARGING CRITERIA

All potential felony/misdemeanor charges involving assaults on peace officers must be submitted to the Office for review. A felony shall be filed anytime an accused commits an assault on a peace officer with a deadly weapon or instrument, or by any means likely to produce great bodily injury, even if no injury occurs.

When considering whether to file a felony or misdemeanor under Penal Code § 243(c)(2), a felony shall be filed if the accused:

- Used a weapon;
- Inflicted or intended to inflict other than a minor injury;
- Has a history of assaultive conduct; or
- Has a strike prior.

When any of the above factors exist, prior approval by a Head Deputy or Deputy-in-Charge shall be obtained before filing a misdemeanor charge. A misdemeanor may be filed only where unusual or mitigating circumstances exist.

These cases are to be reviewed with the same care and objectivity as all other cases. Whenever appropriate, the victim peace officer should be interviewed by the filing deputy before the filing decision is made.
If before a case has been filed, there is evidence to support a suspect's claim that an officer acted illegally, the claim should be investigated by the law enforcement agency. If the filing deputy determines there is evidence that a peace officer used excessive force or committed any crime, the deputy shall immediately forward a written memorandum (enclosing copies of all supporting documentation) to the Justice System Integrity Division (JSID).

If after a case has been filed, a deputy becomes aware of evidence that one or more peace officers may have used excessive force or committed any crime, that deputy shall review the entire case. After this review, if the deputy determines that different charges would have been filed had this newly discovered evidence been known at the time of filing, the pleadings should be amended to reflect the appropriate charges. If the deputy determines that the case would not have been filed, the case shall be dismissed. The deputy shall inform JSID, in writing, of any allegation of criminal activity by the peace officer and the resolution of the original case.

JSID shall refer all allegations of peace officer misconduct to the law enforcement agency to conduct an investigation.

4.06 CONTROLLED SUBSTANCES

4.06.01 LABORATORY ANALYSIS

When an accused is in custody at the time a case is presented for filing consideration, a felony or misdemeanor complaint for a controlled substance violation may be filed when identification of the controlled substance is based upon a positive scientifically reliable field test or preliminary laboratory analysis. Additional confirmatory laboratory analysis must be completed prior to preliminary hearing on felony cases and prior to jury trial on misdemeanor cases.

When an accused is out of custody at the time a case is presented for filing consideration, a felony or misdemeanor complaint for a controlled substance violation should be filed only when identification of the controlled substance is based upon a positive laboratory analysis.

Statutorily Significant Large Quantities

Extremely large drug seizures may be difficult to unpack completely and determine net weight within filing deadlines. Most cases will not involve quantities within the measurement uncertainty for a statutory limit. If there may be an issue as to the net quantity of the controlled substance, the filing deputy shall contact the laboratory to make arrangements for any necessary weighing of controlled substances with all packaging fully removed.

4.06.02 PROPOSITION 215 - MEDICAL USE OF MARIJUANA

Proposition 215, known as the "Compassionate Use Act of 1996," added § 11362.5 to the Health and Safety Code. It did not repeal any existing statutes. It is the policy of the Office that

§ 11362.5 created an affirmative defense to the offenses of possession of marijuana as defined in Health and Safety Code § 11357 and cultivation of marijuana as defined in Health and Safety Code § 11358. This affirmative defense applies only to a "patient, or to a patient's primary caregiver" (as defined) "who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

Further, it is Office policy that Health and Safety Code § 11362.5 is inapplicable to Health and Safety Code § 11357(a) (concentrated cannabis) and to the sale of marijuana or any predicate act to the sale of marijuana.

In any case in which the medical use defense may apply, the filing deputy shall inquire of the investigating officer whether the medical use defense is factually applicable, and what investigation has been done to confirm or disprove the defense.

If evidence of the medical use defense comes to light after a case has been filed, the deputy shall ask the investigating officer to conduct further investigation. If the defense is determined to be valid, the deputy shall dismiss the case.

As with other affirmative defenses, the burden of proof is on the defendant. A deputy shall presume the conduct is unlawful unless the affirmative defense can be proven.

4.06.03 MINIMUM WEIGHT REQUIREMENT IN POSSESSION CASES

A charge involving the possession of cocaine, heroin, or methamphetamine shall be filed if the weight of the substance is equal to or greater than shown below:

Substance	Weight
Powder cocaine	0.053 grams
Cocaine base	0.023 grams
Powder heroin	0.053 grams
Tar heroin	0.023 grams
Methamphetamine	0.023 grams

A possession case shall not be filed if the weight of the controlled substance is less than shown above.

Controlled substance cases in which five or fewer pills are possessed may be treated as de minimis and rejected with the approval of the Head Deputy.

In cases involving the possession of all other controlled substances, filing decisions shall be governed by applicable statutes and case law. (*People v. Rubacalba* (1993) 6 Cal.4th 62.) The filing deputy shall consider the nature of the substance, the manner in which the substance is typically ingested, and the attributes of possession in deciding whether the amount seized is a usable quantity.

4.06.04 NO MINIMUM WEIGHT REQUIREMENT IN SALE CASES

When charging the sale of, or offer to sell, controlled substances, no minimum weight is required. (Bench Note, CALCRIM 2300; Use Note, CALJIC 12.02 and 12.03; and *People v. Diamond* (1970) 10 Cal.App.3d 798, 801.)

4.06.05 PHENCYCLIDINE (PCP)

Possession of PCP should be charged whenever a usable quantity is found. The following are examples:

- The PCP was in a usable liquid or concentrated form in an amount sufficient to "lace" a secondary substance (e.g., mint leaves, marijuana, tobacco, etc.);
- The PCP was found in a "laced" or secondary substance exceeding four grams;
- The PCP was found in a quantity less than indicated above, but the accused demonstrated by overt conduct, reasonably related to PCP use, a propensity for violence or a threat to public safety.

4.06.06 DATE RAPE DRUGS

Possession of any usable amount of rohypnol, gamma hydroxybutyrate (GHB), or other controlled substances associated with the facilitation of sexual assaults (also known as "date rape drugs") should be charged and vigorously prosecuted. When there is evidence of an intent to use the drug to facilitate a sexual assault the filing deputy shall carefully review all of the evidence to determine whether there is sufficient evidence to prove conduct that, when coupled with the requisite intent, would constitute an attempt to commit a sexual assault in violation of Penal Code § 220.

4.06.07 MDMA ("ECSTASY")

MDMA (3,4-methylenedioxymethamphetamine) ("ecstasy"), unlike cocaine, heroin, or most other illegal substances, is not specifically listed as a prohibited substance in the Health & Safety Code. The current scientific view, shared by LASD and LAPD laboratories, is that MDMA is a controlled substance analog of prohibited drug MDA (3,4-methylenedioxyamphetamine). (H&S § 11054(d)(6).) Ecstasy is therefore illegal as it is a controlled substance analog of MDA. (H&S § 11401(a).)

Prosecuting an ecstasy case is no different from prosecuting any other case involving a controlled substance analog. A controlled substance analog is defined as:

1. A substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance classified in H&S §§ 11054 or 11055; or
2. A substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect of the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or

hallucinogenic effect on the central nervous system of a controlled substance classified in H&S §§ 11054 or 11055. (H&S § 11401(b).)

To prove a substance is an analog of a scheduled drug, deputies must either prove that the alleged analog has a chemical structure that is substantially similar to the chemical structure of the scheduled drug, or that the alleged analog affects the central nervous system in a substantially similar manner. (§ 11401(b)(1)-(2).) Deputies should be prepared to obtain a stipulation that ecstasy is a structural analog of MDA or produce expert testimony to that effect.

If a criminalist is not available to testify and the defense has refused to stipulate that ecstasy is an analog of MDA, deputies may consider calling a Drug Recognition Expert who will testify that the effects of ecstasy are substantially similar to methamphetamine, within the meaning of § 11401(b)(2). (See, e.g., *People v. Becker* (2010) 183 Cal.App.4th 1151.) However, this practice should be reserved only for situations where there is no other alternative method of proof.

4.07 DRIVING UNDER THE INFLUENCE

4.07.01 FELONY

It is the policy of the Office to charge driving under the influence as a felony when the defendant:

- Has been convicted of three or more driving under the influence or alcohol-related reckless driving offenses committed within 10 years of the current offense; or
- Has been convicted of a felony violation of Vehicle Code § 23152 or § 23153 that was committed within 10 years of the current offense; or
- Has been convicted of Penal Code § 192(c)(1) (gross vehicular manslaughter) that was committed within 10 years of the current offense; or
- Has been convicted of Penal Code § 191.5 (vehicular manslaughter while intoxicated) as a felony; or
- Causes serious injury to another person in the commission of driving under the influence causing bodily injury (VC § 23153). When provable, a separate great bodily injury enhancement (Penal Code § 12022.7) shall be alleged as to each seriously injured victim to enhance a charge of Vehicle Code § 23153.

Commentary

Appellate courts have consistently held that death is a form of great bodily injury. In appropriate circumstances, deputies should consider charging driving under the influence causing bodily injury as an alternative charge to vehicular manslaughter while intoxicated, enhancing the charged violation of Vehicle Code § 23153 by a great bodily injury allegation for each fatality or seriously injured victim. (Vehicle Code § 23153 is a lesser included offense of Penal Code § 191.5 and, as such, a defendant may not be convicted of both offenses when they involve the same victim.) Importantly, great bodily injury allegations are not available to enhance charges of murder or manslaughter, even when the allegation specifies a victim other than the one identified in the underlying homicide charge.

4.07.02 MISDEMEANOR

Cases involving a blood alcohol level of .08% or higher shall be charged under both subsections (a) and (b) of Vehicle Code §§ 23152 or 23153.

Cases involving a blood alcohol level below .08% shall be charged under subsection (a) of Vehicle Code §§ 23152 or 23153 when there is evidence of grossly erratic driving, sufficient symptoms of intoxication, or drug or narcotic ingestion.

Cases involving refusals of a chemical test shall be charged under subsection (a) of Vehicle Code §§ 23152 or 23153 if there are symptoms of being under the influence.
Cases in which a blood or urine test was taken but the results are unavailable may be charged under both subsections (a) and (b) of Vehicle Code §§ 23152 or 23153 if there are sufficient symptoms of being under the influence.

All allegeable priors shall be charged including alcohol-related reckless driving (VC § 23103.5).

4.07.03 VEHICULAR HOMICIDE

In *People v. Cook* (2015) 60 Cal. 4th 922, the California Supreme Court held that a great bodily injury (GBI) sentencing enhancement may not be applied to a murder or manslaughter charge, even when the enhancement specifies a victim other than the one identified in the underlying homicide charge. Deputies should carefully review pending cases with enhancements that could be proscribed in *Cook* and immediately seek to amend charges when necessary.

In appropriate circumstances, deputies should consider charging a violation of Vehicle Code § 23153 (DUI causing injury) and enhancing the offense by one or more GBI allegations, as an alternative or in addition to a charge of PC § 191.5 (vehicular manslaughter while intoxicated). See *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552 ["Prosecut(ors) have the sole discretion to …choose, for each particular case, the actual charges from among those potentially available…"]; *People v. Fong* (2013) 217 Cal.App.4th 263, 269-270 [Veh. Code § 23153 enhanced by PC § 12022.7, is a viable alternative to PC § 191.5]; *Hale v. Superior Court* (2014) 225 Cal.App.4th 268, 276 [separate GBI enhancements may be alleged for each seriously injured victim]; and *People v. Calles* (2012) 209 Cal.App.4th 1200, 1220 [death is a form of GBI.]

The *Cook* opinion was relatively narrow in scope and expressed no opinion regarding the question whether and, if so, how great bodily injury enhancements may attach to other crimes for a defendant convicted of murder or manslaughter as well as those other crimes. (*Cook*, supra, at 938 fn.3)

4.07.04 DUI TRAINING AND PROSECUTION SECTION (DTAPS)

The DUI Training and Prosecution Section (DTAPS) in the Training Division is an Office of Traffic Safety grant funded unit. It was created to directly addresses the growing threat to public safety posed by drivers operating motor vehicles while impaired by alcohol, drugs, or a combination of the two. DTAPS primarily provides consultation, support and training to

prosecutors and law enforcement in the investigation and prosecution of all vehicular homicide and driving under the influence cases. In addition, DTAPS works with law enforcement to increase the number of Drug Recognition Experts throughout the county. Although grant mandated as primarily a training unit, DTAPS also vertically prosecutes some vehicular murder cases involving DUI.

In those cases where a vehicular homicide occurs and, at the time of filing, alcohol and/or drugs are believed to be involved, the case shall be reviewed by DTAPS for filing consideration. Deputies shall immediately contact DTAPS if a case is presented for filing that meets the above criteria. Upon contact, a DTAPS deputy shall be available to review the case.

Resources permitting, some vehicular murder cases involving alcohol and/or drugs may be vertically prosecuted by DTAPS. In all DUI vehicular homicide cases not vertically prosecuted by DTAPS, a DTAPS deputy shall be available to provide consultation and support for deputies filing and handling these cases.

The filing process for these cases shall be conducted by the support staff at the office having jurisdiction over the offense. A DTAPS deputy shall be available during the entire filing process to answer any questions.

4.07.05 DUI-RELATED MURDERS

Deputies filing a DUI-related murder case involving a driver who had an impairing substance (alcohol, drugs, or both) in their system, regardless of whether there are DUI-related charges filed with the murder charge, must designate the case "DUI-Related" in PIMS.

To designate a murder case "DUI Related," open the case on PIMS. Under the "Case" tab, pull down, select "Case Category," and then select "DUI Related." (Case>Case Category>DUI Related).

4.07.06 DUI CASES INVOLVING DRUGS OR DRUGS AND ALCOHOL COMBINED

Deputies filing any misdemeanor or felony DUI case that involves drugs (whether alone or combined with alcohol) must identify the category of intoxicating substance(s) in PIMS.

To identify and document the category of drug(s) involved, open the case on PIMS. Under the "People" tab, pull down and select "Defendant." Select the 76 "Substance" tab (People>Defendant>Substance) and pull down to choose from the following nine (9) categories:

• DUI - Cannabis • DUI - CNS Depressant • DUI - CNS Stimulant • DUI - Dissociative Anesthetic • DUI - Hallucinogen • DUI - Inhalant • DUI - Narcotic Analgesic • DUI - Alcohol • DUI - Unknown

The above list encompasses the seven drug categories that Drug Recognition Experts (DREs) are trained to recognize and identify when conducting a drug-related DUI investigation. Often, drugs

are consumed in combination with other drugs or in combination with alcohol. The above process allows deputies inputting the information to make multiple selections in any given case.

In those cases where a DRE was not utilized, or the drug category was unknown at the time of filing, the Filing Deputy must input the data known at the time of filing. As the case progresses, and if the drug category changes or becomes known, the Handling deputy must make the appropriate selection in PIMS as soon as possible.

4.07.07 CANNABIS-ONLY DUI CASES

Whenever a misdemeanor or felony complaint is filed with a count of Vehicle Code sections 23152(f) or 23153(f), and the sole impairing substance is cannabis, the Filing Deputy must write on the face sheet of the complaint "Cannabis Only Pursuant to Vehicle Code section 23155."

Any questions on this tracking system, or any DUI related questions and/or issues, can be directed to DTAPS at (213) 974-6757 or DTAPS@da.lacounty.gov

4.08 HATE CRIMES

Hate crimes, as defined in Penal Code § 422.55, are criminal acts committed, in whole or in part, because of a victim's actual or perceived disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics. Penal Code § 422.56(d) defines the phrase "in whole or in part, because of" to mean that the hate motive must be a cause in fact of the offense, whether or not other causes also exist. When multiple motives exist, the hate motive must be a substantial factor in the defendant's conduct.

A person may commit an independent hate crime or may commit another crime that is hate motivated. The following non-exclusive factors shall be considered in evaluating whether there is sufficient evidence to prove a hate crime or that another crime was hate motivated:

- Membership in, or affiliation with, any hate group;
- Symbols of bias (e.g., tattoos, literature or memorabilia);
- The offense date (e.g., Hitler's birthday - April 20);
- The offense location (e.g., gay pride parade);
- The history of any relationship between the suspect and the victim;
- Derogatory slurs, however, if the crime is based upon speech alone, the filing deputy shall attempt to determine whether the defendant threatened a violent injury against a specific person or group of persons with the apparent ability to carry out that threat; or
- Lack of any other motive.

If an accused commits a crime that is hate motivated, the filing deputy shall add a special allegation under Penal Code §§ 422.7 or 422.75.

If the crime is against property and the property belongs to a public agency or private institution associated with a person or group of an identifiable protected characteristic and the damage exceeds $950, it is a felony.

The Hate Crimes Section of the Organized Crime Division is responsible for maintaining office-wide statistics on all felony and misdemeanor hate crime cases. When a hate crime or hate allegation is charged, the filing deputy shall notify the Hate Crimes Section.

4.08.01 PENAL CODE § 422.6

Penal Code § 422.6, interference with the exercise of civil rights because of the actual or perceived characteristics of the victim, is a misdemeanor. However, if one or more of the aggravating factors enumerated in Penal Code § 422.7 is present, the offense may be charged as a felony. The factors enumerated in Penal Code § 422.7 are:

- The crime against the person of another either includes the present ability to commit a violent injury or causes actual physical injury.
- The crime against property causes damage in excess of nine hundred fifty dollars ($950).
- The person charged with a crime under this section has been convicted previously of a violation of § 422.6(a) or (b), or has been convicted previously of a conspiracy to commit a crime described in § 422.6(a) or (b).

If one of these factors exists, the offense should generally be charged as a felony. In exceptional cases in which the victim's injury is slight and the incident appears to be aberrant behavior by an otherwise law-abiding citizen, a misdemeanor may be considered.

Commentary

The filing deputy should be sensitive to the victim's customs and mores. In some cases, the social consequences of being victimized and reporting the crime to authorities can be quite negative. A case should not be rejected merely because the victim demonstrates a reluctance to prosecute. The filing deputy should refer the victim to the appropriate victim's advocate or agency for counseling and support.

4.08.02 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art, I § 28(b)(1).) (See LPM § 24.02.04)

4.09 FALSE GOVERNMENT DOCUMENTS

Penal Code §§ 113 and 114, were enacted by initiative (Proposition 187) to address the manufacture, distribution, sale, or use of multiple false documents to conceal a person's true citizenship or resident alien status. Pursuant to Penal Code § 18, these offenses are alternate felony/misdemeanor crimes. It is Office policy to charge violations of Penal Code §§ 113 and 114 involving multiple false documents as felonies.

Both Penal Code §§ 113 and 114 require evidence of multiple "false documents." Penal Code § 113 requires a person knowingly "manufacture, distribute or sell" multiple documents with the intent to conceal the true citizenship or resident alien status of another person. Penal Code § 114 requires a person "use" more than one document with the specific intent to conceal the person's own true citizenship or resident alien status. A single false document is insufficient to trigger a criminal filing.

Mere possession of false documents does not constitute "use" pursuant to Penal Code § 114. There must be evidence of an act by the defendant that reveals the requisite specific intent to use the documents.

Penal Code § 112, a misdemeanor, prohibits a person from manufacturing or selling a single false government document with the intent to conceal the true citizenship or resident alien status of another person. Every false government document that is manufactured or sold in violation of this section may be charged and prosecuted as a separate and distinct violation, and consecutive sentences may be imposed for each violation. As used in this section, "government document" means any document issued by the United States government or any state or local government, including, but not limited to, any passport, immigration visa, employment authorization card, birth certificate, driver's license, identification card, or social security card.

4.10 AUTO THEFT

When the accused has committed auto theft or a violation of Vehicle Code § 10851 and any of the following factors exist, the accused shall be charged with a felony:

- The method of theft demonstrates sophistication, such as switching vehicle identification numbers or license plates, altering ownership documents, or possession or use of special tools to force entry or operate a vehicle (e.g., a "slim jim" or slide hammer);
- The vehicle was stripped, substantially altered or damaged, or there is evidence that the defendant intended to strip, alter or damage the vehicle;
- The vehicle has not been recovered;
- The defendant stole the vehicle in Los Angeles County, and the vehicle was recovered in another county, state or country; or
- Any other circumstance which demonstrates that the defendant intended to permanently deprive the victim of the vehicle, or is engaged in a commercial criminal enterprise.

Theft of an automobile as defined in Penal Code § 487(d)(1), or a "taking" theory of Vehicle Code § 10851, is a misdemeanor unless the value of the automobile exceeds $950, or the defendant has been convicted of a superseding prior. In most cases the value of an automobile will be greater than $950 but Penal Code § 490.2 requires proof of the value at the preliminary hearing and at trial.

4.11 AUDIO AND VIDEO PIRACY

Audio and video piracy is the illegal duplication and subsequent possession, rental or sale of audiovisual or recorded works. It is a crime which has significant economic consequences to the

owners of intellectual property. Piracy is not a victimless crime; it destroys jobs and steals billions of dollars from legitimate business entities and individuals. Penal Code §§ 653h, 653s, 653u, 653w and 653z address piracy offenses. Filing and trial deputies may consult the Cyber Crime Division for questions concerning video and audio piracy prosecutions.

4.11.01 OVERVIEW OF PIRACY STATUTES

The piracy statutes define alternative felony/misdemeanor offenses depending on the number of illegally duplicated items involved and whether the perpetrator has any prior convictions for similar conduct, with the exception of Penal Code § 653z which is a misdemeanor. Penal Code § 653z prohibits any person from recording a movie with any type of recording device while it is playing in a theater without the express written authority of the owner. The punishment for a violation of this offense is a sentence of up to 364 days in county jail and a fine not to exceed $25,000, or both.

Penal Code § 653z does not preclude filing alternative charges, such as commercial burglary in violation of Penal Code § 459, if warranted. Commercial burglary is a wobbler, which permits charging as a felony in appropriate situations. Prosecution under a general criminal statute, such as Penal Code § 459 is not prohibited in this instance because the California Legislature made clear the intent not to "preclude prosecution[s] under any other provision of law" by enacting subdivision (c) of § 653z. This section is a "savings clause" that was added to the statute prior to its enactment at the request of the Office.

The other piracy statutes address the recording, transportation, sale or possession for sale of recordings or live performances or possession of counterfeit music or audiovisual products. Under Penal Code § 653h, it is a crime to re-record music or films for sale or use for commercial advantage or financial gain through public performance without the owner's consent. Penal Code § 653u prohibits any person from recording live performances for sale without the owner's consent while Penal Code § 653s prohibits the possession or transportation of these illegally recorded live performances.

Finally, Penal Code § 653w makes it a crime to possess pirated audio recordings or audiovisual products for rent or sale without disclosing the true name and address of the manufacturer. An alternative charge to Penal Code § 653w is a violation of Penal Code § 350(a) Counterfeit of Registered Mark, which is an alternative felony/misdemeanor and may result in asset forfeiture in certain cases.

The punishment and fine for these offenses vary depending on the number of articles involved and the perpetrator's prior convictions, if any. Deputies should consult the specific code section for the appropriate sentencing scheme.

4.11.02 ALTERNATIVE FELONY/ MISDEMEANOR FILING POLICY

When deciding whether to file a misdemeanor or felony in an audio or video piracy case, deputies should consider the criteria set forth in the *Crime Charging - Generally* chapter of this manual and the criteria set forth below:

- Evidence of rentals or sales of the pirated material;
- Previous warnings, such as warning letters and/or seizure of pirated materials by personnel from the Motion Picture Association of America, theater operators or others;
- Previous attempts to resolve matters involving pirated material through civil lawsuits and other opportunities afforded to correct the problem;
- Circumstances showing sophistication, such as possessing or accessing equipment, devices or material used to record, duplicate, enhance, alter or distribute the pirated material;
- Circumstances showing the accused intended to distribute or disseminate the pirated material to others; or
- Circumstances showing the accused is associated with an organized criminal enterprise, regardless of whether the accused knew others in the organization.

4.11.03 EXPERT WITNESS TESTIMONY

Expert witness testimony is often necessary to assist in identifying counterfeit items. For expert witness referrals, contact the Los Angeles Police Department Commercial Crimes Division at (213) 486-6099 or Investigative Consultants at (310) 978-4554.

4.11.04 RESTITUTION

Many piracy cases are investigated by law enforcement agencies with the assistance of private agencies hired by the Motion Picture and Recording Industry Associations or Special Agents affiliated with production companies. Restitution in all piracy cases should include investigative costs incurred.

4.11.05 ASSET FORFEITURE

If a defendant commits two or more felony piracy offenses involving fraud or embezzlement and the taking is more than $100,000, Office policy is to take full advantage of the "freeze and seize" legislation in Penal Code § 186.11. If a defendant is charged with Counterfeit of Registered Mark (PC § 350(a)), asset forfeiture law and rules may apply pursuant to Penal Code § 186.3. If the defendant has assets valued at $5000 or more and the investigative agency can establish: (a) the defendant acquired the assets through a pattern of criminal profiteering; or, (b) the assets were proceeds of a pattern of criminal profiteering, the filing deputy should contact the Consumer Protection Division's Criminal Profiteering and Forfeiture Section.

4.11.06 FORFEITURE AND DESTRUCTION

Under Penal Code § 653v, the court shall order the forfeiture and destruction or other disposition of the pirated material and the electronic devices used to criminally manufacture, reproduce or assemble pirated products. Forfeiture and destruction should be ordered in addition to any other penalty imposed by the court.

4.12 PENAL CODE § 290

Failure to register as a sex offender is a serious offense. Penal Code §§ 290 et seq. provide law enforcement with a powerful tool to ensure public safety, protect law-abiding citizens, and monitor offenders to deter further criminal activity. This policy is promulgated to provide uniformity in the filing and settlement of these cases. For the case settlement guidelines, see Legal Policies Manual Chapter 12, Felony Case Settlement Policy.

4.12.01 FILING GUIDELINES

Every violation of Penal Code §§ 290 et seq., failure to register as a sex offender, that can be proven beyond a reasonable doubt shall be filed.

Felonies:

- If the underlying registrable sex offense is a felony, generally the failure to register shall be filed as a felony. (PC § 290.018(b).)
- If the registrant has a prior conviction for Penal Code § 290 as a misdemeanor, the second offense shall be filed as a felony. (PC § 290.018(b).)
- Failure of a Sexually Violent Predator to verify registration every 90 days is a wobbler. This offense shall be filed as a felony absent unusual circumstances. (PC § 290.018(f).)

Misdemeanors:

- If the underlying registrable sex offense is a misdemeanor, the penalty for the first violation is a misdemeanor. (PC § 290.018(a).)
- A misdemeanor shall be filed on the first and second misdemeanor offense in which a transient fails to register within a 30-day period. On the third offense, a felony shall be filed. (PC § 290.018(g).)
- Failure to provide proof of residence at the time of registration is a misdemeanor, regardless of the offense upon which the duty to register is based. (PC § 290.018(h).)
- Failure to provide information or providing false information at the time of registration is a misdemeanor in addition to any other penalty imposed by the section. (PC § 290.018(j).)

Statute of Limitations:

Any person who is required to register who willfully violates any requirement of the section is guilty of a continuing offense. (PC § 290.018(i).) Since these are continuing offenses, there is no statute of limitations bar to prosecution. (*People v. Wright* (1997) 15 Cal.4th 521.)

Jurisdiction:

When a registrant fails to provide written notice of a move to the last registering agency, a violation of Penal Code § 290.013(a), and fails to register at a new residence in another jurisdiction, a violation of Penal Code § 290 (b), the registrant has committed two crimes. In

People v. Britt (2004) 32 Cal.4th 944, the court, citing Penal Code § 781, held it is proper to file both offenses in either jurisdiction if practical. The court further held that both counts should be tried together if the prosecutor knew or should have known about the second violation. The defendant can be convicted of both offenses, but multiple punishment is prohibited under Penal Code § 654 if the violations of both (a) and (f) were part of one continuous transaction or one move.

4.13 PENAL CODE § 11414

Penal Code § 11414 makes it a misdemeanor to intentionally harass the child of another person because of that person's employment.

Misdemeanor cases that include a violation of Penal Code § 11414 presented for filing by law enforcement agencies at a branch or area office shall be referred to the Target Crimes Division for initial screening. Complex cases which include a charged violation of Penal Code § 11414 shall be retained for prosecution by the Stalking and Threat Assessment Team of the Target Crimes Division. Other cases which include a potential Penal Code § 11414 charge shall be referred through the appropriate Line Operations Bureau Director for filing consideration and potential subsequent prosecution.

4.14 ASSAULT WEAPONS AND OTHER FIREARMS

California's firearms laws are complicated and ever-changing. Each year the California Legislature passes new laws or amends existing laws, creating a complex and sometimes contradictory regulatory scheme that is often difficult to understand and apply. Due to their complexity, firearms laws have not always been prosecuted in a consistent manner throughout the Office.

As part of an effort to achieve uniformity throughout the Office, the following guidelines shall be followed when evaluating firearms violations presented by law enforcement for filing consideration.

4.14.01 ASSAULT WEAPONS

Assault weapons are classified in three different categories:

- Category I firearms are designated as assault weapons by being listed by type, series, and model in Penal Code § 30510(a)-(c). The type, series, and model are typically imprinted on the lower receiver of the firearm. The lower receiver houses the operating parts, such as the trigger assembly and safety. The upper receiver typically consists of the bolt carrier group, firing chamber, and barrel. Possession of these weapons is illegal unless the firearm was registered with the California Department of Justice (DOJ) by March 31, 1992. (PC § 30605.)

- Category II weapons were classified as assault weapons under a procedure commonly referred to as the "add-on provision." Certain superior courts, upon petition by the Attorney General, were called upon to declare a firearm an assault weapon because of its

essential similarity to the firearms listed in Penal Code § 30510(a)-(c). As of August 16, 2000, listed firearm models that are variations of the AK (the ubiquitous AK47) or AR15 are assault weapons. These firearms are listed in § 5499 of Title 11 of the California Code of Regulations and in the Attorney General's Assault Weapons Identification Guide. (See also PC §§ 30510(e) and 30510(f).) Possession of these weapons is illegal unless the firearm was registered with the DOJ by January 23, 2001. (PC § 30605.)

There may be a misconception among law enforcement that Category II also includes firearms that are only variations of listed weapons with minor differences, regardless of the manufacturer. In *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, the California Supreme Court ruled that only the specific firearms listed in the California Code of Regulations and the Assault Weapons Identification Guide fall within Category II.

- Category III weapons are defined in Penal Code § 30515. Category III assault weapons are classified by their features. A semiautomatic centerfire rifle that does not have a fixed magazine AND one of the following features is an assault weapon:

    1. Pistol grip
    2. Thumbhole stock
    3. Folding or telescoping stock
    4. A grenade launcher or flare launcher
    5. A flash suppressor
    6. A forward pistol grip.

  The definition of "assault weapon" in this chapter also includes shotguns and pistols with various features listed in Penal Code § 30515 (a)(4)-(8).

  "Centerfire" refers to the ammunition. Centerfire ammunition has the primer located in the center of the cartridge case head. Common centerfire calibers include 5.56x45mm and 7.62x39mm. Rimfire ammunition uses a firing pin to strike the rim of the cartridge to ignite the primer.

  Category III also includes a semiautomatic centerfire rifle with a fixed magazine with the capacity to accept more than 10 rounds, or a semiautomatic centerfire rifle that has an overall length of less than 30 inches. (PC §§ 30515(a)(2) and (a)(3).)
  A fixed magazine is defined as an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action. (PC § 30515(b).)

  Prior to January 1, 2017, it was legal to possess an assault weapon exhibiting any of the six characteristics listed above if the weapon was equipped with a magazine lock. A magazine lock replaces the standard magazine release and prevents the magazine from being detached from the weapon without the use of a tool. These devices are commonly referred to as "bullet buttons" because the tip of an unfired cartridge can be used to release the magazine.

As of January 1, 2017, any person who lawfully possesses a Category III assault weapon with a magazine lock must register the firearm with the California Department of Justice no later than January 1, 2018. (PC §§ 30680, 30900.)

In the alternative, lawful possessors of an otherwise registrable Category III assault weapon can remove **all** of the features specified in Penal Code § 30515(a)(1)(A-F). Removal of all the features would not only eliminate the need to register the firearm, but also permit the removal of the magazine lock.

However, unregistered Category I and II weapons are illegal to possess regardless of the installation of a fixed magazine. Likewise, Penal Code § 30515(a)(2) and Penal Code § 30515(a)(3) weapons are illegal to possess even when equipped with a fixed magazine.

4.14.02 PARTIALLY ASSEMBLED FIREARMS

Law enforcement may present for filing consideration a case in which a partially assembled firearm or assault weapon was discovered. In *People v. Nguyen* (2013) 212 Cal.App.4th 1311, the defendant possessed a box of AK47 parts. The receiver lacked either an imprinted serial number or manufacturer name to identify it as a Category I or II assault weapon. The defendant explained to an officer he had purchased an "80%" or unfinished AK47 flat lower receiver. An "80%" or unfinished lower receiver is a partially machined lower receiver that requires the user to complete the machining process. This may require drilling, bending, or milling of the unfinished receiver. The defendant pulled up the AK-Builder.com web site on his computer and showed the officer the AK47 flat receivers for sale. The defendant had already bent his flat receiver into shape for assembly, by using a vise or a flat bending die set. A firearms expert went through the box of parts and compared them to an AK47 diagram and determined all the parts necessary to build a working AK47 were present. The defendant acknowledged having all the necessary parts. At least one more hole needed to be drilled into the receiver before the weapon could be completely assembled. Per the opinion, the evidence that the defendant obtained a kit to build an AK47, read Internet instructions, and took at least one step towards assembly by using a tool to bend the receiver into shape, was sufficient to support a conviction for attempting to manufacture and possess an assault weapon. The court reasoned that had the police not intervened, defendant would have completed the assembly and thereupon been in possession of an assault weapon.

The following inquiries should be made whenever filing charges related to attempted possession or manufacturing of an assault weapon:

- Was the firearm lawfully registered prior to March 31, 1992 (Category I) or January 23, 2001 (Category II)?
- For a Category III (PC § 30515(a)(1)) firearm equipped with a magazine lock (bullet button) and lawfully possessed from January 1, 2001, to December 31, 2016, was the firearm registered prior to January 1, 2018? (PC § 30900(b)(1).)
- Are all the necessary parts present to complete the assembly of a disassembled weapon?
- If an unfinished lower receiver is involved, were assembly instructions, tools, jigs, or bending dies found as well? Has any milling, drilling, or machining been completed?

- Is there sufficient evidence of specific intent as well as a direct but ineffectual act done towards the commission of the completed crime?

When evaluating whether to charge attempted possession or manufacturing of an assault weapon, it is crucial to keep CALCRIM 225 in mind - charges shall not be filed if two or more reasonable conclusions can be drawn from the circumstantial evidence and one conclusion supports a finding that the defendant did not have the required intent.

4.14.03 MEASURING OF FIREARMS

As stated above, a Category III assault weapon also includes a semiautomatic centerfire rifle that has an overall length of less than 30 inches. California law also restricts the possession of shotguns and non-assault rifles under a certain length. A short-barreled shotgun either has a barrel of less than 18 inches in length or an overall length of less than 26 inches. A short barreled non-assault rifle either has a barrel of less than 16 inches in length or an overall length of less than 26 inches. (PC §§ 17170, 17180, 33210, and 33215.)

Rifles, assault weapons, and shotguns are frequently equipped with accessories that can affect the barrel length and/or the overall length of the firearm. These devices include telescoping or folding stocks, removable stocks, muzzle brakes, and flash suppressors.

Questions may arise on how a particular weapon should be measured. In *People v. Rooney* (1993) 17 Cal.App.4th 1207, a suspected short-barreled rifle was measured without extending its folding stock. The rifle measured 35 inches with the stock extended but less than 26 inches with the stock folded. The court upheld a conviction for possession of a short-barreled rifle. The court reasoned it would defeat the purpose of the statute to allow possession of weapons that can be concealed during part of a criminal enterprise and only extended for more reliable use when needed.

Several local law enforcement agencies follow the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) policy and measure the rifle barrel in its shortest operational configuration. Temporarily, but not permanently, attached items such as muzzle brakes or flash suppressors are removed. Permanent methods of attachment include welding, high-temperature soldering, or blind pinning with the pin head welded over. However, some local law enforcement agencies do not follow ATF policy and only measure the weapon in the condition it was seized. This lack of a uniform law enforcement policy may result in disparate treatment throughout the county.

As part of an effort to achieve consistency, deputies shall verify that the submitting agency measured the weapon in its shortest operational configuration and request re-measurement if needed. Telescoping or folding stocks should be collapsed, and non-permanent muzzle attachments should be removed. Charges should only be filed if the length requirement is violated based on the shortest operational configuration. **"**Shortest operational configuration" means the weapon is capable of firing at least one shot after removing all non-permanent muzzle attachments, fully collapsing any folding or telescoping stocks, and removing any detachable stocks.

In 2022, the US Supreme Court redefined the legal test that applies to state statutes prohibiting the possession and carrying of arms, *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). The Court stated, "In keeping with *Heller*, we hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg* v. *State Bar of Cal*., 366 U.S. 36, 50, n. 10 (1961)." To clarify, the US Supreme Court had previously held in 2008 that the term "arm" encompasses "**all** instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *District of Columbia v. Heller*, 554 U.S. 570 (2008). Since the 2022 opinion in *Bruen*, there have been numerous state and federal court opinions across the country striking down assault weapons bans on Second Amendment grounds, and other opinions upholding them. There have been numerous legal challenges to the California Assault Weapon ban. As of December 2024, litigation is still ongoing.

Based on the legal test as stated in *Bruen* and the reality that these issues are currently being litigated, consideration should be given to the manner in which an individual acquired and maintained a particular firearm. PC § 30605 is a wobbler which criminalizes the possession of an unregistered firearm defined above in Category I, II, and III as assault weapons. However, many California residents purchased these firearms from licensed California firearms dealers, only to have the definition of "assault weapon" change later by statute. Law enforcement may seek filing of charges for possession of an assault weapon in a situation where a person has "failed to register" the firearm after the law changed. The California Department of Justice did not give actual notice when these statutes changed to individuals who owned these weapons that they were required to register them in order to avoid prosecution. Element three of CALCRIM 2560 requires prosecutors to prove beyond a reasonable doubt that "the defendant knew or reasonably should have known that it had characteristics that made it an assault weapon." Be cautious in such a filing as proving beyond a reasonable doubt that the person had knowledge that the weapon had such characteristics and was required to register the legally acquired firearm will be very difficult if not impossible.

Some California legal assault rifles, which can be purchased at licensed California firearms dealers, measure over 30 inches in length but are sold with muzzle attachments that are not permanently attached; removal of the muzzle attachment reduces the overall length to less than 30 inches. Furthermore, California firearms dealers also sell legal upper receivers which, when attached to the lower receiver, create an assault rifle less than 30 inches in overall length. Because of the near-infinite creativity of firearms manufacturers, there are many products designed to ensure a firearm complies with California's firearms laws which may or may not actually bring the firearm into compliance with the law. Some of these products limit the ability of a collapsible or folding stock to function in order to ensure the rifle is over 30 inches in length. Although not permanent, these products take knowledge and sometimes tools to install.

Deputies shall consult with their Head Deputy when evaluating a case involving a firearm or firearm accessory lawfully purchased from a licensed California firearms dealer that nonetheless potentially violates the law. For example, removal of a non-permanently affixed muzzle attachment from a firearm, barrel, or upper receiver lawfully purchased from a licensed firearms dealer in California may result in a short-barreled rifle or an assault weapon less than 30 inches in length. Because an otherwise lawful firearm purchaser should be able to reasonably assume that a firearm or accessory lawfully purchased from a licensed California firearms dealer is legal to own in California, head deputies should exercise discretion when evaluating such cases. However, the purchaser of an otherwise California legal firearm increases the risk of being prosecuted by modifying the firearm through the use of parts ordered from companies located outside of California.

Filing deputies must review the most current caselaw related to assault weapon litigation before filing felony or misdemeanor charges for possession of an assault weapon to ensure they are not filing criminal charges related to a statute where enforcement has been stayed. Nothing in this section should discourage filing deputies from charging specific conduct-based crimes that punish assault with assault weapons (PC §§ 245(a)(3), 245(d)(3), etc.)

California's licensing requirements for firearm dealers include a valid federal firearms license, a valid seller's permit from the State Board of Equalization, and a certificate of eligibility issued by the Department of Justice. (PC §§ 26700-26725.)

4.14.04 DESTRUCTIVE DEVICES

Destructive devices are defined in Penal Code § 16460. The definition includes any bomb, grenade, explosive missile, or similar device or any *launching device therefor*. It is illegal to possess any destructive device. (PC § 18710(a).) The evidence needed to establish a violation of Penal Code § 18710 includes the defendant's knowledge that the defendant possessed a destructive device. (CALCRIM No. 2570.)

Muzzle brakes are threaded attachments on the end (muzzle) of the rifle barrel designed to vent exhaust gasses in order to reduce recoil. A flash suppressor is designed to reduce the muzzle flash from the shooter's line of sight. Both are screwed on the muzzle of the barrel and are considered muzzle attachments.

Rifles used by the U.S. military and other NATO armed forces are designed with a 22mm flash suppressor attached to the end of the barrel to accommodate the standard NATO rifle grenade, which has a 22mm opening in its base so it can be fit over the flash suppressor and be fired from the end of the barrel. These "dual use" flash suppressors are specially designed to fire 22mm rifle grenades while also functioning as a flash suppressor.

Other muzzle attachments are designed with a single use in mind - either to fire a rifle grenade or to function as a flash suppressor or muzzle brake. For example, the muzzle attachment on a Zastava SKS carbine was not constructed to function as a flash suppressor or as a muzzle brake. The attachment appears to have one, and only one purpose: for use as an adapter to launch rifle

grenades. The California DOJ has therefore determined that the muzzle attachment on a Zastava SKS carbine is an illegal destructive device based on its construction and the factory brochure. Many rifles are legally sold in California with a bullet button and an attached 22mm muzzle attachment. Some firearms experts may conclude that these commercially available and legally purchased muzzle attachments, which could theoretically launch a 22mm rifle grenade, are destructive devices.

Absent proof of knowledge, possession alone of a rifle equipped with an attachment that could be used to launch a destructive device is insufficient to file.

For dual use muzzle attachments, criminal charges should only be filed if there are some indicia the possessor actually intended to use it as a grenade launcher. This policy is not intended to turn a general intent crime into a specific intent crime. Rather, this policy is designed to protect from prosecution lawful owners of California-legal rifles who know that dual use muzzle attachments can theoretically fire 22mm rifle grenades, but do not harbor the intent to use the device to do so.

Evidence such as the presence of a 22mm rifle grenade on or near the suspect weapon, the possession of a user's manual describing the attachment as a launching device, videos or photographs depicting the weapon equipped with a rifle grenade, or statements by the suspect should be evaluated to determine whether charges should be filed.

4.14.05 GRAND THEFT OF A FIREARM

Pursuant to Proposition 63, any theft of a firearm committed on or after November 9, 2016, is a felony grand theft pursuant to Penal Code § 487(d)(2) and is punishable by state prison (PC § 489(a)). The provisions of Proposition 47 (Prop 47) may affect a pre-November 9, 2016, violation of Penal Code § 487(d)(2). Pending felony Penal Code § 487(d)(2) cases that were filed prior to November 9, 2016, are subject to reduction pursuant to Prop 47 if: (1) the gun was valued at less than $950 and (2) a petition for reduction pursuant to Penal Code § 1170.18 was filed prior to November 9, 2016, and (3) no prior applicable felony convictions preclude reduction. All crimes of Penal Code § 487(d)(2) committed prior to November 9, 2016, but filed after that date present a possible argument for reduction pursuant to Prop 47 since the effective date of the statute was November 9, 2016. Therefore, Proposition 63 will most likely only apply to a firearm theft committed after the effective date of the statute.

4.15 ANIMAL CRUELTY CASES

Filing animal cruelty charges requires specialized knowledge. The majority of the most commonly occurring animal cruelty crimes do not appear in the Office's Uniform Crime Charging Manual, and elements for the majority of animal-related crimes cannot be deciphered merely from reading the Penal Code due to the fact that they have been established by case law. Additionally, at this time there are no jury instructions for most animal-related offenses. For these reasons the following policies apply to animal cruelty cases:

- All animal cruelty cases should be filed by the specially assigned animal cruelty designee. If the designee is unavailable, the Animal Cruelty Case Coordinator (ACCC) should be consulted prior to charges being filed.

- If a case presented for filing involves animal cruelty crimes and other offenses, the filing deputy should consult with either the animal cruelty designee assigned to that particular office, or with the ACCC prior to filing charges.

- Upon filing a case involving animal cruelty charges, the case should be entered into the Animal Cruelty Database.

- After filing is complete, animal cruelty cases shall not be sent to an early disposition court (EDP).

For further discussion of this topic, see Legal Policies Manual Chapters 9, 10, 11, 12, and 13.

CHAPTER 5

DECLINING TO CHARGE

5.01 DECLINING TO CHARGE

A deputy has the responsibility to prosecute individuals who commit crimes. A deputy also has the responsibility as a member of the executive branch of government to decline to prosecute when criminal prosecution would defeat the underlying purpose of the particular statute or a deputy's duty to foster and maintain a just and lawful society. However, declining to prosecute for reasons other than evidentiary insufficiency should be done only when society would clearly be served by such action.

Commentary

The court in Taliaferro v. Locke, 182 Cal.App.2d 752, 755-56 (1960), indicated that budgetary limitations justified non-action by a prosecutor. There the prosecutor refused to abate a nuisance or prosecute for perjury where the victim and accused were ex-spouses. The court upheld the prosecutor's unfettered authority to decline to charge.

In State ex rel. McKittrick v. Wallach, 353 Mo. 312, 182 S.W.2d 313 (1944), the court specifically recognized the right to use prosecutorial discretion to determine what action would best result in general law observance and good law enforcement. The case was the subject of an annotation in Annot., 155 A.L.R. 10 (1944).

The following sections provide some examples of proper and improper reasons for the exercise of discretion not to charge. The list is not exclusive.

5.02 PROPER BASES FOR DECLINING TO CHARGE

There are valid reasons for exercising the power to decline to charge other than insufficient evidence.

5.02.01 CONTRARY TO LEGISLATIVE INTENT

It would be proper to decline to charge because the application of criminal sanctions to the accused's conduct is contrary to the legislature's intent in enacting the particular statute.

Commentary

Penal Code § 4 states, "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

5.02.02 ANTIQUATED STATUTE

It would be proper to decline to charge because the statute in question is antiquated in that:

- It has not been enforced for many years;
- Most members of society generally act as if it were no longer in existence; and
- It no longer serves a deterrent or protective purpose in modern society.

Commentary

Prolonged non-enforcement of a criminal statute lulls society into an impression that certain conduct is not unlawful. Furthermore, there may be no legitimate prosecutorial purpose in enforcing an outdated statute. This exception is not to be construed as a basis for rejecting cases because the law in question is unpopular or because appellate decisions have made the law difficult to enforce.

5.02.03 VICTIM REQUESTS NO PROSECUTION

Crimes are prosecuted on behalf of the People of the State of California, not on behalf of particular individuals. The victim is neither a party to the criminal prosecution nor the prosecutor's client. Crimes are committed primarily against society and secondarily against individual members of society. There are rare situations, however, in which the secondary interest of the individual outweighs the primary interest of society.

It would be proper to decline to charge because the victim does not wish the prosecutor to file criminal charges when the case involves the following crimes: (1) in assault or battery cases when the victim has suffered little or no injury and the accused's conduct is not likely to be repeated; and (2) in crimes against property, not involving violence, when no major loss was suffered and the accused's conduct is not likely to be repeated.

When an accused has a history of violence, even though it may never have been brought to the attention of the criminal justice system, the filing deputy and the deputy's superior shall, with the help of the Bureau of Victim Services, encourage prosecution.

Where a criminal filing is appropriate and the case can be proved without the testimony of the victim, charges shall normally be filed, despite the victim's refusal to be a witness.

Commentary

There are rare situations, set forth here, in which the secondary interest of the individual outweighs the primary interest of society. This primary interest is outweighed when none of the four sentencing goals of deterrence, protection, punishment and rehabilitation are particularly applicable. In these cases, non-prosecution would foster harmony, good employment relations, the promotion of individual friendships, and the victim's personal privacy.

The issue described here is different from a case in which a witness is so uncooperative that successful prosecution is unlikely. The problems of proof associated with an uncooperative witness are potentially applicable in any criminal case, but in serious cases, society's interest in protection and deterrence requires deputies to try to secure the victim's or witness's

cooperation. In such cases, a deputy should be prepared to impeach the witness with the witness' own prior recorded statements.

5.02.04 DE MINIMIS VIOLATION

It is proper to decline to charge because the violation is de minimis. In this rare circumstance, consider the following factors: (1) the availability of appropriate alternative charges; (2) whether the accused, if convicted, would merit any confinement or significant fine; (3) whether a deterrent purpose would be served by prosecuting the offense; and (4) possession of controlled substances cases in which the amount of the controlled substance falls below the minimum requirements enumerated in Legal Policies Manual § 4.06.03.

Commentary

This policy recognizes the judicial principle of "de minimis non curat lex": The law does not concern itself with trifles. This policy may be applied to a single de minimis violation; however, a filing should be considered when multiple de minimis violations occurred and a deterrent effect or significant sentence may be obtained. In de minimis situations, alternatives to prosecution (such as office hearings) should be considered when the same purpose of criminal prosecution can be achieved without incurring the cost.

5.02.05 PROBATION VIOLATION - CONFINEMENT ON OTHER CHARGES

In certain instances, it would be proper to decline to charge because revocation of the accused's probation is imminent or the accused has been sentenced to a lengthy period of confinement on another charge.

A deputy shall consider initiating a probation violation in lieu of filing a criminal complaint when (1) there is sufficient evidence to prove the violation, and (2) the probationer's conduct that constitutes the violation is either not criminal or if criminal, (a) conviction on the new offense would not merit any significant, additional, direct or collateral punishment, (b) the new offense is not particularly aggravated, and (c) conviction on the new offense would not serve any significant deterrent purpose.

A deputy may file a probation violation in lieu of a new criminal filing when the evidence is sufficient to show probable cause (as required by California Professional Rules of Conduct, Rule 3.8 (Special Responsibilities of a Prosecutor)) but may be insufficient to prove the charge to a jury beyond a reasonable doubt.

5.02.06 PENDING PROSECUTION ON OTHER CHARGES

It would be proper to decline to charge because the accused is facing a pending prosecution in this or another jurisdiction and:

- Conviction on the new offense would not merit any significant, additional direct or collateral punishment;
- There is a reasonable certainty that conviction in the pending prosecution is imminent;

- The new offense is not aggravated; or
- Conviction on the new offense would not serve any significant deterrent purpose.

When the new offense is a felony, a deputy needs prior Head Deputy or Deputy-in-Charge approval to decline to charge.

The quality of the evidence of the new offense is an appropriate factor to consider in close decisions regarding whether to prosecute under this policy.

Commentary

In some cases, it may be appropriate to delay the initiation of prosecution until the outcome of another pending matter is determined. A filing deputy should consider, though, whether any delay could jeopardize the People's case or an accused's right to due process and a speedy trial.

5.02.07 DISPROPORTIONATE COST OF PROSECUTION

A decision not to charge because the cost of prosecution or the burden on prosecution witnesses may be disproportionate to the importance of prosecuting the particular offense shall be made only with Bureau Director prior approval.

Commentary

The mere fact that a witness is inconvenienced does not justify declining to prosecute. In extreme situations, prosecution may be declined because of disproportionately high costs in producing witnesses or of burdens on those witnesses when compared to the importance of prosecuting the offense.

5.03 IMPROPER BASIS FOR DECLINING TO CHARGE

There are certain factors that do not justify declining to charge unless other mitigating factors are present as well.

5.03.01 RESTITUTION

It would be improper to decline to charge simply because the accused made or tendered restitution to the victim.

Commentary

The mere fact restitution has been made should not justify declining to charge. If it did, the accused would in effect be buying a way out of criminal prosecution. The accused would have no incentive to refrain from committing a crime. On the other hand, the fact restitution was made when combined with other legitimate factors, like the victim's request not to prosecute or the existence of a de minimis situation, might justify a decision not to prosecute.

5.03.02 EXTRADITION NOT WARRANTED

It would be improper to decline to charge simply because extradition is necessary to obtain jurisdiction over the accused. The decision to charge and the decision to extradite should be made independently.

Commentary

Failure to charge because an accused is outside the jurisdiction could cause due process, speedy trial or statute of limitations problems. Deputies should address any concerns or questions about extradition to the Extradition Services Section.

5.03.03 RELATION OF ACCUSED AND VICTIM

It would be improper to decline to charge simply because the victim and accused are related.

5.03.04 UNPOPULAR STATUTE

It would be improper to decline to charge simply because the statute is unpopular with a segment of the local population, the local judiciary, or even the prosecutor.

Commentary

There is an important distinction between a statute that is simply unpopular and one that is antiquated. An equal protection argument that may constitute a defense to the antiquated statute does not apply to the unpopular statute.

5.03.05 VICTIM'S LACK OF COOPERATION

A deputy shall not decline to charge simply because the victim's future cooperation is problematical. A deputy should take steps to ensure cooperation and encourage a reluctant victim to pursue the victim's obligation as a citizen to see that criminal conduct does not go ignored. Bureau of Victim Services staff can assist a deputy in this regard.

Nothing in this policy, however, should be viewed as preventing a deputy from considering the victim's present lack of cooperation as a factor in determining whether the case can be successfully prosecuted.

5.03.06 SEVERE IMPACT ON THE ACCUSED OR THE ACCUSED'S FAMILY

It would be improper to decline to charge simply because prosecution will have a severe impact on the accused or the accused's family.

Commentary

Prosecutions often have a severe impact on the accused and the accused's family. The first is usually justifiable, the second is unavoidable. To decline to charge because of an accused's family status would result in an unequal administration of justice.

5.03.07 IMPROPER MOTIVES OF THE COMPLAINANT

It would be improper to decline to charge simply because the motives of the complainant in seeking prosecution are self-serving, vindictive or competitive.

Commentary

This issue is relevant in evaluating witness credibility or determining if a witness's bias will affect the successful prosecution of the case. It is otherwise irrelevant because crimes are prosecuted on behalf of the People of the State of California, not individuals.

5.03.08 COMMISSION OF PERJURY IN JUDICIAL PROCEEDING

If a defendant or a witness commits perjury during a judicial proceeding, a deputy should not decline to charge perjury simply because the defendant or a codefendant was convicted on the original charge. In deciding whether to file a charge of perjury against a person who has been sentenced on another charge or a person who gave false evidence in a proceeding, the filing deputy should consider the following factors:

- To permit perjury to occur without consequence makes it appear that the criminal justice system condones liars and that lying is a normal part of the system.
- A charge of perjury may increase a defendant's punishment.

5.04 DECLINATION PROCEDURES

A Charge Evaluation Worksheet shall be completed in PIMS in every felony and misdemeanor case for which charges are being declined. All declinations require that the filing deputy (or support staff, at the deputy's direction) enter into PIMS the name of the victim, the charges, and the name of the investigating or filing officer, along with the reasons for the declination.

5.04.01 FELONY DECLINATIONS

All felony declinations shall be in writing and signed by a deputy using the electronic version of the Charge Evaluation Worksheet (CEW) which can be located in PIMS. All declinations shall include the California Department of Justice letter code indicating the primary reason for the declination. Only one code may be entered because the Department of Justice only accepts one code. If multiple codes are entered into PIMS, only the first code is captured and retained. Because only one code is recorded, the selected code should be the one that most accurately represents the primary reason for the rejection. The declination should also include a written statement in the "Comments" section explaining the reason(s) for the rejection.

The following discussion of California Department of Justice letter reason codes is intended to provide guidance for filing deputies when a decision has been made to decline filing a charge and two or more possible reject codes apply. Not every fact pattern will lend itself to these suggestions and deputies shall use their best judgment in all other situations.

Lack of Corpus (**A**) should only be selected when there is absolutely no evidence, independent of the accused's statement(s), which would establish the corpus delicti of a crime.

Lack of Sufficient Evidence (**B**) should be selected when there is insufficient evidence to prove the charge beyond a reasonable doubt. It is appropriate to select **B** in narcotics cases when there is an insufficient amount of contraband to test. In domestic violence cases, **B** should be used when the victim recants and there is no other independent evidence to establish the charge(s). Reason code **B** should not be used when another, more specific reason code applies.

Inadmissible Search/Seizure (**C**) should be selected when the filing deputy believes that the law enforcement agency acted outside permissible 4th Amendment restrictions. Deputies should be mindful of any *Brady* implications when evaluating the facts and should not be reluctant to select this reason code if it accurately reflects the reason for the filing decision to decline prosecution.

Victim Unavailable/Declines To Testify (**D**) should be selected when a victim refuses to testify or has fled the jurisdiction. In these situations, **D** most accurately reflects the reason to decline to file rather than **B**. Certain witnesses and victims have statutory privileges or constitutional rights not to testify (e.g., Code of Civil Procedure § 1219 and the 5th Amendment). In these situations, **D** should be selected as the reason code with an explanation in the Comments section as to the applicable privilege.

Witness Unavailable/Declines To Testify (**E**) should be selected when a witness refuses to testify or has fled the jurisdiction. In these situations, **E** more accurately reflects the reason to decline to file rather than **B**.

Combined with Other Counts/Cases (**F**) should rarely be used. This reason code should be used if the suspect has a pending case and filing an additional charge(s) would not significantly add to the sentence or further strengthen the prosecution's case.

Interest of Justice (**G**) should be selected in circumstances in which judicial economy merits declination. For example, if the suspect already has been sentenced to a lengthy prison sentence on another case.

Other (**H**) requires deputies to indicate their reasons in the Comments portion of the CEW. This reason code would be selected primarily when the statute of limitations has passed and/or the Office does not have jurisdiction to file the charge(s).

Referred to Non-California Jurisdiction (**I**) should be used if the charges presented are within the purview of federal jurisdiction, military jurisdiction or more appropriately filed in another state.

Deferred for Revocation of Parole (**J**) should no longer be selected in felony declinations. If the charge is provable, the charge should be filed. Since the State of California has instituted non-revocable parole status, the Office cannot rely on a defendant's parole being revoked in lieu of a criminal filing. Therefore, the charge should be pursued. If the charge is unprovable, select

reason code **B** and note the defendant's parole status in the Comments section. Also, filing deputies should ensure the presenting law enforcement officer notifies the defendant's parole agent that the case was declined.

Further Investigation (**K**) should be used whenever a filing deputy requests a law enforcement officer/agency to conduct further investigation of the charge(s). Completing a CEW in these situations serves multiple purposes. First, selecting **K** on the CEW documents that the Office has not declined the case should the matter be presented to a city attorney/prosecutor. Second, once the CEW has been entered into PIMS with the reason code **K**, a DA case number is generated. This case number can be used to track the allegations when the agency presents the case at a later time for filing.

The filing deputy shall provide the presenting officer with a due date (first due date) for submitting the additional investigative material being requested (depending on the nature of the charge(s) and the request), and indicate the due date on the CEW. The filing deputy shall also indicate the final due date on the CEW. If a law enforcement officer is not present at the time the charge(s) are referred for further investigation, the filing deputy shall ensure that a copy of the CEW is given to the law enforcement liaison. Filing deputies shall also ensure that a copy of the initial CEW is given to support staff.

In PIMS, support staff shall note the first due date and final due date for the law enforcement agency to provide the requested materials. The Notices screen (AP111) in PIMS can be used to track the case. If the law enforcement agency does not respond to the request by the first due date, support staff shall send the agency a *Final Reminder* notice (444 B). The *Final Reminder* will inform the agency of the final due date and that the charge(s) will be declined if the requested materials are not received by the final due date. If the law enforcement agency does not present the case for filing or rejection by the final due date, the responsible staff shall notify the original filing deputy and Head Deputy or Deputy-in-Charge.

In any serious or violent felony or other significant case, the Head Deputy or Deputy-in-Charge may choose to contact command level staff at the law enforcement agency to apprise them of the filing officer's failure to conduct the requested further investigation. A conforming letter should be sent to the law enforcement agency to document any telephone conversation(s). The filing deputy shall prepare the CEW, select reason code **B**, indicate in the Comments section that the reason or part of the reason for the declination was the agency's failure to conduct further investigation as requested, and close the case. Staff shall send the investigating officer a *Prosecution Declined* letter, stating that the charges were declined.

The *Final Reminder* and *Prosecution Declined* notification letters are available in PIMS.

A weekly report is available on LADAnet (Library>Reports>Declines for Further Investigation) for cases with outstanding due dates. This report can be used to send out the notification letters to law enforcement agencies as appropriate.

Prosecutor Prefiling Deferral (**L**) is used for those offices that have PDP officers and submit the allegations for an office hearing. A Charge Evaluation Worksheet shall be prepared in every

instance in which a matter is referred for an office hearing. Staff shall enter the filing deputy's name and charges in PIMS. Refer to Legal Policies Manual § 6.01.02 et seq. for guidance on what offenses are appropriate to refer to a PDP officer.

Probation Violation In Lieu Of (M) - Revised Procedures

The Motion Requesting Revocation of Probation and Declaration In Support Thereof shall be prepared in every new case filing with a probation violation or when a probation violation is initiated "in lieu of" a new case filing. This motion is available as a Word document in PIMS under File/Document/Templates. Additionally, this document may be created in PIMS by accessing the case. If completed in this manner, the form will be prepopulated and preserved for future reference.

The following procedures should be used in all probation violation and probation violation "in lieu of" cases.

New Open Case

If a new case is filed, the filing deputy should not prepare a Charge Evaluation Worksheet. When the case is filed and the defendant is on probation, the filing deputy shall also prepare a Motion Requesting Revocation of Probation and Declaration In Support Thereof and submit all paperwork together whether the defendant is on probation in the same or different court location. If the charges presented are fileable, a new case should be filed. The decision regarding the appropriate sentence on the violation and/or new case is one that should be made by the trial judge and assigned deputy in court.

No New Open Case

A probation violation "in lieu of" a filing should only be initiated if the new charge(s) cannot be proven beyond a reasonable doubt. If charges are declined and a probation violation is initiated "in lieu of" a new case filing, the filing deputy shall prepare a Charge Evaluation Worksheet and select reason code **M.**

When the defendant is on probation at that court location, the filing deputy shall prepare the Motion Requesting Revocation of Probation and Declaration In Support Thereof and ensure the paperwork is filed with the court for appropriate action.

If the defendant is on probation at another court location, the filing deputy shall fax or e-mail a copy of the police reports and the Charge Evaluation Worksheet to the Assistant Head Deputy (AHD) or Deputy-in-Charge (DIC) at that location. The filing deputy shall also note this action in the Comments section of the Charge Evaluation Worksheet. The AHD or DIC shall be responsible for preparing or causing the Motion Requesting Revocation of Probation and Declaration In Support Thereof to be prepared. In addition, the AHD or DIC is responsible for ensuring the court revokes the defendant's probation, secures a no bail setting where appropriate and issues a Temporary Commitment Order (TCO) for the defendant.

Referred to City Attorney (**N**) should be selected when a determination is made that a wobbler should be filed as a misdemeanor and there is a city attorney/prosecutor responsible for handling misdemeanor cases in that jurisdiction. In the event a straight felony is presented and the filing deputy decides to decline prosecution, the filing deputy shall prepare the Charge Evaluation Worksheet and select the most applicable reason code, such as code **B,** or another code if more appropriate, and not use reason code **N** since a straight felony cannot be filed as a misdemeanor. The deputy may note in the Comments section that the presenting agency may wish to refer the case to the city attorney/prosecutor for consideration of possible misdemeanor charges arising from the same conduct (e.g., lesser related charges).

Bureau of Victim Services Referrals

The Bureau of Victim Services assists qualifying victims of crimes of violence or threat of violence whether or not a criminal case is filed. If the case involves a crime of violence or threat of violence, the filing deputy shall mark the "Victim Assistance Referral" box on the Charge Evaluation Worksheet so that eligibility for victim services can be determined.

5.04.02 MISDEMEANOR DECLINATIONS

The policy for misdemeanor declinations is the same as the policy for felony declinations, including the requirement that the filing deputy (or support staff, at the deputy's direction) enter into PIMS the name of the victim, the charges, and the name of the investigating or filing officer, along with the reasons for the declination. (See LPM § 5.04.01)

5.04.03 LAW ENFORCEMENT REQUESTS FOR REVIEW OF FILING DECISION

If an investigating officer disagrees with a filing deputy's charging decision, the officer may appeal the decision to the Assistant Head Deputy of the branch office or division, or to the Deputy-in-Charge of the area office or section/unit. If the matter remains unresolved, the officer's supervisor may request review by the Head Deputy.

If a deputy city attorney disagrees with a filing deputy's decision to refer a case to the City Attorney's Office pursuant to Penal Code § 17(b)(4), the deputy city attorney may contact the filing deputy to discuss the referral. If the matter remains unresolved, the deputy city attorney's supervisor may request review by the filing deputy's Head Deputy or Deputy-in-Charge. This request for review should be made at the filing stage.

5.04.04 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art, I § 28(b)(1).) (See LPM § 24.02.04)

CHAPTER 6

ALTERNATIVES TO CHARGING

6.01 PRE-FILING DIVERSION PROGRAM (PDP)

The Pre-Filing Diversion Program (PDP) diverts low-level non-violent offenders away from the criminal court process and into a voluntary supervision program. The PDP offers immediate intervention and resources to offenders and their victims. Terms of the program include, but are not limited to: intensive monitoring, treatment, counseling, restitution, community service, protective/stay-away conditions, and education. The requirements for the PDP shall be tailored to address the issues involved and may vary for each offender. The terms for each offender shall be determined by the PDP officer. Restitution shall be required in all cases involving losses.

The filing deputy shall exercise discretion in referring cases to the PDP and shall not be required to refer to the PDP every offender who may appear eligible for the program. Where the evidence, circumstances, and the interest of justice dictate that a matter should be resolved in court, the filing deputy shall exercise the deputy's discretion *not* to refer a case to the PDP.

An experienced PDP officer shall evaluate each referral to the program for the offender's eligibility and suitability, conduct an investigation into the circumstances of the crime and the offender's background, propose a global plan to address the offender's particular circumstances, and enter into a contract for supervision with the offender. At all times, the PDP officer shall be mindful of Marsy's Law and the circumstances pertaining to the victim(s).

When the referral offense constitutes misdemeanor conduct, the PDP officer shall monitor the offender's progress for at least six months. When the referral offense constitutes felony conduct, the PDP officer shall monitor the offender's progress for at least one year.

If the offender successfully completes the terms of the program, the case shall not be filed. If the offender fails to abide by the terms of the PDP, the case shall be filed, and the offender shall be prosecuted for the crimes committed.

The purpose of the PDP is to:

1. Divert adult offenders who commit misdemeanor and low-level, non-violent felony crimes from the criminal justice system;
2. Collect restitution on behalf of victims;
3. Direct the offender into counseling; mental health treatment; alcohol or substance use disorder treatment; parenting classes; and/or education classes, as appropriate;
4. Impose community service when appropriate;
5. Foster an understanding of the consequences of poor choices and redirect offenders away from criminal behavior;
6. Reduce recidivism rates;
7. Resolve minor problems before they escalate into more serious criminal conduct; and

8. Conserve resources that would otherwise be expended in the prosecution of minor offenses or disputes.

6.01.01 PROCEDURAL OVERVIEW

The following is a procedural overview of the PDP:

1. The filing deputy shall evaluate the case for filing and determine whether the offender is both eligible and suitable to participate in the PDP pursuant to this chapter.
2. If the filing deputy determines the offender is both eligible and suitable for the PDP, the filing deputy shall complete the Charge Evaluation Worksheet, using code "L" for PDP referrals.
3. A referral to the PDP does not guarantee acceptance into the program. The PDP officer has discretion to accept or reject a candidate upon the initial referral to the program, or at any time thereafter. When returning a case for prosecution, the PDP officer shall expedite the return of the case so that the filing may occur in time to maintain the original citation date. The referral shall also include a brief explanation supporting the return for prosecution.
4. The offender, victim(s), and arresting law enforcement agency shall be notified in writing when an offender has been referred to the PDP. The notice shall include the date, time and location of the PDP hearing.
    a. The notification to the offender shall inform the offender that failure to appear and/or failure to respond to the notice may result in prosecution for the offense(s) underlying the referral to the PDP.
    b. The notification to the victim shall inform the victim that they may contact the PDP officer; may request that the offender have no contact with the victim as a condition of the offender's grant of Pre-Filing Diversion; and may request that restitution be collected from the offender on the victim's behalf.
    c. Upon referring a case to the PDP, a notice requesting preservation of evidence shall be sent to the arresting law enforcement agency.
5. When an offender is accepted into the PDP Program, a contract shall be signed documenting the terms of the PDP plan of supervision.
6. The PDP officer shall verify all relevant documents concerning the enrollment and/or completion of the terms of the PDP submitted by the offender. Additionally, the PDP officer shall obtain and review an updated copy of the offender's criminal history information immediately prior to the end of the deferral period and determine whether the offender has committed any new offenses.
7. If an offender successfully completes the PDP, closing letters shall be sent to the offender, victim(s) and arresting law enforcement agency notifying them of the disposition of the case. The letter to the arresting law enforcement agency shall state that any evidence need not be preserved any longer.
8. If the offender does not successfully complete the program requirements, the PDP officer shall terminate the offender from the PDP and refer the matter to the filing deputy for filing consideration. Relevant violations include, but are not limited to: the commission of a new offense, a violation of a protective or stay-away order, failure to pay full

restitution within the period instructed by the PDP officer, and failure to participate in a required program. When returning a case for prosecution, the PDP officer shall:

   a. Include a brief explanation regarding the nature of the offender's non-compliance with the terms of the PDP.
   b. Notify the victim(s) and law enforcement agency in writing that the offender has been terminated from the PDP and the case has been referred for prosecution.

9. If the case involves the violation of a local city ordinance, the procedures described in LPM 10.18 (Prosecution of Local City Ordinances) shall be followed.

Additional guidance and specific procedures, including forms to be utilized, may be found in the Pre-Filing Diversion (PDP) Manual.

6.01.02 ELIGIBILITY FOR THE PRE-FILING DIVERSION PROGRAM

Each offender who is eligible for the PDP shall be evaluated for acceptance to the PDP on a case-by-case basis. The primary consideration shall be the offender's conduct related to the current offense.

There may be exceptional cases in which the Office may choose to deviate from the enumerated eligibility criteria. However, no deviation is permitted in cases involving: family or domestic violence (Penal Code § 13700); elder and/or dependent adult abuse (Penal Code §§ 368, et seq.); or child abuse (Penal Code §§ 273a, et seq.). Without exception, those types of cases are strictly ineligible for the PDP. In all other cases, the Filing Deputy shall obtain the approval of the deputy's Deputy-in-Charge of the relevant area office or Head Deputy (or designee) of the branch office prior to deviating from the following criteria:

1. The case shall meet the filing criteria described in the Legal Policies Manual.
2. The offender shall be at least 18 years of age at the time of the commission of the offense(s).
3. The offender shall not have suffered a prior felony conviction, nor have any criminal charge(s) pending in any court in any jurisdiction. The offender shall not be on an active grant of diversion, probation, Post-Release Community Supervision (PRCS), or parole to any other court or agency at the time of the commission of the current offense(s), or at any time during the term of the PDP. *(See "Commentary" below.)*
4. The offender shall not have suffered a sustained juvenile petition for an offense enumerated in Welfare & Institutions Code § 707(b), nor have served a commitment to a Secure Youth Treatment Facility or the Division of Juvenile Justice (formerly the California Youth Authority).
5. The offender's record shall not indicate that the offender has participated in a misdemeanor or felony diversion program within five years prior to the commission of the alleged offense. These diversion programs include, but are not limited to: the PDP, drug court or pretrial diversion for narcotics offenders pursuant to PC §§ 1000 et seq.
6. The offender shall not have a criminal protective order or civil emergency, temporary, or permanent restraining order in effect naming the offender as the restrained party.
7. The offender shall not have exhibited criminal sophistication in the conduct underlying the current offense(s).

8. The conduct underlying the current offense(s) shall not constitute a felony enumerated in Penal Code §§ 667.5(c) or 1192.7(c).
9. The conduct underlying the current offense(s) shall not require mandatory registration under any of the following registration sections:
    a. Penal Code § 290(c), et seq. (Sex Offender);
    b. Penal Code § 457.1 (Arson); or
    c. Penal Code § 186.30 (Gang).
10. The conduct underlying the current offense(s) shall not qualify to deny a potentially dangerous person the right to possess a firearm within ten years of the date of conviction pursuant to Penal Code § 29805(a) or a lifetime ban pursuant to § 29805(b). The current offense(s) shall not be enumerated in Welfare & Institutions Code § 6600(b).
11. Restitution shall not exceed $2,500.00, except in unusual circumstances.
12. The conduct underlying the current offense(s) shall not involve:
    a. A hate crime (Penal Code §§ 422.55, et seq.);
    b. Human trafficking (Penal Code §§ 236.1, et seq.);
    c. Stalking (Penal Code §§ 646.9, et seq.);
    d. Family or domestic violence (Penal Code § 13700) – *no exceptions*;
    e. Elder and/or dependent adult abuse (Penal Code §§ 368, et seq.) – *no exceptions*;
    f. Child abuse (Penal Code §§ 273a, et seq.) – *no exceptions*;
    g. Sexual intercourse by a person over 21 upon a minor under the age of 16 (Penal Code § 261.5(d));
    h. Gang activity;
    i. Dissuading or intimidating witnesses (Penal Code §§ 136.1, et seq.);
    j. Infliction of, or intent to inflict, serious bodily injury as defined in Penal Code § 243(f)(4), or great bodily injury as defined in Penal Code § 12022.7(f);
    k. Driving under the influence of alcohol or drugs (Vehicle Code §§ 23152 or 23153);
    l. Personal use, possession of, or principal armed with, a firearm or other weapon *(see Commentary below);*
    m. Sale, transportation for sale, or possession for sale of a controlled substance *(see "Commentary" below)*;
    n. A quantity of a controlled substance sufficient to establish a weight enhancement allegation enumerated in the Health and Safety Code *(see "Commentary" below)*; or
    o. Animal cruelty (Penal Code §§ 597(a), et seq.) *(see "Commentary" below).*

Commentary
Where an offender is on an active grant of PRCS, the filing of a new case may render the offender ineligible for flash incarceration for the related violation.

Where a weapon is merely possessed without having been displayed or otherwise used in any manner, the circumstances may justify a deviation from the eligibility criteria.

With the approval of the Head Deputy or Deputy-in-Charge, individuals arrested for low level sales, transportation for sale, or possession for sale of narcotics charges may be eligible for

participation in the PDP where there is clear evidence that the sales activity is driven by a documented history of narcotics addiction.

Charges involving any form of animal abuse, including dog and cock fighting, require prior approval from the Animal Cruelty Case Coordinator (ACCC) and Head Deputy or Deputy-in-Charge pursuant to LPM 10.13.01.

6.01.03 PROCEDURE FOR CONDUCTING PRE-FILING DIVERSION PROGRAM HEARINGS

PDP hearings shall be conducted in District Attorney facilities and be treated as informal proceedings, not restricted by technical rules of evidence or procedure. Separate meeting times for the victim and the offender are preferred. However, there may be circumstances in which a joint hearing may be appropriate. The PDP officer shall exercise careful judgment on a case-by-case basis in determining whether to hold a joint hearing. The safety of the participants and office staff shall be the paramount consideration.

Attorneys for a party shall be permitted to attend in an advisory role only. The parties must speak for themselves during the hearing. Witnesses and other concerned individuals shall be excluded until their participation is needed.

At the conclusion of the hearing, the PDP officer shall state the recommended resolution and provide an explanation for the decision. PDP officers have discretion to fashion a resolution that fairly addresses the concerns of the parties and public safety. Outcomes include, but are not limited to: payment of restitution, stay-away directives, community service, education, and referrals to various counseling and treatment services.

If the offender is required to pay restitution to the victim, the payment shall be in the form of a cashier's check or money order. The PDP officer shall not accept cash. The PDP officer shall send the payment to the victim only after the victim has agreed in writing that the money order or cashier's check may be mailed to the victim. In all other cases, arrangements shall be made with the victim to collect the restitution at the branch or area office at a date and time mutually convenient to the victim and PDP officer. A copy of the check or money order along with the victim's driver license or any other photo identification shall be included in the case file with a written acknowledgment by the victim that restitution has been received.

6.01.04 VICTIMS' RIGHTS AND THE PRE-FILING DIVERSION (PDP) PROGRAM

California law gives crime victims the right to be treated with fairness and respect as to both their dignity and their privacy. Office policies related to these laws are detailed more thoroughly in Legal Policies Manual § 11.21, et seq., and the PDP Manual.

A victim's personal and contact information shall not be provided to offenders enrolled in the PDP.

PDP officers shall maintain communication with victims at each stage of PDP proceedings. Victims shall be informed in writing when a case has been: 1) referred to the PDP, 2) accepted into the PDP, 3) successfully completed pursuant to the terms of the PDP; 4) terminated from the PDP, and 5) referred for prosecution.

The PDP requires participating offenders to make restitution to the victim, as would have been required in the event of a conviction.

6.01.05 PDP STATISTICAL INFORMATION AND FILE RETENTION POLICY

In order to evaluate the efficacy of the PDP, the PDP officer shall utilize the PDP database to track each offender's referral to, and participation in, the PDP. The PDP officer shall be responsible for updating the PDP database. The system shall include statistical information both for offenders whose cases are referred to the PDP and for the program overall, as set forth in the PDP Manual.

Additionally, PDP officers shall input case information into the Prosecutors' Information Management System (PIMS).

PDP officers shall enter statistical data into the PDP database on a daily basis. At the end of the month, a report summarizing the data shall be generated.

In all cases, PDP officers shall retain a copy of the file at the appropriate branch or area office. The case files shall be retained for a minimum period of three years.

6.02 REQUESTS FOR INFORMAL HEARING BEFORE CHARGING

Requests are sometimes received from attorneys representing an accused to present the accused's side of a case at an informal hearing before a complaint is filed.

A pre-filing request for an informal hearing shall be referred to the Head Deputy or Deputy-in-Charge. When the case is presented for filing by a law enforcement agency, it should be referred to the Head Deputy or Deputy-in-Charge for processing.

If the request is granted, the attorney shall be advised that time is of the essence and unless the attorney can appear within a reasonable time, a filing may be considered without the hearing.

At the hearing, the deputy shall advise the attorney generally of the charges under consideration and that the hearing was granted solely to provide an opportunity to present information the attorney feels is relevant to the determination of whether a complaint should be issued. The deputy shall advise the attorney that this hearing is not a discovery proceeding, an opportunity to learn the facts of the case, or an opportunity to cross-examine any prosecution witnesses.

If the attorney desires to have the accused present at the hearing, prior Head Deputy approval is required. If approved, a district attorney investigator or an investigator from the law enforcement agency must be present in addition to the prosecutor.

Taping or transcribing the hearing is not required unless the accused is present and expected to make a statement. Should formal statements be taken, the deputy can place a witness or the accused under oath pursuant to Government Code §§ 24000 and 24057. At the conclusion of the hearing, the deputy shall memorialize the substance of the hearing in a memorandum. In the event of a filing, the memorandum shall be placed in the case file. In the event of a rejection, the memorandum shall be attached to the reject form.

Suspects without counsel can also be granted pre-filing hearings. The same policies set forth above shall be followed. If a hearing is held, an investigator and a deputy shall be present. The interviewer shall make the suspect aware that the suspect is welcome to be represented by counsel if the suspect so desires.

If a defense attorney's request for a pre-filing hearing is directed to a filing deputy's Deputy-in-Charge, Head Deputy, or a supervisor higher in the chain of command and the request is approved, that supervisor shall notify the filing or assigned deputy and the deputy an opportunity to attend the hearing. The supervisor should inform the defense attorney that these conditions (notification and opportunity to attend) are prerequisites to granting a hearing.

6.03 VOLUNTARY COMPLIANCE

In some cases involving minor violations of consumer protection, environmental/workplace safety, administrative regulations, zoning and business license laws, voluntary compliance may be an acceptable alternative to criminal prosecution.

6.03.01 CONSUMER AND ENVIRONMENTAL CASES

In some cases involving minor violations of consumer protection or environmental/workplace safety laws, voluntary compliance may be an acceptable alternative to criminal prosecution. Voluntary compliance is an acceptable alternative to prosecution in consumer protection cases when:

- The incident is the first offense involving this type of conduct.
- The violation was not deliberate.
- The incident appears to be isolated and not part of a pattern of conduct or conspiracy.
- Complete restitution is made to all known victims.

Voluntary compliance is an acceptable alternative to prosecution in environmental cases when:

- The deputy is reasonably satisfied voluntary compliance will compensate the victim or complainant for damage done.
- The deputy is reasonably satisfied that the accused will not repeat the conduct in question.
- There is no pattern of continuing violations of the law in question.
- The violation was neither deliberate nor was the damage significant.

6.03.02 REGULATIONS, ORDINANCES, AND PUBLIC NUISANCE CASES

Voluntary compliance is an acceptable alternative to prosecution for violations of administrative regulations, zoning, building and safety, health, or other similar county ordinances, or a violation of Penal Code § 370 when:

- Voluntary compliance will compensate for past damage or is satisfactory with the victim or complainant.
- The deputy is reasonably satisfied that the accused will not repeat the conduct in question.
- There is no pattern of continuing violations of the ordinance or statute in question.

6.03.03 BUSINESS LICENSE VIOLATIONS

Voluntary compliance is an acceptable alternative to prosecution for business license violations when:

- The accused, upon request, promptly obtains the proper license.
- There is no pattern of continuing violations of the statute or ordinance in question.
- The violation was not deliberate.

6.04 CIVIL ACTION

In some cases involving minor violations of consumer protection, environmental/workplace safety, administrative regulations, zoning and business license laws, a deputy may seek civil penalties or injunctive relief without filing criminal charges.

6.04.01 CONSUMER AND ENVIRONMENTAL CASES

In some cases involving violations of consumer protection or environmental/workplace safety laws, a deputy may seek civil penalties or injunctive relief without filing criminal charges in the following situations:

- Money damages, civil penalties, or injunctive relief will be an effective deterrent to the accused and others.
- The conduct is likely to cease as a result of a successful civil suit.
- The accused's conduct does not involve a single or occasional violation for which criminal prosecution would be more expeditious and effective.

6.04.02 CIVIL ABATEMENT - PUBLIC NUISANCE CASES

When the prosecution has the right to seek a civil injunction to abate a public nuisance, a deputy may use this remedy whenever practical. Civil abatement actions are often more effective than criminal prosecutions in public nuisance cases because they are designed to correct ongoing situations rather than specific past acts.

Commentary

The primary consideration in deciding to seek an injunction is a tactical one. A deputy should select the best available means to accomplish the four goals of deterrence, protection, punishment, and rehabilitation. The legislature has given prosecutors additional tools to accomplish these goals: the right to proceed civilly as well as criminally in certain types of cases.

There are conflicting considerations a deputy should weigh. A civil lawsuit offers certain advantages that may make it the only practical remedy. The potential monetary damages are greater. Due to the lack of stigma, civil suits may lead to faster correction of the problem and resolution of the lawsuit. A deputy is generally not limited by the Fifth Amendment so the right to discovery is more effective and meaningful. The burden of proof is less than the burden in a criminal case. A civil lawsuit may, however, unnecessarily overburden the resources of the Office in lengthy litigation. All these factors should be weighed in deciding which course of action will accomplish the overall goal of remedying the interference with the freedom of others to live in a just and lawful society.

CHAPTER 7

SPECIAL CIRCUMSTANCES CASES

7.01 INTRODUCTION

Murder with special circumstances is an aggravated form of the most grievous of all criminal offenses, and one "that exacts an unimaginable toll on the lives of victims and those the victims leave behind." (*People v. Hardin* (2024) 15 Cal.5th 834, 864.)

The gravity of the consequences upon conviction for murder with special circumstances demands that great care be taken in determining the appropriate punishment upon conviction. There are occasions in which "the only adequate response may be the penalty of death." (*People v. Dennis* (1998) 17 Cal.4th 468, 511, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 184.) There are also instances in which even a sentence of life imprisonment without the possibility of parole (LWOP) may be unduly harsh in light of the facts and circumstances of the case and the conduct, involvement, age, and criminal history, if any, of the defendant.

It shall be the policy of the District Attorney's Office that every special circumstance murder case will be comprehensively evaluated to ensure that the punishment sought by the Office is fitting and appropriate. Specifically, the punishment pursued must be commensurate with the provable conduct, informed by any concerns specific to the defendant and determined only after careful consideration of all relevant circumstances, including the views of the murder victim's survivors.

In all cases in which one or more special circumstance allegations are filed and remain supported by admissible evidence, a presumption will exist that the appropriate punishment upon a conviction for murder with special circumstances is LWOP. It shall also be the policy of the District Attorney's Office that cases in which the death penalty is appropriate are exceedingly rare; the death penalty will only be pursued in those most egregious circumstances.

7.01.01 CHARGING

The California Legislature has prescribed only two possible forms of punishment for a first-degree murder conviction enhanced by one or more special circumstances enumerated in Penal Code section 190.2 that are charged and found to be true: death or imprisonment for life without the possibility of parole.

Special circumstances cases should be vertically prosecuted whenever possible. The following procedures shall be followed in all special circumstances cases.

7.01.02 REVIEW AND FILING OF SPECIAL CIRCUMSTANCE CASES AND BAIL

A special circumstances case shall only be filed by a Deputy District Attorney IV or higher, or by a designated charge evaluation deputy. All applicable special circumstances shall be alleged if a special circumstance appears to be provable beyond a reasonable doubt, unless the Head Deputy of the operation responsible for the handling of a case determines that the interests of justice do not support the filing of a special circumstance.

Additionally, an abridged version of the Special Circumstances Memorandum is required whenever a provable special circumstance is not alleged at the filing stage. This document can be generated in PIMS as the "Special Circumstances - Eligible Unfiled" document. The memorandum contains instructions as to the required content. Once completed, the memorandum shall be sent, through the chain of command, to the Chair of the Special Circumstances Committee, within 45 calendar days of filing. A copy of the reviewed memorandum is to be returned to the assigned deputy and maintained in the case file.

If special circumstances are filed, the defendant is not eligible for bail. (Cal. Const. Art. I, § 12.)

7.02 PRELIMINARY SPECIAL CIRCUMSTANCES MEMORANDUM

The deputy assigned to a murder case in which one or more special circumstances are alleged shall prepare a Preliminary Special Circumstances Evaluation Memorandum (Preliminary Memorandum) within 45 calendar days of the date of the defendant's arraignment on the Complaint or Grand Jury indictment. The Preliminary Memorandum shall be addressed to the Chief Deputy through the Bureau Director and the Assistant District Attorney, each of whom is to carefully review it and indicate their respective positions as to the punishment recommended by the assigned deputy and Head Deputy.

The purpose of the Preliminary Memorandum is to determine at an early stage, when possible, whether the District Attorney's Office intends to seek only a sentence of LWOP, the presumptively appropriate punishment in a special circumstances murder case or, rather, defers to a later date the decision as to whether the Office will seek an LWOP sentence or death.

7.02.01 CONTENTS OF PRELIMINARY MEMORANDUM

The Preliminary Memorandum will include a cover page that identifies each supervisor in the assigned deputy's chain of command, the names of every defendant and attorney involved in the case, as well as the date of the memorandum, the filing date, the arraignment date, the next court date, and the date of the preliminary hearing if it has been calendared.

The Preliminary Memorandum will also identify every charged offense and allegation for each charged defendant and provide the following: a summary of the facts of the case, including support for any special circumstance allegations; the background of each defendant, including criminal history, if any, and significant mitigating or aggravating circumstances in each defendant's social history, if any; a detailed narrative of the charged offense(s); the views of the murder victim's survivors regarding sentencing; and the views of investigating officers regarding sentencing.

In a section marked, "Work Product," the assigned deputy and each supervisor in the deputy's chain of command will recommend either death or LWOP.

Deputies shall use the standardized Preliminary Special Circumstances Memorandum format that can be generated in PIMS as the "Special Circumstances Memo (Preliminary)" document.

7.02.02 EARLY DETERMINATION OF LWOP SENTENCE

After reviewing the Preliminary Memorandum and considering the recommendations provided, the Chief Deputy will be responsible for determining whether LWOP is the only appropriate punishment upon conviction or, alternatively, that the decision on sentencing is to be deferred until a Special Circumstances Evaluation Memorandum, as discussed in Sections 7.05 through 7.05.05, is prepared and submitted for evaluation.

The annotated Preliminary Memorandum will be returned to the assigned deputy, along with a letter from the Chief Deputy that indicates the preliminary determination. On or before the next calendared court date, the assigned deputy shall inform the court and defense counsel of the decision indicated on the Preliminary Memorandum: either that the Office intends to pursue only a sentence of LWOP or that decision is being deferred. The assigned deputy shall provide a copy of the letter from the Chief Deputy to defense counsel and place copies of the Preliminary Memorandum and the preliminary determination letter from the Chief Deputy in the District Attorney's Office case file. The Chief Deputy will separately send a copy of the preliminary determination letter to defense counsel, as well. Except as authorized by the Chief Deputy, the defense attorney shall not be provided with a copy of the Preliminary Memorandum.

7.02.03 DEFERRAL FOR CONSIDERATION OF DEATH SENTENCE

If the decision regarding punishment is deferred, the assigned deputy will prepare a Special Circumstances Penalty Evaluation Memorandum within 45 calendar days of the date of arraignment on the Information, or within 90 calendar days of arraignment on a Grand Jury indictment. Upon receipt of the Special Circumstances Penalty Evaluation Memorandum, discussed in Section 7.05, the Chief Deputy will convene a meeting of the Special Circumstances Committee.

The Special Circumstances Committee will be comprised of the Chief Deputy; the Assistant District Attorney in Charge of Line Operations; the Assistant District Attorney in Charge of Special Operations; the Bureau Director for Specialized Prosecutions; and other experienced deputy district attorneys as may be selected by the Chief Deputy. The Chief Deputy, or the Chief Deputy's designee, shall serve as its Chair.

The Committee will then make a recommendation to the District Attorney, who will determine the appropriateness of a death sentence in the case. It shall be the policy and practice of the Office that cases in which the death penalty is appropriate are exceedingly rare, and that the death penalty will only be pursued in those most egregious circumstances.

7.03 PRELIMINARY HEARING

When a special circumstance allegation is not charged in the Complaint, but it is determined before the preliminary hearing that the evidence and the interests of justice support a special circumstance allegation, the Complaint shall be amended and filed with the court as soon thereafter as possible. The assigned deputy's immediate supervisor shall be consulted before a special circumstance allegation is added to the Complaint.

When a special circumstance allegation was not originally filed, but the defendant has been provided with due notice of the nature of the case and sufficient evidence in support of the allegation has been presented at the preliminary hearing, the Head Deputy or Deputy-in-Charge must authorize the filing of any special circumstance allegations in the Information. (See *Talamantez v. Superior Court* (1981) 122 Cal.App.3d 629, 634-636.)

Head Deputy approval is required before Proposition 115 hearsay testimony of a key witness is presented at the preliminary hearing.

NOTE: The special circumstance allegation that the defendant was previously convicted of murder (Pen. Code, § 190.2, subd. (a)(2)) must be supported by evidence presented at the preliminary hearing. (People v. Superior Court (Sholes) (1995) 31 Cal.App.4th 564, 568-569.)

7.04 GRAND JURY INDICTMENT

The same procedures set forth in this manual for securing approval to appear before the Grand Jury in other cases apply in special circumstances cases.

Evidence supporting the special circumstance allegation(s) known at the time the case is presented to the Grand Jury shall be proved during the Grand Jury.

7.05 SPECIAL CIRCUMSTANCE PENALTY EVALUATION

If the Chief Deputy has not authorized only a LWOP sentence in a special circumstances case pursuant to the protocol detailed in Sections 7.02 through 7.02.03 and Preliminary Memorandum, the Head Deputy shall cause a Special Circumstances Penalty Evaluation Memorandum (Special Circumstances Memorandum) to be prepared within 45 calendar days of the date of arraignment on the Information or within 90 calendar days of arraignment on a Grand Jury indictment. The Special Circumstances Memorandum, which is to be executed and transmitted to the Chair of the Special Circumstances Committee through the Assistant District Attorney and Bureau Director, is to include a factual summary of the case and an evaluation of the case.

The Special Circumstances Memorandum will include the sentencing recommendations of the assigned deputy and the Head Deputy. It will also provide a place for each supervisor in the deputy's chain of command to recommend punishment. The sentencing recommendations constitute privileged work product and should be clearly marked as "Attorney Work Product." The sentencing recommendations shall not be disclosed to the court or to defense counsel.

In preparing the Special Circumstances Memorandum, deputies shall use the standardized special circumstances penalty evaluation format that can be generated in PIMS as the "Special Circumstances Memo" document.

Except for Section VI ("Attorney Work Product"), the defense attorney will receive a copy of the Special Circumstances Memorandum when the Office is determining whether the appropriate punishment is death or LWOP.

If it is not possible to complete the evaluation within the prescribed time period, the Head Deputy shall inform the Chair of the Special Circumstances Committee, the Assistant District Attorney, and the Bureau Director and explain the specific reasons for the delay. The Head Deputy shall also indicate the expected completion date of the evaluation and request an extension to file the Special Circumstances Memorandum.

7.05.01 BUREAU DIRECTOR EVALUATION

The Bureau Director shall forward the Special Circumstances Memorandum containing the Bureau Director's evaluation and punishment recommendation to the Chair of the Special Circumstances Committee through the Assistant District Attorney within seven calendar days of receipt.

7.05.02 SPECIAL CIRCUMSTANCES COMMITTEE EVALUATION AND RECOMMENDATION

Upon receipt of all applicable memoranda, the Special Circumstances Committee will meet and consider the case to determine whether to recommend punishment of death or LWOP. After the Preliminary Hearing or Grand Jury Indictment, the assigned deputy shall inform defense counsel that counsel may submit documentation in mitigation that will be reviewed and considered in the determination of the punishment that will be sought. The Special Circumstances Committee shall consider all material submitted in accord with this procedure in making its recommendation.

Individual committee members will make penalty recommendations to the Chair of the Special Circumstances Committee. When the punishment under consideration is death or LWOP, the Committee will recommend one of the two forms of punishment to the District Attorney, who will be responsible for determining the sentence pursued by the Office.

Upon request, defense counsel for a defendant whose case is under review is to be provided an opportunity to meet with the Special Circumstances Committee before a recommendation regarding punishment is submitted to the District Attorney and/or with the District Attorney before a final decision regarding penalty is made.

7.05.03 APPROPRIATENESS OF DEATH PENALTY

A recommendation that the death penalty is appropriate shall not be made unless it is believed that the evidence bearing on the issue is of such convincing force that a reasonable and

objective fact finder, after considering all the relevant evidence, would conclude that the aggravating circumstances outweigh the mitigating circumstances, as defined in Penal Code section 190.3, and justify the death penalty. This recommendation to the District Attorney shall be made after careful deliberation, taking into account all relevant aggravating circumstances, including but not limited to the following factors:

- The circumstances of the crime charged in the present proceeding and the existence of any special circumstances as enumerated in Penal Code section 190.2;
- The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;
- The presence or absence of any valid prior felony convictions;
- Whether the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- Whether the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;
- Whether the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for the conduct;
- Whether the defendant acted under extreme duress or under the substantial domination of another person;
- Whether at the time of the offense the capacity of the defendant to appreciate the criminality of the conduct or to conform their conduct to the requirements of law was impaired as a result of mental disease or the effects of intoxication;
- The age of the defendant at the time of the crime;
- Whether the defendant was an accomplice to the offense and the defendant's participation in the commission of the offense was relatively minor;
- Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime; and
- The defendant's character, background, history, mental condition and physical condition, except that no criminal activity which did not involve the express or implied threat to use force or violence shall be considered unless it has resulted in a prior felony conviction; and
- The views of the victim's survivors.

A recommendation that the death penalty is appropriate must be the result of an informed opinion, taking into account the circumstances set forth above, together with the four basic purposes of a criminal prosecution, which are:

- The protection of society from individuals who pose a danger to others;
- The deterrence of other individuals from posing a similar danger in the future;
- The punishment of individuals for failing to fulfill their responsibilities to obey the laws on which the preservation of an orderly and free society rests; and
- The rehabilitation of individuals to the extent they will no longer be a threat to others.

The factors listed above shall be addressed in the Special Circumstances Memorandum submitted to the Special Circumstances Committee Chair.

7.05.04 CHANGE OF PENALTY RECOMMENDATION

Once the Special Circumstances Committee Chair has determined the appropriate penalty in a special circumstances case, any change shall require the prior, written approval of the Committee Chair. The assigned deputy shall prepare a memorandum setting forth the facts, reasons and justification for the proposed action. The memorandum shall be forwarded to the Special Circumstances Committee Chair through the Head Deputy, Bureau Director, and the Assistant District Attorney. When the death penalty is under consideration, the Head Deputy, Bureau Director, the Assistant District Attorney, and Special Circumstances Committee Chair shall review the memorandum and make a recommendation to the District Attorney, who will be responsible for adopting or rejecting the proposed change.

The change may be from a greater to a lesser penalty or from a lesser to a greater penalty. (*Leo v. Superior Court* (1986) 179 Cal.App.3d 274, 284.) The change must be objectively determined in accordance with the criteria set forth above.

Notice shall be given to the defense attorney and defendant as soon as possible if a penalty decision is changed. In addition, at the next court appearance the prosecutor shall state on the record that the decision as to the appropriate penalty has been changed and that the defense attorney and defendant have been notified.

Defense attorneys are not to be referred directly to the Committee Chair before conferring with the Head Deputy and Bureau Director.

7.05.05 SPECIAL CIRCUMSTANCES TRACKING FEATURE IN PIMS

PIMS automatically tracks special circumstances case data and statistics. Events such as the punishment sought, guilt and penalty phase results, mistrials, reversals, and sentence imposed can now be tracked. After opening a case in PIMS, select "Other" from the pull-down menu at the top of the screen. Scroll to the bottom of the menu and highlight "Special Circumstance Tracking."

Upon the receipt of the penalty evaluation memorandum, the Bureau Director for Special Operations shall verify that PIMS has been properly updated.

7.06 NOTICE OF DECISION NOT TO SEEK DEATH PENALTY

If it is decided that the death penalty is not appropriate – following consideration of either the Preliminary Memorandum or the Special Circumstances Memorandum, or both – the Special Circumstances Committee Chair will send a letter to the defendant's attorney providing notice that the Office is not seeking the death penalty. The Committee Chair will also send a copy of the letter to the trial deputy, who will maintain a copy in the District Attorney's Office case file.

When the Office does not seek the death penalty and the defendant is found guilty of first-degree murder and a special circumstance allegation is found to be true, there exists only one other penalty under Penal Code § 190.3. Therefore, there is no requirement that the defendant or

defense counsel waive any rights, and there is no triable issue of fact for the jury concerning penalty. The purpose for holding a penalty hearing is eliminated once the decision is made that the death penalty will not be sought.

7.07 GRANTS OF LENIENCY AND IMMUNITY FOR WITNESSES IN SPECIAL CIRCUMSTANCE MURDER CASES

All requests to offer leniency or immunity must be submitted in writing through the chain of command to the Special Circumstances Committee Chair.

7.07.01 PROCEDURE TO REQUEST LENIENCY OR IMMUNITY

The deputy shall prepare a memorandum containing the following information:

- A statement of the case which shall include a description of the offense(s), number of defendants, charge(s) filed against each defendant, and a summary of the admissible evidence available to prove the charge(s) without the testimony of the prospective witness;
- The charge(s) for which the prospective witness is being given immunity and any other consideration that is being sought for the witness;
- The reasons justifying the request for immunity;
- A summary of the recorded statement obtained from the prospective witness;
- The stage of criminal proceedings at which the prospective witness will testify;
- Whether any conflict exists with other jurisdictions which may prosecute the crime; and
- The criminal record of the defendant and the prospective witness.

When the Special Circumstances Committee Chair has authorized a grant of leniency or immunity to a witness, suspect, or defendant, the deputy shall place a copy of the memorandum and authorization in the case file. The deputy shall inform the Post-Conviction Litigation and Discovery Division's Discovery Compliance Unit (DCU) in writing of the date the grant of leniency or immunity was conveyed to the party, the date leniency or immunity was accepted or rejected by the party, the date the witness testified, the date the case was completed, and the final disposition of the case.

In addition, the deputy receiving an approved grant of leniency or immunity shall use best efforts, including running the witness granted leniency or immunity in PIMS, to determine whether the subject of the grant is a witness in another pending or imminent prosecution. If so, the deputy shall notify the deputy with case assignment responsibility for the other case(s), in writing. The efforts undertaken by the deputy and the notification provided to any other deputy with case assignment responsibility, if applicable, shall be documented in the case file.

7.07.02 PROTOCOL WHEN REQUESTS FOR LENIENCY AND IMMUNITY HAVE BEEN AUTHORIZED

When the Special Circumstances Committee Chair authorizes a grant of leniency or immunity, the Chair shall email the memorandum and authorization to the requesting deputy, the deputy's Deputy-In-Charge (DIC) and/or Head Deputy, and to the DCU.

The secretary for the Special Circumstances Committee Chair will input the name, date of birth, CII number, case number of the person authorized to receive immunity or leniency, as well as the memorandum requesting leniency or immunity and corresponding approval into the Leniency and Immunity System (LIS).

Once input, an email will be automatically generated and sent to the requesting deputy and the deputy's DIC and/or Head Deputy reminding the requesting deputy to inform the DCU, in writing, of the date the grant of leniency or immunity was conveyed to the party, the date leniency or immunity was accepted or rejected by the party, the date the witness testified, the date the case was completed, and the final disposition of the case.

The DCU will input the information into LIS upon receipt from the requesting deputy.

7.07.03 PROTOCOL WHEN AN AUTHORIZED GRANT OF LENIENCY OR IMMUNITY IS NOT IN THE LENIENCY AND IMMUNITY SYSTEM (LIS)

If a deputy is aware of an authorized grant of leniency or immunity that is not contained in the LIS database, the deputy shall provide the name, date of birth, CII number, case number of the person authorized to receive leniency or immunity, as well as the memorandum requesting leniency or immunity and corresponding approval, if practical, to the Special Circumstances Committee Chair if the grant pertained to a special circumstance case.

If the Special Circumstances Committee Chair agrees the witness was previously authorized to receive leniency or immunity, the secretary for the Special Circumstances Committee Chair will input the name, date of birth, CII number, case number of the person authorized to receive immunity or leniency, as well as the memorandum requesting leniency or immunity and corresponding approval into LIS.

Once input, an email will be automatically generated and sent to the requesting deputy and the deputy's DIC and/or Head Deputy reminding the requesting deputy to inform the DCU, in writing, of the date the grant of leniency or immunity was conveyed to the party, the date leniency or immunity was accepted or rejected by the party, the date the witness testified, the date the case was completed, and the final disposition of the case.

The DCU will input the information into LIS upon receipt from the requesting deputy.

7.08 JURY TRIAL

7.08.01 JURY TRIAL WAIVER

The Special Circumstances Committee Chair must approve, through the chain of command, a jury waiver or the refusal to waive jury in special circumstances cases.

7.08.02 MULTIPLE MURDERS - AMENDED PLEADINGS

In any special circumstances case in which a jury has found the defendant guilty of multiple murders within the meaning of Penal Code § 190.2(a)(3), the pleadings shall be amended to indicate that the defendant has been convicted (rather than merely charged) of more than one offense of murder of the first or second degree.

7.08.03 RETRIALS

The Special Circumstances Committee Chair is responsible for determining whether a special circumstances case will be retried. When the issue arises, the assigned deputy shall prepare and submit a memorandum (Retrial Memorandum) to the Special Circumstances Committee Chair through the chain of command. The Retrial Memorandum shall provide a recommendation regarding a possible retrial and include detailed support for the recommendation. The Special Circumstances Committee Chair shall return the Retrial Memorandum along with written approval or disapproval through the chain of command to the assigned deputy. The deputy shall place a copy of the Retrial Memorandum and written approval or disapproval in the case file.

7.09 SPECIAL CASE SETTLEMENT RULES

The complexion of a case sometimes changes as it passes from stage to stage in the justice system. Factors may emerge which, when considered with all other factors in a case, call for a reevaluation of previous decisions. Because of the unique demands of equal justice that attach to death penalty cases, special rules apply to the dismissal of a special circumstance allegation or settlement of a special circumstances case.

7.09.01 DEFECTIVE SPECIAL CIRCUMSTANCE ALLEGATIONS

If, after a special circumstance allegation has been filed, the deputy assigned to the case develops a belief that a special circumstance allegation is defective or deficient for evidentiary or legal reasons, the assigned deputy shall prepare a memorandum and forward it through the chain of command to the Special Circumstances Committee Chair. The memorandum shall explain the basis of the assigned deputy's beliefs, provide relevant facts and citations to legal authority in support of the deputy's position, and recommend a course of action. The deputy may neither move for a dismissal of the allegation nor settle the case without the prior written approval of the Special Circumstances Committee Chair.

The Special Circumstances Committee Chair shall return the memorandum along with written approval or disapproval through the chain of command to the assigned deputy. The deputy shall place a copy of the memorandum and written approval or disapproval in the case file.

7.09.02 SETTLEMENT OF SPECIAL CIRCUMSTANCES CASES

Following an announced determination that the Office intends to seek only a sentence of LWOP upon conviction, rather than death, the defense attorney is to be provided an opportunity to meet with the Head Deputy and, additionally, to submit materials in mitigation to the contemplated LWOP sentence. If the defense attorney disagrees with the position adopted by the Head Deputy as to whether a sentence lesser to LWOP is appropriate, the defense attorney is to be afforded an opportunity to meet with the assigned deputy's Bureau Director. The preferred practice is for the Head Deputy or Bureau Director to meet defense counsel in the presence of the assigned deputy to discuss the appropriateness of a sentence lesser to LWOP, which would require special circumstances to no longer be alleged.

Murder cases in which one or more special circumstances are alleged shall not be settled without the prior written approval of the Chief Deputy.

7.09.03 WHEN SPECIAL CIRCUMSTANCE ALLEGATION NOT FILED

If a special circumstance allegation is not filed in the Complaint, but it becomes known or is discovered that evidence beyond a reasonable doubt exists to support a special circumstance allegation, the case shall not be settled without the prior written approval of the Chief Deputy. Cases filed without a special circumstance allegation pursuant to the authority granted to Head Deputies under Section 7.01.02 are exempt from this rule.

7.09.04 DEPARTURE FROM POLICY

Any departure from policy in a special circumstances case must be approved in writing by the Chief Deputy, prior to the action being taken, in accordance with the case settlement rules set forth in this chapter and in the Felony Case Settlement Policy chapter.

7.10 CONCLUSION OF CASE

7.10.01 NOTIFICATION TO ATTORNEY GENERAL IF DEATH SENTENCE IMPOSED

In any case in which a death sentence has been imposed, the trial deputy shall promptly write a letter advising the Attorney General of the sentence and attach the non-Attorney Work Product portion of the Special Circumstances Penalty Evaluation Memorandum and all other related memoranda. Following approval by the Head Deputy, the letter and attachments shall be sent to:

Office of the Attorney General
Capital Case Coordinator
300 South Spring Street
Los Angeles, California 90013

A copy of the letter shall be placed in the case file.

7.10.02 CASE DISPOSITION MEMORANDUM

Within 30 working days after all proceedings have concluded in the trial court, the Head Deputy shall submit a "Special Circumstances Case Disposition Memorandum" through the Bureau Director and Assistant District Attorney to the Special Circumstances Committee Chair. Deputies shall use the standardized case disposition memorandum that can be generated in PIMS as the "Special Circumstances Disposition Memo" document.

The memorandum contains instructions as to the required content, which includes:

- The deputy or deputies who appeared at all significant stages of the proceedings;
- Whether the death penalty was sought;
- The precise charges of which the defendant was convicted by the court or jury;
- The penalty selected by the court or jury;
- Whether the case was retried due to a hung jury or reversal;
- The reasons for an acquittal or dismissal;
- Whether the case resolved due to a negotiated disposition;
- The specific sentence imposed; and
- The specific dates of the verdict(s), plea, dismissal, and sentencing.

7.10.03 SENTENCING MEMORANDUM ON JUVENILE DEFENDANTS

Whenever an LWOP sentence is sought for a juvenile defendant pursuant to § 190.5(b), the trial deputy shall submit a sentencing memorandum to the Chief Deputy, through the deputy's chain of command, addressing the factors set forth in *Miller v. Alabama* (2012) 567 U.S. 460:

- The juvenile's age and life history;
- The circumstances of the crime and how it relates to the degree of responsibility the juvenile was capable of exercising; and
- The possibility of rehabilitation.

NOTE: California law provides that a juvenile who commits a special circumstances murder at age 16 or 17 may be sentenced to LWOP or, at the discretion of the court, 25 years to life in prison. (Pen. Code, § 190.5, subd. (b).) However, juvenile offenders sentenced to LWOP are statutorily entitled to youth offender parole hearings after their 25th year of incarceration, effectively invalidating LWOP sentences for minors. (Pen. Code, § 3051, subd. (b)(4), cited in People v. Hardin (2024) 15 Cal.5th 834, 845.)

7.10.04 SPECIAL CIRCUMSTANCES TRACKING

Upon the receipt of the case disposition memorandum, the Bureau Director for Special Operations, or the Bureau Director's designee, shall verify that PIMS has been properly updated.

7.10.05 DISTRICT ATTORNEY STATEMENT OF VIEW

A District Attorney's Statement of View shall be filed in every case in which a defendant is sentenced to death or an indeterminate sentence. Refer to Legal Policies Manual § 17.02.01 for a discussion of the documentation that shall be submitted in a Statement of View.

CHAPTER 8

BAIL AND OWN RECOGNIZANCE

8.01 BAIL AND OWN RECOGNIZANCE GENERALLY

The standards for bail, "no bail" and own recognizance releases (hereinafter OR) are generally set forth in the California Constitution article I, § 12, and article I, § 28(f)(3).

8.01.01 ARTICLE I, § 12

SEC. 12. A person shall be released on bail by sufficient sureties, except for:

(a) Capital crimes when the facts are evident or the presumption great;

(b) Felony offenses involving acts of violence on another person, or felony sexual assault offenses on another person, when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or

(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

A person may be released on his or her own recognizance in the court's discretion.

8.01.02 ARTICLE I, § 28

SEC. 28(f)(3) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney and the victim shall be given notice and reasonable opportunity to be heard on the matter.

When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

8.02 PUBLIC SAFETY AND SAFETY OF VICTIMS ARE PRIMARY CONSIDERATIONS

Public safety and the safety of victims are the primary considerations in determining whether bail should be set and in what amount. (Cal. Const. art. I, § 28(f)(3); see PC § 1275(a)(1) ["In setting, reducing or denying bail … (t)he public safety shall be the primary consideration"]; see also Cal. Const. art. I, § 28(b)(2) [a victim shall be entitled "to be reasonably protected from the defendant ad persons acting on behalf of the defendant"]; Cal. Const. art. I, § 28(b)(3) [a victim shall be entitled "to have the safety of the victim and the victim's family considered in fixing bail and release conditions for the defendant"].) "The Los Angeles County District Attorney's Office is dedicated to … the safeguarding of crime victim's rights" and these considerations shall be vigorously asserted in all appropriate cases.

Office personnel shall be vigilant to ensure that victims receive a Marsy's law notification when a case is filed. Office personnel shall follow all procedures set forth in LPM § 24.02 to ensure that the victims' requests regarding bail and release conditions are safeguarded.

The denial of bail should be recommended in capital cases when the facts are evident or the presumption great and in non-capital cases where legally permitted and appropriate.

8.02.01 ON THE RECORD ONLY

Deputies shall seek enforcement of article I, § 28 (f)(3) of the California Constitution which states in part, "When a judge or magistrate grants or denies bail or a release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes." Penal Code § 1270.1 also requires that bail hearings be held in open court and that the judge state reasons for any deviation from the bail schedule amount. Thus, "off the record" rulings on bail are improper. (See *In re Pipinos* (1982) 33 Cal.3d 189, PC § 1270.1, and Cal. Const. art. I § 28(f)(3).)

8.03 LOS ANGELES COUNTY SUPERIOR COURT BAIL SCHEDULES

Each year the Executive Committee of the Los Angeles Superior Court approves and publishes bail schedules for felonies, misdemeanors and infractions. The bail schedules are available on the Superior Court's website under the "Criminal" heading. The current Bail Schedules supersede all previous bail schedules.

8.04 BAIL RECOMMENDATION AT TIME OF CHARGING

Bail recommendations at the time of charging should generally be in accordance with the Superior Court bail schedules and include all sentence enhancements and special allegations.

The bail schedule need not be followed in every case. The recommendation may be higher or lower than the amount in the bail schedule. A filing deputy, after consultation with the investigating officer, should consider the following factors in determining whether the bail schedule amount is appropriate:

- Public safety;
- Safety of the victim;
- Safety of the victim's family;
- The seriousness of the offense(s) charged including infliction of bodily injury or use of a weapon;
- The defendant's previous criminal record including probation status, parole or post-release community supervision, if any;
- The probability the defendant will appear for future court proceedings. In particular, this includes:
  - The defendant's contacts with the community (e.g., length of residence, family, employment and ownership of property);
  - The deterrence effect that the prospect of bail forfeiture would have on the defendant;
  - Express indications of the defendant's unwillingness to appear in court; or
  - The defendant's prior record of nonappearance;
- The legal principles set forth in *In Humphrey* (2021) 11 Cal.5th 135 and its progeny.

8.04.01 BAIL DEVIATION PROCEDURES

If a filing deputy determines that the bail schedule amount is not appropriate, the deputy shall:

- Prepare a "Declaration for Bail Deviation,"
- Indicate the proposed bail amount on the complaint, and

Submit the "Declaration for Bail Deviation" with the filing of the complaint or deliver to the arraignment court.
The arraignment deputy shall:

- Be prepared to present testimony or oral argument in support of the declaration for bail deviation to demonstrate to the magistrate (or judge) that the bail schedule amount is not appropriate; and
- Ask the magistrate (or judge) to fix the bail in the amount recommended on the complaint.

Felony Complaint: A bail recommendation in excess of $100,000 must have Head Deputy approval, except when authorized by the bail schedule.
Grand Jury Indictment: A bail recommendation in excess of $1,000,000 must have Bureau Director approval, through chain of command, except when authorized by the bail schedule.

8.04.02 RELEASE CONDITIONS

Victims have a right to be reasonably protected from the defendant and have their safety and the safety of their family considered in setting release conditions for the defendant. Prosecutors shall request a protective order setting forth the victim's requested release conditions in appropriate cases.

8.05 "NO BAIL" RECOMMENDATIONS

8.05.01 CAPITAL CASES

In capital cases, deputies shall recommend "no bail" when the facts are evident or the presumption great in accordance with Penal Code § 1270.5 and California Constitution, article I, § 12 (Proposition 4).

8.05.02 NON-CAPITAL CASES

In non-capital cases, deputies shall recommend "no bail" under the following circumstances:

Violent Felony/Sexual Assault: Deputies shall recommend "no bail" for violent felonies or felony sexual assaults when the facts are evident or the presumption great and there is clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others. (Cal. Const., art. I, § 12(b).)

Felony Offenses: Deputies shall recommend "no bail" for felony offenses when the facts are evident or the presumption great and there is clear and convincing evidence that the person has threatened another with great bodily harm and there is a substantial likelihood that the person would carry out the threat if released. (Cal. Const., art. I, § 12(c).)

8.05.03 AUTHORIZATION FOR "NO BAIL" IN NON-CAPITAL CASE

A Head Deputy or Deputy-in-Charge must approve a "no bail" recommendation in a non-capital case.

8.05.04 BAIL IN MURDER CASES

The bail schedule for murder with special circumstances is "no bail". The bail schedule for all other murder cases is $2,000,000. Bureau Director approval is required for a bail recommendation under $250,000 in any murder case.

8.06 COURT APPEARANCES

Bail motions are typically heard at arraignment, but may be heard at other times as well. A deputy shall be present at all felony bail motions.

In all cases in which "no bail" is recommended or the recommended bail is other than as set forth in the bail schedule, the deputy appearing in court shall be prepared to justify the recommendation. Oral statements summarizing the reasons for the recommendation may be sufficient. Reliable proffers and hearsay are permissible but the court retains discretion to require additional evidence. (See *In re Harris* (2024) 16 Cal.5th 292.) Deputies should be prepared to present additional evidence justifying the recommendation and file a written motion where appropriate.

Deputies shall also be prepared to respond to defense motions seeking to reduce bail. In addition to the factors for setting bail listed above, deputies shall be prepared to address factual issues relating to the principles of *In re Humphrey* (2021) 11 Cal.5th 135 that may not have been known at the time of filing (e.g., the defendant's ability to pay monetary bail and potential nonfinancial conditions of release).

8.07 BAIL RECOMMENDATION PRIOR TO ARRAIGNMENT

Felony arrestees may be released on bail prior to arraignment. If a suspect is arrested on a warrant, the amount of bail is designated in the warrant. This amount is not subject to deviation prior to arraignment. (PC § 1269a.)

If a suspect is arrested on probable cause, the amount of bail should follow the Felony Bail Schedule unless a deviation is obtained.

8.07.01 BAIL DEVIATIONS

When a bail deviation is being sought by either a police agency seeking higher bail or an arrestee seeking lower bail, a deputy shall make a recommendation in accordance with the factors discussed above, but only after consultation with law enforcement officers who have knowledge of the particular case and arrestee.

8.07.02 EXCEPTIONS TO BAIL DEVIATION PROCEDURES

Arrest Warrants: The bail on suspects arrested on warrants shall remain as set on the warrant and cannot be increased or decreased until the arrestee is physically before a magistrate at the time of arraignment on the offense for which the suspect was arrested. If the arrest is made pursuant to a warrant and additional charges, then increased bail can be required based upon the additional charges.

Serious/Violent and Other Enumerated Felonies: Before any person who is arrested for an offense enumerated in Penal Code §§ 1270.1(a)(1) through (4) may be released on bail in an amount either more or less than the amount designated in the Felony Bail Schedule for the offense, or released on the person's own recognizance, a hearing shall be held in open court before a magistrate or judge. The offenses enumerated in Penal Code §§ 1270.1(a)(1) through (4) are:

- A serious felony, as defined in Penal Code § 1192.7(c), or a violent felony, as defined in Penal Code § 667.5(c), but not including a violation of Penal Code § 460(a) (residential burglary);
- A violation of Penal Code § 136.1 where punishment is imposed pursuant to Penal Code §§ 136.1(c), 262, 273.5, 422 where the offense is punished as a felony, or Penal Code § 646.9;
- A violation of paragraph (1) of Penal Code § 243(e); and

- A violation of Penal Code § 273.6 if the detained person made threats to kill or harm, has engaged in violence against, or has gone to the residence or workplace of, the protected party.

8.07.03 BAIL DEVIATION PROCEDURES

Penal Code § 1269c permits a peace officer to request an increase in bail for those arrested without a warrant for a bailable felony offense or a misdemeanor offense for violating a domestic violence restraining order where there is reasonable cause to believe that the amount in the schedule is insufficient to ensure the defendant's appearance or the protection of a victim, or family member of a victim, of domestic violence.

The officer seeking to increase bail must contact the Court's Pre-Arraignment Support Unit and provide a declaration to the magistrate.

A law enforcement official may also contact the Court's Pre-Arraignment Support Unit to request that an arrestee's designation under the Pre-Arraignment Release Protocol (PARP) be elevated (e.g., CB/BR to MR).

A deputy on After-Hours Duty may be contacted for an opinion regarding bail deviation requests between 5 p.m. and 8 a.m. on weeknights and at any time on weekends and holidays. Deputies shall only make a recommendation after consultation with a law enforcement official who has knowledge of the particular case and the arrestee.

8.07.04 8 HOUR HOLD

Penal Code § 1269c provides that after booking an arrestee may be held without bail for up to eight hours while a bail increase is being sought. If no order increasing bail is obtained within the eight-hour period, the arrestee is entitled to be released on the amount set forth in the Felony Bail Schedule.

8.08 MOTION TO EXAMINE SOURCE OF BAIL

8.08.01 PENAL CODE § 1275.1

Penal Code § 1275.1(a) prohibits the use of feloniously obtained money or goods for bail purposes:

> Bail, pursuant to this chapter, shall not be accepted unless a judge or magistrate finds that no portion of the consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained.

"Feloniously obtained" refers to any money or goods obtained through an unlawful act, transaction, or occurrence constituting a felony. (PC § 1275.1(k).)

8.08.02 HOLD ON RELEASE OF DEFENDANT

A hold on the release of a defendant from custody shall only be ordered by a magistrate or judge if any of the following occurs (PC § 1275.1(b)):

- A peace officer, as defined in Penal Code § 830, files a declaration under penalty of perjury setting forth probable cause to believe that the source of any consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained; or
- A prosecutor files a declaration under penalty of perjury setting forth probable cause to believe that the source of any consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was obtained by felonious means; or
- A magistrate or judge has probable cause to believe that the source of any consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained.

8.08.03 HEARING TO DETERMINE SOURCE OF BAIL

Once a magistrate or judge has determined that probable cause exists to believe that the source of bail was feloniously obtained:

> Defendant bears the burden by a preponderance of the evidence to show that no part of any consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was obtained by felonious means. Once a defendant has met such burden, the magistrate or judge shall release the hold previously ordered and the defendant shall be released under the authorized amount of bail. (PC § 1275.1(c).)

8.08.04 MOTION AND ORDER TO PLACE HOLD ON RELEASE OF DEFENDANT

A Notice of Motion and Motion Concerning Bail, Memorandum of Points and Authorities, Supporting Declaration, and Proposed Order Prohibiting Acceptance of Proffered Bail are available in PIMS. An Order Prohibiting Acceptance of Proffered Bail will place a hold on the release of a defendant until a determination is made by the court whether the proffered bail was obtained by felonious means.

8.09 CHANGING BAIL AFTER DEFENDANT ADMITTED TO BAIL

After a defendant has been admitted to bail on an indictment or information, Penal Code § 1289 permits the court in which the charge is pending to increase or reduce bail upon a showing of good cause. The statute does not require the prosecution to give notice to the defense of a motion to increase bail, but does require the defense to give the prosecutor notice of a motion to reduce bail. If the amount of bail is increased, the court may commit the defendant into actual custody until the defendant gives such bail.

8.10 BAIL FORFEITURE

If a defendant on bail fails to appear in court, the court must immediately forfeit the bond in open court on the record. (PC § 1305(a).) Following forfeiture, the bail agent or surety has 185 days,

known as the "exoneration period," from the date that the notice of forfeiture is mailed to the bail agent and surety to return the defendant to court in order for the forfeiture be set aside. (PC § 1305(c).)

A bail agent or surety with "good cause" may move the court for up to, but not more than, an additional 180 days, to locate the defendant. (PC § 1305.4.) Any request from a surety, bail agent or their attorney for an extension of time should be immediately forwarded or scanned and emailed to the Extradition Services Section (ESS).

If the defendant is not returned to court within the initial 185 day period, plus any additional extension of time, the court shall enter summary judgment on the bond forfeiture and the surety is required to pay the full bond amount. (PC § 1306.)

8.10.01 EXCEPTIONS

Penal Code § 1305 sets forth the specific circumstances under which a defendant's failure to appear will be excused such that forfeiture will be set aside and the bond exonerated.

Sufficient Excuse for Non-Appearance

Penal Code § 1305.1 provides that if the defendant fails to appear in court but the court has reason to believe that sufficient excuse may exist for the failure to appear, the court may continue the case for a period it deems reasonable to enable the defendant to appear without ordering the forfeiture of bail or issuing a bench warrant. If the defendant fails to appear on or before the continuance date set by the court, the bail must be forfeited and a warrant issued.

A defense attorney's statement, "If the court will hold the warrant and forfeiture I will endeavor to locate the defendant and bring them in" is not a sufficient legal justification for a delay of the forfeiture. (PC § 1305(b); *People v. Surety Ins. Co*. (1984) 160 Cal.App.3d 963.) The deputy shall ensure that the court states its reasons for the continuance on the record, or object to the court holding the bench warrant without a sufficient explanation for the defendant's failure to appear.

Permanent Disability

A defendant's failure to appear will be considered justified if the defendant is dead or is otherwise permanently unable to appear in court due to illness, insanity or detention by military or civil authorities. (PC § 1305(d).)

Temporary Disability

In the case of the defendant's temporary disability, including illness, insanity or detention by military or civil authorities, the remainder of the 185-day exoneration period may be tolled to allow for the defendant to be returned to court. (PC § 1305(e).)

Out-of-Custody Defendant's Detention in the United States

California law provides for bond exoneration when a defendant is not in custody and is found by the bail agent or surety and temporarily detained, but not taken into custody. (PC § 1305(g).) For the bond to be exonerated under this procedure, the bail agent or surety must provide the District Attorney with documentation providing that:

1. The defendant was temporarily detained by the bail agent;
2. In the presence of a local law enforcement officer from the jurisdiction where the defendant is located; and
3. The defendant was positively identified by the law enforcement officer in an affidavit signed under penalty of perjury.

Once this information is provided to the Office and verified, the Office must then elect whether or not to seek the defendant's extradition.

Deputies receiving a request from a bail agent or surety for extradition of an out-of-custody defendant temporarily detained, but not taken into custody, in the United States shall forward the original request to Extradition Services Section. Scan and email the request and forward the original via county mail and place a copy in the case file. If the information provided by the bail agent or surety is verified and the exoneration period has not expired, the matter will be returned to the appropriate Head Deputy for their extradition decision. (LPM § 21.01.04.)

Out-of-Custody Defendant's Temporary Detention Outside the United States

The same requirements must be met by a bail agent or surety who seeks a bail forfeiture exoneration when they temporarily detain, but do not take into custody, a defendant in a foreign country. (PC § 1305(g).) However, the Office's procedures are different from those for a domestic extradition.

Deputies receiving a request from a bail agent or surety seeking a decision regarding an international extradition shall scan and email the request to the ESS Deputy-in-Charge. The original shall be sent by county mail to the ESS Deputy-in-Charge's attention and a copy placed in the case file.

After verification of the bail agent or surety's documentation, and if the exoneration period has not expired, a decision will be made by the Head Deputy of the Post-Conviction Litigation and Discovery Division whether or not to seek the defendant's extradition from the foreign country.

Tolling of Bail Forfeiture During Extradition

In cases arising under Penal Code § 1305(g), § 1305(h) permits the District Attorney to agree to a tolling of the forfeiture exoneration period, but only if an extradition decision has been made by the appropriate Head Deputy prior to the expiration of the period.

A deputy receiving a tolling request or motion under § 1305(h) for an international extradition shall refer the request or motion to the ESS Deputy-in-Charge for a decision on whether the Office will agree to the toll of the forfeiture deadline.

The bail agent or surety must give the District Attorney written notice of a motion brought pursuant to Penal Code § 1305(f), (g) or (j) at least 10 court days prior to the hearing. (PC § 1305(k)) Unless the bail agent or surety produces the defendant in court, deputies shall request a hearing and require the bail agent or surety to prove by competent evidence that an exception to Penal Code § 1305 applies.

Any request for exoneration or extradition under Penal Code § 1305 (d), (e), (f), and (g) shall be referred to Extradition Services Section for processing.

8.10.02 APPEAL OF ADVERSE DECISION ON BAIL FORFEITURE

If the court issues an adverse decision at a bail hearing on a motion to set aside a bail forfeiture, the deputy shall prepare a memorandum documenting the proceedings and forward it to the Writs and Appeals Division to determine whether the ruling should be appealed. The memorandum shall be prepared and forwarded within 10 days following the adverse decision. The memorandum should contain the factual circumstances and legal reasoning why the court erred.

8.10.03 COSTS AND ATTORNEY'S FEES

If a court grants relief from bond forfeiture, it shall impose costs which the prosecution incurred in returning the defendant to custody. (PC § 1306(b).) All motions for costs sought under this provision are handled by deputies assigned to ESS in the assigned bond court at the Clara Shortridge Foltz Criminal Justice Center (CJC).

If the Office successfully opposes a motion to vacate the bond forfeiture, deputies assigned to ESS shall move to recover costs and attorney's fees incurred in successfully opposing such a motion. (PC § 1305.3)

8.11 BAIL EXONERATION

Exoneration refers to the canceling of the bail agreement such that the bail is no longer subject to forfeiture. Exoneration occurs when a defendant is convicted of a crime and judgment is pronounced, when a defendant is acquitted, or when the charges against the defendant are dismissed such that there are no additional court appearances.

Exoneration also occurs when the bail agent or surety surrenders the defendant into custody and says it no longer wishes to post a bond to ensure the defendant's appearance. If the bonding company surrenders a defendant into custody and the defendant has not previously failed to appear or violated any court order, and the court determines that good cause did not exist for the surrender, the court may order the bonding company to return all or part of the premium paid by or on behalf of the defendant to purchase the bond. (PC § 1300(b))

If the bond is exonerated, the bail agent or surety is absolved of any further liability if the defendant subsequently fails to appear in court.

If a case is dismissed after bail has been forfeited due to a defendant's failure to appear, the bond shall not be exonerated. (PC § 1306(d).) A subsequent dismissal has no effect upon a prior bond forfeiture.

8.11.01 EXONERATION AND REMAND WHEN JURY RETURNS GUILTY VERDICT

When a jury returns a guilty verdict against a defendant who is in custody, the defendant must be remanded. (PC § 1166) If the defendant is on bail, the court shall commit the defendant to the custody of the sheriff to await the judgment of the court upon the verdict unless the court makes a specific finding, on the record, based upon consideration of the following factors, to allow the defendant to remain out on bail:

- The protection of the public;
- The seriousness of the offense charged and proven;
- The previous criminal record of the defendant;
- The probability of the defendant failing to appear for the judgment of the court upon the verdict; and
- Public safety.

Unless the court makes such a finding, on the record, deputies shall urge the court to commit the defendant to the custody of the sheriff. When the defendant is committed, bail is exonerated. (See Penal Code § 1166)

8.11.02 EXONERATION AT TIME OF JUDGMENT

When a defendant who is on bail appears for judgment, and judgment is pronounced, or probation is granted, Penal Code § 1195 requires that the bond shall be exonerated. If a court, on its own or at the request of the defendant, appears ready to grant a defendant a temporary "stay" to "get his affairs in order," the deputy shall advise the court that the bond has been exonerated and the defendant will have no financial incentive to appear to serve the defendant's sentence.

8.12 REFILING - REINSTATEMENT OF BOND

Penal Code § 1303 provides that if a case is dismissed against a defendant who is out on bail, the bond shall not be exonerated until 15 days after the dismissal. If, within this 15-day period, the case is refiled, the bond will be applied to the refiled case so long as it arises out of the same conduct as the dismissed case. The clerk must promptly notify the bonding company of the reapplication of the bond.

8.13 BAIL ON APPEAL

Penal Code § 1272 provides that after conviction, except when convicted of an offense punishable by death, a defendant who has made application for probation or who has appealed may be admitted to bail:

- As a matter of right in cases of misdemeanors; and
- As a matter of discretion in all other cases.

A defendant convicted of a felony who makes a motion to set bail after sentencing shall provide notice of the hearing to the deputy at least five court days prior to the hearing. (PC § 1272.3) Penal Code § 1272.1 sets forth the factors a judge must consider in deciding whether to allow bail on appeal and in setting the amount. In relevant part, Penal Code § 1272.1 provides as follows:

> Release on bail pending appeal under subdivision (3) of § 1272 shall be ordered by the court if the defendant demonstrates all the following:
>
> (a) By clear and convincing evidence, the defendant is not likely to flee. Under this subdivision the court shall consider the following criteria:
> (1) The ties of the defendant to the community, including employment status, duration of residence, the defendant's family attachments and the defendant's property holdings.
> (2) The defendant's record of appearance at past court hearings or of flight to avoid prosecution.
> (3) The severity of the sentence the defendant faces.
>
> (b) By clear and convincing evidence, the defendant does not pose a danger to the safety of any other person or to the community.
> Under this subdivision the court shall consider, among other factors, whether the crime for which the defendant was convicted is a violent felony as defined in subdivision (c) of § 667.5.
>
> (c) The appeal is not for the purpose of delay and, based upon the record in the case, raises a substantial legal question which, if decided in favor of the defendant, is likely to result in reversal.
> For purposes of this subdivision, a "substantial legal question" means a close question, one of more substance than would be necessary to a finding that it was not frivolous. In assessing whether a substantial legal question has been raised on appeal by the defendant, the court shall not be required to determine whether it committed error.
> In making its decision on whether to grant defendants' motions for bail under subdivision (3) of § 1272, the court shall include a brief statement of reasons in support of an order granting or denying a motion for bail on appeal. The statement need only include the basis for the order with sufficient specificity to permit meaningful review.

The constitutional provisions for setting bail are also applicable to bail on appeal.

Notice of Appeal Required: A notice of appeal must be filed before a court grants bail on appeal. If bail is granted on appeal and no appeal is filed, the defendant will remain on bail and may never serve his sentence.

8.13.01 BAIL ON APPEAL: MAKING A RECORD

Deputies shall request that the court make a record of its reasons for granting or denying bail on appeal.

If bail is denied, the deputy shall request the court order the clerk to include the reasons in the minute order. In the event a writ of habeas corpus is filed requesting bail from an appellate court, the minute order may support opposition to the writ.

If bail is granted, the deputy shall request the court order the defendant to return to court on a certain day, generally 120 days later, for the court to determine if the defendant is diligently perfecting the defendant's appeal. If the defendant is not diligently perfecting the appeal, the deputy shall request the court revoke the bail on appeal.

When a court abuses its discretion by granting bail on appeal or setting an unreasonably low bail amount, the deputy shall immediately document the court's action and refer the case to the Writs and Appeals Division.

8.14 FAILURE TO APPEAR AS A SUBSTANTIVE CRIME

8.14.01 FAILURE TO APPEAR WHEN RELEASED OR

Misdemeanors: Penal Code § 1320(a) provides that every person who is charged with or convicted of a misdemeanor who is released from custody on their own recognizance and who in order to evade the process of the court willfully fails to appear as required, is guilty of a misdemeanor. It shall be presumed that a defendant who willfully fails to appear within 14 days of the date assigned for appearance intended to evade the process of the court.

Felonies: Penal Code § 1320(b) provides that every person who is charged with or convicted of a felony who is released from custody on their own recognizance and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony. It shall be presumed that a defendant who willfully fails to appear within 14 days of the date assigned for appearance intended to evade the process of the court.

8.14.02 FAILURE TO APPEAR WHEN RELEASED ON BAIL ON A FELONY

Penal Code § 1320.5 makes it a felony for a person who is charged with or convicted of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony. "Willful failure to appear within 14 days of the date assigned for appearance may be found to have been for the purpose of evading the process of the court."

8.15 FAILURE TO APPEAR - POLICY AND PROCEDURE

8.15.01 DEFENDANT CHARGED WITH FELONY

When a defendant fails to appear for any felony court appearance, and the court issues a bench warrant for the defendant's arrest, the deputy shall ascertain from the court clerk whether the defendant was on bail or OR. The defendant's bail status shall be noted in bold writing on the outside of the DA case file.

Thirty days after the defendant's failure to appear, the Head Deputy or Deputy-in-Charge shall request the appropriate law enforcement agency submit evidence necessary to issue a complaint for a violation of Penal Code § 1320 or 1320.5. If the necessary evidence is obtained, the deputy shall file a new felony complaint.

8.15.02 DEFENDANT CHARGED WITH MISDEMEANOR

When a defendant fails to appear for any misdemeanor court appearance, and the court issues a bench warrant for the defendant's arrest, the deputy shall ascertain from the court clerk whether the defendant was on bail or OR. The defendant's bail status shall be noted in bold writing on the outside of the case file.

Thirty days after the defendant's failure to appear, the Head Deputy or Deputy-in-Charge shall request the appropriate law enforcement agency to submit the evidence necessary to issue a complaint for a violation of Penal Code § 1320. If the necessary evidence is obtained, the prosecutor shall file a new misdemeanor complaint.

8.16 "NO BAIL" ON EXTRADITION ARRESTS

Defendants who are arrested in this state and who are to be extradited to another state may not be released from custody pending transfer to the requesting state.

Deputies in the Bureau of Central Operations, Charge Evaluation Division, will process most cases in which fugitives are being sought by other states.

Cases involving juvenile fugitives must first be filed in adult court. (WIC § 216(a).) These cases are prepared and handled by the Los Angeles County Sheriff's Department, Fugitive Division, except cases from the City of the Los Angeles and City of Long Beach. These police departments handle their own fugitive matters.

8.17 "NO BAIL" ON JUVENILE MATTERS

No minor handled by the juvenile court is entitled to bail while under the jurisdiction of the juvenile court.

8.18 FELONY COMMITTED WHILE ON BAIL OR OWN RECOGNIZANCE

Penal Code § 12022.1 provides a two-year enhancement for any person who commits a new felony while released from custody on bail or own recognizance (OR) prior to final judgment on a pending felony. The two year enhancement shall be served consecutive to any other term imposed by the court.

If the pending felony and new felony are of the same class of crimes, consideration should be given to consolidating the two offenses in one proceeding. (PC § 954.) Consolidation would eliminate additional problems of proof when a trial judge might not permit evidence of an unrelated, uncharged offense to prove the enhancement allegation.

8.19 RELEASE OF ACCUSED ON OWN RECOGNIZANCE

8.19.01 OR RECOMMENDATIONS

Article I, § 12 of the California Constitution states: "A person may be released on his or her own recognizance in the court's discretion." The appropriateness of an OR release shall be determined by the same factors governing the setting of bail. Deputies shall oppose inappropriate OR releases. A deputy shall be present at all OR motions and should be prepared to present testimony, oral argument or declarations, if necessary.

Police officers should follow the bail deviation procedures set forth above when seeking an OR release prior to filing a case.

No person arrested for a violent felony (PC § 667.5(c)) may be released OR until a hearing is conducted in open court before a magistrate or judge and until the prosecutor is given notice and a reasonable opportunity to be heard on the matter. (PC § 1319)

CHAPTER 9

MISDEMEANOR CASE MANAGEMENT

9.01 INTRODUCTION

A deputy should appear at all misdemeanor arraignments, but it may not always be possible to do so. A deputy shall appear at the arraignment for any significant case of public interest. In some misdemeanor arraignment courts, calendar for certain misdemeanors (e.g., misdemeanor traffic violations), is called without a deputy being present.

Deputies appearing at misdemeanor arraignments shall be familiar with the most current misdemeanor bail schedule and Office policy on bail and own recognizance.

9.01.01 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art, I § 28(b)(1).) (See LPM § 24.02.04)

9.02 DISCOVERY

Penal Code §§ 1054 et seq. govern prosecution and defense discovery. These statutes mandate reciprocal discovery. Office policies and procedures for managing discovery are set forth in detail in the *Felony Case Management* chapter of this manual. The same policies and procedures apply to misdemeanor cases.

9.03 JURY TRIAL - WAIVER

A trial deputy may waive jury only if the defendant and defense counsel are willing to waive jury, the court is willing to accept the waiver and it is in the People's best interests. The trial deputy shall discuss the decision to waive jury with the Head Deputy or Deputy-in-Charge before a jury is waived.

9.03.01 SIGNIFICANT CASES

The decision to waive jury in a significant case of public interest requires Chief Deputy approval. The trial deputy shall request approval through chain of command.

9.04 MOTION FOR NEW TRIAL

A trial deputy shall continue to represent the People at all post-conviction proceedings including a motion for new trial, when possible.

9.05 PROBATION AND SENTENCE HEARINGS

In misdemeanor cases in which the court orders a formal probation report, the trial deputy is responsible for providing the Probation Department with all known information relevant to the defendant's sentencing.

When a court has ordered a probation report, the trial deputy shall represent the People at the probation and sentence hearing. When it is not possible for the trial deputy to appear, the Head Deputy or Deputy-in-Charge shall assign another deputy to represent the People. The deputy who appears at this hearing shall be familiar with the facts, the case file, the probation report, the law concerning probation eligibility and sentencing procedures. When appropriate, the deputy may make a sentence recommendation. When a deputy makes a sentence recommendation, the deputy shall articulate reasons for that recommendation.

Whenever the probation report fails to provide all necessary information relevant to a defendant's sentence, the deputy shall bring such information to the court's attention consistent with Penal Code § 1204.

9.05.01 SENTENCE

A proper sentence shall be commensurate with the gravamen of the offense and shall be based on the four goals of sentencing:

- Protection of society
- Punishment
- Deterrence
- Rehabilitation

9.05.02 PROBATION CONDITIONS

When a court grants probation, deputies shall recommend appropriate probation conditions.

9.05.03 RESTITUTION

Victims have a Constitutional Right to restitution. See LPM § 24.12.

Deputies shall be familiar with Penal Code §§ 1191.2, 1202.4, 1203, 1203.44, 1205, 1205.3, 1214, 1464 and 2900.5 as well as Welfare and Institutions Code §§ 730.6 and 1752.82. These code sections implement the Victims' Bill of Rights restitution provisions.

Victims who need further assistance shall be referred to the Restitution Enhancement Program or the Bureau of Victim Services.

9.05.04 ATTENDANCE OF VICTIM OR NEXT OF KIN AT SENTENCING

Pursuant to the Victims' Bill of Rights (PC § 1191.1), deputies shall allow the victim, or the victim's next of kin, a reasonable opportunity to attend all sentencing proceedings in both felony and misdemeanor cases. A deputy may not agree to a case disposition that denies the victim or the victim's next of kin an opportunity to be present at the sentencing hearing. All deputies shall encourage the victim or the victim's next of kin to be present at the sentencing hearing.

In any case in which a court is contemplating immediate sentencing, the deputy shall remind the court of its statutory obligation to contact the victim or the victim's next of kin to allow them to be present at the time of sentencing.

Deputies shall be familiar with Penal Code § 679.02 which sets forth the statutory rights of victims and witnesses to be notified of court proceedings and final dispositions.

9.06 MISDEMEANOR APPEALS

A deputy who desires appellate review in a misdemeanor case shall obtain prior approval from their Head Deputy or Deputy-in-Charge. If the Head Deputy or Deputy-in-Charge agrees that appellate review is appropriate, the Head Deputy or Deputy-in-Charge shall forward a memorandum with all necessary documentation to the Writs and Appeals Division as soon as possible.

The trial deputy and the Head Deputy or Deputy-in-Charge shall review all defense notices of appeal or writs filed in misdemeanor cases. The documents shall be forwarded, together with a memorandum, if appropriate, to the Writs and Appeals Division as soon as possible.

Whenever an appeal is sought, a reporter's transcript of the proceedings shall be reviewed for purposes of settling the record on appeal. Immediately following the hearing to settle the Statement on Appeal, the trial deputy is responsible for forwarding the transcript to the Writs and Appeals Division.

9.07 PROBATION VIOLATIONS

A deputy shall consider initiating probation violation proceedings, pursuant to Penal Code § 1203.2(b), in lieu of filing a new criminal complaint, when:

- There is sufficient evidence to prove the violation; and
- The conduct that constitutes the violation is either not criminal or of insufficient gravity to warrant an independent criminal prosecution.

9.08 DETERMINATION OF FACTUAL INNOCENCE

Penal Code § 851.8 establishes procedures by which a person who has been arrested but not charged, or charged but not convicted, may petition the law enforcement agency having jurisdiction over the offense, or the court, for a determination of factual innocence. If the

petition is granted, all records of the arrest and any related court proceedings must be sealed for three years from the date of the arrest and then destroyed.

The burden of proof for a determination of factual innocence is set forth in Penal Code § 851.8 (b):

> A finding of factual innocence and an order for the sealing and destruction of records pursuant to this section shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made. In any court hearing to determine the factual innocence of a party, the initial burden of proof shall rest with the petitioner to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made.

A petition for relief under this section may be filed up to two years from the date of the arrest or filing of the accusatory pleading, whichever is later. This time restriction may be waived upon a showing of good cause by the petitioner and in the absence of prejudice. (PC § 851.8(l).)

If the petitioner or a codefendant has filed a civil action against the peace officers or law enforcement agency that made the arrest or instituted the prosecution, the records may be sealed but shall not be destroyed until the civil action is resolved. (PC § 851.8(k).)

A judicial determination of factual innocence may be based upon declarations, affidavits, police reports or any other evidence which is material, relevant and reliable, including evidence which was illegally obtained. Once a determination of factual innocence is made, the arrest shall be deemed not to have occurred and the person may properly deny that the arrest ever occurred.

9.08.01 PROCEDURES

The procedures that an arrested person must follow in seeking a determination of factual innocence, and the prosecution's response, depend upon the stage at which criminal proceedings against the arrestee were terminated. Most cases will involve persons who were arrested but never charged. Defendants who were charged but whose cases are dismissed or who are acquitted at trial may also seek determinations of factual innocence.

9.08.02 PERSON ARRESTED BUT NOT CHARGED

Penal Code § 851.8(a)

When a person has been arrested but no accusatory pleading has been filed, the arrestee may petition the law enforcement agency having jurisdiction over the offense to seal and destroy the record of the arrest. A copy of the petition must also be served upon the prosecuting attorney of the county or city having jurisdiction over the offense.

All such petitions received by the Office shall be forwarded immediately to the office with geographic jurisdiction over the offense for which the petitioner was arrested. The deputy assigned to handle the petition shall confer with the law enforcement agency and determine

whether the petition should be granted or denied. If the deputy determines that the petition should be denied, the deputy shall so inform the law enforcement agency.

If the deputy determines that the petition should be granted, the deputy shall report the findings and recommendation to the Head Deputy for review and approval. If the Head Deputy agrees with the recommendation to grant the petition, the Head Deputy shall advise the Bureau Director of the decision.

Penal Code § 851.8(b)

If the petition is initially denied, it may be renewed by the petitioner in the Superior Court. The deputy assigned to handle the petition will appear at the hearing in Superior Court and oppose the petition as provided in Penal Code § 851.8(b).

If the petition is granted at the Superior Court hearing, the deputy shall send a copy of the minute order and all records of the arrest and subsequent proceedings in the custody of the Office in a sealed envelope to:

District Attorney's Office
Records Section
210 West Temple Street, Room 17-713
Los Angeles, California 90012

The envelope must show the name of the petitioner, the case number (if any), the date of the arrest and the notation, "Sealed Records - 851.8 P.C." Three years after the date of arrest the sealed records shall be destroyed.

9.08.03 PERSON ARRESTED AND CHARGED BUT CASE DISMISSED

Penal Code § 851.8(c)

When a person has been arrested and an accusatory pleading has been filed, but no conviction has occurred, the person may, after the case has been dismissed, petition the court in which the dismissal occurred for a finding of factual innocence. A copy of this petition must be served on the prosecuting attorney of the county or city in which the accusatory pleading was filed at least 10 days before the hearing.

All such petitions received by the Office shall immediately be forwarded to the office or division where the accusatory pleading was filed. The deputy assigned to handle the petition shall review the file and confer with the law enforcement agency to determine whether the petition should be granted or denied. If the deputy determines that the petition should be denied, the deputy shall appear at the hearing in Superior Court and oppose the petition as provided in Penal Code § 851.8 (b).

If the deputy determines that the petition should be granted, the deputy shall report the findings and recommendation to the Head Deputy for review and approval. If the Head Deputy agrees

with the recommendation to grant the petition, the Head Deputy shall advise the Bureau Director of the decision.

Penal Code § 851.8(d)

On occasion, the issue of the defendant's factual innocence may arise at the time a case is dismissed. Penal Code § 851.8 (d) permits the court, with the concurrence of the prosecuting attorney, to make a finding of factual innocence at the time a case is dismissed without the formal filing of a petition. If the deputy handling the case believes the petition should be denied, the deputy shall inform the court that the deputy does not concur.

If the Office does not concur, the defendant may file a petition in the Superior Court as set forth above. Prior to taking any action the deputy handling the petition shall notify their Head Deputy.

If the deputy handling the petition determines that the petition should be granted, the deputy shall first advise their Head Deputy of the facts and circumstances of the case and the reasons for the recommendation. If the Head Deputy agrees, the Head Deputy shall advise the Bureau Director of the decision.

If the petition is granted, the deputy shall collect all records of the arrest and subsequent proceedings in the custody of the Office and forward them in a sealed envelope to the Records Section as set forth above.

9.08.04 PERSON CHARGED BUT ACQUITTED

Penal Code § 851.8(e)

When a person is acquitted of a charge and it appears to the judge presiding at the trial at which the acquittal occurred that the defendant was factually innocent of the charge, the judge may make a finding of factual innocence with no further hearing. Prosecuting attorney concurrence is not required. If a finding of factual innocence occurs, the trial deputy shall collect, seal and forward all records to the Records Section, as set forth above.

9.08.05 CONDUCTING THE HEARING

Contested hearings shall be conducted pursuant to the procedures set forth in Penal Code § 851.8 (b). Declarations, affidavits, police reports and any other evidence which is material, relevant and reliable is admissible, including evidence otherwise subject to suppression under Penal Code §§ 1538.5 and 1539.

The initial burden of proof is on the petitioner to establish that no reasonable cause exists to believe the petitioner committed the offense for which the arrest was made. If the court finds the petitioner has made an initial showing of no reasonable cause, the burden of proof shifts to the People who must show that a reasonable cause exists to believe that the petitioner committed the offense for which the arrest was made.

9.08.06 SEALING AND DESTROYING RECORDS

All records ordered sealed pursuant to Penal Code § 851.8 are to be maintained in a separate file in the Records Section of the Bureau of Central Operations. Sealed records shall be reviewed monthly and destroyed three years from the date of the arrest.

Any record of arrest and subsequent proceedings which cannot be destroyed without affecting other records shall have all references to the arrestee obliterated or marked "exonerated." (PC §§ 851.8 (h) and (j).)

9.08.07 CITY ATTORNEY CASES

Penal Code § 851.8 provides that a copy of the petition shall be served upon the prosecuting attorney of the county or city having jurisdiction over the offense when no accusatory pleading has been filed, or the prosecuting attorney of the county or city in which the accusatory pleading was filed. When a petition for a declaration of factual innocence is served upon the Office, and the deputy handling the petition determines that the petition should have been served upon a city prosecutor's office, the deputy shall notify their Head Deputy or Deputy-in-Charge who shall forward the petition to the appropriate city prosecutor's office.

9.08.08 LIAISON WITH POLICE AGENCIES

The Los Angeles Sheriff's Department and Los Angeles Police Department have designated units to process § 851.8 petitions:

Los Angeles Police Department
Police Administration Building
Records and Identification Unit
100 West 1st Street, Room P1-137
Los Angeles, California 90012
(213) 486-8310

Los Angeles County Sheriff's Department
Records and Identification Bureau, Sealing Unit
12440 E. Imperial Hwy, 400 West
Norwalk, CA. 90650
(562) 345-4439

Citizens may obtain blank petitions to seal records at the above locations or at the California Department of Justice website: Form BCII 8270 (Rev. 7/06) . These units will also accept service of process for petitions concerning their respective departments. Deputies in branch and area offices serving other police departments should establish liaison with persons responsible for processing 851.8 petitions in those departments.

The California Department of Justice maintains a § 851.8 compliance unit in Sacramento which can be reached at (916) 227-3839.

9.09 CHALLENGE OF A JUDGE

9.09.01 PEREMPTORY CHALLENGE IN AN INDIVIDUAL CASE

The peremptory challenge of a judge in an individual case requires prior Head Deputy approval. The affidavit must state that the judge is prejudiced against the interests of the People, not that the judge is prejudiced against the *attorney* for the People. The Head Deputy shall inform the Bureau Director of the decision to file a peremptory challenge against a judge. Code of Civil Procedure § 170.6 allows the prosecution and the defense to make only one peremptory challenge of a judge in an individual case. The decision to challenge a judge should be discreetly exercised and confined to unusual situations.

9.09.02 PEREMPTORY CHALLENGE IN ALL CASES OR CHALLENGE FOR CAUSE

The peremptory challenge of a judge in all cases, or a challenge for cause, requires Chief Deputy approval. To obtain approval, the Head Deputy or Deputy-in-Charge shall forward a memorandum to the Chief Deputy through the chain of command explaining the reasons for the challenge.

9.10 STIPULATION TO COMMISSIONER

9.10.01 COMMISSIONERS

No preliminary hearing, motion, trial or probation and sentence hearing shall be heard before a commissioner acting as a judge or magistrate without a written stipulation. The written stipulation must be signed by the deputy district attorney, defense counsel, and defendant and filed with the court. A copy shall be placed in the case file.

9.10.02 PRIVATE ATTORNEYS

Generally, a deputy shall not stipulate that a private attorney may act as a judge or magistrate. In those rare instances in which it is deemed advisable to enter into such a stipulation, prior Bureau Director approval shall be obtained and the stipulation shall be in conformity with the procedures set forth above.

9.11 CRIMINAL CASE INFORMATION SECURITY

The daily flow of confidential information is critical for the Office to operate successfully. Any policy on the disclosure of information must balance the need for security and the need for the efficient exchange of information within the Office, from the Office to law enforcement agencies, and to members of the public. Information on criminal cases being handled by the Office shall be disclosed, over the telephone, only as follows:

- If the caller is a deputy district attorney, member of law enforcement, or probation officer personally known to the employee possessing the requested information, and the caller has a need to know the information, the information should be disclosed;
- If the caller is not personally known to the employee possessing the requested information, and claims to be a deputy district attorney, member of law enforcement, or probation officer, the employee possessing the information must request and receive a callback verification number from the caller. If the number is verified, and there is a need to know the information, the information should be disclosed;
- If the caller is seeking information which is generally available to the public (e.g., time and location of a court appearance), that information should be given;
- Under no circumstances should the names, addresses or telephone numbers of witnesses be disclosed over the telephone; and
- Detailed information or prosecution strategy on a case should never be discussed over the telephone. Only the bare minimum facts, on a verified need-to-know basis, should be disclosed telephonically.

9.12 DEFENSE ATTORNEY REQUEST FOR CASE REVIEW

This section sets forth the appeal policy for attorneys representing defendants or minors whose cases are being prosecuted by the Office. One of the most important responsibilities of a supervisor within the Office is the duty to meet and confer with defense counsel concerning cases that fall within the supervisor's jurisdiction. If a defense attorney disagrees with the assigned prosecutor's proposed disposition of a case, the defense attorney has the right to discuss the case disposition with the prosecutor's supervisor. An appeal by defense counsel to a proposed disposition on a filed case shall be made according to the following policy.

An appeal in a misdemeanor case may be made through the chain-of-command to the appropriate Head Deputy. After this process has been followed, and if no resolution has been reached, upon written application, an appeal on *any* case may be made to the appropriate Bureau Director. The Bureau Director may meet with defense counsel to review the matter. The decision to meet with defense counsel is at the discretion of the Bureau Director and should only occur after a discussion of the case with the Head Deputy. The Bureau Director may confer with the appropriate Assistant District Attorney concerning the merits of the defense counsel's appeal before reaching a final decision in the matter.

Defense counsel who wish to discuss a potential disposition on a pending matter should be referred to the appropriate supervisor for a meeting to discuss the case. In accordance with this policy, a defense attorney shall have the opportunity to meet with the assigned supervisor in person to discuss the case. A decision on an appeal should be carefully made and should take into consideration the assessment of the assigned prosecuting attorney and any other supervisors who may have previously reviewed the case. The views of law enforcement and victims, if applicable, should also be considered. The preferred practice is for the Head Deputy or Bureau Director to meet defense counsel in the presence of the assigned prosecuting attorney handling the case and any intermediate supervisor who took part in the decision being appealed.

The Office policy for requests by defense counsel for an informal hearing before a charging decision has been made remains the same. (LPM § 6.02.)

9.13 MARSY'S LAW -- THE VICTIMS' BILL OF RIGHTS ACT OF 2008

Penal Code § 1191.1 grants a statutory right to "[t]he victim of any crime [guardians of minor victims], [next of kin of deceased victims] . . . to attend all sentencing proceedings," and the right to "be given adequate notice by the probation officer of all sentencing proceedings . . . ." (PC § 1191.1.) In any case in which a court is contemplating immediate sentencing, the deputy must remind the court of the statutory obligation to contact the victim or the victim's next of kin to allow them to be present at the time of sentencing.

9.13.01 RESTITUTION

Section 13.03.01 of the Legal Policies Manual requires all deputies to "make it a priority to assist victims who have suffered financial losses." Under Proposition 9, victims retain their constitutional right to restitution, but under Cal. Const. article I, § 28(b)(13)(C), "All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim." With the passage of Proposition 9, courts would now appear to be precluded from excusing a defendant from making restitution for "compelling and extraordinary reasons."

Deputies shall ensure that appropriate restitution fines and restitution orders are put on the record when sentence is imposed. (LPM § 9.05.03.) "In cases in which restitution on uncharged or dismissed counts should be sought, the deputies shall be prepared to take the appropriate waivers in compliance with *People v. Harvey* (1979) 25 Cal.3d 754." Deputies "are to seek the maximum appropriate restitution fine and penalty assessment." (LPM § 12.04.04.)

9.13.02 REQUESTS FOR RETURN OF PROPERTY

Although victims have a right under Cal. Const. article I, § 28(b)(14), to the "prompt return of property when no longer needed as evidence," criminal cases have a life long after the trial court has pronounced sentence. Cases may be reversed on appeal or new trials granted years or even decades after the original conviction. It is Office policy to oppose any return of property until there is no possibility that the capacity to effectively retry a case will be in any way compromised. Deputies shall be familiar with Penal Code § 1417 et seq., and § 11.08.06 of the Legal Policies Manual.

9.14 DISCLOSURE OF RAP SHEETS

It is a misdemeanor to release state or local summary criminal history information (rap sheets) to anyone not authorized to receive them. (PC §§ 11142, 13302.) Consequently, caution should always be exercised when disclosing information to anyone from either state rap sheets or PIMS.

It is important to note that state rap sheets are records of the Department of Justice and furnished by the Attorney General only to authorized agencies to fulfill their duties. (PC § 11105.) The

District Attorney is approved to receive such records. (PC § 11105(b)(3).) Likewise, a defense attorney may receive state rap sheets from the Attorney General when representing a client in a criminal case "if authorized access by statutory or decisional law." (PC § 11105(b)(9).) A copy of the *defendant's* criminal record should be provided to defendant's attorney at the time of arraignment. (PC § 11105(b)(9).)

Deputies complying with their obligation to disclose the record of *prosecution victims and witnesses* to the defense shall only release information about the relevant offenses. (PC § 1054.1(d).) The information to be disclosed "is restricted to the name or type of crime and the date and place of conviction." (*People v. Allen* (1986) 42 Cal.3d 1222, 1270.) Victims' and witnesses' physical rap sheets should never be disclosed nor given to defense counsel as they may contain identifying information (CII numbers) and irrelevant convictions and arrests. (*People v. Santos* (1994) 30 Cal.App.4th 169, 176.) For a further discussion of this topic, see also LPM § 14.04.01.

Trial courts are also approved to receive rap sheets from the Attorney General. [PC § 11105(b)(1)]. Rap sheets, however, are not furnished to trial courts at the time a case is filed because court records, with limited exceptions, are open for inspection by any member of the public. (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 782).

If a judge requests to review a defendant or witness's rap sheet, the judge should be permitted to inspect it. Once reviewed, it should be returned and retained in the District Attorney case file.

If the court orders the deputy to provide the court with a copy of the *defendant's* rap sheet for the purpose of placing it in the court file and transmitting it to a state hospital or treatment facility where the defendant is to be committed, the deputy shall provide the court with a copy. If so ordered, there is no need for the deputy to ask for a protective order limiting the dissemination of that rap sheet to the public.

The release of local criminal history information (PIMS) is also restricted and should only be disclosed as detailed in Legal Policies Manual § 23.06, et seq., and 89 Opinions of California Attorney General 204 (2006).

9.15 AUTHORITY TO PROSECUTE FELONY REDUCED TO MISDEMEANOR

When the court exercises its discretion to reduce a felony (a wobbler) to a misdemeanor pursuant to Penal Code § 17(b)(5) at the conclusion of a preliminary hearing, the Office no longer has jurisdiction to prosecute the misdemeanor case if the crime occurred in a city with a city attorney/prosecutor who has authority to prosecute state law misdemeanors. For a full discussion of this topic and a list of the cities with city attorneys/prosecutors, see Legal Policies Manual § 11.03.11.

9.16 PROPOSITION 47- CASES FILED FOR ARREST WARRANT

Many cases filed by the Office in the years preceding the passage of Proposition 47 (Prop 47) were filed for arrest warrant and remain in warrant status. Prop 47 affected matters that are in

warrant status should be handled as defendants surrender or are arrested on an outstanding warrant. The assigned deputy shall make a determination if the defendant has ever been convicted of a superseding prior. The deputy shall also make a determination if alternative felony charges can be filed.

When felony charges in a case reducible under Prop 47 are not appropriate, the case file shall immediately be turned over to local prosecutors if the charged offense(s) occurred in a municipality that prosecutes its own misdemeanors. If the Prop 47 affected criminal conduct took place in a jurisdiction that is the responsibility of the Office, deputies are directed to follow the guidelines below:

- Defendants whose cases have been in arrest warrant status are eligible to receive the benefits provided by Prop 47, even though the charged criminal conduct may have been committed, and the case may have been filed, prior to the passage of Prop 47. (*In re Estrada* (1965) 63 Cal.2d 740, 745.)

- Do not attempt to generate an amended complaint through PIMS that reflects that a charged offense is being reduced to a misdemeanor under Prop 47. PIMS has been modified to adapt prospectively to changes implemented by Prop 47 and may not permit revisions to charges that were filed prior to the passage of Prop. 47.

- When the matter is called in court, ask the bench officer for leave to amend the felony complaint, by interlineation, to reflect changes effectuated by Prop 47: (a) that a charged offense is now a misdemeanor; or (b) that a new charge (such as petty theft, pursuant to Penal Code §§ 484(a)/490.2) shall be added, and a now inapplicable offense (such as grand theft) should be dismissed.

- If the court insists that a new charging document be filed that reflects proposed changes necessitated by Prop 47, handwrite or type all appropriate revisions onto a copy of an existing complaint, identify the document as an amended complaint, then file it with the judicial assistant, securing conformed copies for the defense and for the case file.

9.17 ANIMAL CRUELTY CASES

One of the main goals of the Animal Cruelty Prosecution Program is to ensure that animal cruelty cases are appropriately filed and vigorously prosecuted, and that dispositions are consistent and uniform throughout the county. The following policies have been implemented to ensure that both of these goals are met.

One of the distinguishing features of the Animal Cruelty Prosecution Program is the trained deputies who are assigned to vertically prosecute cases in which the primary charges involve crimes against animals. Each Head Deputy and Deputy-in-Charge shall appoint an animal cruelty designee and provide the Animal Cruelty Case Coordinator (ACCC) with the name of the designee. In order to avoid frequent turnover, managers should make every effort to appoint designees who are not expected to be transferred in the near future.

Every designee is required to attend an animal cruelty prosecution training. Upon appointment, a new designee shall immediately contact the ACCC so that a training can be scheduled. When an assigned animal cruelty designee becomes aware that they are going to be transferred, the designee shall immediately notify the ACCC.

Animal cruelty cases should be vertically prosecuted by the assigned designee. Animal cruelty cases shall not be sent to an early disposition court (EDP).

It is the responsibility of all parties involved in an animal cruelty case to ensure that an animal that has been seized as evidence is not held longer than is necessary. For more details regarding procedures to follow with evidence animals, see Legal Policies Manual § 11.08.07.

There is a high level of interest by the public and the media in cases involving animals. A deputy shall notify both the ACCC and Media Relations if the deputy files or is assigned a case where there is any potential for media coverage if the case would be of interest to the public.

For additional resources, visit the Animal Cruelty section located under the "Library" tab on LADAnet.

9.18 HIV/AIDS TESTING OF DEFENDANT FOR SPECIFIED SEX OFFENSES

Prosecutors have a mandatory obligation to advise victims of specified sexual assault offenses of the right to HIV/AIDS testing and disclosure of results. (PC §§ 1524.1, 1202.1; H&S § 121055.) The Los Angeles County Department of Health Services is statutorily required to perform both pre- and post-conviction disclosure of results to crime victims. It is the policy of the Office to encourage and assist crime victims in obtaining HIV/AIDS testing.

9.18.01 PRE-CONVICTION AIDS TEST UNDER HEALTH & SAFETY CODE § 121055

This section allows named victims of specified charged sex crimes to request the district attorney's office to seek a petition and an order from the court to draw and test the blood of the defendant or minor against whom a petition has been filed. The petition can be filed as soon as the complaint or juvenile petition is filed and must include a written request from the victim. The court then must promptly hold a hearing. If the court determines there is probable cause to believe that blood, saliva, semen or other bodily fluid was possibly transferred between the defendant and the victim, the court shall order that the defendant provide two blood samples for testing. Copies of the test results shall be provided to each requesting victim and the defendant.

9.18.02 PRE-CONVICTION HIV TEST UNDER PENAL CODE § 1524.1

Under Penal Code § 1524.1, once a complaint, information, indictment or juvenile petition has been filed, the court may issue a search warrant to test the blood or saliva of the defendant or minor for HIV. The search warrant may be ordered upon request of the victim and after the court finds that there is probable cause to believe that the defendant committed the charged

offense and that there is probable cause to believe that a bodily fluid capable of carrying HIV was transferred from the defendant to the victim.

This section applies to any victim of any charged crime where the possibility exists that bodily fluid capable of transmitting HIV was transferred from the defendant to the victim. However, if the defendant is charged with a specified sex offense, the victim of an uncharged sex offense may also obtain a search warrant to have the defendant's blood drawn and tested.

The prosecutor is required to inform the victim of the right to request the warrant and must refer the victim to a "local health officer" for pre-request counseling to assist the victim in determining whether to make the request. The results of the HIV test are to be disclosed by the local health officer to the victim requesting the test. The test results shall not be used in any criminal proceeding as evidence of guilt or innocence.

9.18.03 POST-CONVICTION AIDS TEST UNDER PENAL CODE § 1202.1

Upon conviction or a juvenile petition sustained or admission of one of the following offenses, the court shall order the defendant to submit to a blood or buccal swab test for evidence of AIDS:

- Rape in violation of Penal Code §§ 261 or 264.1;
- Unlawful sexual intercourse with a person under 18 years of age in violation of Penal Code §§ 261.5 or 266c;
- Rape of a spouse in violation of Penal Code §§ 262 or 264.1;
- Sodomy in violation of Penal Code §§ 266c or 286; and
- Oral copulation in violation of Penal Code §§ 266c or 288a.

If the conviction or petition was sustained or admitted for one of the following offenses, the court shall order the defendant to submit to an AIDS test, only upon a finding that there was probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim:

- Sexual penetration in violation of Penal Code §§ 264.1, 266c or 289;
- Aggravated sexual assault of a child in violation of Penal Code § 269;
- Lewd or lascivious conduct with a child in violation of Penal Code § 288;
- Continuous sexual abuse of a child in violation of Penal Code § 288.5; and
- an attempt to commit any of these offenses.

This duty applies whether the defendant was sentenced to prison or placed on probation. The testing must be completed within 180 days. The prosecutor or Bureau of Victim Services advocate shall advise the victim of the right to obtain the results and refer the victim to a local health officer for counseling. The local health officer is responsible for disclosing the test results to the victim. If the test results are positive, the results cannot be disclosed without offering or providing counseling to the victim.

9.19 IN-CUSTODY DEFENDANTS IN WHEELCHAIRS/STRETCHERS

In-custody defendants who require the use of a wheelchair pose significant security and transportation problems for the sheriff's department. Delivering these individuals to the various courtrooms throughout the county requires the use of special vehicles and special personnel, and invariably results in lengthy delays in court proceedings. In an effort to alleviate these problems, the Los Angeles Superior Court implemented a policy on the handling of these defendants.

All cases (including probation violation matters) involving in-custody defendants using wheelchairs will be assigned to the Clara Shortridge Foltz Criminal Justice Center (CJC) following arraignment. Post arraignment, the court will transfer the case to the CJC for all further proceedings, including sentencing. At any point during the proceedings, cases will be returned to the original jurisdiction if the defendant is released from custody or no longer requires the use of a wheelchair. Exceptions to this court policy may be made when the court, prosecutor, or defense attorney can demonstrate some compelling reason the case should remain in the original jurisdiction. Cases involving numerous civilian witnesses may fall into that category. In such instances, the presiding judge of the superior court will decide whether an exception should be granted.

After a case has been assigned to the CJC for further proceedings, the deputy appearing at the arraignment shall immediately notify the deputy's supervisor of the transfer. The prosecution case file shall be sent, via county mail, to the Special Assistant to the Director of Central Operations for assignment to a Central Operations deputy for further handling. Concurrent with the sending of the file, a phone call or email to the Special Assistant shall be made providing information regarding the transfer of the case, including details on the next court date, the department in which the case has been calendared and the status of the case (i.e. 0/10 for jury trial, 0/30 for pretrial, etc.). If the case is assigned to a court for any type of proceeding requiring witnesses, the sending or filing branch or area office shall issue subpoenas and serve witnesses for the next court date in CJC.

All wheelchair and stretcher cases will be handled in CJC as follows:

- Procedurally, arraignments will occur in the courthouse of the district where the case has been filed. Thereafter the case (including all defendants) will be transferred to CJC as indicated below.

- In cases involving unique circumstances, any party may specially request that the case remain in the original filing district. These cases will be decided on a case-by-case basis by way of noticed motion in Department 100, depending upon the particular special needs of the parties or the court. All requests to have the case remain in the filing district shall be heard by the supervising or assistant supervising judge of the criminal division within three (3) court days of the original arraignment. The Office may transfer the file to Department 100 for the hearing. The requesting party must give notice to the opposing party and to Department 100.

Wheelchair Cases

At the arraignment, if a "not guilty" plea is entered, all misdemeanor cases involving in-custody wheelchair or stretcher defendants shall be set for pre-trial or other motions in Department 40 (CJC) no later than day 15 of 30.
The court policy includes in-custody probation violation cases. If the defendant has an open case that has already been transferred to CJC pursuant to the wheelchair cases policy, upon notification to the judicial officer hearing the open case, the probation violation shall be transferred to the courtroom where the open case is pending. Otherwise, misdemeanor probation violation matters shall be sent to Department 47.

CHAPTER 10

MISDEMEANOR CASE SETTLEMENT POLICY

10.01 INTRODUCTION

The Misdemeanor Case Settlement Policy has been developed to protect crime victims and the community, punish the guilty and deter crime throughout Los Angeles County. This policy is intended to ensure case settlements throughout the county further these purposes.

The Misdemeanor Case Settlement Policy is intended to be clear and easy to apply in most situations. If conflicting interpretations arise, deputies shall adopt the interpretation that favors the victim and public, not the defendant. If a case includes charges that fall within several different guidelines, deputies shall consider all relevant policies to determine the most appropriate disposition.

10.02 BASIC PRINCIPLE OF MISDEMEANOR CASE SETTLEMENT

A defendant charged with a misdemeanor shall be required to plead guilty to the charge or charges that most accurately reflect the criminal conduct for which there is sufficient evidence for conviction. Otherwise, the case should proceed to trial.

A deputy may not accept a plea to a charge unless the facts support the charge (e.g., a plea to trespass should not be taken to a petty theft charge unless the facts show that a trespass occurred). If the facts do not support any lesser included or related offense, a deputy should consider a dismissal in the interests of justice if there is insufficient evidence for conviction. A deputy shall obtain the prior approval of their Head Deputy or Deputy-in-Charge before dismissing a case.

10.03 MISDEMEANOR GANG CASES

Gangs present an extreme threat to society. Gang members are often far more dangerous than a criminal acting alone. Therefore, gang members should be punished more severely than non-gang members for their crimes because of the potential danger they present to the community.

10.03.01 SENTENCING

A deputy shall seek substantial jail time if the defendant is a gang member.

If the court grants probation, deputies shall recommend the following conditions of probation if the defendant is involved in a criminal street gang:

- The defendant must be subject to search upon the request of a law enforcement officer;
- The defendant must be subject to substance abuse testing whenever permitted by law;

- The defendant may not associate with other gang members and shall stay away from specified locations frequented by gang members; and
- The defendant must not wear or display any common identifying sign or symbol of the gang, including gang colors.

10.04 MISDEMEANOR HATE CRIMES

Because of the far-reaching social implications of many hate crimes, misdemeanor hate crimes shall not be settled without the approval of the Head Deputy or Deputy-in-Charge. This policy is intended to ensure consistent case resolution throughout the county and to increase the community's confidence in the criminal justice system.

10.04.01 SENTENCING

When a court places a defendant on probation, deputies should vigorously urge the court to impose a counseling program, victim restitution, and other relevant conditions for hate crimes pursuant to Penal Code § 422.85.

Deputies shall notify the Hate Crimes Unit of all hate crimes case settlements. Penal Code § 13023 requires local prosecutorial agencies to report all hate crimes statistics to the Attorney General's Office. The Hate Crimes Unit collects, compiles, and reports these statistics.

10.05 MISDEMEANOR DOMESTIC VIOLENCE

Deputies shall seek at least minimal time in custody in every misdemeanor domestic violence case settlement. In unusual cases, the Head Deputy or Deputy-in-Charge may approve a deviation from this policy.

10.05.01 SENTENCING

In determining the appropriate amount of custody time, a deputy shall consider the following factors:

- The level of injury inflicted;
- Prior history of assaultive conduct;
- Future dangerousness and victim safety; and
- The likelihood actual custody time may be reduced by jail crowding.

Domestic violence treatment programs, by themselves, are not sufficient punishment in a domestic violence case. Each sentence should include actual jail time to reinforce the message that that domestic violence is criminal conduct and will not be tolerated. In addition to any jail time imposed, all domestic violence sentences should include an additional, lengthier jail sentence imposed and suspended pending the defendant's successful completion of probation. The goal of stopping violence can best be achieved by having the abuser serve actual time in jail with a suspended jail sentence available for any violations of the terms of probation. Deputies shall request at least a three-year term of probation. A list of appropriate probationary terms and

conditions is contained in Penal Code § 1203.097 and in the *Probation and Sentence Hearings* chapter of this manual.

10.05.02 DISMISSAL

A domestic violence case may not be dismissed or otherwise compromised simply because the victim expresses an unwillingness to participate in the prosecution. Instead, recognizing the continuing vulnerability of domestic violence victims, deputies should use all available resources, such as the Bureau of Victim Services, to encourage cooperation.

Commentary

The continuing vulnerability of domestic violence victims makes it necessary to view their efforts to abandon prosecution with extreme care, or even skepticism. These victims usually remain subject to the continuing threat of physical abuse. This threat is greatly compounded by the social, economic and psychological pressures that are associated with the prosecution of one's spouse or domestic partner, no matter how abusive that person may be.

The combined supportive efforts of law enforcement, victim services representatives and prosecutors touch only a small portion of a victim's daily life while a criminal case is pending. At the same time, the cohabitating defendant is in a position to exert continuing influence over the victim. A victim's reluctance to cooperate is usually born of factors extraneous to the merits of the case and, in itself, should not result in a dismissal. Rather, available resources should be used to counsel victims and foster cooperation.

As in all violent crimes, an objective assessment of the defendant's culpability and propensity for violence should determine the ultimate case disposition.

10.06 MISDEMEANOR ASSAULTS ON PEACE OFFICERS

Deputies shall seek custody time in every assault or battery upon a peace officer case settlement. In unusual cases, a Head Deputy or Deputy-in-Charge may approve a deviation from this policy. A deputy shall have prior approval before making any settlement offer or entering into any plea agreement which does not include custody time.

10.06.01 SENTENCING

In determining the appropriate amount of custody time, a deputy shall consider the following factors:

- The degree of injury inflicted or intended; and
- The defendant's prior history of criminal conduct, particularly any prior history of assaultive conduct.

10.07 DRIVING UNDER THE INFLUENCE

Settling a driving under the influence (DUI) case requires special care.

10.07.01 PLEA BARGAINING

Penal Code § 1192.7 (Proposition 8) prohibits plea bargaining in any case involving driving "while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof," unless:

- There is insufficient evidence to prove the case.
- The testimony of a material witness cannot be obtained.
- A reduction or dismissal would not result in a substantial change in sentence.

The following guidelines have been adopted to aid deputies in determining what constitutes insufficient evidence.

10.07.02 BLOOD ALCOHOL LEVEL OF .08% OR HIGHER

A deputy may not reduce charges in a DUI case involving a blood alcohol level of .08% or higher unless there are significant factual weaknesses that make successful prosecution unlikely. A deputy must have prior Head Deputy or Deputy-in-Charge approval to reduce the charge(s) in a DUI case involving a blood alcohol level of .08% or higher.

10.07.03 BLOOD ALCOHOL LEVEL BETWEEN .05% AND .08%

A deputy may reduce or dismiss a case involving a blood alcohol level between .05% and .08% unless any one of the following circumstances exist:

- Grossly erratic driving;
- Sufficient symptoms of being under the influence; or
- Physical evidence of drug ingestion.

10.07.04 BLOOD ALCOHOL LEVEL BELOW .05%

A deputy may dismiss a case involving a blood alcohol level below .05% unless both of the following circumstances exist:

- Physical evidence of drug ingestion; and
- Sufficient symptoms of drug intoxication.

10.07.05 REFUSAL TO TAKE A CHEMICAL TEST

A deputy may not reduce a case involving the refusal of a chemical test without prior Head Deputy or Deputy-in-Charge approval.

10.07.06 PLEAS

A deputy may settle a DUI case charging violations of both Vehicle Code §§ 23152(a) and (b) by a plea to either count.

10.07.07 DRIVING UNDER THE INFLUENCE WITH INJURY

A deputy may not reduce a Vehicle Code § 23153 case in which there was an injury without prior Head Deputy or Deputy-in-Charge approval.

10.07.08 PRIOR CONVICTIONS

A deputy may not strike a prior DUI conviction unless it is clearly invalid or there are significant proof problems.

10.07.09 IGNITION INTERLOCK DEVICES

This policy pertains to offenses committed on or after July 1, 2010.

Vehicle Code §§ 23700 and 13386 create a pilot program, effective July 1, 2010, that mandates the installation and use of an ignition interlock device ("IID") for all persons convicted of violating Vehicle Code § 23152 or 23153.

It is the policy of the Office, pursuant to VC §§ 23700 and 13386, to request the following condition of probation for all defendants who are convicted of violating Vehicle Code § 23152 or 23153, or Penal Code § 191.5:

> "The defendant is ordered to comply with any and all requirements imposed by the Department of Motor Vehicles regarding the installation and use of an ignition interlock device."

Furthermore, it is also the policy of the Office, pursuant to Vehicle Code § 23575, that deputies shall request a court-ordered IID in any of the following circumstances:

- The defendant's measured blood-alcohol level was .20 or higher;
- The defendant's measured blood-alcohol level was .15 or higher, and the vehicle driven by the defendant is known to have collided with a moving or stationary object;
- The defendant refused the implied consent blood-alcohol test; or
- The defendant committed a violation of Vehicle Code § 23153.

In unusual cases, the Head Deputy or Deputy-in-Charge may approve a deviation from this policy.

If a defendant attempts to circumvent a court-ordered IID by filing a declaration that the defendant does not own or operate a motor vehicle, the declaration should be signed under penalty of perjury and co-signed by an interpreter if one was used to assist the defendant at the time of sentencing.

10.08 DRIVING WITH A REVOKED OR SUSPENDED LICENSE

Driving with a revoked or suspended license (VC §§ 14601, et seq.) may be reduced unless:

- The defendant has a prior Vehicle Code § 14601, 14601.1 or 14601.2 conviction; or
- There is satisfactory proof of service of the suspension or revocation by the Department of Motor Vehicles and the defendant has failed to obtain a valid license.

10.09 MISDEMEANOR CHARGES THAT SHOULD NOT BE REDUCED

- Hit-and-run driving (Vehicle Code § 20002)
- Under the influence of drugs (Health and Safety Code § 11550)
- Petty theft (PC § 484)
- Crimes involving concealed or loaded firearms (PC §§ 25400(a)(1)-(a)(3), 25800(a), and 25850(a))
- Indecent exposure (PC § 314)
- An alternative felony/misdemeanor offense charged as a misdemeanor.

Commentary

When an alternative felony/misdemeanor offense is charged as a misdemeanor pursuant to Penal Code § 17(b)(4), there should be no further reduction except in unusual cases. Since the pending charge has already been reduced from the felony to a misdemeanor, a further reduction would not be warranted unless the evidence fails to support the charge.

10.10 MISDEMEANOR SPECIAL ALLEGATIONS

Special allegations, if found true, may increase punishment or limit a court's sentencing options. If the evidence is sufficient to sustain a special allegation, a deputy should vigorously litigate the allegation or require an admission if the defendant pleads guilty.

10.11 SENTENCE COMMITMENTS IN MISDEMEANOR CASES

Some courts handling misdemeanor cases sentence a defendant immediately after a guilty plea without the benefit of a probation report. The sentences may or may not involve custody time. A deputy should enter into case settlements containing specific sentence commitments with care. At a minimum, deputies should review the defendant's rap sheet and advise the court of the defendant's criminal history.

10.11.01 SENTENCE COMMITMENTS EXCLUDING JAIL TIME

A Head Deputy or Deputy-in-Charge may agree to a misdemeanor sentence that excludes jail time. The Head Deputy or Deputy-in-Charge may delegate responsibility to another deputy to make this determination. When deciding whether to enter into any such agreement, a deputy shall take into account the defendant's prior record and the severity of the offense. The reasons for the disposition shall be noted in the file.

10.11.02 RESTITUTION

Deputies are to seek the maximum appropriate restitution fine and penalty assessment. In addition, deputies shall seek restitution for the victim for actual losses or damages.

10.11.03 STIPULATION TO PROBABLE CAUSE

Deputies shall not attempt to obtain a stipulation that there was probable cause to arrest a defendant in exchange for a reduction or dismissal of a criminal charge. The California Rules of Professional Conduct, Rule 3.10 (Threatening Criminal, Administrative, or Disciplinary Charges), prohibit an attorney from threatening to present a criminal charge to obtain an advantage in a civil dispute.

10.12 DEPARTURE FROM POLICY

Departure from this Misdemeanor Case Settlement Policy may be made in cases not enumerated in Penal Code § 1192.7 in two instances:

- When the admissible evidence is legally insufficient to establish the defendant's guilt; or
- When unusual or extraordinary circumstances exist that demand a departure in the interests of justice.

Unusual or extraordinary circumstances that may justify a departure from policy include circumstances that will result in indirect or collateral consequences to the defendant in addition to the direct consequences of the conviction. A departure from policy in a misdemeanor case based on unusual or extraordinary circumstances requires the prior approval of the Head Deputy or Deputy-in-Charge.

In those rare cases when a settlement is proposed based upon one or more of the factors listed above, prior approval by the Head Deputy or Deputy-in-Charge shall be obtained and the proposed disposition and its reasons shall be noted upon the file and signed by the Head Deputy or Deputy-in-Charge.

Commentary

Collateral consequences can, in some cases, have a greater adverse impact on a defendant than the conviction alone. When collateral consequences will have so great an adverse impact on a defendant that the resulting "punishment" will be disproportionate to the punishment other defendants would receive for the same crime, a departure from policy may be warranted.

The California Rules of Court include collateral consequences in the rules that courts are to follow when imposing sentence. Rule 4.414 lists the criteria to be considered when deciding whether or not to grant probation for a defendant who has suffered a felony conviction. These criteria are divided into (a) factors relating to the crime and (b) factors relating to the defendant. One of the factors relating to the defendant is: "(6) The adverse collateral consequences on the defendant's life resulting from the felony conviction."

A departure from policy based on collateral consequences may only be made in unusual or extraordinary circumstances that demand a departure in the interest of justice. All departures from policy based on collateral consequences shall be approved by the appropriate supervisor.

10.12.01 CONSIDERATION OF ADVERSE IMMIGRATION CONSEQUENCES

Pursuant to Penal Code § 1016.3(b), deputies shall consider the avoidance of adverse immigration consequences as one factor in reaching a just resolution of a case at all times when engaged in the plea negotiation process.

If deviation from case settlement policy is warranted due to these considerations, prior approval by the Head Deputy or Deputy-in-Charge shall be obtained. The proposed disposition and the reasons for the disposition shall be noted in the file and signed by the Head Deputy or Deputy-in-Charge.

10.13 ANIMAL CRUELTY

It has been established that a correlation exists between intentional animal abuse and other forms of criminality. Other forms of animal cruelty, such as neglect and illegal animal fighting, are also associated with various negative behaviors and consequences. Neglecting an animal can lead to prolonged suffering or death, and is often indicative of other types of dysfunction within an environment. Illegal animal fighting not only impacts the animals involved, it also adversely affects the quality of life of citizens who reside in areas where illegal animal fighting occurs.

Consequences for mistreating animals should be consistent and uniform. It is essential that sentences for animal cruelty crimes impart the message that no form of animal cruelty is acceptable. Sentences should appropriately address the crime by including terms and conditions designed to prevent similar future conduct. Sentences should also be structured in such a way that they protect the victims of the abuse, as well as potential future victims.

In an effort to ensure that animal cruelty crimes are vigorously prosecuted, animal cruelty cases shall not be sent to EDP courts and, whenever possible, should be vertically prosecuted by designated Animal Cruelty Deputies.

Deviation from this policy requires prior Head Deputy or Deputy-in-Charge approval.

10.13.01 ANIMAL CRUELTY CASE DISPOSITIONS

Sentences in animal cruelty cases should convey the message that animal cruelty is a serious crime. To ensure that dispositions are appropriate, specific disposition guidelines have been established for animal cruelty cases.

No one other than an animal cruelty designee or the Animal Cruelty Case Coordinator (ACCC) shall make offers in cases involving animal cruelty charges.

The animal cruelty case disposition guidelines include terms and conditions that are mandated by law, as well as conditions that are designed to provide adequate oversight of defendants. The disposition guidelines shall be followed by all deputies. Deviation from this policy requires prior approval from the ACCC and the Head Deputy or Deputy-in-Charge.

The disposition guidelines are available on LADAnet, under Library > Animal Cruelty > Filing, Litigating, and Sentencing Your Case.

Dismissals and Reductions: Charges involving any form of animal abuse, including dog and cock fighting, should not be dismissed, reduced or "diverted" without prior approval from the ACCC and Head Deputy or Deputy-in-Charge.

This policy applies in all cases, regardless of whether the case only involves charges of animal cruelty, or if there are other charges filed, as well.

Diversion: Those who violate any of the animal cruelty statutes are eligible for misdemeanor military diversion under the provisions of Penal Code § 1001.80. When appropriate, deputies should vigorously argue against diversion in animal cruelty cases, especially when the animal-related charges are "priorable" offenses. When the court is considering granting diversion, the deputy shall state the facts of the case, ask the court to review evidence, such as photos and/or video, and present the argument that the defendant may be eligible, but not suitable, for diversion.

Counseling: Depending upon the animal cruelty charge(s) of which the defendant is convicted, counseling may be mandated by law (PC § 589(h).) Judges should be informed of the counseling requirement in cases where counseling is mandated. In all cases that include animal cruelty charges, requiring animal cruelty classes as a term of probation is highly advisable, regardless of whether classes are mandated by law.

When sentencing a defendant to animal cruelty counseling, the designee shall complete a counseling form and email or fax the form to the address or number found at the bottom of the form. A defendant will not be permitted to enroll unless the program had received a copy of the form from the prosecutor.

Database: Upon disposition of a case involving animal cruelty charges the form in the Animal Cruelty Database shall be updated.

10.14 GRAFFITI

Whenever a defendant is granted probation in a graffiti case, a deputy shall request the court to impose specific terms and conditions of probation. Forms detailing the required terms and conditions of probation in adult and juvenile matters are available in LADAnet, as attachments to SD 10-07. Head Deputies and Deputies-in-Charge are responsible for periodically auditing graffiti cases to determine if these terms and conditions are being imposed by courts. Deviation from this policy requires prior Head Deputy or Deputy-in-Charge approval.

10.15 MILITARY PRETRIAL DIVERSION PROGRAM

Penal Code §§ 1001.80 et seq. authorize a court, at its discretion, to grant a pretrial diversion program to current or former members of the United States military who may be suffering from a form of trauma or substance abuse as a result of their military service and are charged with a

misdemeanor offense. Subdivision (a)(2) permits the court to request an assessment to aid in deciding whether a veteran qualifies for military pretrial diversion. Deputies should familiarize themselves with the provisions of the military pretrial diversion program contained in Penal Code §§ 1001.80 et seq.

If a court determines that a defendant is eligible for a military pretrial diversion program and the defendant consents and waives the right to a speedy trial, the defendant may participate in the program over the prosecution's objection. Deputies shall object on the record when the defendant has failed to meet eligibility requirements, or is unsuitable for the program based upon the facts of the case or the defendant's criminal history.

Except in unusual cases in which a Head Deputy or Deputy-in-Charge approves a deviation from this policy, deputies shall object to diversion on domestic violence offenses because of the inherently serious nature of such crimes. Deputies shall also object to diversion for driving under the influence, if a military veteran has previously been granted diversion for driving under the influence under this section or is otherwise unsuitable based on their criminal history. In the instance where a victim has suffered a significant financial loss, deputies shall object to diversion on the grounds that the victim will be denied their right to receive restitution under California Constitution § 28, Article 13(A-B) and Penal Code § 1202.4(f).

In all cases where the court places a defendant into a military pretrial diversion program where the defendant is charged with a violation of Vehicle Code § 23153 (a) or (b), deputies shall notify the victim that the defendant is being diverted. Deputies shall advise the victim of the potential consequences of the diversion process, including the fact that the victim will be unable to obtain court-ordered restitution due to the lack of a conviction. If the victim requests, deputies shall make every effort to provide the victim an opportunity to be heard prior to diversion being granted by the court.

Although the ability of a court to enforce a restitution order in the absence of an actual conviction is not established law, deputies shall request appropriate terms and conditions of diversion, including but not limited to: victim restitution, protective and stay-away orders, orders prohibiting firearm possession, participation in specific programs, community service, and search and seizure conditions.

Marsy's Law requires that victims who have requested notification be informed of case outcomes. When a defendant is diverted and the victim has requested notifications, victims shall be contacted by the handling deputy and informed of the following: (1) the court has granted diversion; (2) if the defendant successfully completes diversion and the case is dismissed, the law does not provide for the payment of restitution for any loss arising out of the crime, including medical expenses; (3) if the victim wishes to obtain damages for loss arising from the crime, the victim will have to timely seek and obtain a civil judgment; (4) when the defendant has successfully completed diversion; and (5) when the defendant has been terminated from diversion and prosecution reinstated. In cases where victims have suffered significant financial losses related to crimes and the court diverts, deputies shall notify victims regardless of a request to be notified.

If diversion is granted for driving under the influence, deputies shall do the following to ensure public safety and prevent recidivism:

- Request that the court order the defendant to attend all standard DUI programs and install an ignition interlock device (IID) where appropriate; and
- Have the military veteran being diverted acknowledge the Watson advisement.

Deputies who become aware of a violation of the terms imposed by the court at any time during the period of pretrial diversion are expected to notify the court and move for termination of diversion and reinstatement of criminal proceedings. Relevant violations include, but are not limited to: the commission of a new offense, a violation of a protective or stay-away order, failure to pay full restitution within the period ordered by the court, or failure to participate in a program. Deputies shall obtain and review an updated copy of the defendant's criminal history information immediately prior to the end of the deferral period to determine whether the defendant has committed any new offenses.

Commentary

In the interest of public safety, deputies are encouraged to request that the court confirm the defendant's claim that the defendant is, or was, a member of the United States military. Deputies should also request that the defendant provide documentation from a medical professional that the defendant suffers from a mental health problem as a result of military service.

10.16 COURT ADMINISTERED DEFERRED ENTRY OF SENTENCING

Former Penal Code §§ 1001.94 et seq. authorized a Deferral of Sentencing Pilot Program ("Program"), at the court's discretion. The Program expired by operation of law (PC § 1001.99) on January 1, 2018.

10.17 DIVERSION FOR DEVELOPMENTALLY DISABLED DEFENDANTS

Penal Code § 1001.21 provides that a defendant evaluated by a regional center to have a cognitive developmental disability may seek diversion of pending misdemeanor charges, including offenses reduced from felonies, at any stage of the criminal proceedings. When a defendant is diverted under this section, the prosecutor, the Probation Department, and the regional center for the developmentally disabled must fulfill specified, time-sensitive responsibilities. If a defendant successfully completes diversion, the misdemeanor charges are to be dismissed.

A defendant is eligible for diversion under § 1001.20 et seq. if each of conditions stated in Penal Code § 1001.21 is satisfied. A developmentally disabled defendant may be eligible for diversion regardless of the defendant's criminal history or the nature of the pending charge. Deputies should be aware that some misdemeanor offenses, such as driving under the influence of alcohol or drugs, are statutorily excluded from diversion, with the exception of military diversion. (PC § 1001.80(*l*); VC § 23640; see *People v. Weatherill* (1989) 215 Cal.App.3d 1569, 1580; see LPM § 10.15.)

If the court suspects that the defendant may have a cognitive developmental disability, and the

defendant consents to diversion and waives the right to a speedy trial, the court will order the prosecutor, the Probation Department, and the regional center to prepare separate reports. Penal Code § 1001.22 imposes specific timelines for producing the reports as well as specified information which must be included in the reports from each agency. If the deputy recommends against this form of diversion, the deputy shall file a written declaration that states the grounds for the opposition to diversion.

After reviewing the reports prepared by the Probation Department, the prosecutor, and the regional center, the court must decide whether to place the defendant on this form of diversion. A defendant may be eligible but arguably unsuitable for diversion. While the court may divert a developmentally disabled defendant notwithstanding the prosecutor's opposition, it is the obligation of the Office to ensure that the rights of victims and the interests of public safety are maintained. A deputy shall object on the record when a defendant is deemed an unsuitable candidate for the program.

When evaluating a developmentally disabled defendant's suitability for diversion under this section, deputies shall carefully consider the facts and circumstances surrounding the commission of the underlying offense, the nature of the charge, and the defendant's criminal history.

Except in unusual cases in which a Head Deputy or Deputy-in-Charge approves a deviation from this policy, deputies shall object to diversion on cases involving domestic violence, child abuse, elder abuse, or sexual assault because of the inherently serious nature of such crimes.

Also, consequences that follow convictions for certain crimes may be particularly important as to a given defendant and case, rendering a grant of diversion under this section inappropriate. For example, convictions for specified arson and sex related misdemeanor offenses require registration with the Department of Justice. (PC §§ 457.1, 290 et seq.) Additionally, a conviction for a misdemeanor that involves violence or the threat of violence will frequently deny a potentially dangerous defendant the right to possess a firearm within 10 years of the date of conviction (PC § 29805(a)) or a lifetime ban in the case of a misdemeanor violation of PC § 273.5 (PC § 29805(b)).

In every instance in which the court diverts a developmentally disabled defendant under this section, deputies shall request that the court provide the victim with notice and an opportunity to be heard if the victim has made such a request. Appropriate terms and conditions should be imposed as conditions of diversion, including but not limited to: victim restitution; court-ordered protective orders and stay-away orders, as may be appropriate; an order prohibiting firearm possession; and search and seizure conditions.

Deputies who become aware of a violation of the terms imposed by the court during the period of pretrial diversion shall notify the court and move for termination of diversion and reinstatement of criminal proceedings. Possible violations include, but are not limited to: the commission of a felony (after the defendant has been bound over for trial for the subsequently charged felony); a violation of a protective or stay-away order; or an unsatisfactory performance in the diversion program. Deputies shall obtain and review an updated copy of the defendant's

criminal history information immediately prior to the completion of the diversion period to determine whether the defendant has committed any new felonies.

10.18 PROSECUTION OF LOCAL CITY ORDINANCES

There are 88 incorporated cities in the County of Los Angeles. Many of these cities have adopted local city ordinances creating offenses for conduct not otherwise prohibited by state law or county ordinance. These offenses can be punished as either misdemeanors or infractions. Some of the cities retain their own City Attorney or City Prosecutor to pursue violations of these ordinances. Others, however, rely on the Office to prosecute violations of these ordinances on behalf of the city. These cities have contracted with the County of Los Angeles for this service at standard contract rates and must reimburse the county for the cost engendered by Office staff in the prosecution of these ordinances.

Whenever one of the cities with established contracts with the county asks the Office to file a criminal complaint for a violation of a city ordinance, the code for Contract Cities (CC) shall be entered in the box at the bottom of the Misdemeanor Filing Worksheet by the filing deputy. This information shall then be entered into PIMS by support staff assigned to complete the filing paperwork and prepare the case file.

In preparing the misdemeanor case file in a Contract Cities case, support staff shall attach the Contract Cities Billing Sheet to the file in lieu of the standard Misdemeanor Filing Worksheet Comments page. The Billing Sheet shall be placed in the file behind the Misdemeanor Filing Worksheet. Whenever any Office employee, including an attorney, investigator, support staff or PDP officer, handles one of these cases, the employee shall write the amount of time the employee spent handling the case, in 15 minute increments, on the Billing Sheet.

When the case is closed, a copy of the Billing Sheet shall be forwarded to Bureau of Administrative Services, Budget and Fiscal Services Division, Attention: Cost Accounting Unit. Accounting will calculate the charges and bill the city for Office services.

All filing documents referenced above can be located in the **DA Filing Forms** icon in Lotus Notes and in PIMS.

CHAPTER 11

FELONY CASE MANAGEMENT

11.01 DISCOVERY

Penal Code §§ 1054 et seq. govern prosecution and defense discovery in criminal cases. These statutes mandate reciprocal discovery.

Discovery is a continuing obligation. If new material becomes known to, or comes into the possession of, either party that was not turned over to the other party initially, disclosure of the new material shall be made as soon as possible. If the new material becomes known to, or comes into the possession of, either party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred. (PC § 1054.7)

11.01.01 DEFENSE DISCOVERY

Deputies shall disclose materials and information in the deputy's possession or known to be in the possession of the investigating agencies as described in Penal Code § 1054.1 to a defendant or the defendant's attorney. Discovery includes:

- The names and addresses of persons the deputy district attorney intends to call as witnesses at trial;
- Statements of all defendants;
- All relevant evidence seized or obtained as part of the investigation of the offenses charged;
- The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial;
- Any exculpatory evidence; and
- Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at trial.

A deputy shall not disclose or permit to be disclosed to a defendant the address and telephone number of a victim or witness in the alleged offense. (PC §§ 841.5 and 1054.2(b).)

11.01.02 PRIVILEGED INFORMATION

Privileged information must not be disclosed. Deputies shall advise officers who present cases for filing that it is their responsibility to bring any privileged information contained in the police reports to the attention of the filing deputy. If informed by a law enforcement officer that privileged information should be withheld or excised, a filing deputy shall insert a memorandum

in the case file to alert the arraignment deputy and any other deputy who may handle the case. The filing deputy shall excise privileged information when appropriate and note this in the case file.

A deputy who turns discovery over to the defense shall note the date, name of the defense attorney and the documents furnished on the "Acknowledgment of Discovery" form. The deputy shall notify the defense if any privileged information has not been disclosed. Defense counsel should acknowledge receipt by initialing the appropriate lines on the "Acknowledgment of Discovery" form and signing the form. A defendant who receives discovery should acknowledge receipt on the record.

11.01.03 PROSECUTION DISCOVERY

Under Penal Code § 1054.3, a defendant and the defendant's attorney must disclose to the prosecution:

- The names and addresses of persons, other than the defendant, they intend to call as witnesses at trial;
- Any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case; and
- The results of any physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at trial.

Deputies are strongly encouraged to take advantage of the provisions of Penal Code § 1054.3 allowing prosecutorial discovery. Prosecutorial discovery should be sought in any case where discoverable materials may exist and obtaining such discovery from the defense would aid in the prosecution of the case.

11.01.04 TIME FOR DISCOVERY

Deputies are responsible for providing discovery to the defense at the arraignment and thereafter at the earliest practicable time. Deputies shall ask law enforcement agencies to provide an additional set of discovery materials for each defendant at the time the complaint is filed.

All discovery must be turned over at least 30 days prior to the trial, unless good cause is shown why disclosure should be denied, restricted or deferred pursuant to Penal Code § 1054.7. An untimely disclosure or the failure to disclose discovery can result in sanctions including, but not limited to, contempt proceedings, delaying or prohibiting the testimony of a witness or presentation of real evidence, continuance of the proceeding, an admonition to the jury or any other lawful order regarding the discovery violation.

See LPM § 14.04, Timing of Disclosure, regarding the disclosure of exculpatory and impeachment information prior to a preliminary hearing ("Felonies"), through trial ("Continuing Duty Through Trial"), and after trial ("Post-Trial Duty").

11.01.05 INFORMAL DISCOVERY

A deputy shall provide all appropriate discovery to the defense based on an informal discovery request in accordance with Penal Code § 1054.1 and consistent with the court's policy.

In all death penalty cases and any other case in the discretion of the Head Deputy or Deputy-in-Charge, deputies shall request that any informal discovery request be put on the record to ensure that a complete and accurate record of what the defense sought and what the prosecution provided is included in the court record.

11.01.06 DISCOVERY REQUESTS RELATING TO ENDANGERED WITNESSES

On occasion, defense attorneys file discovery motions which seek information about persons who have been provided Witness Protection Program assistance. Sometimes these requests are so specific it is clear that a routine response could endanger the protected witness. In other instances, the requests may appear so innocuous they are not contested.

A deputy handling a discovery motion relating to a person in the Witness Protection Program shall immediately contact the Bureau of Investigation Administrative Lieutenant. The Lieutenant will provide information about the procedures and forms used in the program and how this information may jeopardize witnesses.

It is vital that deputies use all appropriate legal authority to protect endangered witnesses when responding to discovery motions.

11.01.07 INSPECTION OF A DISTRICT ATTORNEY CASE FILE

On occasion, a defense attorney may seek to inspect a District Attorney case file. (PC §§ 1054 et seq.) When authorized, the inspection should occur in the Office or the courtroom. A defense attorney shall not be permitted to remove the case file from the office or the deputy's possession. Whenever a case file has been inspected, the deputy authorizing the inspection shall prepare an "Acknowledgment of Discovery" form indicating the date, the defense attorney's name and the documents inspected. The defense attorney shall acknowledge the inspection by initialing the appropriate lines and signing the form. If there is a disagreement as to the propriety of the inspection, that fact shall be noted in the case file.

11.01.08 DISCOVERY REQUESTS FOR SUSPECTED CHILD ABUSE REPORTS (SCARS) AND CHILD FORENSIC INTERVIEWS

A Suspected Child Abuse Report (SCAR) is a Department of Justice standardized form which must be prepared in "every known or suspected instance of child abuse or neglect" as defined in the Child Abuse and Neglect Reporting Act (CANRA) codified in Penal Code §§ 11164 et seq. Whenever a mandated reporter reasonably suspects that child abuse, neglect or child endangerment has occurred, the mandated reporter must report this information to either the Department of Children and Family Services (DCFS) or law enforcement. Once a written SCAR

is created, that document is cross-reported between DCFS and the law enforcement agency. Penal Code §§ 11166(j) and (k) mandate that a copy of every SCAR be distributed to the District Attorney's Office.

ESCARS

ESCARS is a web-based application that allows agencies to share suspected child abuse reports as well as review historical information about victims and suspects. ESCARS is the preferred means for statutorily mandated and authorized agencies to cross-report allegations of child abuse in Los Angeles County.

The Office has a statutory duty to audit SCAR cross-reporting in Los Angeles County (PC §§ 11166(j) and (k).) ESCARS enables the Office to more diligently and comprehensively perform this function.

The narrative section of a SCAR contains statements from at least one, but potentially many, witnesses to the precipitating incident of suspected abuse or neglect. These statements are considered discoverable pursuant to Penal Code § 1054.1(f) and constitutional obligations under *Brady v. Maryland* mandate that potentially exculpatory evidence be provided to the defense.

A SCAR contains the identity of the reporting party which is deemed confidential (PC § 11167) as is the report itself (PC § 11167.5). Therefore, the identity of the reporting party may be disclosed only when confidentiality is waived by the mandated reporter or by court order. Any violation of the confidentiality provided by the section regarding the status of the individual as the reporting party is a misdemeanor. All staff must be extremely cautious not to release the name of a mandated reporter.

Procedures Reconciling Discovery Obligations and Confidentiality

In the event the arraignment deputy determines that a SCAR contains exculpatory information or information which might be used to impeach a witness, a redacted version of the SCAR containing only the 19-digit DCFS referral number, the defendant's name, the first name and last initial of the child victim/witness and an appropriately redacted narrative (deleting all identifying information for the reporting party) should be provided to the defense at the time of arraignment whether or not the defense makes a request for the document.

The deputy in court should request the judge issue a protective order prohibiting defense counsel from releasing a copy of the SCAR or any of the contents therein to any individual, including but not limited to, the defendant. This order may be done in writing or verbally on the record.

In the event the arraignment deputy determines that the SCAR does not contain any exculpatory information or information which might impeach a witness, upon request by defense counsel, the arraignment deputy shall ask the court for a protective order and provide a redacted copy of the SCAR to opposing counsel.
It should be anticipated that some defense attorneys will request a non-redacted copy of the SCAR. If this request is made, deputies shall insist a formal discovery process be employed in

order to obtain the necessary court order to maintain compliance with the confidentiality requirements of Penal Code §§ 11167 and 11167.5. Should the court grant the formal discovery request, it is incumbent upon the deputy participating in the hearing to request a protective order directing counsel not to disclose the contents of the SCAR to anyone not specifically authorized by the court, particularly the defendant.

Child Forensic Interviews

The discovery and dissemination of child forensic interviews is restricted by Penal Code § 11166.4. See LPM § 24.03 for a detailed discussion of this topic.

11.01.09 CALECPA

The California Electronic Communication Privacy Act (CalECPA) sets forth the procedure for searching electronic devices and obtaining electronic communication information. In the overwhelming majority of cases, a search warrant is needed whenever law enforcement seeks the following types of information:

1. Records from telecommunications companies, Internet service providers or social media websites, such as Verizon, Google or Facebook;
2. GPS "pings"/cell tower location data from a service provider or any use of an Electronic Serial Number (ESN) Identifier;
3. Searches of an individual's cellular phone, computer, iPad, hard drive, etc.

CalECPA requires that any information obtained through the execution of a search warrant that is unrelated to the objective of the search warrant must be sealed. The review of such "unrelated" information requires a court order. Information that is initially determined to be "unrelated" to the objective of the search warrant may become relevant as the case progresses. For example, the relevance of such information may only become apparent following a hearing or the receipt of defense discovery. This sealed and now relevant information can only be accessed with a court order. CalECPA essentially requires the prosecution to seek a court order to comply with discovery obligations.

11.01.10 DISCOVERY OF SEALED *HOBBS* ATTACHMENTS

In *People v. Hobbs* (1994) 7 Cal.4th 948, the California Supreme Court held that all or part of the information in a search warrant affidavit furnished by an informant may be sealed to protect the informant's identity where the informant's only relevance is supplying probable cause. If a physical copy of any portion of a sealed *Hobbs* attachment is needed for litigation of the search warrant (motions to quash or traverse), the affiant shall be directed to provide a copy to the assigned deputy for that purpose. Procedures for responding to motions to quash or traverse search warrants containing a sealed *Hobbs* attachment are set forth in the Office's *Search Warrant Manual*.

Any deputy who seeks to have any portion of a *Hobbs* attachment in a search warrant or wiretap affidavit unsealed must notify the affiant or their supervisor of the law enforcement agency that

executed the warrant/wiretap prior to requesting authorization from a court to unseal the *Hobbs* Attachment.

11.01.11 DISCOVERY OF A U VISA REQUEST FOR CERTIFICATION

Brady v. Maryland mandates that potentially exculpatory evidence be provided to the defense. A request for U visa certification by a victim or the victim's representative during the pendency of the case is considered discoverable pursuant to constitutional obligations and Penal Code § 1054.1(e). If a request for certification is made during the pendency of the case to the Office or the handling law enforcement agency, this information shall be disclosed to the defense. Any decision regarding the request for certification shall also be disclosed. The handling deputy shall document the request for certification and all disclosures to the defense in the case file. In an abundance of caution, if the victim requesting U visa certification in a current case was previously the victim of the same defendant in a prior case for which the victim also requested U visa certification, it is recommended that such information be disclosed to the defense.

11.01.12 REQUEST FOR PACE RECORDS

A defendant may seek confidential appointment of an expert witness by the Los Angeles Superior Court (LASC) under Evidence Code §§ 730, 952 and 1017. The fact of the appointment need not be disclosed unless the attorney intends to call the expert as a witness.

The LASC maintains payment records for court-appointed expert witnesses. These records are commonly referred to as "PACE Records." PACE is the acronym for "Professional Appointee Court Expenditure System Records." These records are often used by prosecutors to cross-examine the defendant's expert on the amount of compensation the expert has received for testimony rendered on behalf of other defendants.

LASC has set forth guidelines by which the prosecution may obtain some of the information it needs to assist in the cross-examination of a defense expert while preserving the confidentiality requirement on prior cases. The following guidelines have been adopted by LASC:

1. The District Attorney may request the total amount paid to an expert in any given time period as to the current case or in all cases on which the expert has been appointed.

2. PACE records can be sought by subpoena duces tecum, a formal motion, or by informal discovery request to the court; but in all cases notice is to be given to the defense counsel.

3. The court can order PACE records. There may be occasions when the expert is disclosed late in the discovery process, and an expedited request may be necessary to avoid trial delay.

4. PACE will accommodate these expedited requests; however, with limited resources available, expedited requests should be the exception. In most cases, PACE can provide the information within 10 days.

11.01.13 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art, I § 28(b)(1).) (See LPM § 24.02.04)

11.02 CONTINUANCES

11.02.01 NOTICE

Penal Code § 1050(b) requires prosecutors and defense attorneys to give opposing counsel at least two days' notice of a continuance based on good cause. Noncompliance may subject an attorney to a $1000 fine and the filing of a report with an appropriate disciplinary committee pursuant to Penal Code § 1050.5.

11.02.02 UNNECESSARY CONTINUANCES

Deputies shall require compliance with Penal Code § 1050(b) and strongly oppose all unnecessary continuances. A deputy shall request a continuance only when good cause can be shown. When a continuance is necessary, it should be for the shortest time possible.

In cases where animals must remain impounded for the duration of the criminal proceedings due to the owner declining to relinquish ownership and continuing to pay the cost of care of the animal(s), it is imperative that the deputy:

1. Inform the court that there is an animal(s) being held "in custody;" and
2. Object to any unreasonable continuances.

11.02.01 SPECIFIC TIME WAIVERS REQUIRED

Penal Code § 859b mandates dismissal if the preliminary hearing is set or continued more than 60 days from the date of arraignment, unless the defendant personally waives this right. Absent a personal waiver, the court may not continue the hearing beyond 60 days, even for good cause or to maintain joinder in a multi-defendant case. *(Ramos v. Superior Court (2007) 146 Cal.App.4th 719, 722*.)

Courts have typically applied this absolute bar to continuances for good cause only to the initial 60 days following arraignment. However, a defendant may enter a "general waiver," which would then allow further continuances for good cause (see GOM 21-009 for further discussion). In order to allow reasonable continuances of the preliminary hearing after the initial 60 days, especially to maintain joinder in multi-defendant cases, the defendant should expressly agree to allow such continuances on the record.

The following is some suggested language:

You have the right to a preliminary hearing within 10 court days and 60 calendar days of today's date. Do you give up those rights and agree that your preliminary hearing may be held on or before ___ (or within X days of ___)? Do you further enter a general waiver of those rights and agree that the court in its discretion may continue your preliminary hearing for good cause beyond that date (in order to keep your case together with your codefendant(s))?

11.02.02 VERTICAL PROSECUTIONS

When a deputy vertically prosecuting a murder, domestic violence, sexual assault, hate crime or stalking case, or any other case listed in Penal Code § 1050(g)(2), has another preliminary hearing, motion to suppress or trial in progress and must request a continuance, the scheduling conflict constitutes good cause. A continuance based on § 1050(g)(2) shall be limited to a maximum of 10 additional court days.

11.03 PRELIMINARY HEARINGS

11.03.01 HEARSAY PRELIMINARY HEARINGS - PROPOSITION 115

Hearsay evidence shall be offered only by officers involved in the case investigation or the defendant's arrest, except in unusual circumstances. Proposition 115 does not authorize a finding of probable cause based on the testimony of a non-investigating officer or "reader" merely reciting the investigating officer's police report. Only qualified officers who are subject to meaningful cross-examination regarding the circumstances under which the out-of-court statement was made may testify to hearsay evidence.
Deputies may use hearsay evidence for witnesses who establish the corpus of a crime (e.g., the vehicle owner whose car was stolen or the homeowner whose home was burglarized). Live testimony shall be presented for all other necessary witnesses, except in unusual circumstances.

Deputies may consider using hearsay evidence when a child has previously participated in a recorded forensic interview which has been preserved. In cases in which a recorded forensic interview has been conducted of a child witness and preserved, deputies shall review the tape to determine if the interview clearly establishes that the child will qualify as a witness at trial. Deputies shall also consider if having the child testify at a preliminary hearing will cause undue trauma to the child or unnecessarily increase the likelihood of inconsistent statements. Deputies shall also consider whether it is necessary to memorialize testimony in cases in which it is likely that the child will be unavailable at trial.

Deputies shall obtain Head Deputy, Assistant Head Deputy, or Deputy-in-Charge approval before presenting hearsay testimony.

11.03.02 LIVE TESTIMONY

Live testimony should be presented to accomplish the following objectives:

- Memorialize the testimony of a witness who might be unavailable for trial;
- Memorialize the testimony of a witness who might change the witness' testimony at trial;

- Test the credibility of a questionable witness;
- Present a witness or officer who has knowledge of complicated facts which the investigating officer may be unable to adequately explain;
- Obtain the testimony of an immunized witness;
- Test a witness's ability to identify a defendant; or
- Obtain testimony that may encourage a favorable disposition.

Police officer witnesses must be available to testify in a motion to suppress evidence because Proposition 115 does not apply to such motions.

11.03.03 GUILTY PLEA BEFORE OR DURING PRELIMINARY HEARING

All guilty pleas before or during a preliminary hearing shall be in compliance with the Felony Case Settlement Policy.

11.03.04 WAIVER OF PRELIMINARY HEARING

A deputy may not waive a preliminary hearing except in unusual cases. Before a deputy may waive a preliminary hearing, the Head Deputy or Deputy-in-Charge must approve the waiver. If a Head Deputy or Deputy-in-Charge approves a preliminary hearing waiver, the approval shall be documented in the case file.

11.03.05 ATTORNEY NOTES IN CASE FILES

To assist other deputies who will handle a case, a preliminary hearing deputy shall record all opinions, conclusions, recommendations, settlement offers and events in the case file. Attorney notes should include witness insights, stricken allegations, dismissed counts and possible defenses.

This information is attorney work product and will not be disclosed in response to discovery motions, subpoenas duces tecum or Public Records Act requests.

11.03.06 IMMEDIATE REFILING WHEN DEFENDANT IS IN CUSTODY

When a case involving an in-custody defendant has been dismissed and will be refiled before the defendant's release, a complaint with a request for an arrest warrant must be initiated. The complaint must be signed by a law enforcement officer with knowledge of the crime who can verify the reports are true and correct. The signed complaint must immediately be delivered to the court clerk with instructions that it should immediately be processed and entered into the Countywide Warrant System (CWS). Deputies should request the bailiff notify County Jail Inmate Reception Center (IRC) of the refiling in order to avoid a defendant's erroneous release.

11.03.07 INFORMATION PLEADING INSTRUCTIONS FORM

After a defendant is held to answer, the preliminary hearing deputy shall fill out the "Information Pleading Instructions" form. The deputy should indicate the proof offered at the preliminary

hearing and the magistrate's rulings on the form. The Head Deputy or Deputy-in-Charge shall approve any significant changes in the charges to be filed in the information from the original charges in the complaint.

11.03.08 SERIOUS OR VIOLENT FELONIES AND SEXUAL ASSAULT CASES

Deputies handling serious or violent felonies, hate crimes, domestic violence or sexual assault cases shall personally notify the victim if a case is dismissed or the defendant is not held to answer after a preliminary hearing. The deputy shall explain the reasons for the dismissal or the court's failure to hold the defendant to answer. (Refer to Penal Code § 1192.7 for the list of serious felonies and Penal Code § 667.5(c) for the list of violent felonies.)

11.03.09 PRELIMINARY HEARING DISPOSITION REPORT

The preliminary hearing deputy shall prepare a Disposition Report if a case is concluded at the preliminary hearing stage. Within 10 business days after a case has concluded, the deputy shall prepare a Disposition Report, sign it, place it in the felony case file and submit the file to the Head Deputy or Deputy-in-Charge for review. The Head Deputy, Head Deputy's designee, or Deputy-in-Charge shall review the file to ensure it is in proper form for closing, sign the Disposition Report and forward the file to support staff for case closing.

In addition, the preliminary hearing deputy shall also prepare a Disposition Report when:

- The court does not hold a defendant to answer on one more charged felony offenses; or
- The court reduces the one more felony offenses to a misdemeanor pursuant to Penal Code § 17(b)(5).

Disposition reports are to be completed at the conclusion of every felony case with the following exceptions. Cases in which the defendant receives pretrial diversion, pursuant to Penal Code § 1000 et seq., or is sentenced pursuant to Proposition 36 are exempt from this requirement, except where one or more counts or one or more special allegations are dismissed in order to render a defendant eligible for those programs. Under those circumstances, a disposition report shall be completed. Disposition reports shall be reviewed and signed by the Head Deputy or the Head Deputy's designee.

Upon successful completion of pretrial diversion, and dismissal of the case, a disposition report need not be prepared.

11.03.10 DISMISSAL OF INFORMATION

An information must be filed whenever an accused is held to answer at the preliminary hearing. If, after the preliminary hearing, a deputy believes there is a strong possibility that the case cannot be successfully prosecuted, the deputy shall discuss the case with their Head Deputy or Deputy-in-Charge to determine whether a dismissal is warranted. If the Head Deputy or Deputy-in-Charge agrees that the case should be dismissed, the Head Deputy or Deputy-in-Charge shall notify the assigned trial deputy, if any, in writing of the recommendation and reasons for the

dismissal. All dismissals shall be consistent with the policies of this manual. A Disposition Report shall be completed detailing the reason(s) for the dismissal.

11.03.11 FELONY REDUCED TO MISDEMEANOR PURSUANT TO PENAL CODE § 17(B)(5)

When the court exercises its discretion to reduce a felony (a wobbler) to a misdemeanor pursuant to Penal Code § 17(b)(5) at the conclusion of a preliminary hearing, the Office no longer has jurisdiction to prosecute the case if the crime occurred in a city with a city attorney/prosecutor who has authority to prosecute state law misdemeanors.

Charter Cities

Cities in Los Angeles County are either charter cities or general law cities. In charter cities, if the city's charter mandates that the city attorney/prosecutor shall prosecute all misdemeanors that occur within that city, the legal authority to prosecute the resulting misdemeanor(s) rests solely with that local prosecutor. The Office no longer has authority to prosecute the case after it has been reduced to a misdemeanor.

If the defendant desires to enter an open plea to the resulting misdemeanor charge(s), the local city attorney/prosecutor should take the plea. If the court, in an effort to expedite the disposition of the case, refuses to allow time for the local city attorney/prosecutor to appear and orders the deputy district attorney to take the plea, the deputy should comply with the court's order. Before taking the plea, however, the deputy shall state on the record in open court and in the presence of the defendant and the defendant's attorney that this case is now under the prosecuting authority of the city attorney/prosecutor, that the Office no longer has the legal authority to prosecute the case, and that the deputy is proceeding to take the plea only because of the court's order and that the Office will not be handling additional appearances.

Under no circumstance should a deputy agree to cross-designation as a deputy city attorney/prosecutor for purposes of taking a § 17(b)(5) misdemeanor plea.

The Charter Cities that prosecute their own misdemeanors are:

- Burbank
- Inglewood
- Long Beach
- Los Angeles
- Pasadena
- Redondo Beach
- Santa Monica
- Torrance

General Law Cities

This policy also applies in general law cities. In general law cities, the local city attorney/prosecutor has authority to prosecute misdemeanors that occur within that city if the city has requested and received the consent of the District Attorney. A deputy in these jurisdictions may continue to prosecute a § 17(b)(5) misdemeanor *only* if extraordinary circumstances are present and Head Deputy approval is obtained in advance.

The General Law Cities that prosecute their own misdemeanors are:

- Hawthorne
- Hermosa Beach

11.04 MOTION TO REINSTATE THE COMPLAINT

Penal Code § 871.5 provides for limited judicial review when a magistrate dismisses all or part of a case at the preliminary hearing pursuant to Penal Code §§ 859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, 1389, and Vehicle Code § 41403.

Penal Code § 871.5 does not apply to dismissals based on non-statutory motions or on statutory provisions other than listed above. However, in some cases, it may be possible to argue that the actual dismissal itself was in fact a dismissal under § 871.5. (*People v. Superior Court (Feinstein)* (1994) 29 Cal.App.4th 323, 331-335.)

While § 871.5 provides an alternative to refiling a dismissed case, the only ground upon which an 871.5 motion can be based is that a magistrate's dismissal was erroneous as a matter of law. A decision dismissing charges is "erroneous as a matter of law if the evidentiary record discloses a rational basis for believing the defendant guilty of the crime charged." (*People v. Slaughter* (1984) 35 Cal.3d 629, 642.) In general, the People are bound by a magistrate's adverse factual findings when they are supported by substantial evidence. However, not all findings of a magistrate which purport to be factual findings are binding on the People. Some findings may in fact be legal conclusions which are reviewable under § 871.5. (*People v. Slaughter*, *supra*, 35 Cal.3d at pp. 638-640.) It is important that the deputy ascertain, on the record, whether the magistrate's ruling is based on factual findings, and, if so, to specify those findings on the record.

An 871.5 motion can be used to challenge a magistrate's erroneous legal ruling that certain evidence is inadmissible when that ruling results in a dismissal at a preliminary hearing. If a case or a portion thereof is dismissed at a preliminary hearing as a result of the suppression of evidence obtained under a search warrant, an 871.5 motion may be brought seeking to uphold the warrant's validity.

If the reviewing court grants the 871.5 motion, the preliminary hearing magistrate must resume proceedings within 10 days of the entry of the reviewing court's order. Procedurally, what happens when the matter is remanded to the preliminary hearing court will depend on whether the dismissal occurred before or after all evidence had been presented at the preliminary hearing. If the dismissal occurred before all evidence had been presented, the preliminary hearing will

resume when the matter is remanded. If the dismissal occurred after all evidence had been presented, there is nothing left for the magistrate to do except hold the defendant to answer. The magistrate may not make any factual findings. (*People v. Childs* (1991) 226 Cal.App.3d 1397, 1409.)

If an 871.5 motion is denied, the People may appeal, but may not refile the charges. If refiling is not prohibited by Penal Code § 1387, or any other provision of law, it is important to carefully weigh the option of refiling the charges rather than proceeding under Penal Code § 871.5. It is also important to consider whether the magistrate's rulings were based upon discretionary matters. Adverse rulings on discretionary matters will not be held to be erroneous as a matter of law absent a showing of abuse of discretion. Abuse of discretion is often very difficult to establish.

If the defendant is extremely dangerous or likely to flee while an 871.5 motion is pending, it may be preferable to rearrest the defendant and refile the complaint rather than file an 871.5 motion.

Penal Code § 871.5(a) motions are limited to counts "which may not be charged by information under section 739." If this is the first time the count has been dismissed, the dismissed count is transactionally related to a count or counts for which the defendant is held to answer and there was sufficient evidence at the preliminary hearing to support the dismissed count, the proper procedure is to file the dismissed count in the information pursuant to Penal Code § 739. (*People v. Superior Court (Martinez)* (1993) 19 Cal.App.4th 738, 749-750.) If this is the second dismissal by a magistrate, even if the count is a transactionally related count, it cannot be filed in the information pursuant to Penal Code § 739. Review must be sought under Penal Code § 871.5. (*People v. Ramos* (1982) 32 Cal.3d 26, 35-37.)

11.04.01 PROCEDURE

If a case or portion thereof is dismissed at the preliminary hearing and it appears that a Penal Code § 871.5 motion is appropriate, the deputy shall obtain the approval of the Head Deputy or Deputy-in-Charge to file the motion. The motion shall be filed in the reviewing court within 15 days of the date of the dismissal. The hearing on the motion does not have to be held within 15 days of the dismissal. (*People v. Dianda* (1986) 178 Cal.App.3d 174.) Notice of the motion shall be given to the defendant and the preliminary hearing magistrate. Notice may be given by serving the defendant, either personally or through the defendant's attorney, and the magistrate with a copy of the motion and a cover letter. The deputy shall also file a written request for the preliminary hearing transcript with the magistrate's clerk within 10 days of the dismissal.

If a deputy anticipates that a particular case or a portion thereof may be dismissed at the preliminary hearing, the deputy may seek prior approval to file an 871.5 motion. If the dismissal occurs, the deputy can give oral notice to the defendant and magistrate, on the record, of the intent to file the motion. If the necessary documents were prepared in advance, they should be served at the time of the dismissal. The defendant should be informed of the date and department in which the motion will be heard. The defendant should also be advised that if the defendant fails to appear for the motion, a bench warrant will be issued.

If a case or portion thereof is dismissed unexpectedly at the preliminary hearing and the deputy believes that an 871.5 motion is appropriate, the deputy should give the magistrate and the defendant oral notice of the prosecution's intent to file the motion on the record. The deputy should then promptly seek Head Deputy or Deputy-in-Charge approval and, if approved, file and serve the relevant documents within 15 days. If approval for the motion is denied, the defendant and magistrate may be advised informally that the motion will not be filed.

11.04.02 TIME FOR HEARING

If all charges are dismissed at the preliminary hearing, the 871.5 motion should be set about two weeks after it is noticed to allow time for the transcript to be prepared. The motion should be set in the department to which the defendant would have been held to answer or to the department assigned by the supervising judge.

If only a portion of the case is dismissed at the preliminary hearing and the defendant is held to answer on other counts, the motion should be set on the date and in the department to which the defendant has been held to answer or to the department assigned by the supervising judge.

If the defendant does not appear at the time set for the 871.5 motion, a bench warrant should be issued.

11.04.03 CONDUCTING THE HEARING

An 871.5 motion is based solely on the transcript of the preliminary hearing. In an 871.5 motion, the prosecution's arguments that charges were erroneously dismissed or evidence improperly suppressed are limited to the four corners of the preliminary hearing transcript. A memorandum of points and authorities referring to specific portions of the transcript and citing applicable case law should be filed with the court and served on defense counsel before the hearing. "Boiler plate" points and authorities should not be used. Deputies should also submit a proposed court order for the specific relief sought or ask the reviewing court to issue a written order at the conclusion of the motion.

11.05 PENAL CODE § 1538.5 MOTIONS

11.05.01 PRELIMINARY HEARING

A Penal Code § 1538.5 motion may be made at the preliminary hearing only if, at least five court days before the date set for the preliminary hearing, the defendant has filed and personally served on the People a written motion accompanied by a memorandum of points and authorities. (PC §§ 1538.5(a)(2) and 1538.5(f)(2).) When the motion is made at the preliminary hearing, it shall be restricted to evidence sought to be introduced by the People at that hearing. (PC § 1538.5(f)(1).)

Penal Code § 1538.5(i) limits the taking of evidence on search and seizure issues to one hearing, either at the preliminary hearing or at a special hearing in the trial court. If the defense unsuccessfully moves to suppress evidence at the preliminary hearing, the defense may not offer

evidence "that could reasonably have been presented at the preliminary hearing" at the special hearing in the trial court. The People, however, may recall witnesses who testified at the preliminary hearing.

If, pursuant to a 1538.5 motion, the preliminary hearing magistrate suppresses all or part of the evidence sought to be introduced and does not hold the defendant to answer, the deputy may refile the case or move to reinstate the complaint pursuant to Penal Code § 871.5.
If, pursuant to a 1538.5 motion, the preliminary hearing magistrate suppresses all or part of the evidence sought to be introduced but holds the defendant to answer on all counts, the deputy must notify the court and the defendant that the People will bring a motion within 15 days pursuant to Penal Code § 1538.5(j) to relitigate the validity of the search or seizure.

If, pursuant to a 1538.5 motion, the preliminary hearing magistrate suppresses all or part of the evidence sought to be introduced and holds the defendant to answer on at least one count but dismisses one or more other count(s), the deputy may give notice of a motion to reinstate the dismissed count (PC § 871.5), refile the dismissed count, or file the dismissed count as part of the information (PC § 739).

11.05.02 PENAL CODE § 1538.5(J)

If the defendant's motion to suppress at the preliminary hearing is granted, and the defendant is held to answer on all counts, the ruling on the motion to suppress is binding on the People unless the People request a special hearing in the trial court pursuant to Penal Code § 1538.5(j). The People cannot file a Penal Code § 871.5 motion since the defendant was held to answer on all counts.

To obtain review of the magistrate's suppression order pursuant to § 1538.5(j), the preliminary hearing deputy shall:

- Give oral notice on the record to the court and the defendant that the People will request a special hearing under Penal Code § 1538.5(j);
- Mark for identification those exhibits which were excluded from evidence and request the court clerk to keep them in custody and transmit them to the trial court for further proceedings. If the court clerk refuses to accept the exhibits, the deputy shall arrange for appropriate custody to ensure their availability at the special hearing; and
- Personally deliver the case file to the Head Deputy or Deputy-in-Charge within two business days following the preliminary hearing.

The Head Deputy or Deputy-in-Charge shall ensure that the information and Penal Code § 1538.5(j) moving papers are filed in the trial court within 15 court days of the preliminary hearing.

11.05.03 SPECIAL HEARING IN TRIAL COURT - APPELLATE REVIEW

Case Dismissed: If a case is dismissed after a successful motion to suppress at a special hearing in the trial court and the deputy wants appellate review of the ruling, the deputy shall inquire as

to the basis upon which the trial court ruled adversely to the People and shall, if possible, obtain a statement from the court indicating whether the ruling was based on an issue of credibility or an issue of law.

If the court indicates that the ruling was based on law and not credibility, the deputy shall request that the minute order reflect the court's reasons for dismissal as required by Penal Code § 1385. The minute order should reflect that the ruling was a matter of law and that the court believed the People's witnesses.

Within five court days after the ruling, if an appeal is recommended and approved by the Head Deputy, the deputy shall prepare and forward a Disposition Report to the Writs and Appeals Division. The deputy shall indicate in the Disposition Report whether the case was heard de novo, in whole or in part, or submitted on the preliminary hearing transcript, and the basis for the trial court's adverse ruling. If the case was heard de novo, in whole or in part, the deputy shall prepare a summary of the evidence produced at the special hearing and include the summary as an attachment to the "Report of Dismissal or Acquittal."

Case Not Dismissed: If a case is not dismissed after a successful motion to suppress at a special hearing in the trial court, but the deputy still desires appellate review of the ruling, the deputy shall inquire as to the basis upon which the trial court ruled adversely to the People and shall, if possible, obtain a statement from the court indicating whether the ruling was based on an issue of credibility or an issue of law.

If the court indicates that the ruling was based on law and not credibility, the deputy shall request that the minute order reflect the court's reasons for dismissal as required by Penal Code § 1385. The minute order should reflect that the ruling was a matter of law and that the court believed the People's witnesses.

Within two court days after the ruling and with Head Deputy approval, the deputy shall prepare and forward a memorandum to the Writs and Appeals Division. The deputy shall indicate whether the case was heard de novo, in whole or in part, or submitted on the preliminary transcript, and the basis for the trial court's adverse ruling. If the case was heard de novo, in whole or in part, the deputy shall include a summary of the evidence produced at the special hearing.

11.06 FELONY INFORMATIONS AND INDICTMENTS

A Head Deputy or Deputy-in-Charge is responsible for preparing all informations. Only a Head Deputy or Head Deputy's designee may sign an information.

The Grand Jury legal advisor is responsible for monitoring the preparation and return of all indictments to Department 100 to ensure statutory compliance concerning indictments.

It is the responsibility of each deputy who obtains an indictment to ensure that all case information in PIMS is accurate. All Grand Jury matters are given court case numbers issued from Central Operations (24CJCFXXXXX) and created via the court's computer system as

"John/Jane Does." It is incumbent upon the deputy handling the case in front of the Grand Jury to transfer the case out of Central Operations to the appropriate Bureau/Branch Division/Unit and verify that the defendant's true name and all charges are accurately reflected in PIMS. The assigned deputy shall also add their name as the "Assigned Deputy" in PIMS. After the arraignment on the indictment, the deputy handling the case should coordinate with the Office's Systems Division and the Grand Jury Advisor to effect the transfer in PIMS.

11.06.01 ARRAIGNMENT ON THE INFORMATION

A deputy shall attend all felony arraignments.

When a defendant is not represented by counsel and does not specifically request to appear *in pro per*, the deputy at the arraignment shall bring to the court's attention the defendant's constitutional right to counsel.

When the same lawyer represents two or more defendants, deputies shall bring to the court's attention the strong probability of reversible error due to a conflict of interest if each defendant does not have their own lawyer. The court must take a specific waiver, on the record, if the defendants insist on being represented by the same attorney.

11.06.02 BAIL

An arraignment deputy shall be familiar with the most current bail schedule and with Office policies regarding bail issues. (See LPM Chapter 8, *Bail and Own Recognizance*.)

11.06.03 DISMISSALS

A Head Deputy must approve the dismissal of an entire case other than as part of a case settlement. A dismissal should occur only after all other alternatives have been considered and rejected, and when the interests of justice would be served. Dismissal includes setting aside an information or indictment.

Major Crimes/Significant Cases: The Chief Deputy, through the chain of command, must approve the dismissal of any count in a major crime or significant case.

Special Circumstances Cases: A Bureau Director, through the chain of command, must approve the dismissal of any special circumstances allegation or case. However, if the Special Circumstances Committee has determined the penalty in the case, only the Special Circumstances Committee Chair can approve the dismissal of any special circumstances allegation or case.

11.06.04 DISPOSITION REPORTS

A Disposition Report shall be prepared at the conclusion of every felony case. Within 10 business days after a case has concluded, the deputy handling the case shall prepare a Disposition Report, sign it, place it in the felony case file and submit the file to the Head Deputy, Head

Deputy's designee, or Deputy-in-Charge for review. The Head Deputy, Head Deputy's designee, or Deputy-in-Charge shall review the file to ensure it is in proper form for closing, sign the Disposition Report and forward the file to support staff for case closing.

In addition, whenever all or some counts in a case are dismissed without the deputy's recommendation, or after a trial results in an acquittal on some or all counts, the deputy shall prepare a Disposition Report.

Disposition reports are to be completed at the conclusion of every felony case with the following exceptions. Cases in which the defendant receives pretrial diversion, pursuant to Penal Code § 1000 et seq., or is sentenced pursuant to Proposition 36 are exempt from this requirement, except where one or more counts or one or more special allegations are dismissed in order to render a defendant eligible for those programs. Under those circumstances, a disposition report shall be completed. Disposition reports shall be reviewed and signed by the Head Deputy or the Head Deputy's designee.

Upon successful completion of pretrial diversion, and dismissal of the case, a disposition report need not be prepared.

If the deputy seeks appellate review, the deputy shall forward a copy of the Disposition Report to the Writs and Appeals Division within two business days of the dismissal or acquittal.

11.06.05 VICTIM NOTIFICATION

In all cases where defendants are sentenced to the California Department of Corrections and Rehabilitation (CDCR), victims, next of kin, and threatened witnesses shall be sent a CDCR 1707 form so that they are kept apprised of the custody status of the defendant. See LPM § 24.02.05 for a full discussion of the victim notification obligations of District Attorney personnel for defendants sentenced to state prison.

The use of the CDCR 1707 form has become significantly more important in light of changes in the law that are currently resulting in early release of defendants sentenced to state prison. Many victims, next of kin, and threatened witnesses are unaware that defendants are subject to release at a much earlier date than they might have expected based upon the original sentence imposed. If victims, next of kin, and threatened witnesses do not register the CDCR 1707 form with the CDCR, the CDCR will not notify them of the release of the defendant, execution of the defendant, the death of the defendant, or the escape of the defendant. The CDCR will also not collect restitution or impose requested parole conditions.

11.07 DNA EVIDENCE

In cases in which DNA analysis has not been requested, it is the trial deputy's responsibility to determine whether the case will benefit from DNA analysis. A deputy who wishes to request DNA analysis shall first obtain Head Deputy approval. The Deputy-in-Charge of the Forensic Science Section is available for consultation on issues pertaining to DNA evidence.

11.08 EXHIBITS

11.08.01 PRESERVATION OF EXHIBITS

At the conclusion of a case, the trial deputy shall determine whether it is necessary to preserve any or all of the exhibits. The trial deputy shall prepare and forward a letter to the court clerk requesting preservation of exhibits in the following cases:

- When a case is dismissed and is to be refiled;
- In a major crime or significant case of public interest; or
- In any case in which it is anticipated the exhibits will be necessary for future prosecution (e.g., future federal prosecution or when there are other outstanding suspects) or be of public interest.

11.08.02 DESTRUCTION OF EXHIBITS

Pursuant to Health and Safety Code § 11479, a law enforcement agency may, without court order, destroy that portion of a seized controlled substance that exceeds 10 pounds in gross weight.

Pursuant to Health and Safety Code § 11479.1, if a forensic chemist or criminalist has determined that a seized controlled substance contains phencyclidine (PCP) or its analog, a law enforcement agency may, without court order, destroy that amount in excess of:

- 1 gram of a crystalline substance containing PCP or its analog;
- 10 milliliters of a liquid substance containing PCP or its analog;
- 2 grams of plant material containing PCP or its analog; or
- 5 hand-rolled cigarettes treated with PCP or its analog.

The destruction provisions under Health and Safety Code §§ 11479 and 11479.1 are permissive, not mandatory. The statute contains procedural and substantive safeguards (e.g., sample retention, photographing, and weighing of exhibits). There is no statutory requirement that law enforcement notify the prosecution or defense before destroying controlled substances.

Deputies shall be familiar with these statutory destruction procedures and take all necessary steps to preserve evidence in any case where the destruction of the material would be detrimental to an effective prosecution. In such cases, a deputy shall request the investigating officer to preserve the complete exhibit.

11.08.03 AUTOMATIC DESTRUCTION OF EXHIBITS

Health and Safety Code §§ 11473 and 11474 provide that upon conviction, narcotic and drug evidence shall be ordered destroyed. There is no statutory provision for maintaining the evidence pending appeal. Present Superior Court practice is to preserve the evidence until the time for appeal has lapsed if no appeal has been noticed. If a notice of appeal has been filed, the evidence will be preserved until the conclusion of the appeal.

If after conviction, circumstances arise that necessitate court retention of the exhibits, the deputy shall notify the court and request an order preserving the evidence.

11.08.04 DANGEROUS EXHIBITS

Dangerous exhibits shall not be brought into the courtroom. All superior courts prohibit the introduction of dangerous exhibits into evidence. No volatile or dangerous substances are to be introduced into evidence. Ether in any form shall never be introduced into evidence. Some exhibits (e.g., pipe bombs, poisons, or radioactive materials) may be brought into court and introduced into evidence after having been rendered harmless by police or fire department experts.

Commentary

Los Angeles Superior Court Rule 6.28, effective July 1, 2003, bans hazardous materials, including most controlled substances, from the courtroom. Upon a finding of good cause, certain toxic materials may be brought into a courtroom and introduced into evidence, but they must remain sealed at all times. (*PC § 1417.3(b).)*

Law enforcement agencies shall be directed to photograph or videotape all dangerous exhibits and to preserve all documentary reports and laboratory analyses associated with them. When photographs are to be introduced into evidence in lieu of a dangerous exhibit, the photographs must clearly identify the dangerous exhibit (e.g., the photographs could show the investigating officer or the seizing officer with the exhibit).

If the exhibit poses a danger and cannot be brought to court, the investigating agency shall, when necessary, provide an expert witness to testify to the reason for not bringing the exhibit to court. Generally, this witness will be a chemist from the police crime lab or a fire department expert. All dangerous exhibits shall be preserved until the conclusion of the case by the investigating agency for purposes of defense examination and further prosecution needs whenever such exhibits do not pose an immediate threat to personnel or storage facilities. At the conclusion of the case, the deputy shall advise the investigating agency whether the exhibits should continue to be preserved for any reason.

Before a dangerous exhibit is destroyed or disposed of, all necessary chemical and physical analyses shall be conducted and sufficient samples shall be maintained, if it is safe to do so, for possible defense examination. If the dangerous exhibit does not constitute a danger to personnel or facilities, the law enforcement agency shall maintain it in its complete form.

In cases involving certain dangerous exhibits (e.g., firebombs, pipe bombs or flammable liquids), there may be strong evidentiary value in demonstrating the explosive or incendiary nature of the exhibit. In such circumstances, the investigating agency shall be directed to detonate or ignite one or more of such exhibits and to videotape the demonstration. When the investigating agency lacks the facilities or expertise to perform the demonstration, assistance shall be sought from another agency.

Exhibits that pose an immediate threat to personnel or storage facilities will likely be destroyed by the investigating agency shortly after the time of seizure (e.g., aging dynamite). This destruction process should be filmed or videotaped, if possible.

11.08.05 LOADED FIREARMS

Loaded firearms shall not be brought into court as exhibits nor introduced as evidence. Unloaded firearms may be introduced into evidence. As a procedural safeguard, firearm exhibits shall be inspected by the investigating officer and the bailiff before handling by any witness or counsel. The deputy shall request that the court not permit the jury to possess firearm and ammunition exhibits simultaneously.

11.08.06 RELEASE OF EXHIBITS

Penal Code § 1417.2 permits the release of exhibits upon stipulation of the parties or upon notice and motion if the following requirements are met:

- No prejudice will be suffered by either party; and
- A full and complete photographic record is made of the exhibits to be released.

Victims' have a Constitutional right to prompt return of property when no longer needed as evidence. Cal. Const. Art. I, § 28(b)(14). (See also LPM § 11.21.09).

Before authorizing the release of any court exhibit, deputies shall ensure the exhibit will not be needed for any pending or future case. No deputy shall authorize the release of an exhibit to anyone other than the exhibit's owner or the owner's authorized agent. If a deputy was the victim in the criminal proceeding, or the owner of the exhibit before the initiation of the criminal proceeding in which the exhibit was introduced into evidence, that deputy shall not personally make the request for, nor obtain the release of, the exhibit. Another deputy shall make the request. A deputy shall not act as an agent for an owner in securing the release of exhibits.

When introducing an exhibit would cause the owner undue hardship compared to the prosecution's need, the deputy shall have the property photographed. The photograph shall be used as the exhibit and the property returned to the owner. When appropriate, the owner shall be requested to retain the property and opposing counsel notified that the property will be returned to the owner.

Weapons shall not be returned to a defendant except in unusual circumstances. A deputy shall consider whether the weapon played a role in the commission of the crime and whether it will present a danger to victims, witnesses or society if returned.

11.08.07 EVIDENCE ANIMALS

It is the responsibility of all parties involved in an animal cruelty case to ensure that no animal seized as evidence is held any longer than is absolutely necessary. At the time the case is presented for filing review or at the first scheduled court appearance the deputy shall inquire of the investigating officer if any animals have been seized and are being held as evidence. The

following policies will ensure that all "evidence animals" are released in a timely and expeditious manner.

Seized Animals - Suspect is the Owner

If animals were seized as evidence and the suspect is the owner of the seized animal, the deputy shall immediately ensure that the following is, or has been, done:

1. Post Seizure Notice and Hearing - If an animal is seized pursuant to Penal Code § 597.1 (i.e., exigent circumstances) the seizing officer is required to provide the owner, if known, with a notice that informs the owner that the owner is entitled to a post-seizure hearing pursuant to Penal Code § 597.1(f). Deputies shall ensure that the seizing agency delivered a post-seizure notice to the owner. If a post-seizure hearing was held, the deputy shall request any recordings or transcripts of the proceedings.

2. Owner Relinquishment - Inquire if the seizing agency offered the suspect the opportunity to relinquish the animal. If neither animal control nor the investigating agency offered the defendant the opportunity to relinquish ownership of the animal, at the first opportunity the deputy shall provide the defendant's attorney with an Owner Relinquishment (Animal Release) Form and ask if the defendant is willing to sign the form. If the defendant signs the Owner Relinquishment (Animal Release) form, the deputy shall immediately forward the signed form to the agency which is housing the animal(s).

3. Statement of Charges: If a defendant was provided with a post-seizure notice and *either*: a hearing was held and the hearing officer ruled that the seizure was lawful or the owner did not request a hearing, the deputy shall ensure that the seizing agency sent the owner a statement of charges pursuant to Penal Code § 597.1(h).

4. Removal of an Evidence Hold: Once all evidence has been collected from the animal and documented, the deputy shall immediately inform the seizing agency and the investigating officer that the animal need not be held as evidence. The deputy shall also inform the defense attorney of the prosecution's intention to lift the evidence hold. If the defense attorney wishes to have the animal examined, the examination should take place expeditiously in order to avoid having to hold the animal any longer than is absolutely necessary.

Seized Animals - Suspect is Not the Owner

In cases where the suspect does not own the seized "evidence animal(s)" the deputy shall immediately inform the seizing agency that the animal can be returned to the owner once all of the evidence has been collected from the animal and documented, and the deputy has ensured that the suspect will not have access to the animal.

Seized Animals - Animal Has No Owner

In cases where an animal has no legal owner (this includes cases in which a suspect disavows ownership of the animal and no other owner can be ascertained, or the owner has surrendered or relinquished the animal to law enforcement or animal control), the deputy shall immediately inform the seizing agency that the evidence hold on the animal can be lifted once the evidence has been collected from the animal and documented. The deputy should also inform the defense attorney of the prosecution's intention to lift the evidence hold. If the defense attorney wishes to have the animal examined and the deputy believes there is a legitimate reason/basis for the request, the deputy should ensure that an examination takes place expeditiously in order to avoid having to hold the animal any longer than is absolutely necessary.

11.09 INADMISSIBLE SCIENTIFIC INVESTIGATIVE PROCEDURES

The use of scientific investigative procedures, the results of which have not yet been held to be admissible in court (e.g., polygraph examinations), shall be limited to the investigative stage. If it is determined that use of such a procedure would be beneficial before a case filing, the requesting deputy shall first obtain Chief Deputy approval. Such procedures are not intended as a substitute for traditional investigative tools, nor are they intended as substitutes for requests for further investigation.

The testimony of a psychiatrist who has relied on inadmissible scientific investigative procedures as a basis for an expert opinion is not barred by this policy.

11.10 JURY TRIAL

11.10.01 WAIVER OF JURY TRIAL

A deputy may waive jury if all defendants and their counsel are willing to waive jury, the court is willing to accept the waiver, and it is in the People's best interests. A trial deputy shall discuss the decision to waive jury with the Head Deputy or Deputy-in-Charge. If a jury trial is waived, the deputy shall ensure that the defendant is advised of, and waives, the right to a jury trial on the record.

Major Crimes/Significant Cases: The Chief Deputy must approve, through the chain of command, a jury waiver or the refusal to waive jury in major crimes/significant cases.

Special Circumstances Cases: The Special Circumstances Committee Chair must approve, through the chain of command, a jury waiver or the refusal to waive jury in special circumstances cases.

11.10.02 REMAND UPON CONVICTION

When a jury returns a guilty verdict against a defendant, the defendant must be remanded if in custody. If on bail, the court shall commit the defendant to the custody of the sheriff to await judgment of the court upon the verdict unless the court, after considering the factors listed below,

makes a finding that the evidence supports its decision to allow the defendant to remain out on bail. (PC § 1166.) The factors the court must consider are:

- The protection of the public;
- The seriousness of the offense charged and proven;
- The previous criminal record of the defendant;
- The probability of the defendant failing to appear for the judgment of the court upon the verdict; and
- Public safety.

Unless the court makes such a finding, on the record, the deputy shall urge the court to remand the defendant. If the defendant is remanded, the bail is exonerated. (PC § 1166.)

11.10.03 RETRIALS

After a hung jury, mistrial or appeal, the Head Deputy must decide whether a case will be retried. The Bureau Director must decide whether a defendant should stand trial more than twice.

Major Crimes/Significant Cases: The Chief Deputy District Attorney must decide whether a major crime or significant case will be retried.

Special Circumstances Cases: The Special Circumstances Committee Chair must decide whether a special circumstances case will be retried.

On any motion for a new trial, the People should be represented by the trial deputy whenever possible.

11.11 SUBMITTING A CASE ON THE PRELIMINARY HEARING TRANSCRIPT

Deputies may submit a case on the preliminary hearing transcript for a court to determine the defendant's guilt only if, in the judgment of the assigned deputy, it is the most effective way to present the People's case. A deputy may submit a case on the preliminary hearing transcript only if the trial court will decide the defendant's guilt as to all pending charges.

A Deputy District Attorney I, II or III may not submit a case on the preliminary hearing transcript without prior approval from the Deputy District Attorney IV calendar deputy or Head Deputy.

A deputy may not submit a case on the preliminary hearing transcript either to expedite a finding of not guilty or to have a defendant found guilty of a lesser offense.

If a deputy submits a case on the preliminary hearing transcript and a court convicts the defendant of a lesser offense or finds a defendant not guilty, the deputy shall submit a Disposition Report explaining the court's decision to the Head Deputy.

11.12 REVIEW OF CASES WITH OUTSTANDING WARRANTS

The Head Deputy or Deputy-in-Charge shall review all felony cases in which a preliminary hearing or trial has not occurred due to the defendant's failure to appear. An arrest warrant shall be issued, or a bench warrant sought, in all such cases. The purpose of the review is to ensure that the statute of limitations has been tolled and to encourage due diligence in the execution of such arrest warrants.

When an arrest warrant is issued, the filing deputy shall advise the investigating officer of the "due diligence" responsibility to locate the accused and serve the arrest warrant.

11.13 CONFLICTS OF INTEREST AND RECUSAL MOTIONS

11.13.01 CONFLICTS OF INTEREST (PC § 1424)

Conflicts of interest present a unique problem for the public prosecutor. They can be "actual conflicts" when the facts rise to the level of the legal standard for disqualification of the Office, or "apparent conflicts" when the appearance of a conflict might undermine public confidence in the administration of justice if the District Attorney does not self-recuse from the matter.

Deputies shall always avoid situations that might give rise to an actual or apparent conflict of interest. If a deputy believes that a conflict of interest may exist, the deputy shall advise their Head Deputy. If the Head Deputy agrees that a conflict of interest may exist, the Head Deputy shall advise their Bureau Director.

Bureau Directors shall refer all conflict of interest issues to the Office's Conflict of Interest Designee. The current Conflict of Interest Designee is the Director of the Bureau of Fraud and Corruption Prosecutions. The Conflict of Interest Designee is the Office's liaison with the Attorney General's Office on all conflict of interest issues. The Conflict of Interest Designee shall review the matter to determine whether an actual or apparent conflict exists and whether the matter should be referred to the Attorney General's Office.

The Conflict of Interest Designee shall communicate the decision and, if the matter was referred to the Attorney General, the decision of the Attorney General, through the chain of command to the deputy who made the conflict referral and, if applicable, to the deputy or deputies who are handling the case or cases at issue.

11.13.02 CONFLICTS OF INTEREST INVOLVING THE ELECTED DISTRICT ATTORNEY

When it is believed the elected District Attorney should be recused from acting in a particular matter because of a conflict of interest, which may be equally attributable to all deputies, all investigators, and all other members of the Office, the matter should be referred to the Conflict of Interest Designee. The Conflict of Interest Designee shall review the matter to determine whether an actual or apparent conflict exists and whether the matter should be referred to the Attorney General's Office.

The Conflict of Interest Designee shall communicate their decision and, if the matter was referred to the Attorney General, the decision of the Attorney General, through the chain of command to the deputy who made the conflict referral and, if applicable, to the deputy or deputies who are handling the case or cases at issue.

11.13.03 RECUSAL MOTIONS MADE BY THE DEFENSE

The legal standard for a motion to disqualify or recuse the Office based on a conflict of interest claim is set forth in Penal Code § 1424. The motion may not be granted unless the evidence shows a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.

If a motion to recuse the Office is filed by the defense, the deputy assigned to the case shall determine whether the motion meets the procedural and substantive requirements of Penal Code § 1424. Specifically, Penal Code § 1424 requires that:

- The motion shall be served on both the District Attorney and the Attorney General at least 10 court days before the motion is heard. The 10-day notice is a jurisdictional requirement;
- The motion shall contain a statement of facts setting forth the grounds for the claimed disqualification and the legal authority relied upon;
- The motion shall be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit; and
- The motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial.

Upon receipt of a recusal motion, the deputy assigned to the case shall immediately notify, through chain of command, their Head Deputy and Bureau Director. The Bureau Director shall notify the Conflict of Interest Designee.

11.13.04 UNCONTESTED RECUSAL MOTIONS

In the event a deputy agrees with the defense that the Office may have a conflict of interest, the deputy shall discuss the matter with their Head Deputy and Bureau Director. In deciding whether the defense's assertion of a conflict is well taken, the deputy shall consider whether an actual conflict may exist under Penal Code § 1424 or whether an apparent conflict may exist that would undermine public confidence in the administration of justice if the Office did not disqualify itself. If the Bureau Director agrees that a conflict may exist, the Bureau Director shall notify the Conflict of Interest Designee in writing by memorandum or e-mail.

The Conflict of Interest Designee is responsible for notifying the Attorney General of the Office's position. The Conflict of Interest Designee shall prepare the necessary notification letter and attachments in event a conflict is found to exist. The decision of the Conflict of Interest Designee and any instructions will be communicated through the chain of command to the deputy.

11.13.05 CONTESTED RECUSAL MOTIONS

If after examining the defense motion and discussing the issues with their Head Deputy, a deputy is satisfied there is no conflict of interest requiring the recusal of the Office, the deputy shall determine if the motion conforms to the requirements of Penal Code § 1424. If the required 10-day written notice was not given, the deputy should argue the jurisdictional prerequisite has not been met. If the moving papers do not set forth both facts and legal authorities in support of the claimed disqualification, the deputy shall move to strike the motion. The deputy should resist the motion as vigorously as the law and the facts permit.

After receiving written notice of a defense motion to recuse the Office, the deputy assigned to the case shall notify, through the chain of command their Head Deputy, Bureau Director and the Conflict of Interest Designee. The Conflict of Interest Designee shall contact the Senior Assistant Attorney General in Los Angeles and forward a copy of all police reports, pertinent memoranda and motions. A deputy attorney general will be assigned to respond to the motion. The deputy attorney general should contact the deputy to discuss the matter prior to filing any written opposition. After discussion with the Attorney General, the deputy shall immediately inform the court of the Attorney General's involvement in the case.

11.13.06 APPELLATE REVIEW OF ADVERSE RULING

If a court grants a contested motion to recuse the Office, the deputy assigned to the case shall, through the chain of command, notify the Conflict of Interest Designee within two days. Within five days, the deputy shall forward through the chain of command a memorandum summarizing the basis of the motion, the court's ruling and the deputy's recommendation regarding appellate review to the Conflict of Interest Designee. Notification by e-mail or fax is acceptable.

The Conflict of Interest Designee shall review the matter, and, if in agreement with the deputy, shall supplement the deputy's memorandum with their views on the propriety of appellate review and forward all documentation to the Head Deputy of Writs and Appeals Division through the Director of the Bureau of Prosecution Support Operations within five days.

Motions to disqualify the District Attorney and a city attorney or city prosecutor must be made separately.

11.13.07 ATTORNEY CONFLICTS OF INTERESTS AND THE HARRIS DATABASE

In *Harris v. Superior Court* (2014) 225 Cal.App.4th 1129 (*Harris*), the Court of Appeal ordered the dismissal of a criminal information based on a showing that the attorney who represented the defendant at the preliminary hearing was concurrently being criminally prosecuted, by the same prosecuting agency, in a separate case. The appellate court found an inherent conflict of interest in such a situation, observing that, "[a]s a criminal defendant, it can reasonably be assumed that [the attorney] had an interest in maintaining a cordial and cooperative (if not subservient) relationship with the district attorney's office." (225 Cal.App.4th at 1139.) Additionally, the *Harris* court noted that deputy district attorneys in the office are presumed to have constructive

knowledge of cases that are being prosecuted anywhere in the county by the office. (225 Cal.App.4th at p. 1143, fn.12.)

In response to *Harris*, deputies shall inform defense counsel of a *Harris* conflict, as soon as it is discovered, when a defendant is being represented by an attorney who is either currently being prosecuted by the Office or on probation for a case prosecuted by the Office. The protocol is the same whether the case against the attorney involves felony or misdemeanor charges. Deputies are further directed to provide immediate notice of the conflict to the court in which the attorney's client's case is pending.

The deputy shall advise the attorney in writing that pursuant to *Harris*, the Office is required to provide notice to the court of the potential conflict and that the Office will ask the court to inquire of the defendant whether the defendant is willing to knowingly and intelligently waive the right to conflict-free counsel pursuant to the Sixth Amendment of the United States Constitution and article I, § 15 of the California Constitution.

Additionally, the deputy shall provide written notice to the court indicating that, pursuant to *Harris*, the Office believes there may be a potential conflict of interest based upon the fact that the attorney is being prosecuted by the Office while representing the named defendant in the instant case. Deputies shall request that the court advise the defendant of the conflict, allow the defendant to speak with an independent attorney if the defendant wishes and, if possible, obtain a knowing and intelligent waiver of the right to counsel free of any potential conflict. If the defendant refuses to waive, the deputy shall make sure that notice has been duly filed with the court and that the request to notify the defendant is on the record.

The period during which the Office is obligated to provide *Harris* notice requires consideration of the status of the criminal case against the defense attorney as well as the status of the criminal case involving their client. Notice requirements begin when a case is filed against an attorney and continue until the end of the attorney's grant of probation. Deputies must generally provide notice through sentencing of the defense attorney's client. If a deputy does not learn of a then-existing *Harris* conflict until after the attorney's client has been convicted and sentenced, and the client's matter is pending appeal, the deputy has an affirmative duty to contact the client's appellate counsel and inform counsel of the *Harris* conflict in support of a possible ineffective assistance of counsel claim.

In an effort to provide deputies with continuing access to a current log of attorneys affected by the *Harris* decision, the Office maintains a database (the *Harris* Database) in Lotus Notes. The *Harris* Database icon is located in the Lotus Notes workspace of all deputies. By clicking on the *Harris* Database icon, deputies will be able to review a regularly updated list of practicing criminal defense attorneys who are either being prosecuted by the Office in a pending case, or who are on probation for a case that was prosecuted by the Office, as well as other information of concern. An attorney whose *Harris* log listing is in red letters is presently ineligible to practice law in California.

The *Harris* Database contains links to templates for the letter that is to be completed and delivered to the defense attorney at issue and for the pleading that the deputy is responsible for

filing with the court when an attorney on the list is representing a criminal defendant. Deputies shall address *Harris* conflicts of interest on the record as soon as possible after the letter to the attorney has been sent or served and the *Harris* notice motion has been filed.

It is not necessary to inform either the Writs and Appeals Division or a Bureau Director about a criminal action when the defense attorney of concern is already identified in the *Harris* log. However, deputies continue to be responsible for following the protocol that directs deputies to contact the Head Deputy of the Justice System Integrity Division (JSID) when the Office charges an attorney (or any other member of the justice system) with a criminal offense.

If a deputy suspects that a defendant in a case is an attorney whose practice includes criminal defense work, the deputy is strongly encouraged to check the *Harris* Database log. If the attorney is not identified in the log, the deputy shall immediately seek to add the defense lawyer to the *Harris* Database. The *Harris* Database provides an online form that allows a deputy to submit the name of a criminal defense lawyer, along with other pertinent information, when the deputy believes that an attorney should be added to the log based on the criteria described above. Once an attorney's information is submitted via the online form, the Writs and Appeals Division will review the information and revise the *Harris* log accordingly.

If for any reason, a deputy believes that an attorney has been erroneously included or maintained in the *Harris* log, the deputy shall immediately inform the deputy's supervisor of this concern. If a discussion confirms the need for action, the Head Deputy of the Writs and Appeals Division should then be contacted and apprised of the basis for the belief that an attorney should be removed from the log.

Deputies will automatically receive email notification each time the *Harris* Database is updated. Deputies are expected to remain familiar with the identities of the attorneys listed in the *Harris* log so that they are able to fulfill their *Harris* obligations.

11.14 DETERMINATION OF FACTUAL INNOCENCE

Penal Code §§ 851.8 and 851.85 provide that a person who has been arrested but not charged, charged but not convicted, or charged but acquitted, may petition the law enforcement agency having jurisdiction over the offense, or the court, for a determination of factual innocence. A copy of the petition shall be served upon the prosecuting attorney of the county or city having jurisdiction over the offense. If the petition is granted, all records of the arrest and any related court proceedings must be sealed for three years from the date of the arrest and then destroyed.

The procedures for handling a petition for determination of factual innocence are covered in detail in Legal Policies Manual Chapter 9, *Misdemeanor Case Management,* § 9.08, *Determination of Factual Innocence*. The same policy and procedures apply in felony cases.

11.14.01 PERSON CHARGED AND CONVICTED

- Penal Code § 851.86

When a person is convicted of a charge, but the conviction is set aside based upon a determination that the person was factually innocent, the court shall order that the records be sealed and later destroyed as provided in § 851.8. The determination of factual innocence may be made upon written or oral motion of any party in the case, or the court, and with notice to all parties to the case. If such an order is made, the court shall inform the defendant of the availability of indemnity for persons erroneously convicted pursuant to Penal Code §§ 4900 et seq. and the time limitations for presenting those claims.

Whenever a deputy learns that a defendant has filed a petition for a determination of factual innocence pursuant to Penal Code § 851.86, that deputy shall promptly notify their Head Deputy. That Head Deputy shall promptly notify the Head Deputy of the Post-Conviction Litigation and Discovery Division. The Post-Conviction Litigation and Discovery Division will then notify the Attorney General's Office and facilitate communication between the Attorney General's Office and the deputy handling the case.

11.14.02 INDEMNIFICATION OF PERSONS ERRONEOUSLY CONVICTED

- Penal Code § 851.865

If a person has secured a declaration of factual innocence from the court pursuant to Penal Code §§ 851.8 or 851.86, the court's finding shall be sufficient grounds for payment of compensation to the person by the California Victim Compensation and Government Claims Board for a claim made pursuant to §§ 4900 et seq. It should be noted, however, that §§ 4900 et seq. only apply to persons who were convicted of a felony and sentenced to state prison or county jail for that felony conviction.

Penal Code § 4904 provides that if the person has sustained pecuniary injury as a result of their erroneous conviction and imprisonment, the California Victim Compensation and Government Claims Board shall submit a recommendation to the Legislature that the person be indemnified for the pecuniary injury by a sum equivalent to $100 per day of incarceration subsequent to the person's conviction.

- Penal Code § 1485.5

Penal Code § 1485.5 provides that if the District Attorney stipulates to, or does not contest, the factual allegations underlying one or more of the grounds for granting a writ of habeas corpus, or a motion to vacate a judgment, the facts shall be binding on the Attorney General and the Claims Board.

It also requires the District Attorney to give notice to the Attorney General prior to entering into a stipulation of facts that will be the basis for the granting of a writ of habeas corpus or a motion to vacate a judgment. (See PC § 1485.5(b).)

Whenever a deputy handling a writ of habeas corpus, or a motion to vacate a judgment, contemplates entering into a stipulation to, or not contesting, the factual allegations underlying one or more of the grounds for granting the writ or motion, that deputy shall promptly notify their Head Deputy. That Head Deputy shall promptly notify the Head Deputy of the Post-Conviction Litigation and Discovery Division. The Post-Conviction Litigation and Discovery Division will then notify the Attorney General's Office and facilitate communication between the Attorney General's Office and the deputy handling the case.

11.15 CHALLENGE OF A JUDGE

11.15.01 PEREMPTORY CHALLENGE IN AN INDIVIDUAL CASE

The peremptory challenge of a judge in an individual case requires prior Head Deputy approval. The affidavit must state that the judge is prejudiced against the interests of the People, not that the judge is prejudiced against the *attorney* for the People. The Head Deputy shall inform the Bureau Director of the decision to file a peremptory challenge against a judge. Code of Civil Procedure § 170.6 allows the prosecution and the defense to make only one challenge of a judge in an individual case. The decision to challenge a judge should be discreetly exercised and confined to unusual situations.

11.15.02 PEREMPTORY CHALLENGE IN ALL CASES OR CHALLENGE FOR CAUSE

The peremptory challenge of a judge in all cases, or a challenge for cause, requires Chief Deputy approval. To obtain approval, the Head Deputy or Deputy-in-Charge shall forward a memorandum to the Chief Deputy through the chain of command explaining the reasons for the challenge.

11.16 STIPULATION TO COMMISSIONER

11.16.01 COMMISSIONERS

No preliminary hearing, motion, trial or sentencing matter shall be heard before a commissioner acting as a judge or magistrate without a written stipulation. The written stipulation must be signed by the deputy, defense counsel and defendant and filed with the court. A copy shall be placed in the case file.

11.16.02 PRIVATE ATTORNEYS

Generally, a deputy shall not stipulate that a private attorney may act as a judge or magistrate. In those rare instances in which it is deemed advisable to enter into such a stipulation, prior Bureau Director approval shall be obtained and the stipulation shall be in conformity with the procedures set forth above.

11.17 ESCAPED, ERRONEOUSLY RELEASED OR CAPTURED PRISONERS

When a prisoner escapes or is erroneously released from county jail, the Sheriff's Department will immediately notify the arresting agency and the Office's Command Center. The Command Center will immediately notify the Head Deputy of the division, branch or unit that prosecuted or is prosecuting the case. It is the Head Deputy's responsibility to immediately notify their Bureau Director, the trial deputy and Media Relations Division.

The trial deputy shall contact the investigating officer on the case to determine if the suspect-at-large presents a danger to the safety of any witness or justice system employee. If such a danger exists, the investigating officer and trial deputy shall take whatever action is deemed necessary to provide appropriate protection for the witness or justice system employee including witness relocation through the Witness Protection Program administered by the Bureau of Investigation.

When the escaped or erroneously released prisoner is captured or apprehended, the Sheriff's Department shall immediately notify the arresting agency and the Office's Command Center. The Command Center will then notify the Head Deputy who will notify the Bureau Director, trial deputy and Media Relations Division.

11.17.01 EXTRADITION OF ESCAPED OR ERRONEOUSLY RELEASED PRISONERS CAPTURED IN ANOTHER STATE

An escaped or erroneously released prisoner captured in another state shall be extradited absent compelling reasons not to do so. A refusal to extradite an escaped or erroneously released prisoner requires Bureau Director approval.

11.18 CRIMINAL CASE INFORMATION SECURITY

The daily flow of confidential information is critical for the Office to operate successfully. Any policy on the disclosure of information must balance the need for security and the need for the efficient exchange of information within the Office, from the Office to law enforcement agencies, and to members of the public. Information on criminal cases being handled by the Office shall be disclosed, over the telephone, only as follows:

- If the caller is a deputy district attorney, member of law enforcement, or probation officer personally known to the employee possessing the requested information, and the caller has a need to know the information, the information should be disclosed;
- If the caller is not personally known to the employee possessing the requested information, and claims to be a deputy district attorney, member of law enforcement, or probation officer, the employee possessing the information must request and receive a callback verification number from the caller. If the number is verified, and there is a need to know the information, the information should be disclosed;
- If the caller is seeking information which is generally available to the public (e.g., time and location of a court appearance), that information should be given;
- Under no circumstances should the names, addresses or telephone numbers of witnesses be disclosed over the telephone; and

- Detailed information or prosecution strategy on a case should never be discussed over the telephone. Only the bare minimum facts, on a verified need-to-know basis, should be disclosed telephonically.

11.18.01 FILE NOTATIONS

Any employee who, in compliance with these guidelines, telephonically discloses information of a non-public nature shall make a notation of what was disclosed and to whom it was disclosed. This notation should be placed in the case file or, if the file is not accessible, sent in written form to the deputy handling the case.
If an employee has any doubt about the identity of the caller, the validity of the call-back number, or whether the caller has a need to know, the employee should immediately contact the Assistant Chief of the Bureau of Investigation.

Commentary
It is essential that all employees prevent breaches of office security through the inadvertent disclosure of confidential information to persons not authorized to receive such information. Strict compliance with this policy should ensure that such breaches do not occur.

11.19 DEFENSE ATTORNEY REQUEST FOR CASE REVIEW

This section sets forth the appeal policy for attorneys representing defendants or minors whose cases are being prosecuted by the Office. One of the most important responsibilities of a supervisor within the Office is the duty to meet and confer with defense counsel concerning cases that fall within the supervisor's jurisdiction. If a defense attorney disagrees with the assigned deputy's proposed disposition of a case, the defense attorney has the right to discuss the case disposition with the deputy's supervisor. An appeal by defense counsel to a proposed disposition on a filed case shall be made according to the following policy.

An appeal in a felony case may be made through the chain-of-command to the appropriate Head Deputy. After this process has been followed, and if no resolution has been reached, upon written application, an appeal on *any* case may be made to the appropriate Bureau Director. The Bureau Director may meet with defense counsel to review the matter. The decision to meet with defense counsel is at the discretion of the Bureau Director and should only occur after a discussion of the case with the Head Deputy. The Bureau Director may confer with the appropriate Assistant District Attorney concerning the merits of the defense counsel's appeal before reaching a final decision in the matter.

Defense counsel who wish to discuss a potential disposition on a pending matter should be referred to the appropriate supervisor for a meeting to discuss the case. In accordance with this policy, a defense attorney shall have the opportunity to meet with the assigned supervisor in person to discuss the case. A decision on an appeal should be carefully made and should take into consideration the assessment of the assigned prosecuting attorney and any other supervisors who may have previously reviewed the case. The views of law enforcement and victims, if applicable, should also be considered. The preferred practice is for the Head Deputy or Bureau

Director to meet defense counsel in the presence of the assigned prosecuting attorney handling the case and any intermediate supervisor who took part in the decision being appealed.

Refer to Legal Policies Manual § 6.02 for the Office policy for requests by defense counsel for an informal hearing before a charging decision has been made.

11.20 HARRIS REPORT - CASE MANAGEMENT POLICY AND PROCEDURE

11.20.01 INCREASED COMMUNICATION AMONG PROSECUTION TEAM MEMBERS

Thorough and timely communication between all members of the prosecution team is essential to the pursuit of justice in all cases. It is vital that open and active lines of communication exist between law enforcement, Victim Services Representatives (VSRs), support staff and attorney staff. While this is particularly true in VIP-category cases, it is an important aspect in every case the Office prosecutes. The following policies are implemented to encourage and facilitate better communication among members of the prosecution team throughout the Office:

- Detailed, immediate, written documentation of every pertinent event occurring at all stages of the proceeding shall be included in the case file.
- A "Request for Case Appearance" form shall be completed whenever a deputy assigned to Sex Crimes, Family Violence, Elder Abuse, and Stalking is unable to make a court appearance and requests another deputy to make the appearance. The form is also recommended for use by deputies in other assignments who are vertically prosecuting a case. The form is available in PIMS.
- A uniform approach to writing the Statement of Facts at the time of filing, which shall include the defendant's complete criminal history, facts surrounding the offense(s), and any strengths, weaknesses and possible defenses. In the event a pre-filing interview was conducted, the Statement of Facts shall include the filing deputy's impressions of the victim and the level of danger, if any, posed to the victim.
- All authorizations necessary for case disposition shall be documented in writing using a disposition report prior to an offer being placed in the file or conveyed to the defendant. In cases alleging strike priors, Head Deputy authorization to strike a strike shall be obtained and noted in the file in conjunction with the entry of the disposition offer.

11.20.02 INCREASED COMMUNICATION WITH VICTIMS

Clear and consistent lines of communication must also be established with victims. The following policies reflect best practices for deputies in all cases and are actively encouraged to the extent practicable. In every VIP-category case, however, deputies will be required to comply with the following procedures:

- Make contact with victims as soon as feasible after each court appearance to keep them abreast of the current status of the case and the next court date. Telephonic contact is preferred, but written communication is acceptable if telephone contact cannot be established.

- Notify the victim of any important occurrence(s) in the case and attempt to preserve open lines of communication in order to build rapport and maintain good relationships with the victims in each case.
- Make every effort reasonably possible to notify victims and law enforcement before a case settlement offer is tendered and before a defendant is released from custody. If prior notification has not occurred, do so as soon as possible following the court appearance.
- Document all contacts with, or efforts to contact, the victim in the case file.

11.20.03 INCREASED ACCOUNTABILITY

It is the goal of the Office to ensure that all deputies are thoroughly familiar with the expectations for performance in their role as a prosecutor; this is particularly true of deputies who are assigned to special units that prosecute VIP-category cases. All deputies who handle VIP-category cases are expected to conform to the following guidelines, regardless of whether the deputy appearing on the case is assigned to a special unit that prosecutes VIP-category cases:

- It is the policy of the Office to object to the assignment of any VIP-category case to an early disposition court except in unusual circumstances. Early disposition programs are presumptively not the appropriate venue for resolution of VIP-category cases. To rebut this presumption, the approval of a supervisor (Deputy-in-Charge, Assistant Head Deputy or Head Deputy) is required. In such circumstances, the reasons for agreeing to the assignment of the case to an early disposition court shall be documented in the file.
- The deputy filing the case shall complete a protective order form at the time of filing a VIP-category case. Protected parties should include any appropriate victim or witness in any case falling within one of the VIP categories. The deputy assigned to appear at the arraignment will be responsible for presenting the protective order application to the court and shall be prepared to argue good cause for issuance of the order.

Commentary

By implementing the policies and procedures outlined above, it is the expectation of the Office that all staff members will better serve the interests of public safety.

11.21 MARSY'S LAW - THE VICTIMS' BILL OF RIGHTS ACT OF 2008

On November 4, 2008, California voters passed Proposition 9 -- The Victims' Bill of Rights Act of 2008, also known as "Marsy's Law." Proposition 9 amended article I, § 28, of the California Constitution, enumerating crime victims' rights.

11.21.01 DEFINITION OF VICTIM

Article I, § 28(e), now expands the definition of victim to include:

> . . . a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act . . . includ[ing] the person's spouse, parents, children, siblings, or guardian . . . .

Upon request, all reasonable efforts shall be made to consider requests from these collateral victims.

11.21.02 MARSY'S RIGHTS

Pursuant to article I, § 28(b)(17), victims have a constitutional right to be informed of their "Marsy's Rights" as enumerated in article I, § 28 (b), of the California Constitution. To that end, Penal Code § 679.026(c)(1), requires:

> [e]very law enforcement agency investigating a criminal act and every agency prosecuting a criminal act shall, . . . at the time of initial contact with a crime victim, during follow-up investigation, or as soon thereafter as deemed appropriate by investigating officers or prosecuting attorneys, provide or make available to each victim of the criminal act . . . a "Marsy's Rights" card.

Upon the filing of criminal charges, the Office shall notify the listed victims, and any identified next of kin or guardians, of the rights under article I, § 28(b).

11.21.03 BAIL

Article I, § 28(b)(3), grants victims the constitutional right to have their safety and the safety of their families considered in the setting of bail. This is consistent with existing policies and practices of the Office. In advocating for bail, deputies currently take into consideration the safety of the public, which includes the safety of the victim and the victim's family. Deputies shall continue to advocate for bail according to the California Constitution, provisions of the Penal Code, other relevant statutory provisions, and the Legal Policies Manual.

Proposition 9 mandates that the victim as well as the prosecutor be given notice and an opportunity to be heard. Any deputy who receives notice of a hearing covered by article I, § 28(f)(3), shall make all reasonable efforts to notify the victim of the date and time of the hearing.

11.21.04 DISCOVERY

Victim's Address

Article I, § 28(b)(4) grants a victim the right to "prevent disclosure of confidential information . . . which could be used to locate or harass the victim . . . ." This does not alter obligations imposed by the Due Process Clause of the United States Constitution. Deputies shall continue to comply with Penal Code § 1054.1 which requires the disclosure of the addresses of intended witnesses, even when the witness is a victim. Of course, if disclosure of such information would endanger the victims or witnesses, deputies shall seek to prevent disclosure through mechanisms available through established criminal procedures and practices as well as Office policy.

Right to Refuse an Interview

Pursuant to article I, § 28 (b)(5), which allows a victim to "refuse an interview, deposition, or discovery request by the defendant," and to set "reasonable conditions" on any interview to which the victim does consent, deputies may inform victims that they have the right to set reasonable conditions for, or to entirely refuse, a defense interview. Deputies shall not advise the victim to adopt, nor advocate for, any course of action. It is important to distinguish this right held by the victim with discovery obligations regarding information that deputies obtain from victims. All discovery must properly be disclosed to the defense pursuant to Penal Code §§ 1054 et seq.

Compliance with Discovery Request

Evidence entirely in the possession of the victim or other third parties may be obtained by the defense through the use of a subpoena duces tecum. If a victim chooses to assert the constitutional right to refuse compliance, the victim may seek to quash the subpoena. The trial court must balance the victim's right under the California Constitution against the defendant's rights as guaranteed by the Federal Constitution. Deputies should be prepared to argue for disclosure if failure to comply with the discovery requests will conflict with ethical obligations or any other duties inherent in the pursuit of justice.

11.21.05 VICTIM NOTIFICATION

Article I, § 28(b)(6), (7) and (8), grant victims the rights to "reasonable notice" of the filing and progression of cases, to "reasonably confer" with prosecuting attorneys regarding filing, extradition, and disposition decisions, to be present at hearings and to be heard by the court at specified proceedings. The notice requirements of subdivisions (b)(6), (7) and (8), are triggered by a victim's "request" for notification and consultation. If a victim requests notification and consultation, employees shall initiate office procedures designed to meet this request. If there is no specific request, employees shall proceed as otherwise mandated by statute and the Legal Policies Manual.

Prosecutorial Discretion

Although deputies shall confer when reasonable with any victim who so requests, prosecutorial discretion must be exercised in compliance with the United States Constitution, the California Constitution, the Penal Code and the Legal Policies Manual. The basic principles underlying the duties of a prosecutor are defined as follows:

> [I]t is the sworn duty of a district attorney to fairly and impartially prosecute persons accused of crime, and to protect as well the individual rights of an accused person as those of the whole people, whose laws he is specifically enjoined to uphold and maintain, yet there is, and must be, committed to his judgment many matters of discretion in the discharge of his duties as a public official. (*People v. Johnson* (1910) 13 Cal.App. 776, 780.)

Case Status

Although Proposition 9 requires victim notification of case status only upon "request," deputies shall continue to comply with Legal Policies Manual § 11.03.08, which states:

> Deputies handling serious or violent felonies, hate crimes, domestic violence or sexual assault cases shall personally notify the victim if the case is dismissed or the defendant is not held to answer after a preliminary hearing.

Additionally, § 11.06.05 requires deputies to "notify the victim(s)" if any of these cases are "dismissed or the defendant is acquitted."

Disposition

Prior to settling any felony case, § 12.15.01, of the Legal Policies Manual requires a deputy, "within reason," to "attempt to notify the victim or next of kin before the plea is entered." If it "is not possible to notify the victim of the disposition before the plea is entered, the deputy must ensure that notification is made later, either by the Office or by the Probation Department." Legal Polices Manual § 24.08 further states, "Deputies shall explain and discuss proposed case settlements with victim(s). Communication of the results of a case to the victim(s) must be made as soon as possible."

Sentencing

Article I, § 28(b)(12), gives victims the right, upon request, to be informed of "the conviction, sentence, place and time of incarceration . . . the scheduled release date of the defendant, and the release of or escape by the defendant from custody." If requested by the victim, the Office must inform the victim of the conviction and disposition of a case. Currently, if a victim fills out a form, the Department of Corrections and Rehabilitation will keep the victim informed of the required information for defendants sentenced to state prison. Requests for information regarding the incarceration of a defendant in county jail must be addressed to the Los Angeles County Sheriff's Department.

Penal Code § 1191.1, grants a statutory right to "[t]he victim of any crime [guardians of minor victims], [next of kin of deceased victims] . . . to attend all sentencing proceedings," and the right to "be given adequate notice by the probation officer of all sentencing proceedings . . . ." (PC § 1191.1.) Pursuant to Legal Policies Manual §§ 9.05.04 and 13.03.02, in any case in which a court is contemplating immediate sentencing, the deputy shall remind the court of the statutory obligation to contact the victim or the victim's next of kin to allow them to be present at the time of sentencing. In felony cases, the Probation Department has the primary obligation to provide adequate notice to the victims. (LPM § 13.03.02.)

11.21.06 VICTIM'S RIGHT TO A SPEEDY TRIAL

Pursuant to article I, § 28(b)(9), a victim has the right to a speedy trial. When victims are unwilling to accept a trial schedule as set by court and counsel, trial deputies shall be prepared to

argue that the rights of the People to a fair trial, and/or the rights of the defendant, necessitate a continuance, even if this is contrary to the asserted rights of the victim. While the Office remains sensitive to the needs of victims, the foremost concern is the just prosecution of a constitutionally valid case.

11.21.07 PROBATION REPORTS

Under article I, § 28(b)(10) and (11), victims have the right to provide information to the probation department and to request pre-sentence reports. The Probation Department is the entity responsible for complying with these subdivisions.

11.21.08 RESTITUTION

Section 13.03.01 of the Legal Policies Manual requires all deputies to "make it a priority to assist victims who have suffered financial losses." Under Proposition 9, victims retain their constitutional right to restitution, but now under article I, § 28 (b)(13)(C), "All monetary payments, monies, and property collected from any person who has been ordered to make restitution shall be first applied to pay the amounts ordered as restitution to the victim." With the passage of Proposition 9, courts would appear to be precluded from excusing a defendant from making restitution for "compelling and extraordinary reasons."

As always, deputies shall ensure that appropriate restitution fines and restitution orders are put on the record when sentence is imposed. (LPM § 9.05.03.) "In cases in which restitution on uncharged or dismissed counts should be sought, the deputies shall be prepared to take the appropriate waivers in compliance with *People v. Harvey* (1979) 25 Cal.3d 754," and to "notify the Probation Department by placing a memo in the case file." (LPM § 24.12.02.) Deputies "are to seek the maximum appropriate restitution fine and penalty assessment." (LPM § 12.04.04.)

11.21.09 REQUESTS FOR RETURN OF PROPERTY

Although victims have a right under article I, § 28(b)(14), to the "prompt return of property when no longer needed as evidence," criminal cases have a life long after the trial court has pronounced sentence. Cases may be reversed on appeal or new trials granted years or even decades after the original conviction. Deputies shall oppose any return of property until there is no possibility that the capacity to effectively retry a case will be in any way compromised. Deputies shall be familiar with Penal Code § 1417 et seq., and § 11.08.06 of the Legal Policies Manual.

11.21.10 ENFORCEABLE RIGHTS

Pursuant to article I, § 28 (c)(1), each of the above-enumerated rights contained therein are personally enforceable by the victim, the retained attorney of a victim, a lawful representative of the victim, or the prosecuting attorney upon the request of the victim. Prosecutors can only act on the request of a victim in this regard to the extent that they are able to maintain ethical obligations and prosecutorial independence and discretion.

In any cause of action brought by the victim or the victim's representative, Marsy's Law specifically excludes monetary damages against the state, county or officer/employee of the court.

11.21.11 EARLY RELEASE PROHIBITION

Although a prohibition on any early release policies "intended to alleviate overcrowding" which "substantially diminish" a defendant's sentence is included as a victims' right under article I, § 28(f)(5), compliance with this provision is the responsibility of the penal institution, either at the county or state level. Challenges to the enforcement of this provision are properly addressed to the legal representatives of those agencies, specifically County Counsel or the California Attorney General.

11.21.12 EARLY PAROLE OF SECOND STRIKE INMATES

The California Department of Corrections and Rehabilitation (CDCR) evaluates second strike inmates convicted of non-violent offenses to determine if parole should be granted after the inmate has served 50% of the sentence. When the Board of Parole Hearings (BPH) is considering an early release, BPH will send a letter to notify the Office. BPH requests a written response when the Office objects to early release. The Parole Division shall evaluate and prepare the written response. The response is due within 30 calendar days of the date of the BPH's letter. The Head Deputy of Parole Division shall be contacted immediately upon receipt of any correspondence from the BPH/CDCR regarding the early parole of second strike inmates on non-violent offenses. The Parole Division shall contact the Bureau of Victim Services to ensure efforts are made to contact any victim(s) impacted the potential early release of the inmate.

11.22 DISCLOSURE OF RAP SHEETS

It is a misdemeanor to release state or local summary criminal history information (rap sheets) to anyone not authorized to receive them. (PC §§ 11142, 13302.) Consequently, caution should always be exercised when disclosing information to anyone from either state rap sheets or PIMS.

It is important to note that state rap sheets are records of the Department of Justice and furnished by the Attorney General only to authorized agencies to fulfill their duties. (PC § 11105.) The District Attorney is approved to receive such records. (PC § 11105(b)(3).) Likewise, a defense attorney may receive state rap sheets from the Attorney General when representing a client in a criminal case "if authorized access by statutory or decisional law." (PC § 11105(b)(9).)

A copy of the *defendant's* criminal record should be provided to the defendant's attorney at the time of arraignment. (PC § 11105(b)(9).)

Deputies complying with their obligation to disclose the record of *prosecution victims and witnesses* to the defense should only release information about the relevant offenses. (PC § 1054.1(d).) The information to be disclosed "is restricted to the name or type of crime and the date and place of conviction." (*People v. Allen* (1986) 42 Cal.3d 1222, 1270.) Victims' and

witnesses' physical rap sheets should never be disclosed nor given to defense counsel as they may contain identifying information (CII numbers) and irrelevant convictions and arrests. (*People v. Santos* (1994) 30 Cal.App.4th 169, 176.)

Trial courts are also approved to receive rap sheets from the Attorney General. (PC § 11105(b)(1).) Rap sheets, however, are not furnished to trial courts at the time a case is filed because court records, with limited exceptions, are open for inspection by any member of the public. (*Estate of Hearst* (1977) 67 Cal.App.3d 777, 782.) Placing rap sheets in court files would destroy the statutory scheme limiting access to such records.

However, if a judge requests to review either a defendant's or witness's rap sheet, the judge should be permitted to inspect it. Once reviewed, it should be returned and retained in the case file. Rap sheets should never be placed in the court's file where they would be made available for public inspection.

The release of local criminal history information (PIMS) is also restricted and should only be disclosed as detailed in Legal Policies Manual § 23.06 et seq., and 89 Opinions of California Attorney General 204 (2006).

11.23 NARCOTICS ASSET FORFEITURE CASES

Under California's Narcotics Asset Forfeiture law (H&S §§ 11470 et seq.), in contested civil forfeiture cases involving less than $25,000 in cash or cash equivalents, a conviction of one of the drug trafficking charges enumerated in Health and Safety Code § 11470 in an underlying or related criminal cases **is mandated** to support a judgment of forfeiture. In addition, the civil forfeiture case must be tried before same trier of fact as the underlying criminal case and must be proved beyond a reasonable doubt. These procedures require the deputy litigating the underlying or related criminal case to also try the forfeiture case as well. Cases involving $25,000 or more are handled in their entirety by the Asset Forfeiture Section as civil cases independent of any criminal action.

A contested narcotics civil asset forfeiture case involving less than $25,000 in cash or cash equivalents requires the conviction "of a defendant" for violating Health and Safety Code §§ 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, 11383, or a felony violation of 11366.8, or for a conspiracy to violate one of these sections. In any case in which property has been seized for forfeiture, the filing deputy will note "Agency seeking forfeiture filing" on the case summary to alert subsequent deputies of the potential forfeiture case.

11.23.01 MOTIONS FOR RETURN OF PROPERTY

If a motion for return of property is made in connection with a criminal case, the Asset Forfeiture Section is to be notified immediately. Sample points and authorities will be sent or faxed if enough notice is provided.

11.23.02 FORFEITURE FILING AND NOTIFICATION

The Superior Court requires a defendant or other party wishing to contest a seizure of property to file a claim in the judicial district in which the underlying or related case is pending, and for the forfeiture case to bear the same case number as the criminal case.
The procedure is as follows:

1. The asset forfeiture filing will be presented by the arresting agency to the Asset Forfeiture Section.

2. If a forfeiture case is filed, potential claimants will be served with notice of the forfeiture by the deputy handling the pending underlying or related criminal case if the potential claimant is a defendant.

3. Potential claimants are instructed to serve a conformed copy of their claim, if any, on the Asset Forfeiture Section. If a defendant or other claimant serves a claim on Central Operations or Branch and Area personnel, the Asset Forfeiture Section shall be notified immediately and a copy of the claim forwarded to the Asset Forfeiture Section.

4. In those cases in which a claim is filed and the Asset Forfeiture Section is notified, the Asset Forfeiture Section will issue a petition to forfeit the property using the criminal case number and will serve it upon the claimant.

5. Once the Claim Opposing Forfeiture and the Petition for Forfeiture are filed, the criminal and the civil forfeiture actions will be joined. The two forms of actions have entirely different time limits, and it is possible that by the time the forfeiture case is ready to be joined with the criminal case, the criminal case may have been resolved. The Superior Court requires these cases to be heard by the same court that heard the criminal case, even if the criminal case has been resolved.

11.23.03 FORFEITURE LITIGATION

If it appears from the criminal case file that a forfeiture action may be an issue, the deputy handling the criminal case should contact the Asset Forfeiture Section to determine the status of any forfeiture action. If a forfeiture action has been rejected, or if the potential claimants have failed to respond to the forfeiture notice, no further action need be taken by the court nor the deputy handling the criminal case.

11.23.04 RECORD KEEPING

Every seizure of cash is deposited by the seizing agency into an account maintained and monitored by the Office. This account is subject to audit and careful record keeping is essential. It is imperative that when a forfeiture case is tried or settled in conjunction with a criminal case the Asset Forfeiture Section be notified of the result. A memorandum, or a copy of a minute order reflecting the result of the trial or the settlement, should be sent or faxed to the Asset Forfeiture Section as soon as possible after the event. If all or a portion of the seized property is

to be forfeited, the Asset Forfeiture Section will prepare a judgment for forfeiture for the judge to sign. If the forfeiture matter fails, the property will be returned. In either case, the record keeping shall be maintained in a central location.

If there are any questions about these procedures generally or about any particular case, deputies are encouraged to contact the Asset Forfeiture Section.

11.24 PROPOSITION 47

11.24.01 HANDLING OF PROPOSITION 47 CASES FILED FOR ARREST WARRANT

Many cases filed by the Office which precede the passage of Proposition 47 (Prop 47) were filed for arrest warrant and remain in warrant status. Prop 47 affected matters should be addressed as defendants surrender or are arrested on an outstanding warrant.

The assigned deputy should review the defendant's current criminal history and determine if the defendant has ever been convicted of a "superseding prior," which disqualifies defendants from Prop 47 relief. If the charged offenses are subject to reductions as misdemeanors, the deputy should possibly consider alternative felony charging. If felony charges are reducible under Prop 47, the case file should immediately be turned over to local prosecutors if the charged offenses occurred in a municipality that prosecutes its own misdemeanors.

In Prop 47 cases handled by the Office, the following guidelines apply:

- When the matter is called in court, ask the bench officer for leave to amend the felony complaint, by interlineation, to reflect changes effectuated by Prop 47 that a charged offense is now a misdemeanor; or (b) that a new charge (such as petty theft, pursuant to Penal Code §§ 484(a)/490.2) should be added, and a now inapplicable offense (such as grand theft) should be dismissed.

- Do not attempt to generate an amended complaint through PIMS that reflects a charged offense is being reduced to a misdemeanor under Prop 47. PIMS has been modified to adapt prospectively to changes implemented by Prop 47 and may not permit revisions to charges that were filed prior to the passage of Prop 47.

- If the court insists that a new charging document be filed that reflects proposed changes necessitated by Prop 47, handwrite or type all appropriate revisions onto a copy of an existing complaint, identify the document as an amended complaint, then file it with the judicial assistant, securing conformed copies for the defense and for the case file.

11.24.02 VICTIM'S RIGHTS UNDER PROPOSITION 47 CASES FILED FOR ARREST WARRANT

Marsy's Law notification letters may not have been generated in cases that were filed for arrest warrant and are now affected by Prop 47. In such cases, victim notification letters should be

mailed before any action is taken in a case involving civilian victims, including dismissals initiated either by the Office or by defense motion. Restitution collection mechanisms that exist for felonies are likely to cease if an offense is reduced to a misdemeanor. Deputies shall undertake reasonable efforts to ensure that defendants continue to satisfy any outstanding restitution orders.

11.25 ANIMAL CRUELTY CASES

One of the main goals of the Animal Cruelty Prosecution Program is to ensure that animal cruelty cases are appropriately filed and vigorously prosecuted, and that dispositions are consistent and uniform throughout the county. The following policies have been implemented to ensure that both of these goals are met.

One of the distinguishing features of the Animal Cruelty Prosecution Program is the trained deputies who are assigned to vertically prosecute cases in which the primary charges involve crimes against animals. Each Head Deputy and Deputy-in-Charge shall appoint an animal cruelty designee and provide the Animal Cruelty Case Coordinator (ACCC) with the name of the designee. In order to avoid frequent turnover, managers should make every effort to appoint designees who are not expected to be transferred in the near future.
Every designee is required to attend an animal cruelty prosecution training. Upon appointment, a new designee shall immediately contact the ACCC so that a training can be scheduled.

When an assigned animal cruelty designee becomes aware that the designee is going to be transferred, the designee shall immediately notify the ACCC.

Animal cruelty cases should be vertically prosecuted by the assigned designee. Animal cruelty cases shall not be sent to an early disposition court (EDP).
It is the responsibility of all parties involved in an animal cruelty case to ensure that an animal that has been seized as evidence is not held longer than is necessary. For more details regarding procedures to follow with evidence animals, see Legal Policies Manual § 11.08.07.

There is a high level of interest by the public and the media in cases involving animals. A deputy shall notify both the ACCC and Media Relations if the deputy files or is assigned a case where there is any potential for media coverage if the case would be of interest to the public.

For additional resources, refer to the Animal Cruelty section located under the “Library” tab on LADAnet.

11.26 CERTIFIED PRIORS

In many cases, certified priors from the California Department of Corrections and Rehabilitation and other agencies may already be in the possession of the Office. In order to efficiently manage certified priors and avoid duplicative requests, the following procedures shall be implemented:

1. All branch office paralegals and Central Priors Unit staff will utilize the Certified Priors Database in Lotus Notes to log and track all certified priors documents in the possession

of the Office. This will enable branch paralegals and Central Priors Unit staff to share information about these documents and defendants, eliminate duplicate requests to outside agencies as well as significantly improve the Office's ability to locate priors documents for use in court.

2. All certified priors documents shall be maintained in the Office's Central Priors Unit in standard 10" by 15" manila envelopes. The envelopes shall be filed by the CII number which is affixed to the envelope in color coded tabs.

3. At the conclusion of a case, deputies shall return all certified priors that have not been entered into evidence and retained by the court to a paralegal or Central Priors Unit staff. Priors documents include all Penal Code § 969b priors packets, certified booking photos and fingerprint cards, certified California rap sheets, certified FBI rap sheets, or any similar documentary evidence gathered to establish a defendant's identity or prior criminal record. Priors documents shall not be left in a closed case file.

4. Whenever possible, deputies shall attempt to introduce into evidence photocopies of original certified documents rather than the originals themselves so that the originals may be returned to the Central Priors Unit and filed in case they are needed again. If a stipulation to the introduction of photocopies is unavailable, the court may, in its discretion, admit photocopies if the originals have been made available to the defense for inspection prior to or at trial. (EC §§ 1521 and 1522.)

11.27 IN-CUSTODY DEFENDANTS IN WHEELCHAIRS/STRETCHERS

In-custody defendants who require the use of a wheelchair pose significant security and transportation problems for the sheriff's department. Delivering these individuals to the various courtrooms throughout the county requires the use of special vehicles and special personnel, and invariably results in lengthy delays in court proceedings. In an effort to alleviate these problems, the Los Angeles Superior Court implemented a policy on the handling of these defendants.

All cases (including probation violation matters) involving in-custody defendants using wheelchairs will be assigned to the Clara Shortridge Foltz Criminal Justice Center (CJC) following arraignment. Post arraignment, the court will transfer the case to the CJC for all further proceedings, including sentencing. At any point during the proceedings, cases will be returned to the original jurisdiction if the defendant is released from custody or no longer requires the use of a wheelchair. Exceptions to this court policy may be made when the court, prosecutor, or defense attorney can demonstrate some compelling reason the case should remain in the original jurisdiction. Cases involving numerous civilian witnesses may fall into that category. In such instances, the presiding judge of the superior court will decide whether an exception should be granted.

After a case has been assigned to the CJC for further proceedings, the deputy appearing at the arraignment should immediately notify their supervisor of the transfer. The prosecution case file should be sent, via county mail, to the Special Assistant to the Director of Central Operations for assignment to a deputy assigned to Central Operations for further handling. Concurrent with the

sending of the file, a phone call or email to the Special Assistant should be made providing information regarding the transfer of the case, including details on the next court date, the department in which the case has been calendared and the status of the case (i.e. 0/10 or 5/10 for preliminary hearing). If the case is assigned to a court for preliminary hearing, the sending or filing branch or area office shall issue subpoenas and serve witnesses for the next court date in CJC.

In cases that are filed by deputies in the Bureau of Special Operations outside of the CJC, the assigned deputy shall immediately notify the respective Head Deputy of the impending transfer of the case. The Head Deputy shall determine whether the case will continue to be handled by the assigned deputy, or transferred to a Special Operations deputy in CJC.

In the event that a VIP-category case is transferred according to this policy, the assigned deputy and the Head Deputy for the sending branch shall assess whether the case is best handled by the assigned Deputy, or should be handled by a Special Operations or Central Operations Deputy. Thereafter, the assigned deputy shall contact the Special Assistant to the Director of Central Operations and the Special Operations Head Deputy or DIC to determine who should handle the case.

All wheelchair and stretcher cases will be handled in CJC as follows:

- Procedurally, arraignments will occur in the courthouse of the district where the case has been filed. Thereafter the case (including all defendants) will be transferred to CJC as indicated below.

- In cases involving unique circumstances, any party may specially request that the case remain in the original filing district. These cases will be decided on a case-by-case basis by way of noticed motion in Department 100, depending upon the particular special needs of the parties or the court. All requests to have the case remain in the filing district shall be heard by the supervising or assistant supervising judge of the criminal division within three (3) court days of the original arraignment. The Office may transfer the file to Department 100 for the hearing. The requesting party must give notice to the opposing party and to Department 100.

Stretcher Cases

All stretcher cases going directly to preliminary hearing shall be set in Department 100 not later than day 5 of 10, and will be assigned to a courtroom by Department 100.

Wheelchair Cases

If the parties desire a felony case to be heard in the Early Disposition Court (EDP), the case shall be sent to Department 50 (CJC), prior to the preliminary hearing date as an agreed Day 0 of 10. The clerk of the forwarding court shall fax a request for a pre-plea EDP report to the Probation Department, showing the next appearance date and the new court location as CJC,

Department 50. Note that cases with a pending charge of a serious or violent felony or in which strikes have been alleged should not be sent to the EDP court (Department 50).

All wheelchair cases going directly from arraignment to preliminary hearing shall be set in one of the preliminary hearing courtrooms in CJC as Day 8 of 10 according to the following matrix:

Cases ending with the digit	Department
1	31
2	32
3	33
4	34
5	35
6	36
7	37
8	38
Cases ending with the digit "9" or "0" will be set in the appropriate preliminary hearing courtroom based on the number to the immediate left of the last digit. For example, if the case number is NA034729, the case would be set in Division 32 because the digit to the immediate left of the "9" is a "2."	

All existing or pending felony cases that have gone through arraignment on the Information and preliminary hearing shall be calendared in Department 100 no later than Day 0 or 10 on the next court date. These cases will then be reassigned accordingly.

Although the preferred practice is to assign the case according to above matrix, whenever agreeable with the court and defense counsel, the case may be sent to Department 30 for assignment to a preliminary hearing court.

The court policy includes in-custody probation violation cases. If the defendant has an open case that has already been transferred to CJC pursuant to the wheelchair cases policy, upon notification to the judicial officer hearing the open case, the probation violation shall be transferred to the courtroom where the open case is pending. Otherwise, misdemeanor probation violation matters shall be sent to Department 47; felony probation violation matters shall be sent to Department 100.

11.28 PLEADING AND PROVING CIRCUMSTANCES IN AGGRAVATION TO ALLOW FOR A HIGH-TERM PRISON SENTENCE

Pleading Circumstances in Aggravation

Deputies handling a felony case after filing should make appropriate amendments to the charging document when evidence is discovered that warrants the filing of aggravating circumstances or supports the dismissal of aggravating circumstances alleged. When a defendant is held to answer at a preliminary hearing, the deputy who conducted the preliminary hearing is to review and complete the *Circumstances in Aggravation Pleading Form* to ensure the Information accurately reflects the aggravating circumstances that are supported by the available evidence in that case.

The law does not appear to require that an aggravating circumstance be pled and proven at preliminary hearing in order for the factor to be alleged and proven at trial. (*Barrigan v. Superior Court* (2007) 148 Cal.App.4th 1478, 1483-1484.) However, in an effort to be prepared for the unforeseeable resolution of a felony matter, provable factors in aggravation should be alleged as to applicable charges and enhancements as early in the prosecution of a case as possible.

If, after review, the preliminary hearing deputy believes that none of the circumstances in aggravation appear to exist, that assessment should be noted on the form. The completed *Circumstances in Aggravation Pleading Form* is to be submitted with the Information Pleading Instructions for creation of the Information by support staff.

Exception for Proof of Prior Convictions

An exception to the rule generally requiring a stipulation or a jury finding exists when the aggravating circumstance is based on a defendant's prior conviction(s). For prior convictions, the court, rather than a jury, may determine through a certified record of conviction, that the facts underlying the aggravated circumstance have been established. (PC § 1170(b)(3).) However, a court may not use the prior convictions exception to determine the existence of an aggravating circumstance when it involves an allegation that was used to enhance a prior conviction, such as use of a weapon or infliction of great bodily injury. (*Ibid*.)

The statutory exception allowing a court to base a high-term sentence on a defendant's prior criminal conduct, as established by a certified record of conviction, applies in this context when the aggravating circumstance is one of the following factors:

- Defendant's conviction for a prior felony offense (*People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1481-1483)
- Criminal record of increasing seriousness (*People v. Black* (2007) 41 Cal.4th at pp. 819-820)
- Defendant was on parole, probation, mandatory supervision, or PRCS at the time the current offense was committed (*People v. Capistrano* (2014) 59 Cal.4th 830, 882-884, overruled on other grounds by *People v. Hardy* (2018) 5 Cal.5th 56)
- Prior performance on parole, probation, mandatory supervision, or PRCS, but only if the unsatisfactory performance is based on a conviction for a new crime (*People v. Towne* (2008) 44 Cal.4th 63, 82-83)
- Prior prison terms (*People v. Thomas* (2001) 91 Cal.App.4th 212, 216-220)
- Prior juvenile adjudications (*People v. Nguyen* (2007) 46 Cal.4th 1007, 1011-1012)
- Crime committed while out on bail (*People v. Johnson* (2012) 208 Cal.App.4th 1092, 1099-1100).

Plea Agreements

When a defendant agrees to a high-term sentence as part of a negotiated plea agreement, the defendant must expressly admit the truth of an aggravating circumstance and stipulate to the facts supporting that aggravated circumstance. Similarly, if a negotiated plea agreement involves a suspended high-term sentence; or felony probation is otherwise granted and the presence of one

or more aggravating factors gives rise to a need to preserve the possibility that a high-term prison sentence may later be imposed on a violation of probation; or, on an open plea, if the court seeks to retain discretion to impose a high-term sentence on a probation violation, the defendant must stipulate to a specified circumstance in aggravation and admit the factual basis for that stipulated circumstance in aggravation. Because these changes to the law implicate defendants' constitutional right to a jury trial on any aggravating factors, defendants must be advised of the right to a jury trial on any circumstance in aggravation and the prosecution's burden of proving any alleged circumstance in aggravation beyond a reasonable doubt, and they must waive those rights in addition to the general waiver of a right to a jury trial.

Such waivers are not necessary when there are no known circumstances in aggravation or a defendant pleads guilty or no contest for an agreed-upon low-term or mid-term sentence.

Aggravating Circumstance Necessarily Proven to Trier-of-Fact

An aggravating circumstance that has necessarily been proven to a jury as a factor that is not an element of a charged offense establishes the existence of an aggravating factor through the finding or verdict and need not separately be proven for a high-term sentence to be imposed. Examples of this include the existence of multiple victims in a case, as determined by the jury that convicted the defendant of charges involving different victims (*People v. Calhoun* (2007) 40 Cal.4th 398, 406) ; and a use of force sentencing allegation, found true by a jury, that renders a defendant ineligible for probation (*People v. Black* (2007) 41 Cal.4th at pp. 816-817).

See LPM 2.18 and 12.04.01 for additional guidance on pleading circumstances in aggravation at the time of filing and felony sentencing.

CHAPTER 12

FELONY CASE SETTLEMENT POLICY

12.01 INTRODUCTION

The purpose of the criminal justice system is to protect the rights of society in general, and crime victims in particular, by appropriately punishing those who have been lawfully convicted of crimes. The Office has developed a Felony Case Settlement Policy to ensure case dispositions throughout the County will further this purpose.

The Felony Case Settlement Policy has been developed to protect crime victims and the community, punish the guilty and deter crime throughout Los Angeles County. This policy is intended to ensure that case settlements throughout the county further these purposes.

The Felony Case Settlement Policy is intended to be clear and easy to apply in most situations. If conflicting interpretations arise, deputies should adopt the interpretation that favors the victim and public, not the defendant. If a case includes charges that fall within several different guidelines, deputies shall consider all relevant policies to determine the most appropriate disposition.

12.02 MARSY'S LAW - THE VICTIMS' BILL OF RIGHTS ACT OF 2008

On November 4, 2008, California voters passed Proposition 9, The Victims' Bill of Rights Act of 2008, also known as "Marsy's Law." Proposition 9 amended article I, § 28, of the California Constitution, enumerating crime victims' rights (see LPM § 11.21). If there is a conflict between the provisions of the California Constitution and this Felony Case Settlement Policy, the California Constitution is controlling.

12.02.01 PLEA BARGAINING

Penal Code § 1192.7(b) defines "plea bargaining" as:

> . . . any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

Penal Code § 1192.7 prohibits plea bargaining in any case in which the information or indictment charges a serious felony, a felony in which the defendant personally used a firearm, or driving under the influence unless:

- There is insufficient evidence to prove the People's case, or
- Testimony of a material witness cannot be obtained, or
- The reduction or dismissal would not result in a substantial change in sentence.

When one or more of these three statutory exceptions apply, any case settlement or sentence commitment shall conform to the Felony Case Settlement Policy.

12.03 SELECTION OF CHARGES

In all felony cases, a defendant must plead guilty to the provable charge(s) that most accurately describe the criminal conduct.

12.03.01 SERIOUS FELONY CASES

A defendant must plead guilty to every provable felony listed in Penal Code § 1192.7 that is separately punishable under Penal Code § 654.

12.03.02 MURDER OR MANSLAUGHTER CASES

If a defendant is charged with multiple counts of murder, voluntary manslaughter, involuntary manslaughter or vehicular manslaughter, the defendant must plead guilty to all counts involving different victims.

12.03.03 PRIOR CONVICTION AND CONDUCT ENHANCEMENT ALLEGATIONS

A defendant must admit all prior felony conviction allegations and any special conduct enhancement allegations involving weapons, great bodily injury, amount of contraband, age of victim, value of property destroyed, or amount of loss resulting from theft that may increase punishment or limit sentencing options, or deputies shall vigorously litigate these allegations.

12.03.04 DISPOSITION REPORT

A Disposition Report shall be prepared at the conclusion of every felony case. Within 10 business days after a case has concluded, the deputy handling the case shall prepare a Disposition Report, sign it, place it in the felony case file and submit the file to the Head Deputy, Head Deputy's designee, or Deputy-in-Charge for review. The Head Deputy, Head Deputy's designee, or Deputy-in-Charge shall review the file to ensure it is in proper form for closing, sign the Disposition Report and forward the file to support staff for case closing.

Disposition reports are to be completed at the conclusion of every felony case with the following exceptions. Cases in which the defendant receives pretrial diversion, pursuant to Penal Code § 1000 et seq., or is sentenced pursuant to Proposition 36 are exempt from this requirement, except where one or more counts or one or more special allegations are dismissed in order to render a defendant eligible for those programs. Under those circumstances, a disposition report shall be

completed. Disposition reports shall be reviewed and signed by the Head Deputy or the Head Deputy's designee.

Upon successful completion of pretrial diversion, and dismissal of the case, a disposition report need not be prepared.

Deputies shall obtain *prior* Head Deputy or Deputy-in-Charge approval and provide an explanation in the Disposition Report when:

- A defendant pleads guilty to a charge or charges that could result in less than the maximum sentence;
- A defendant, charged with multiple offenses separately punishable under Penal Code § 654, does not plead guilty to all offenses;
- A deputy strikes a special enhancement, prior conviction or probation ineligibility allegation as part of a case settlement; or
- A defendant is allowed to plead guilty to a misdemeanor.

12.04 SENTENCE COMMITMENTS IN FELONY CASES

The rights of the victim and the public are the most important considerations in making a sentence recommendation. When appropriate, deputies are encouraged to solicit input from the investigating officer regarding a sentence commitment. All sentence commitments must be based on an objective evaluation of the case and not on a particular judge's sentencing practices.

12.04.01 FELONY SENTENCING GUIDELINES - CALIFORNIA RULES OF COURT

The California Rules of Court establish the basic guidelines for any felony sentence commitment. Effective January 1, 2022, Senate Bill No. 567 (SB 567) amended Penal Code §§ 1170 and 1170.1. Under the new law, a court may only impose a sentence exceeding the mid-term of a triad when one or more circumstances in aggravation related to the crime or to the defendant exist and have been proven. Specifically, the new law requires that circumstances in aggravation must be admitted by the defendant or proven beyond a reasonable doubt to a judge or jury at trial in order to permit the imposition of a high-term sentence. (PC § 1170(b)(2).) The added limitation on the court's authority to impose high-term prison sentences also applies to enhancements that are punishable by a triad of prescribed terms. (PC § 1170.1(d)(1).) Further, other than as discussed below, a high term determinate sentence may only be imposed if the facts underlying an aggravating factor are either stipulated to by the defendant or presented and proven at trial.(PC §§ 1170(b)(2); 1170.1(d)(2).) SB 567 is retroactive as to cases that were not final on appeal as of January 1, 2022.

Circumstances in aggravation are set forth in California Rules of Court (CRC) Rule 4.421, which is expressly non-exclusive. CRC Rule 4.423 provides factors in mitigation. Importantly, a fact that is an element of a charged offense may not concurrently be used as an aggravating factor to impose a high-term sentence. (CRC Rule 4.420(d), cited in *Cunningham v. California* (2007) 549 U.S. 270, 279.)

See LPM 2.18 and 11.28 for additional guidance on pleading and proving circumstances in aggravation.

Any commitment for concurrent or consecutive sentences must be based upon the criteria affecting concurrent or consecutive sentences in Rule 4.425. A "no immediate state prison" commitment must be based upon the criteria regarding probation in Rule 4.414 and the criteria affecting probation in unusual cases in Rule 4.413.

12.04.02 APPROVAL FOR FELONY DISPOSITIONS

A Disposition Report shall be prepared at the conclusion of every felony case. Within 10 business days after a case has concluded, the deputy handling the case shall prepare a Disposition Report, sign it, place it in the felony case file and submit the file to the Head Deputy, Head Deputy's designee, or Deputy-in-Charge for review. The Head Deputy, Head Deputy's designee, or Deputy-in-Charge shall review the file to ensure it is in proper form for closing, sign the Disposition Report and forward the file to support staff for case closing.

Disposition reports are to be completed at the conclusion of every felony case with the following exceptions. Cases in which the defendant receives pretrial diversion, pursuant to Penal Code § 1000 et seq., or is sentenced pursuant to Proposition 36 are exempt from this requirement, except where one or more counts or one or more special allegations are dismissed in order to render a defendant eligible for those programs. Under those circumstances, a disposition report shall be completed. Disposition reports shall be reviewed and signed by the Head Deputy or the Head Deputy's designee.

Upon successful completion of pretrial diversion, and dismissal of the case, a disposition report need not be prepared.

A deputy shall obtain *prior* Head Deputy or Deputy-in-Charge approval and provide an explanation in the Disposition Report when:

- A defendant pleads guilty to an alternative felony charge with a misdemeanor sentence commitment; or
- A defendant pleads guilty to a felony charge with a "no immediate state prison" sentence commitment.

12.04.03 SENTENCING TERMS - EXPLANATION TO DEFENDANT

If a defendant pleads guilty to a felony charge with a sentence commitment, the deputy shall advise the defendant at the time of the plea that the People will urge the court to set aside the plea if the probation report or any other source reveals any facts or circumstances indicating the sentence was contrary to the California Rules of Court and/or Penal Code § 1192.7.

Prosecutors currently have a range of felony sentencing options available to them in criminal cases. A court can impose a grant of formal probation, with or without local jail time or prison time suspended. Alternatively, a court can impose a prison sentence, whether that is served

locally or in traditional state prison. A split sentence is an intermediate ground: It is a prison term served locally in which the available time is "split" between a custodial portion (served in the county jail as local prison) and a supervisory portion (referred to as "mandatory supervision").

If a defendant pleads guilty to a felony charge and is placed on probation, the deputy shall advise the defendant, on the record, of the possibility of a subsequent local or state prison commitment, or the imposition of a split sentence, if the defendant violates the terms or conditions of probation. The deputy shall explain the minimum and maximum local or state prison terms, including potential parole terms.

At the time of a plea, deputies shall state the disposition on the record in open court. Deputies shall not make off-the-record dispositions, agreements or understandings unless a matter legitimately requires confidentiality.

12.04.04 RESTITUTION

Deputies are to seek the maximum appropriate restitution fine and penalty assessment. In addition, deputies shall seek restitution for the victim for actual losses or damages.

12.04.05 STIPULATION TO PROBABLE CAUSE

Deputies shall not attempt to obtain a stipulation that there was probable cause to arrest a defendant in exchange for a reduction or dismissal of a criminal charge. The California Rules of Professional Conduct, Rule 3.10 (Threatening Criminal, Administrative, or Disciplinary Charges), prohibit an attorney from threatening to present a criminal charge to obtain an advantage in a civil dispute.

12.05 THREE STRIKES

All qualifying prior felony convictions shall be alleged in the pleadings pursuant to Penal Code § 1170.12(d)(1). Prior to seeking dismissal of any strike, the prior strike case files shall be reviewed, if available, in order to fairly evaluate mitigating and aggravating factors. If it is determined that proof of a prior strike cannot be obtained or that the alleged strike is inapplicable, dismissal of the strike shall be sought after obtaining Head Deputy approval.

12.05.01 THIRD STRIKE CASES

If a defendant has two or more qualifying prior felony convictions, the case shall be filed as a third strike case when at least one of the new charged offenses is pled as a/an:

- Serious or violent felony;
- Controlled substance offense with an allegation pursuant to Health and Safety Code §§ 11370.4 or 11379.8 after being admitted or found true (weight enhancement);
- Felony offense pursuant to Penal Code § 261.5(d) (sexual intercourse by a person over 21 upon a minor under the age of 16), or pursuant to § 262 (spousal rape);

- Felony offense requiring mandatory sex offender registration pursuant to Penal Code § 290(c), other than the following: § 266 (enticing a minor into prostitution); § 285 (incest); § 286(b)(1) (sodomy with a minor); § 286(e) (sodomy while confined in state prison); § 288a(b)(1) (oral copulation with a minor); 288a(e) (oral copulation while confined in state prison); § 314 (indecent exposure); or § 311.11 (possession of child pornography).
- Offense during which the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.
- Deputies should be mindful of PC § 667(e)(2)(C)(iii) and PC § 1170.12(c)(2)(C)(iii) ("armed with a firearm" by a defendant with two or more prior strikes) and *People v. Frutoz* (2017) 8 Cal.App.5th 171 (holding that a defendant in possession of a firearm can be charged and sentenced as a 3rd strike offender). The correct allegation under the Uniform Crime Charging Manual is PC § 1170.12, Form 2, and "armed with a firearm" is the variable language.")

If the defendant has two or more qualifying prior felony convictions, but none of the new charged offenses are enumerated in 12.05.01, a number of prior convictions will qualify a defendant for three strikes sentencing. These prior convictions include:

- A sexually violent offense, as defined in Welfare and Institutions Code § 6600(b);
- Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than the defendant as defined by Penal Code § 288a; sodomy with another person who is under 14 years of age and more than 10 years younger than the defendant as defined by § 286; or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than the defendant, as defined by § 289;
- A lewd or lascivious act involving a child under 14 years of age, in violation of § 288;
- Homicide and attempted homicide offenses within the meaning of §§ 187 (murder) through 191.5 (vehicular manslaughter while intoxicated);
- Solicitation to commit murder as defined in § 653f;
- Possession of a weapon of mass destruction, as defined in Penal Code § 11418(a)(1);
- Assault upon a peace officer or firefighter with a machine gun as defined in § 245(d)(3);
- Any serious and/or violent felony offense punishable in California by life imprisonment or death.

If the current offense does not involve the use or possession of a firearm or deadly weapon, injury to a victim, or violence or the threat of violence, a Head Deputy may authorize seeking dismissal of a strike after consideration of all of the following:

- Remoteness of the strikes;
- Whether the strikes involved the use or possession of a weapon, injury to a victim, violence or the threat of violence;
- Whether the strikes arose from one incident or transaction; and
- Any other mitigating or aggravating factors enumerated in the California Rules of Court, Rules 4.421 and 4.423.

12.05.02 SECOND STRIKE CASES

Unless the above criteria in LPM § 12.05.01 for charging a third strike case are met, a case against a defendant shall be filed as a second strike case.

In all instances in which a third strike case is pursued as a second strike case, Penal Code § 667.5(b) priors shall be plead and proved or admitted only when the priors are for sexually violent offenses as defined in Welfare and Institution Code § 6600(b).

12.05.03 DISPOSITION REPORT

If a Head Deputy authorizes dismissal of a strike in a third strike case, the Disposition Report shall discuss the applicability of the factors set forth in this case settlement policy.

12.05.04 SECOND STRIKE CASE DISPOSITIONS

When a case is charged as a second strike case, a Head Deputy may authorize the dismissal of strike(s) in the interests of justice and agree to an appropriate prison or probationary sentence only when all of the following factors exist:

- The strike offense occurred more than 10 years ago;
- The strike offense did not involve the use or possession of a firearm or deadly weapon, injury to a victim, violence or the threat of violence;
- There exist mitigating factors enumerated in the California Rules of Court, Rules 4.421 and 4.423.

Whenever a Head Deputy authorizes the dismissal of a strike an explanation shall be included in the Disposition Report.

12.05.05 CASE SETTLEMENT

The decision whether to seek dismissal of a strike shall be made at the earliest practical stage. Once that decision is made, it shall be promptly communicated to the court and defense counsel. This procedure shall be followed even if a defendant chooses to proceed to trial.

12.05.06 EARLY RELEASE OF SECOND STRIKE INMATES

The California Department of Corrections and Rehabilitation (CDCR) is required to lower inmate population by granting early parole to inmates convicted of non-violent offenses who have a prior strike conviction (i.e., second strike inmates). Specifically, CDCR evaluates second strike inmates convicted of non-violent offenses to determine if parole should be granted after the inmate has served 50% of the sentence. The CDCR created a protocol that was implemented by the Board of Parole Hearings (BPH). As part of that protocol, the BPH must request a written letter from the District Attorney's Office in each second strike case where the Office objects to early parole.

The Office must provide the written response within 30 calendar days of the date of the BPH's letter notifying the Office it is considering granting early parole. Upon receipt of any correspondence from the BPH or the CDCR on early parole of second strike inmates, the deputy receiving the notice shall immediately contact the Head Deputy of the Parole Division. The Parole Division shall contact the Bureau of Victim Services to ensure efforts are made to contact any victim(s) impacted by the potential early release of the inmate.

12.05.07 DISTRICT ATTORNEY STATEMENT OF VIEW

A District Attorney's Statement of View shall be filed in every case in which a defendant is sentenced to death or an indeterminate sentence, including life sentences imposed in third strike cases. Refer to Legal Policies Manual § 17.02.01 for a discussion of the documentation that shall be submitted in a Statement of View.

12.06 CONTROLLED SUBSTANCES

12.06.01 SALE AND POSSESSION FOR SALE CASES

In controlled substances cases, deputies may not reduce a sale or possession for sale charge to a lesser offense unless there is insufficient evidence to prove the charge.

12.06.02 STATE PRISON SENTENCES FOR STREET DRUG DEALERS

In cases involving sale or possession for sale of cocaine, heroin or PCP, deputies are to seek the maximum appropriate sentence.

In cases involving sale or possession for sale of cocaine, heroin, or PCP, if probation is legally permissible and the case is a first offense involving nominal quantities, deputies are to urge the sentencing judge to impose a felony sentence with a minimum 6 to 12 months in custody as a condition of probation. When a court grants probation, deputies shall urge the court to order the defendant to submit their person and property to search and seizure at any time of the day or night by any law enforcement officer with or without a warrant as a condition of probation.

In all subsequent cases involving the above-described offenses, deputies are to urge sentencing judges to impose state prison sentences for the appropriate term.

A court must not grant probation in any case in which restrictions pursuant to Penal Code §§ 1203.07 and/or 1203.073 are alleged.

12.06.03 NO WORK FURLOUGH OR WORK RELEASE FOR STREET DRUG DEALERS

In any narcotics case involving possession for sale or sale in which the court sentences the defendant to county jail, deputies shall urge the court to order that the defendant is ineligible for work furlough or work release programs.

12.06.04 NO BAIL FOR REPEAT STREET DRUG DEALERS

Whenever a defendant is on probation for the sale of or possession for sale of narcotics and the Office files a probation violation, it is Office policy that the defendant shall remain in custody without bail until the case is resolved.

12.06.05 RE-ARRESTED NARCOTICS DEALERS WHILE OUT ON BAIL

Narcotic dealers often post bail. While out on bail many dealers continue to sell narcotics. If a defendant is arrested on narcotics charges while on bail, the filing deputy shall:

- Recommend the court set bail at $50,000 or higher on the new case;
- File a Penal Code § 1275.1 motion (Source of Bail) on the new case; and
- Make a motion to consolidate the cases pursuant to Penal Code § 954 because they involve the same class of crimes.

12.07 CRIMINAL STREET GANGS

Commentary

Criminal street gangs present an extreme threat to society; street gang members are often far more dangerous than the typical, individual criminal acting alone. Street gang members should be punished more severely than non-gang members for their crimes because of the danger they present to the community. Deputies shall aggressively seek harsher sentences for street gang members in every case whether or not the instant offense was gang related. The objective is to use every opportunity to remove gang members from the streets. For crimes for which the usual sentence is a county jail sentence, if the defendant is a gang member, deputies shall seek a state prison commitment.

12.07.01 CASE SETTLEMENT IN STREET GANG CASES

A street gang defendant must plead guilty to all charges in any case settlement. Deputies may reduce the charged offense or dismiss counts only when warranted in the interests of justice. Deputies may consider the following factors in making this determination:

- Insufficiency of the evidence;
- The testimony of a material witness cannot be obtained;
- A reduction or dismissal of counts would not result in a substantial change in the maximum sentence for all charged offenses and enhancements; or
- The information or testimony of a defendant is necessary for the conviction of other defendants.

12.07.02 SENTENCING IN STREET GANG CASES

Deputies shall aggressively seek the maximum appropriate sentence on all counts for which a street gang defendant is convicted. Street gang membership is an aggravating factor that outweighs virtually any mitigating factor. Before the sentencing hearing, deputies should submit

a Memorandum of Points and Authorities detailing all factors in aggravation. Deputies shall advise the court the defendant is a gang member and argue that factor as a basis for substantially increasing the punishment imposed.

12.07.03 PROBATION CONDITIONS IN STREET GANG CASES

Deputies shall recommend that the court impose the following conditions on any defendant involved in a street gang who is placed on probation:

- The defendant must be subject to search upon the request of a law enforcement officer;
- The defendant must be subject to substance abuse testing whenever permitted by law;
- The defendant must not associate with other street gang members and shall stay away from specified locations frequented by street gang members; and
- The defendant must not wear or display any common identifying sign or symbol of the street gang.

12.07.04 POSSESSION OF CONCEALED OR LOADED FIREARMS BY GANG MEMBERS

A violation of Penal Code § 25400(a) (carrying firearm concealed within a vehicle or concealed upon a person) or § 25850(a) (carrying a loaded firearm) is punishable as a felony under certain circumstances, e.g.:

- The person has a prior felony conviction. (PC §§ 25400(c)1), 25850(c)(1).)
- The firearm was stolen and the person knew or had reasonable cause to know that it was stolen. (PC §§ 25400(c)(2), 25850(c)(2).)
- The person is an active participant in a criminal street gang as defined in Penal Code § 186.22(a). (PC §§ 25400(c)(3), 25850(c)(3).)
- The person is not in lawful possession of the firearm. (PC §§ 25400(c)(4), 25850(c)(4).) Lawful possession is defined as lawfully owning the firearm or having the consent or permission of the lawful owner to possess the firearm. A person who takes the firearm without permission does not have lawful possession.
- The person in possession of the firearm had the ammunition in their possession or the ammunition was readily accessible to that person and that person is not the registered owner of the firearm or the person is not the registered owner of the loaded firearm.

<u>Active Participant in a Criminal Street Gang</u>

Deputies should carefully review the evidence in determining whether PC § 186.22(a) (substantive gang crime), PC § 25400(c)(3) (gang member with a concealed firearm), or PC § 25850(c)(3) (gang member with a loaded firearm) as stand-alone charges can be proved beyond a reasonable doubt. In *People v. Rodriguez* (2012) 55 Cal.4th 1125, the California Supreme Court held that the People must prove that at least two gang members willfully promoted, furthered, or assisted in felonious criminal conduct by gang members for the substantive crime of PC §186.22(a) to be committed. A single defendant acting alone will not suffice. In *People v. Lamas* (2007) 42 Cal.4th 516, the California Supreme Court held that the

People must prove the defendant promoted, furthered, or assisted in felonious conduct by gang members that was separate and distinct from the offense of carrying a firearm in public. The mere carrying of the firearm itself is insufficient.

Deputies should file all appropriate substantive charges and allegations that can be proved. For example, possession of a firearm by a felon (PC § 29800(a)(1)), possession of a concealed firearm with accessible ammunition by a person who is not the registered owner (PC § 25400(c)(6)), possession of a loaded firearm by a person who is not the registered owner (PC § 25850(c)(6)), or the appropriate underlying felony crime(s), all with a gang allegation (PC § 186.22(b)(1)(A), (b)(1)(B), (b)(1)(C), (b)(4), or (b)(5)), are easier to prove and have more significant penalties.

Deputies should also be mindful of PC § 667(e)(2)(C)(iii) and PC § 1170.12(c)(2)(C)(iii) ("armed with a firearm" by a defendant with two or more prior strikes) and *People v. Frutoz* (2017) 8 Cal.App.5th 171 (holding that a defendant in possession of a firearm can be charged and sentenced as a third-strike offender). The correct allegation under the Uniform Crime Charging Manual is PC § 1170.12, Form 2, and "armed with a firearm" is the variable language.

Other Firearm Possession Charges by a Gang Member and Gang Enhancements

In addition to the felony firearm charge of possession when an active participant in a criminal street gang, there are additional felony charges listed in Penal Code §§ 25400 and 25850. In cases in which *all* the elements of Penal Code § 186.22(a) cannot be proven, but there is sufficient evidence for purposes of sentencing to demonstrate that the person in possession of a firearm actively participates in a criminal street gang, felony charges and a state prison sentence should be pursued under any of the other provable felony sections. For example, a firearm possessed by an active gang member may not be registered to that gang member pursuant to Penal Code §§ 25400(c)(4) and 25850(c)(4) or may be stolen pursuant to Penal Code §§ 25400(c)(2) and 25850(c)(2) .

Compliance with Office Policy

Deviation from this policy requires prior Head Deputy approval.

Commentary

Criminal Street gang members are responsible for many of the serious and violent felonies, including more than half of all murders, committed in Los Angeles County. Handguns are used to commit most of these crimes. In order to reduce the impact and magnitude of gang violence, it shall be the policy of the Office to vigorously prosecute all provable incidents of illegal possession of firearms by gang members. This policy shall apply to the prosecution of violations of Penal Code §§ 25400 and 25850

12.08 HATE CRIMES

Deputies may not settle felony hate crimes cases without consulting with a member of the Hate Crimes Unit. This procedure will ensure consistent case dispositions throughout the county and enable the Office to more effectively communicate the results to the community.

12.08.01 STATE PRISON FOR FELONY HATE CRIMES

Deputies shall seek a state prison sentence for a felony hate crime whenever the facts and/or the defendant's prior record indicate that state prison is appropriate. State prison may be an appropriate sentence for a felony hate crime even if the underlying conduct, without hate motivation, would be misdemeanor conduct. (PC § 422.7)

12.08.02 PROBATION CONDITIONS FOR HATE CRIMES

In all hate crimes cases in which the defendant is granted probation, deputies shall vigorously urge the sentencing court to impose a counseling program, victim restitution and other relevant conditions pursuant to Penal Code § 422.95. For further discussion of probation conditions for hate crimes, refer to the *Probation and Sentence Hearings* chapter of this manual.

12.08.03 CASE SETTLEMENT NOTIFICATION TO HATE CRIMES UNIT

Deputies shall notify the Hate Crimes Unit of all hate crimes case settlements. Penal Code § 13023 requires local prosecutorial agencies to report all hate crimes statistics to the Attorney General's Office. The Hate Crimes Unit collects, compiles and submits these statistics.

Commentary

Hate crimes have far-reaching social implications. Hate crimes not only harm those who are victims, but also generate concern, fear and anger within vulnerable populations and the general public. Hate crimes are serious offenses; at sentencing deputies shall emphasize the long-term damage to the victim and the community that crimes committed out of hate cause. Deputies shall make every effort to obtain a sentence that is substantial yet appropriate in light of the charges and the facts.

12.09 DOMESTIC VIOLENCE

12.09.01 FELONY SENTENCING

A deputy assigned to vertically prosecute a felony domestic violence case shall vigorously seek a state prison sentence or one year in the county jail if the court grants probation. A Head Deputy must approve a recommendation for less than one year in county jail. Deputies must seek a state prison sentence when the defendant:

- Personally used a firearm or dangerous or deadly weapon;
- Inflicted serious injuries by use of a dangerous or deadly weapon;
- Inflicted serious bodily injury;

- Has more than two convictions for Penal Code §§ 273.5 or 243(e)(1); or
- Has a lengthy or serious prior record that warrants a state prison commitment under the California Rules of Court guidelines.

If the court grants a defendant a probationary sentence, deputies should urge the court to suspend a state prison sentence.

12.09.02 TERMS AND CONDITIONS OF PROBATION

In addition to the mandatory terms and conditions of probation as set forth in Penal Code § 1203.097, deputies shall request the following conditions of probation for a defendant convicted of domestic violence when a court grants probation:

- The defendant may not own or possess a firearm or other dangerous or deadly weapon;
- The defendant must complete an approved one-year Batterer's Treatment program, with quarterly reports to the court. If children are present in the defendant's home, the program should include a parenting skills component;
- The defendant may not contact, harass or annoy the victim, if appropriate. (Deputies must prepare a written order to be included in the court file. The deputy must give the victim and defendant copies of the order.);
- The defendant must complete a substance or alcohol abuse program, if appropriate;
- The defendant must be admonished regarding witness intimidation (PC § 136);
- The defendant must support any dependents;
- The defendant must receive actual time in custody absent unusual circumstances;
- The defendant must comply with any Dependency Court orders;
- The defendant must pay a fee of $500 to the Domestic Violence fund;
- The defendant must perform community service; and
- Probation terms in domestic violence cases should be the maximum provided by law.

Work furlough should not be available in place of actual custody for the more serious offenders, and deputies shall strongly oppose electronic monitoring in all domestic violence cases. If the court approves work furlough, deputies shall request an order that the defendant stay away from the victim during the defendant's participation in the work furlough program.

12.10 SEXUALLY VIOLENT PREDATORS

Welfare and Institutions Code sections 6600 et seq. permit the involuntary hospitalization of persons convicted of sexually violent offenses following the completion of a prison sentence for any offense. (See Welf. & Inst. § 6600(b).)

Deputies must advise defendants who plead guilty or no contest to any felony sex offense or any offenses set forth in Penal Code sections 207, 209 and 220 that at the end of their sentence for this offense, they will be subject to screening by the California Department of State Hospitals to determine whether they qualify for trial as a sexually violent predator (SVP), which could result in being committed to a secure medical facility indefinitely.

Deputies must also ensure that the trial court inquires "whether the parties discussed the possibility of a disposition involving a plea to an offense that is not a sexually violent offense."

Deputies must advise defendants who plead guilty or no contest to any felony that if they have an SVP-qualifying conviction on their record, then at the end of the defendant's sentence, they will be subject to screening by the California Department of State Hospitals to determine whether they qualify for trial as a sexually violent predator, which could result in being committed to a secure medical facility indefinitely.

Welfare and Institutions Code sections 6600 et seq. permit the involuntary hospitalization of persons convicted of a sexually violent offense and who have a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that the person will engage in predatory sexually violent criminal behavior. Individuals committed for petitions filed prior to September 20, 2006, were subject to a two-year commitment. Petitions filed after that date, including petitions to re-commit people previously committed for a two-year term, have the potential for an indeterminate commitment.

SVP proceedings begin following the completion of a prison sentence. SVP proceedings are special proceedings of a civil nature and are handled by the Sexually Violent Predator Unit of the Sex Crimes Division.

12.11 ASSAULTS ON PEACE OFFICERS

A deputy assigned to prosecute a felony assault or battery upon a peace officer shall seek a state prison sentence when the defendant:

- Used a deadly or dangerous weapon to commit the assault or battery;
- Inflicted other than a minor injury regardless of the means used; or
- Has a history of assaultive conduct or other than a minor criminal history.

If probation is appropriate, deputies shall seek a suspended state prison sentence. A Head Deputy must approve any sentencing recommendation that includes less than one year in county jail.

12.12 DEPARTURE FROM POLICY

The Felony Case Settlement Policy shall be strictly adhered to in all cases enumerated in Penal Code § 1192.7. Departure from this policy may be made in cases not enumerated in Penal Code § 1192.7 in two instances:

- When the admissible evidence is legally insufficient to establish the defendant's guilt; or
- When unusual or extraordinary circumstances exist that demand a departure in the interests of justice.

Unusual or extraordinary circumstances include circumstances that will result in indirect or collateral consequences to the defendant in addition to the direct consequences of the conviction.

Commentary

Collateral consequences can, in some instances, have a greater adverse impact on a defendant than the conviction alone. When the potential collateral consequences would result in a "punishment" disproportionate to the punishment other defendants would receive for the same crime, a departure from policy may be warranted.

California Rules of Court Rule 4.414 lists the criteria to be considered when deciding whether to grant probation for a defendant who has suffered a felony conviction. These criteria are divided into factors relating to the crime and factors relating to the defendant. One of the enumerated factors relating to the defendant is: "The adverse collateral consequences on the defendant's life resulting from the felony conviction."

A departure from policy based on collateral consequences may only be made in unusual or extraordinary circumstances that demand a departure in the interest of justice.

When the departure is based on the legal insufficiency of the evidence, the action must be approved as follows:

Major Crimes/Significant Cases: Prior written Head Deputy approval must be obtained and the proposed action must be communicated, through the chain of command, to the Chief Deputy.

All Other Cases: In all other cases, prior written Head Deputy or Deputy-in-Charge approval must be obtained.

When the departure from policy is based on unusual or extraordinary circumstances in the interests of justice, prior written Head Deputy approval must be obtained.

Whenever any departure from policy is made, the deputy prosecuting the case shall prepare a Disposition Report setting forth the reasons for the departure. The Disposition Report shall be signed by the deputy's supervisor and placed in the case file before the action is taken.

12.12.01 CONSIDERATION OF ADVERSE IMMIGRATION CONSEQUENCES

When not inconsistent with Penal Code § 1192.7 and pursuant to Penal Code § 1016.3(b), deputies shall consider the avoidance of adverse immigration consequences as one factor in reaching a just resolution of a case at all times when engaged in the plea negotiation process.

If deviation from case settlement policy is warranted due to these considerations, prior approval by the Head Deputy or Deputy-in-Charge shall be obtained. The proposed disposition and the reasons for the disposition shall be noted in the file and signed by the Head Deputy or Deputy-in-Charge.

12.13 DISPOSITION REPORT

12.13.01 CONCLUSION OF THE CASE

A Disposition Report shall be prepared at the conclusion of every felony case. Within 10 business days after a case has concluded, the deputy handling the case shall prepare a Disposition

Report, sign it, place it in the felony case file and submit the file to the Head Deputy, Head Deputy's designee or Deputy-in-Charge for review. The Head Deputy, Head Deputy's designee, or Deputy-in-Charge shall review the file to ensure it is in proper form for closing, sign the Disposition Report and forward the file to support staff for case closing.

Disposition reports are to be completed at the conclusion of every felony case with the following exceptions. Cases in which the defendant receives pretrial diversion, pursuant to Penal Code § 1000 et seq., or is sentenced pursuant to Proposition 36 are exempt from this requirement, except where one or more counts or one or more special allegations are dismissed in order to render a defendant eligible for those programs. Under those circumstances, a disposition report shall be completed. Disposition reports shall be reviewed and signed by the Head Deputy or the Head Deputy's designee.

Upon successful completion of pretrial diversion, and dismissal of the case, a disposition report need not be prepared.

12.13.02 SENTENCING RECOMMENDATION

A Disposition Report is used to make a sentencing recommendation concerning a case disposition. When preparing a Disposition Report, trial and calendar deputies shall include a concise statement of facts, the sentence recommendation and the reasons for the disposition and obtain approval, if required, before settling a case.

In a calendar court, it is the calendar deputy's responsibility to prepare a Disposition Report and secure Head Deputy approval before the recommended action is taken. However, Head Deputies may orally authorize the recommended action to be taken before a written recommendation has been prepared. In that event, a Disposition Report shall thereafter be prepared and processed.

In special units, it is the trial deputy's responsibility to prepare a Disposition Report and secure Head Deputy approval before the recommended action is taken. However, Head Deputies may orally authorize the recommended action to be taken before a written recommendation has been prepared. In that event, a Disposition Report shall thereafter be prepared and processed.

If a defendant pleads guilty to any count significantly different from the charges originally filed or if the sentence imposed fails to meet the minimum penalties of the Felony Case Settlement Policy, the deputy handling the case shall provide an explanation in the Disposition Report. The report should include the efforts made to obtain a sentence consistent with this policy and an assessment of the reason(s) why a less severe sentence was imposed.

12.13.03 VICTIM NOTIFICATION

In all cases where defendants are sentenced to the California Department of Corrections and Rehabilitation (CDCR), victims, next of kin, and threatened witnesses shall be sent a CDCR 1707 form so that they are kept apprised of the custody status of the defendant. See LPM § 24.02.05 for a full discussion of the victim notification obligations of District Attorney personnel for defendants sentenced to state prison.

The use of the CDCR 1707 form has become significantly more important in light of changes in the law that are currently resulting in early release of defendants sentenced to state prison. Many victims, next of kin, and threatened witnesses are unaware that defendants are subject to release at a much earlier date than they might have expected based upon the original sentence imposed. If victims, next of kin, and threatened witnesses do not register the CDCR 1707 form with the CDCR, the CDCR will not notify them of the release of the defendant, execution of the defendant, the death of the defendant, or the escape of the defendant. The CDCR will also not collect restitution or impose requested parole conditions.

12.14 COMMUNICATING RESULTS

Members of the public have a strong interest in the outcome of criminal cases in which they are a victim or witness.

12.14.01 COMMUNICATION WITH CRIME VICTIMS

In the settlement of a serious case, a decision not to pursue one or more counts and/or allegations charged, particularly those involving physical or mental trauma or great financial loss, can have far-reaching negative effects on the victim. If not handled appropriately and carefully, a dismissal or case settlement can leave a victim with the belief that a criminal wrong has not been redressed. A victim may feel angry, resentful, vulnerable and abandoned. A traumatized victim of a serious crime may be shocked to discover, after the fact, that the Office has dismissed the count pertaining to that victim or settled it for a lesser charge. Deputies cannot expect victims to readily appreciate, without an explanation, the problems of the law of search and seizure, mental defenses and the limitations on consecutive sentencing.

Pursuant to Penal Code § 679.02(a), victims of violent felonies (as defined in Penal Code § 667.5(c)) have a right to be notified of a pretrial disposition. Victims of any felony may request to be notified of a pretrial disposition. Accordingly, within reason, a deputy settling a felony case shall attempt to notify the victim or next of kin before the plea is entered. A deputy may use any reasonable means available to make the notification. A victim services representative may make notification on behalf of the deputy. If it is not possible to notify the victim of the disposition before the plea is entered, the deputy shall ensure that notification is made later, either by the Office or by the Probation Department.

12.15 PENAL CODE § 290 POLICY

Failure to register as a sex offender is a serious offense. Penal Code § 290 provides law enforcement with a powerful tool to ensure public safety, protect law-abiding citizens, and monitor offenders to deter further criminal activity. This policy is promulgated to provide uniformity in the settlement of these cases.

12.15.01 CASE SETTLEMENT

Where the Penal Code provides for a felony, state prison is presumed. The nature of the current violation, the gravity and circumstances of the underlying registrable offense, and the defendant's record shall be considered in determining an appropriate disposition.

Strike Cases

A violation of Penal Code § 290 may qualify as a presumed second strike case. In a presumed second strike case, a state prison sentence is presumed. Head Deputy approval is required to settle the case for less than the low-term doubled. Mitigating circumstances shall be clearly documented in the Disposition Report. In appropriate cases, Head Deputies should seek Director approval to proceed as a third strike case.

Probation

A person convicted of a felony Penal Code § 290 violation may be granted probation only in an unusual case where the interests of justice would best be served. When probation is granted, the court shall enter the circumstances indicating that the interests of justice would best be served by the disposition, into the minutes. (PC § 290.018(e).) For felony cases in which probation is granted, or if the imposition or execution of the sentence is suspended, the judge must, as a condition of probation or suspension, order the registrant to serve at least 90 days in county jail. (PC § 290.018(c).)

12.15.02 CASE SETTLEMENT GUIDELINES

Deputies should evaluate whether the circumstances of a Penal Code § 290 violation demonstrate that the offender intended to thwart the statutory scheme for tracking sex offenders or solely failed to comply with a technicality. Deputies should consider the following factors when recommending an appropriate sentence to the court:

Nature of Current Offense:

The following circumstances might mitigate the offense:

- Has the defendant been registering regularly prior to the current Penal Code § 290 violation;
- Is the failure to register less than 30 days late;
- Did the defendant register at the new residence but fail to register at the former residence.

Nature of Underlying Offense and Defendant's Record:

The following circumstances might aggravate the offense:

- Was the defendant sentenced to state prison on the underlying registrable offense;
- Does the defendant have multiple prior registrable offenses;

- Does the defendant have other prior strikes, felony convictions or state prison commitments;
- Does the defendant have a history of use of force, violence or weapons;
- Was the victim of the underlying registrable offense vulnerable.

A Head Deputy must approve any sentencing recommendation which deviates from this policy.

12.16 ANIMAL CRUELTY

It has been established that a correlation exists between intentional animal abuse and other forms of criminality. Other forms of animal cruelty, such as neglect and illegal animal fighting, are also associated with various negative behaviors and consequences. Neglecting an animal can lead to prolonged suffering or death, and is often indicative of other types of dysfunction within an environment. Illegal animal fighting not only impacts the animals involved, it also adversely affects the quality of life of citizens who reside in areas where illegal animal fighting occurs.

Consequences for mistreating animals should be consistent and uniform. It is essential that sentences for animal cruelty crimes impart the message that no form of animal cruelty is acceptable. Sentences should appropriately address the crime by including terms and conditions designed to prevent similar future conduct. Sentences should also be structured in such a way that they protect the victims of the abuse, as well as potential future victims.

In an effort to ensure that animal cruelty crimes are vigorously prosecuted, animal cruelty cases shall not be sent to EDP courts and, whenever possible, should be vertically prosecuted by designated Animal Cruelty Deputies.

Deviation from this policy requires prior Head Deputy or Deputy-in-Charge approval.

12.17.01 ANIMAL CRUELTY CASE DISPOSITIONS

Sentences in animal cruelty cases should convey the message that animal cruelty is a serious crime. To ensure that dispositions are appropriate, specific disposition guidelines have been established for animal cruelty cases.

No one other than an animal cruelty designee or the Animal Cruelty Case Coordinator (ACCC) shall make offers in cases involving animal cruelty charges.

The animal cruelty case disposition guidelines include terms and conditions that are mandated by law, as well as conditions that are designed to provide adequate oversight of defendants. The guidelines shall be regularly requested by deputies as part of the disposition of all animal cruelty cases. Deviation from this policy requires prior approval from the ACCC and the Head Deputy or Deputy-in-Charge.

The disposition guidelines are available on LADAnet, under “Library” > ”Animal Cruelty” > “Filing, Litigating, and Sentencing Your Case.”

Dismissals and Reductions: Charges involving any form of animal abuse, including dog and cock fighting, should not be dismissed, reduced or "diverted" without prior approval from the ACCC and Head Deputy or Deputy-in-Charge.

This policy applies in all cases, regardless of whether the case only involves charges of animal cruelty, or if there are other charges filed, as well.

Diversion: Those who violate any of the animal cruelty statutes are eligible for misdemeanor military diversion under the provisions of Penal Code § 1001.80. When appropriate, deputies should vigorously argue against diversion in animal cruelty cases, especially when the animal-related charges are "priorable" offenses. When the court is considering granting diversion, the deputy shall state the facts of the case, ask the court to review evidence, such as photos and/or video, and present the argument that the defendant may be eligible, but not suitable, for diversion.

Counseling: Depending upon the animal cruelty charge(s) of which the defendant is convicted, counseling may be mandated by law (PC § 589(h).) Judges should be informed of the counseling requirement in cases where counseling is mandated. In all cases that include animal cruelty charges, requiring animal cruelty classes as a term of probation is highly advisable, regardless of whether classes are mandated by law.

When sentencing a defendant to animal cruelty counseling, the designee shall complete a counseling form and email or fax the form to the address or number found at the bottom of the form. A defendant will not be permitted to enroll unless the program has received a copy of the form from the prosecutor.

Database: Upon disposition of a case involving animal cruelty charges, the form in the Animal Cruelty Database should be updated.

12.17 DRIVING UNDER THE INFLUENCE

12.17.01 IGNITION INTERLOCK DEVICES

This policy pertains to offenses committed on or after July 1, 2010.

Vehicle Code §§ 23700 and 13386 create a pilot program, effective July 1, 2010, that mandates the installation and use of an ignition interlock device ("IID") for all persons convicted of violating Vehicle Code § 23152 or 23153.

It is the policy of the Office, pursuant to VC §§ 23700 and 13386, to request the following condition of probation for all defendants who are convicted of violating Vehicle Code § 23152 or 23153, or Penal Code § 191.5:

> "The defendant is ordered to comply with any and all requirements imposed by the Department of Motor Vehicles regarding the installation and use of an ignition interlock device."

Furthermore, it is also the policy of the Office, pursuant to Vehicle Code § 23575, that deputies shall request a court-ordered IID in any of the following circumstances:

- The defendant's measured blood-alcohol level was .15 or higher;
- The defendant has two or more prior moving traffic violations;
- The defendant refused the implied consent blood-alcohol test;
- The defendant committed a violation of Vehicle Code § 23153.

In unusual cases, the Head Deputy or Deputy-in-Charge may approve a deviation from this policy.

If a defendant attempts to circumvent a court-ordered IID by filing a declaration that the defendant does not own or operate a motor vehicle, the declaration should be signed under penalty of perjury and co-signed by an interpreter if one was used to assist the defendant at the time of sentencing.

12.18 HARRIS REPORT - CASE SETTLEMENT POLICY AND PROCEDURE

All authorizations necessary for case disposition shall be documented in written form using a disposition report prior to an offer being placed in the case file or conveyed to the defendant. In cases alleging strike priors, Head Deputy authorization to strike a strike shall be obtained and noted in the file in conjunction with the entry of the disposition offer.

12.19 NARCOTICS ASSET FORFEITURE CASES

A contested narcotics civil asset forfeiture case involving less than $25,000 in cash or cash equivalents requires the conviction "of a defendant" for violating Health and Safety Code §§ 11351, 11351.5, 11352, 11355, 11359, 11360, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11382, 11383, or a felony violation of 11366.8, or for a conspiracy to violate one of these sections. In any case in which property has been seized for forfeiture, the filing deputy will note "Agency seeking forfeiture filing" on the case summary to alert subsequent deputies of the potential forfeiture case.

If it appears from the criminal case file that a forfeiture action may be an issue, the deputy handling the criminal case should contact the Asset Forfeiture Section to determine the status of any forfeiture action. If a forfeiture action has been rejected, or if the potential claimants have failed to respond to the forfeiture notice, no further action need be taken by the court nor the deputy handling the criminal case.

If the forfeiture case is still pending, the deputy handling the criminal case shall be aware that any negotiation with respect to a settlement of the criminal case could impact the forfeiture case. The forfeiture case may be resolved by way of settlement instead of trial if all potential claimants have been served with Notice of Forfeiture and the time has passed for filing any further claims. Before settling a forfeiture case, the deputy handling the criminal case should contact the Asset Forfeiture Section.

Evaluation of the criminal matter shall not be dictated by the forfeiture case. If a case is worth reducing to a simple possession in the absence of a forfeiture action, it is worth the same disposition with a forfeiture action pending, even though such a disposition would mean the loss of the forfeiture. Nor should the amount of the potential forfeiture allow a criminal defendant to bargain away what the defendant should receive by way of charge or sentence. The deputy handling the criminal case shall not negotiate a case settlement that includes the return of seized property without consulting with the Asset Forfeiture Section.

12.20 HIV/AIDS TESTING OF DEFENDANT FOR SPECIFIED SEX OFFENSES

Prosecutors have a mandatory obligation to advise victims of specified sexual assault offenses of the right to HIV/AIDS testing and disclosure of results. (PC §§ 1524.1, 1202.1; H&S §§ 121055.) The Los Angeles County Department of Health Services is statutorily required to perform both pre and post-conviction disclosure of results to crime victims.

12.20.01 PRE-CONVICTION AIDS TEST UNDER HEALTH & SAFETY CODE § 121055

This section allows named victims of specified charged sex crimes to request the district attorney's office to seek a petition and an order from the court to draw and test the blood of the defendant or minor against whom a petition has been filed. The petition can be filed as soon as the complaint or juvenile petition is filed and must include a written request from the victim. The court then must promptly hold a hearing. If the court determines there is probable cause to believe that blood, saliva, semen or other bodily fluid was possibly transferred between the defendant and the victim, the court shall order that the defendant provide two blood samples for testing. Copies of the test results are delivered to each requesting victim and the defendant.

12.20.02 PRE-CONVICTION HIV TEST UNDER PENAL CODE § 1524.1

Under Penal Code § 1524.1, once a complaint, information, indictment or juvenile petition has been filed, the court may issue a search warrant to test the blood or saliva of the defendant or minor for HIV. The search warrant may be ordered upon request of the victim and after the court finds that there is probable cause to believe that the defendant committed the charged offense and that there is probable cause to believe that a bodily fluid capable of carrying HIV was transferred from the defendant to the victim.

This section applies to any victim of any charged crime where the possibility exists that bodily fluid capable of transmitting HIV was transferred from the defendant to the victim. However, if the defendant is charged with a specified sex offense, the victim of an uncharged sex offense may also obtain a search warrant to have the defendant's blood drawn and tested.

The deputy is required to inform the victim of the right to request the warrant and shall refer the victim to a "local health officer" for pre-request counseling to assist the victim in determining whether to make the request. The results of the HIV test are to be disclosed by the local health officer to the victim requesting the test.

The test results shall not be used in any criminal proceeding as evidence of guilt or innocence.

12.20.03 POST-CONVICTION AIDS TEST UNDER PENAL CODE § 1202.1

Upon conviction or a juvenile petition sustained or admitted of one of the following offenses, the court shall order the defendant to submit to a blood or buccal swab test for evidence of AIDS:

- Rape in violation of PC §§ 261 or 264.1;
- Unlawful sexual intercourse with a person under 18 years of age in violation of PC §§ 261.5 or 266c;
- Rape of a spouse in violation of PC §§ 262 or 264.1;
- Sodomy in violation of PC §§ 266c or 286; and
- Oral copulation in violation of PC §§ 266c or 288a.

If the conviction or petition was sustained or admitted for one of the following offenses, the court shall order the defendant to submit to an AIDS test, only upon a finding that there was probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim:

- Sexual penetration in violation of PC §§ 264.1, 266c or 289;
- Aggravated sexual assault of a child in violation of PC § 269;
- Lewd or lascivious conduct with a child in violation of PC § 288;
- Continuous sexual abuse of a child in violation of PC § 288.5; and
- An attempt to commit any of these offenses.

This duty applies whether the defendant was sentenced to prison or placed on probation. The testing must be completed within 180 days. The deputy or Bureau of Victim Services advocate shall advise the victim of the right to obtain the results and refer the victim to a local health officer for counseling. The local health officer is responsible for disclosing the test results to the victim. It the test results are positive, the results cannot be disclosed without offering or providing counseling to the victim.

12.21 GRAFFITI

Whenever a defendant is granted probation in a graffiti case, a deputy shall request the court to impose specific terms and conditions of probation. Forms detailing the required terms and conditions of probation in adult and juvenile matters are available in LADAnet, as attachments to SD 10-07. Head Deputies and Deputies-in-Charge are responsible for periodically auditing graffiti cases to determine if these terms and conditions are being imposed by courts. Deviation from this policy requires prior Head Deputy or Deputy-in-Charge approval.

CHAPTER 13

PROBATION AND SENTENCE HEARINGS

13.01 INTRODUCTION

In appropriate cases, a deputy should submit a sentencing memorandum to the sentencing court clearly explaining the facts of the case and recommending a sentence warranted by the defendant's criminal history and conduct. Deputies shall provide the defense attorney with a copy of the memorandum.

Whenever possible, a deputy, preferably the trial deputy, shall represent the People at every probation and sentence hearing. When it is not possible for the trial deputy to be present, the Head Deputy or Deputy-in-Charge shall assign another deputy to represent the People. The deputy who appears at the hearing shall be familiar with the facts, the case file, the probation report, probation eligibility, credit entitlements, and sentencing procedures. A deputy shall make a sentence recommendation. When a deputy makes a sentence recommendation, it should be on the record and the deputy shall articulate reasons for that recommendation.

When the pre-sentence report fails to provide all necessary information, deputies shall bring the information to the court's attention consistent with Penal Code § 1204. Also, defendants who fail to comply with jail rules and regulations during pre-sentence incarceration are not entitled to Penal Code § 4019(c) good time credit. If a deputy is notified by the Sheriff's Department of a defendant's misconduct, the deputy shall bring it to the court's attention at the probation and sentence hearing.

13.02 SENTENCE COMMENSURATE WITH GRAVAMEN OF OFFENSE

A proper sentence shall be commensurate with the gravamen of the offense and shall seek to achieve the four goals of sentencing:

- Protection of society;
- Punishment;
- Deterrence;
- Rehabilitation.

Commentary

In all sentencing matters, deputies shall always consider the gravity of the defendant's conduct, the defendant's prior record, if any, and protection of the community.

If a state prison commitment is appropriate, deputies shall argue for state prison, articulating the reasons for that recommendation. In cases involving multiple offenses, deputies shall consider consecutive sentences. Deputies shall make every effort to obtain maximum state prison commitments for career criminals and dangerous persons. Deputies shall also vigorously pursue applicable enhancements, if appropriate.

If a probationary or misdemeanor sentence is appropriate, a deputy shall not hesitate to request specific probation conditions. In all cases, deputies should recommend imposition of the fine authorized by the statute under which the defendant was convicted or under Penal Code § 672.

The immigration status of a defendant shall not be considered a mitigating or aggravating factor at sentencing.

13.02.01 SPLIT SENTENCE POLICY

Penal Code § 1170(h)(5)(A) establishes a presumption that split sentences shall be imposed in all local prison cases, "unless the court finds that, in the interests of justice, it is not appropriate in a particular case."

A split sentence is a prison term served locally in which the available time is "split" between a custodial portion (served in the county jail as local prison) and a supervisory portion (referred to as "mandatory supervision.")

Because only local prison sentences may be split pursuant to Penal Code § 1170(h), the split sentence policy addresses only local prison sentences rather than traditional state prison sentences. Local prison sentences (whether split or fully imposed) count as state prison priors for purposes of later sentencing enhancements. This remains true even if a local prison sentence is subsequently expunged pursuant to Penal Code § 1203.41. In addition, local prison sentences significantly differ from traditional state prison sentences in that there is no automatic supervision upon the completion of a local prison sentence, unless the sentence is split.

A local prison sentence may be split according to any proportion of time which does not exceed the total sentence, including priors and subordinate terms.

Deputies shall consider all sentencing options to ensure the course of action that is chosen in every case is appropriate. Deputies shall consult with their supervisors when necessary to determine what sentence would be in the interests of justice. Specific factors to consider include, but are not limited to: the nature of the criminal charges pending; whether the case involves injury to a victim or any other aggravating factor; restitution; the need for a protective order; the danger to the community; the nature and strength of the evidence available to secure a criminal conviction; and, the defendant's criminal background.

If a split sentence is offered, deputies shall ensure that all typical terms that would be ordered upon a grant of formal probation are imposed, such as restitution to the victim(s), drug testing and treatment conditions, GPS monitoring, mental health counseling, anger management counseling, etc. Search and seizure terms shall be required.

Penal Code § 136.2(i) expressly allows courts to issue protective orders in domestic violence and sex cases "regardless of whether the defendant is sentenced to the state prison or a county jail or subject to *mandatory supervision*." (PC 136.2(i)(1), emphasis added.)

If a split sentence is utilized, and there is no statutory basis to impose a stand-alone protective order, a deputy shall instead request the sentencing court to make stay away and no harassment language express conditions of mandatory supervision. Deputies should be aware that any such court orders will only remain in effect for the term of mandatory supervision, which will most often be shorter than traditional probation. Thus, when deciding whether to offer probation or a split sentence, deputies shall consider the need for, and appropriate duration of, a stand-alone protective order to adequately ensure the victim's safety

13.03 FELONY PROBATION AND SENTENCE HEARINGS

When a court imposes an illegal sentence or fails to comply with sentencing laws or Rules of Court, the deputy shall notify the Writs and Appeals Division in writing within 10 days after sentence is imposed so that timely notice of appeal can be filed. This notice is mandatory and does not depend upon the deputy's opinion as to whether the case should be appealed. The opinion of the deputy shall, however, be included in the memorandum to the Writs and Appeals Division.

13.03.01 RESTITUTION

Victims have a Constitutional Right to restitution. See Section LPM § 24.12.

Deputies shall be familiar with Penal Code §§ 1191.2, 1202.4, 1203, 1203.44, 1205, 1205.3, 1214, 1464 and 2900.5 as well as Welfare and Institutions Code §§ 730.6 and 1752.82. These code sections implement the Victims' Bill of Rights restitution provisions.

Victims who need further assistance shall be referred to the Restitution Enhancement Program or the Bureau of Victim Services.

13.03.02 ATTENDANCE OF VICTIM OR NEXT OF KIN AT SENTENCING

Deputies shall allow the victim or the victim's next of kin a reasonable opportunity to attend all sentencing proceedings. A deputy may not agree to a case disposition that denies the victim or the victim's next of kin an opportunity to be present at the time of sentencing. Deputies shall encourage the victim or the victim's next of kin to attend the sentencing hearing.

In any case in which a judge is contemplating immediate sentencing, the deputy shall remind the judge of the deputy's statutory obligation to contact the victim or the victim's next of kin to allow that person or persons to be present at sentencing. The Probation Department has the primary obligation to provide adequate notice to victims.

13.03.03 DEPARTMENT OF CORRECTIONS AND REHABILITATION DIAGNOSTIC EVALUATION

When a court refers a defendant to the Department of Corrections and Rehabilitation for a diagnostic evaluation pursuant to Penal Code § 1203.03, deputies shall provide the following

information to the court clerk who will forward the information to the Department of Corrections and Rehabilitation:

- The defendant's criminal record, including prior convictions and dismissed counts;
- The deputy's opinion concerning the appropriateness of probation for this defendant;
- The existence of detainers from other jurisdictions; and
- Any other pertinent information, including psychiatric reports that may assist the authorities in determining whether the defendant should be released on probation.

Deputies may also forward a copy of this information directly to the Department of Corrections and Rehabilitation at the following address:

California Institution for Men
14901 Central Avenue
Chino, California 91701
(909) 597-1821

Deputies shall provide the defense attorney with a copy of the information and shall insert a copy in the case file.

13.03.04 HOUSE ARREST AND ELECTRONIC MONITORING

The Probation Department oversees carefully screened private monitoring companies to ensure accountability for house arrest and electronic monitoring services. It is Office policy that deputies shall consult with their Head Deputy or Deputy-in-Charge regarding a defendant's suitability for the program. Penal Code § 1203.016 defines home detention and the conditions attached to the use of electronic monitoring or supervising devices. All proposed conditions should be carefully reviewed before determining the defendant's suitability for electronic monitoring.

13.03.05 UNDOCUMENTED IMMIGRANTS

Occasionally undocumented immigrants receive probation on the condition they do not re-enter the United States illegally. The United States Citizenship and Immigration Services (USCIS) within the Department of Homeland Security (formerly the Immigration and Naturalization Service of the United States Department of Justice) has a system to notify the sentencing court when the agency becomes aware that a probationer has illegally re-entered this country.

When a court or a deputy receives notice from USCIS that it has located a probationer who has illegally re-entered the country, time is of the essence in bringing the defendant to court. USCIS is not able to transport defendants on state cases. USCIS cannot house defendants overnight and will not detain defendants at their agency's expense. Therefore, transportation shall be arranged immediately to bring the undocumented immigrant before the sentencing court.

Upon being advised that USCIS has custody of a defendant on probation who has been ordered not to illegally re-enter the country, a deputy shall promptly seek a bench warrant for the

defendant's arrest from the sentencing court. If the defendant is on felony probation, deputies shall ask the court to have the bailiff forward the bench warrant to the Sheriff's Fugitive Detail for immediate service. If the defendant is on misdemeanor probation, deputies shall ask the court to have the bench warrant served in accordance with the customary practice used by that court.

Deputies shall make every effort to ensure the defendant's presence in court and to have the defendant's probation violated. A deportation action is not a sufficient alternative to the probation violation procedure.

13.04 PROBATION VIOLATION HEARINGS

The Office shall be given notice of any motion or petition to modify, revoke, or terminate previous probation orders. If an attempt is made to conduct such a proceeding without prior notice, the deputy in court shall object and request a continuance. Whenever practical, the deputy who handled the original case shall represent the People at the hearing.

If the hearing is conducted without prior notice, the calendar deputy shall confer with the trial deputy to determine if the People have been prejudiced by a court's order to modify or terminate a defendant's probation. A motion to reconsider shall be filed if appropriate. If the trial court refuses to reconsider, deputies shall forward a memorandum to the Writs and Appeals Division.

13.05 PROBATION IN CONTROLLED SUBSTANCES CASES

When a defendant is convicted of a felony or misdemeanor controlled substances offense and placed on probation, deputies shall urge the court to order the defendant to submit their person and property to search and seizure at any time of the day or night by any law enforcement officer with or without a warrant as a condition of probation.

13.05.01 NO PROBATION ALLEGATIONS

Probation may be granted to first-time sellers only in conformity with the provisions of the Felony Case Settlement Policy.

Penal Code §§ 1203.07 and 1203.073 provide that probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, a defendant who is convicted of specified drug offenses

Penal Code § 1203.073 permits an exception in an unusual case in which the interests of justice would best be served. If a case qualifies as an unusual case, the deputy shall ask the judge to state on the record how the interests of justice would be served by granting probation and to have the reasons reflected in the court minutes. The deputy shall prepare a Disposition Report and include the reasons for the grant of probation.

There are no unusual case exceptions for offenses listed in Penal Code § 1203.07. Therefore, state prison sentences are mandatory for offenses listed in this statute. Courts cannot strike a

Penal Code § 1203.07 allegation. (*People v. McGuire* (l993) 14 Cal.App.4th 687; *People v. Pacheco* (l985) 176 Cal.App.3d 100; *People v. Enriquez* (l985) 173 Cal.App.3d 990.)

13.06 PROBATION IN HATE CRIMES CASES

Penal Code § 422.85 provides that when probation is granted for offenses defined in Penal Code §§ 302, 423.2, 594.3, 11411, 11412, or 11413, or for any hate crime, the court, absent compelling circumstances stated on the record, shall make an order protecting the victim, the victim's family or domestic partner from further acts of violence, threats, stalking or harassment including any stay away conditions the court deems appropriate. The court may order the defendant to do one or more of the following as a condition of probation:

- Complete a racial or ethnic sensitivity program or other similar training in the area of civil rights, or complete a one-year counseling program intended to reduce the tendency toward violent or anti-social behavior;
- Make payments or other compensation to a community based program or local agency that provides services to victims of hate violence; and/or
- Reimburse the victim for reasonable counseling costs and other reasonable expenses that the court finds are a direct result of the defendant's acts.

Deputies shall vigorously argue for imposition of these conditions when probation is granted. Programs are available through various organizations in Los Angeles County. Deputies shall contact the Hate Crimes Section before the sentencing hearing to learn about programs in their area and be prepared to offer that information to the court when probation is granted.

13.07 PROBATION IN DOMESTIC VIOLENCE CASES

Whenever a defendant is convicted of a domestic violence offense and probation is granted, deputies shall ask the court to impose all of the probation conditions as set forth in Penal Code § 1203.097 including:

- The defendant must pay a fine to a battered women's shelter up to a maximum of $5000 or to reimburse the victim for reasonable expenses that the court finds are the direct result of the defendant's offense;
- The defendant must complete a chemical dependency program in addition to, but not instead of, a batterer's treatment program;
- The defendant may not own or possess a firearm or other dangerous or deadly weapon;
- The defendant must complete an approved one-year batterer's treatment program, with quarterly reports to the court. If children are present in the defendant's home, the program should include a parenting skills component;
- The defendant may not contact, harass or annoy the victim, if appropriate. (Deputies must prepare a written order to be included in the court file. The deputy must give the victim and defendant copies of the order.);
- The defendant must complete a substance or alcohol abuse program, if appropriate;
- The defendant must be admonished regarding witness intimidation (PC § 136);
- The defendant must support any dependents;

- The defendant must receive actual time in custody absent unusual circumstances;
- The defendant must comply with any Dependency Court orders;
- The defendant must pay a fee of $500 for the Domestic Violence fund;
- The defendant must perform community service;
- The probation term shall be five years in felony cases.

Work furlough and electronic monitoring shall be strongly opposed in domestic violence cases because they are inappropriate and place victims at risk. When the court approves a work furlough program over a deputy's objection, the deputy shall request an order that the defendant stay away from the victim during participation in the work furlough program.

No victim may be compelled to participate in a program or ordered to participate in counseling. (PC § 1203.097(c)(1)(D).)

Absent unusual circumstances, a state prison sentence is warranted when:

- The defendant used a firearm or any dangerous or deadly weapon in the commission of the crime;
- The defendant inflicted serious or great bodily injury; or
- The defendant's prior record establishes a pattern of escalating criminality because of the frequency and seriousness of prior offenses.

13.08 VICTIM NOTIFICATION

In all cases where defendants are sentenced to the California Department of Corrections and Rehabilitation (CDCR), victims, next of kin, and threatened witnesses shall be sent a CDCR 1707 form so that they are kept apprised of the custody status of the defendant. See LPM § 24.02.05 for a full discussion of the victim notification obligations of District Attorney personnel for defendants sentenced to state prison.

The use of the CDCR 1707 form has become significantly more important in light of changes in the law that are currently resulting in early release of defendants sentenced to state prison. Many victims, next of kin, and threatened witnesses are unaware that defendants are subject to release at a much earlier date than they might have expected based upon the original sentence imposed. If victims, next of kin, and threatened witnesses do not register the CDCR 1707 form with the CDCR, the CDCR will not notify them of the release of the defendant, execution of the defendant, the death of the defendant, or the escape of the defendant. The CDCR will also not collect restitution or impose requested parole conditions.

13.09 PROBATION IN GRAFFITI CASES

Whenever a defendant is granted probation in a graffiti case, a deputy shall request the court to impose specific terms and conditions of probation. Forms detailing the required terms and conditions of probation in adult and juvenile matters are available in LADAnet, as attachments to SD 10-07. Head Deputies and Deputies-in-Charge are responsible for periodically auditing

graffiti cases to determine if these terms and conditions are being imposed by courts. Deviation from this policy requires prior Head Deputy or Deputy-in-Charge approval.

13.10 ANIMAL CRUELTY CASE DISPOSITIONS

Sentences in animal cruelty cases should convey the message that animal cruelty is a serious crime. To ensure that dispositions are appropriate, specific disposition guidelines have been established for animal cruelty cases.

No one other than an animal cruelty designee or the Animal Cruelty Case Coordinator (ACCC) shall make offers in cases involving animal cruelty charges.

The animal cruelty case disposition guidelines include terms and conditions that are mandated by law, as well as conditions that are designed to provide adequate oversight of defendants. The disposition guidelines shall be followed by all deputies. Deviation from this policy requires prior approval from the ACCC and the Head Deputy or Deputy-in-Charge.

The disposition guidelines are available on LADAnet, under Library > Animal Cruelty > Filing, Litigating, and Sentencing Your Case.

Dismissals and Reductions: Charges involving any form of animal abuse, including dog and cock fighting, should not be dismissed, reduced or "diverted" without prior approval from the ACCC and Head Deputy or Deputy-in-Charge.

This policy applies in all cases, regardless of whether the case only involves charges of animal cruelty, or if there are other charges filed, as well.
Diversion: Those who violate any of the animal cruelty statutes are eligible for misdemeanor military diversion under the provisions of Penal Code § 1001.80. When appropriate, deputies should vigorously argue against diversion in animal cruelty cases, especially when the animal-related charges are "priorable" offenses. When the court is considering granting diversion, the deputy shall state the facts of the case, ask the court to review evidence, such as photos and/or video, and present the argument that the defendant may be eligible, but not suitable, for diversion.

Counseling: Depending upon the animal cruelty charge(s) of which the defendant is convicted, counseling may be mandated by law (PC § 589(h).) Judges should be informed of the counseling requirement in cases where counseling is mandated. In all cases that include animal cruelty charges, requiring animal cruelty classes as a term of probation is highly advisable, regardless of whether classes are mandated by law.

When sentencing a defendant to animal cruelty counseling, the designee shall complete a counseling form and email or fax the form to the address or number found at the bottom of the form. A defendant will not be permitted to enroll unless the program had received a copy of the form from the deputy.

Database: Upon disposition of a case involving animal cruelty charges, the form in the Animal Cruelty Database should be updated.

13.11 PROBATION CONDITIONS FOR ELECTRONIC SEARCHES

It is important to note the imposition of an electronic search probation condition must be supported by the particular facts of the underlying case. Electronic search conditions should be imposed on defendants for cases in which electronic devices and data were integral to the crime. A probationer must also waive the provisions of CalECPA to allow law enforcement and the probation department to search the particular electronic device(s) without running afoul of CalECPA's requirements.

In order to allow law enforcement to lawfully search electronic devices such as cell phones, tablets, and computers as part of a search condition imposed pursuant to a probationary sentence, Office policy requires that all pleas must include an advisement and waiver which would permit such probationary searches.

CalECPA Waiver

In addition to the electronic search condition, any probationary plea which merits a search of electronic devices must include a waiver similar to this:

By accepting this term of probation, you are waiving the provisions of Penal Code §§ 1546 through 1546.4 for the duration of your [probationary] [community supervision] as to [insert type of electronic device/service/application subject to the probation condition].

This waiver should be given separately and apart from the standard probation search and seizure waiver.

Implications for Prosecutors

Deputies should be prepared to argue the validity of such requests when challenged by the court or counsel. Careful consideration should be given to the feasibility of compliance and monitoring when imposing restrictive conditions on computer use. Examples of more elaborate conditions include requiring advance registration of all online accounts, requiring advance registration of all online accounts, requiring access to passwords and encryption keys, prohibition of using devices that belong to other people, and so forth. Deputies are encouraged to contact the Cyber Crime Division when drafting such conditions.

Furthermore, deputies will need to justify the imposition of such conditions when the conviction is the result of an **open plea** or **trial/adjudication**.

Some probationers may assert a privacy interest prior to any search of an electronic device. For example, a probationer may object to the review of text messages, emails, or other applications that purportedly contain privileged information or information that has no bearing on the probationer's underlying criminal conviction. Deputies should consider including language in

the waiver stating that, under such circumstances, the device will be seized by the probation department or law enforcement and then subject to search only under the direction of the court.

CHAPTER 14

DISCLOSURE OF EXCULPATORY AND IMPEACHMENT INFORMATION

14.01 INTRODUCTION

A California prosecutor's obligation to provide exculpatory and impeaching information arises from the federal Due Process Clause of the Fourteenth Amendment, as applied by the United States Supreme Court in *Brady v. Maryland* (1963) 373 U.S. 83, and California's Criminal Discovery Statute, as codified in Penal Code § 1054.1(e). Additionally, Rule 3.8 of the California Rules of Professional Conduct requires that prosecutors timely disclose all evidence or information that tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when relieved of this responsibility by a protective order. The failure to provide exculpatory and impeaching information may also violate Rule 3.4 of the Rules of Professional Conduct, Penal Code § 141(a), and trigger a report to the State Bar if the reversal of a judgment is based in whole, or in part, on prosecutorial misconduct. Moreover, the United States Supreme Court has indicated that the prudent prosecutor should resolve doubtful questions in favor of disclosure.

The Los Angeles County District Attorney's Office (LADA) policy is to adhere to these obligations regardless of materiality to ensure defendants receive a fair trial and to preserve the integrity of convictions. All deputy district attorneys (deputies) are required to comply with the law regarding the disclosure of exculpatory and impeaching information, to resolve doubtful questions in favor of disclosure, and to follow the policies and procedures set forth herein.

14.02 THE *BRADY* RULE

A deputy has an affirmative duty to disclose all favorable material evidence on the issue of guilt or punishment possessed by the prosecution team, irrespective of a defense request. Favorable evidence consists of all exculpatory and impeaching information.

Exculpatory evidence includes information that:

- Directly opposes guilt;
- Negates an element of a charged offense;
- Supports defense testimony, an affirmative defense, or defense motion; and
- Mitigates punishment.

Impeaching evidence includes:

- Felony convictions involving moral turpitude;
- Misdemeanor or other conduct that reflects on believability;
- Misconduct involving moral turpitude;
- False reports by a prosecution witness;
- Pending criminal charges against a prosecution witness;
- Parole or probation of a prosecution witness;
- Evidence contradicting a prosecution witness's statements or reports;

- Evidence undermining a prosecution witness's expertise;
- Evidence of a sustained finding of misconduct by a Board of Rights or Civil Service Commission that reflects on a prosecution witness's truthfulness, bias, or moral turpitude;
- Evidence that a prosecution witness has a reputation for untruthfulness;
- Evidence that a prosecution witness has a racial, religious, or personal bias against the defendant individually or as a member of a group; and
- Promises, offers, or inducements to a prosecution witness, such as immunity.

When favorable material evidence is contained in the prosecutor's file, the deputy is in actual possession of the evidence and shall disclose it. Additionally, a deputy shall disclose favorable material evidence in the possession of the "prosecution team," including "information possessed by others acting on the government's behalf … gathered in connection with the investigation." (*Strickler v. Greene* (1999) 527 U.S. 263, 281.) The "prosecution team" includes crime labs and sexual assault response teams. (*People v. Uribe* (2008) 162 Cal.App.4th 1457.)

Deputies must disclose impeachment information before a defendant pleads guilty or no contest, or before a minor enters an admission. Plea waivers are neither intelligent nor voluntary if they are entered without knowledge of material evidence withheld by the prosecution. Information establishing factual innocence, or that is otherwise materially exculpatory, shall be disclosed as soon as it becomes known. A deputy's opinion regarding trial issues is work product and not discoverable. However, deputies must immediately correct the testimony of a People's witness known to be false or misleading. Deputies may learn that a peace officer's personnel file contains potentially impeaching information when, for example, they find out a subpoenaed officer is on leave or has been terminated. Deputies shall inform the defense and the Discovery Compliance Unit (DCU), DCU@da.lacounty.gov, of this information and may file a *Pitchess* motion.

14.02.01 *PITCHESS* MOTIONS

Peace officer personnel records are confidential and shall not be disclosed in any criminal or civil proceeding except by a *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evid. Code §§ 1043, 1046; Penal Code § 832.7.) Deputies with good cause may file a *Pitchess* motion to have the court review an officer's personnel file *in camera* for potentially disclosable information. When a *Pitchess* disclosure occurs, the court will issue a protective order. (Evid. Code § 1045(e).) The deputy must email DCU to communicate the disclosure itself, but shall not reveal any underlying content nor send protected documents. The deputy shall request the court's permission to disclose *Pitchess* information to the defense, along with a case-specific protective order. *Pitchess* information disclosed to a deputy shall be placed in the DA file, in an envelope clearly marked, "Confidential: Evidence Code § 1043." (If the *Pitchess* disclosure contains *per se Brady* material not currently known to LADA, such as evidence of a moral turpitude offense, the deputy shall discuss with their supervisor whether to request a protective order modification, to share the information with LADA for future *Brady* purposes. Notice must be given to the officer's agency, so that they have an opportunity to litigate.) Deputies do not need to inform DCU when a *Pitchess* motion is granted if there is not a disclosure. For further information about *Pitchess* and *Serrano/Johnson Brady* motions, please see the Discovery Compliance Manual.

14.02.02 *ALADS* TIPS

Pursuant to *Association for Los Angeles Deputy Sheriffs (ALADS) v. Superior Court* (2019) 8 Cal.5th 28, DCU contacts law enforcement agencies on a biweekly basis, identifying currently subpoenaed officer-witness in upcoming LADA prosecutions. In response, agencies regularly provide DCU with "tips" identifying officer-witnesses who have information that may be potentially exculpatory or impeaching. Different agencies use different standards for this internal determination. An *ALADS* tip provides a good cause basis for a *Pitchess or Serrano/Johnson Brady* motion. If an officer has an *ALADS* tip, it must be disclosed to the defense. Tips do not necessarily mean that a *Pitchess* disclosure will always occur after an *in camera* review.

14.03 PENAL CODE § 1054.1

Penal Code § 1054.1: The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:

(a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
(b) Statements of all defendants.
(c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
(d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
(e) Any exculpatory evidence.
(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

Penal Code § 1054.1(d) imposes a broader statutory duty upon a deputy to disclose all felony convictions of a material witness, not just felony convictions involving moral turpitude as required by *Brady* and its progeny. The duty to disclose felony convictions extends to those that have been expunged pursuant to Penal Code § 1203.4. Penal Code § 1054.1(e) expands the *Brady* rule, requiring disclosure of exculpatory evidence, not just material exculpatory evidence.

14.03.01 JUVENILE PROCEEDINGS

Discovery in juvenile proceedings is governed by California Rules of Court, Rule 5.546. Office policy requires that deputies follow the procedures set forth in Penal Code §§ 1054 to 1054.10 for juvenile discovery. Deputies shall disclose any potentially exculpatory and/or impeaching information, if available, at arraignment or prior to any substantive hearings, including *Gladys R., Dennis H.,* or *William M.* hearings. After these proceedings, deputies shall disclose potentially exculpatory and/or impeaching information as it becomes known.

14.04 TIMING OF DISCLOSURE

Defendants are entitled to timely *Brady* information at all substantive stages of the proceedings, including prior to preliminary hearing, plea, trial, sentencing, and during post-conviction litigation. For felonies, deputies shall disclose the existence of potentially exculpatory and/or impeaching information before the preliminary hearing, including evidence that may impeach a witness's testimony pursuant to Proposition 115. After preliminary hearing, deputies shall disclose this information as it becomes known. For misdemeanors, deputies shall disclose any potentially exculpatory and/or impeaching information before any substantive hearing, or at least 30 days before trial. If the information is not known or reasonably accessible 30 days before trial, it shall be disclosed when known. During trial or juvenile adjudication, a deputy shall continue to comply with *Brady* and Penal Code § 1054.1(e)'s discovery obligations and provide potentially exculpatory and/or impeaching evidence as soon as it becomes known. After trial or juvenile adjudication, a deputy who acquires information which casts doubt upon the correctness of a conviction or sustained juvenile petition shall promptly disclose to the defense the new, favorable evidence.

Commentary

Deputies may need to request that the court deny or restrict discovery disclosures. Penal Code § 1054.7 permits discovery disclosures to be denied, restricted, or deferred upon a showing of good cause, i.e., concerns for witness safety, for the possible loss or destruction of evidence, or for the possible compromise of other investigations by law enforcement.

14.05 DISCOVERY COMPLIANCE SYSTEM

The Discovery Compliance System (DCS) is a secure, internal program comprised of two databases: ***Brady*** and **INFORM**, the Information Notification For Officers and Recurrent-Witness Materials. These databases contain summaries of impeaching, potentially impeaching, and other generally available materials regarding recurrent witnesses. The term "recurrent witness" includes current and former peace officers, probation officers, detention officers, and other witnesses whom the Office reasonably expects could testify or previously testified in a criminal case, including post-conviction matters. These witnesses may be called by either the prosecution or the defense. DCU shall maintain the DCS, along with the underlying documents for each entry. DCU shall also determine whether information pertaining to a recurrent witness shall be categorized as *Brady* or INFORM. The DCS is interfaced with the Adult and Juvenile Subpoena Management Systems to notify a deputy by way of the Master Witness List (MWL) that a recurrent witness is in the DCS. Additionally, at the time the case is filed, and witness information is entered, the filing deputy and supervisor(s) shall be notified within PIMS and/or on the MWL as to whether a witness may be in *Brady* or INFORM.

Whenever "Check *Brady*/INFORM" appears alongside a subpoenaed witness's name on the MWL, the handling deputy shall manually access the DCS to check the accuracy of this notation prior to making any disclosures. When a deputy adds a recurrent witness to the MWL, or corrects information therein, the deputy shall simultaneously check the DCS to determine if an entry exists for that witness.

The DCU continually enters witnesses into the DCS and updates entries. Through IBM Notes, deputies and trained paralegals manually search the DCS by entering a DR/URN, court case, or DA case number, and the recurrent witness's name and/or serial number. Deputies and trained paralegals shall access the DCS and copy source documents only as necessary to perform their official duties. A security log is built into the DCS, tracking every inquiry. **Misuse of the DCS, or improper use of the information and source documents therein, will result in disciplinary action.**

A deputy has an ongoing duty to disclose potentially exculpatory and impeaching information to the defense. Accordingly, a DDA shall, at minimum check the DCS:

- Prior to filing or grand jury;
- Prior to preliminary hearing or other contested hearing with witness testimony;
- Thirty (30) days before trial;
- When a new witness is added to the case;
- Prior to any plea or disposition; and
- During the evaluation of post-conviction matters.

14.05.01 *BRADY* DATABASE

The *Brady* database shall contain exculpatory and impeaching information on officers and other recurrent witnesses that is discoverable *per se*. This includes felony and misdemeanor convictions or other moral turpitude misconduct that reflects on witness credibility. This information shall be disclosed to the defense even if the witness will not be called to testify.

14.05.02 INFORM DATABASE

INFORM contains general information regarding officers and other recurrent witnesses that may be constitutionally or statutorily discoverable depending on the facts and circumstances of a case. INFORM may also include other publicly available material, which does not reflect on credibility, but which is published and/or readily accessible to the public. Materials may come from a variety of sources including, but not limited to media, public records, declinations, non-moral turpitude convictions, Peace Officer Standards and Training, and deputy referrals.

To create uniform disclosures, assist DDAs in their discovery obligations, and minimize allegations of *Brady* violations in current and post-conviction cases, INFORM information shall be summarized and/or disclosed in all cases in which the officer or recurrent witness is a potential witness. Non-confidential source documents shall also be disclosed. However, not all DCS attachments should be disclosed. Some uploaded documents are included for internal DCU purposes, privileged work product (See Penal Code § 1054.6) and/or shared confidentially with LADA. (See Gov. Code § 7921.505, subdivision (c)(5).) Other documents may be non-disclosable or in need of redaction, if disclosure would present a possible danger to a victim or witness, result in loss or destruction of evidence, or possibly compromise an ongoing investigation. (Penal Code § 1054.7.) Prior to disclosure, deputies must carefully review all DCS documents and thereafter file motions *in limine* to sanitize or exclude irrelevant and/or admissible material.

Commentary

Maintaining witness information in INFORM: (i) keeps deputies informed of its existence; (ii) allows deputies to disclose the information and litigate its admissibility; (iii) prevents sensitive information from improper disclosure in a court proceeding; (iv) protects the integrity of convictions; and (v) promotes transparency.

14.06 DISCLOSURE OF DCS INFORMATION

Information in the DCS is confidential and disclosure is prohibited, unless necessary to comply with case-specific discovery obligations. Deputies must disclose appropriate DCS material, while also treating such information with respect and discretion. Information obtained or derived from the DCS, including discovery acknowledgements, source documents, and other documents containing DCS information shall be kept in the DA file an envelope clearly marked, "Confidential DCS Information" and/or PIMS e-folder.

The Confidential DCS Information envelope shall be hole punched and secured within the LADA case file. Deputies must make DCS disclosures in writing via discovery memorandum or direct emails to counsel, and note the date the information was provided. Copies of disclosures and disclosed material(s) must be maintained in the physical file in the Confidential DCS Information envelope and/or PIMS e-folder. A deputy who deems it appropriate to disclose sensitive, nonpublic, or confidential information shall request that the court issue a protective order only where there is articulable good cause pursuant to Penal Code section 1054.7.

LADA asserts multiple privileges over the confidentiality of the DCS and the information contained therein including, but not limited to, Penal Code §§ 1054.6 and 1054.7, Government Code §§ 7921.505, 7922.000, 7923.600, 7927.500, and 7927.700, and Article 1 of the California Constitution. DCU deputies' sourcing practices, as well as opinions, summaries, and instructions contained within the DCS are privileged work product, pursuant to Code of Civil Procedure § 2018.030(a), and not discoverable under Penal Code § 1054 or the California Public Records Act (CPRA). (See Gov. Code §§ 7922.000, 7927.500, 7927.705; Penal Code § 1054.6.).

The exemption from CPRA disclosure is not waived when a deputy, in the discharge of their legal obligations, provides defense counsel with potentially impeaching information learned from the DCS, as disclosure is required by law. (Gov. Code §§ 7921.505, subd. (b)-(c); 7920.200.)

Commentary

Deputies who provide law enforcement records or case related documents to the defense pursuant to criminal discovery statutes do not waive applicable PRA exemptions. (Gov. Code §§ 7921.505(c)(1) and 7920.200.) There is no waiver when records are released within the scope of disclosure of a statute that limits disclosure of specified writings for certain purposes. (Gov. Code § 7921.505, subd. (c)(3); County of Los Angeles v. Superior Court (2015) 242 Cal.App.4th 475, 486; Rackauckas v. Superior Court (2002) 104 Cal.App.4th 169 [No waiver under Gov. Code § 7921.505(c)(5) when DA sent a nonpublic letter to the investigating police department].)

14.07 ENTRY INTO DCS AND THE REVIEW PROCESS

DCU shall enter all appropriate impeachment, potential impeachment, and general publicly available information into the DCS, as authorized by Office policy. Information entered into the DCS is not an endorsement, nor a determination of its validity. Due to its informational nature, DCS entries will only be removed in cases of mistaken identity.

14.07.01 CONFIDENTIAL NOTIFICATION TO THE RECURRENT WITNESS AND THEIR EMPLOYING AGENCY

Entries into the DCS are made in furtherance of deputies' legal, prosecutorial, and ethical duties. The Los Angeles County District Attorney's Office (LADA) neither advocates nor suggests that placement into *Brady* or INFORM shall be a basis for employment related decisions, as entry into the DCS is not, by itself, a determination of wrongdoing. Further, LADA makes no warranty or representation regarding the accuracy or completeness of the information in *Brady* or INFORM. LADA will neither recommend nor endorse any employment or disciplinary action related to this information, its entry into the DCS, or any notification issued to the agencies related to this information.

When DCU first enters a peace officer or recurrent witness into the DCS, DCU personnel will notify the individual, the head of their employing agency (or the personnel designee), the Law Enforcement Liaison, and the Chief of the Bureau of Investigation by confidential correspondence, generally describing the basis. The correspondence will indicate the process by which entries into the DCS may be reviewed and that submitted materials may be discoverable.

14.07.02 ENTRY INTO THE *BRADY* DATABASE AND APPEALS

Witnesses entered in the *Brady* database may, at any time, seek reconsideration of the DCU's decision by contacting the DIC of DCU in writing. Correspondence shall include the reasons challenging the entry along with any supporting documents. Note that submitted documents may be deemed discoverable and uploaded into the DCS. Within ninety (90) calendar days of receiving a request for reconsideration, the DIC of DCU shall review the materials and decide if the witness shall remain in the *Brady* database, be transferred into INFORM, or be removed entirely from the DCS due to mistaken identity. If the DIC of DCU decides that the witness shall remain in the *Brady* database, the witness may appeal that decision, in writing, addressed to the Head Deputy of the Justice System Integrity Division (JSID) Division. Thereafter, requests to appeal the Head Deputy's decision will only be granted in exceptional cases where there is clear and convincing evidence and changed circumstances. Requests must be submitted in writing to the Bureau of Prosecution Support Operations (BPSO) Bureau Director, who will make a final decision.

14.07.03 ENTRY INTO THE INFORM DATABASE

Entries into INFORM shall not be removed except in cases of mistaken identity. Witnesses may submit supplemental documentation to the DCU to address their entry and present further mitigating information. DCU may transfer a recurrent witness from INFORM into the *Brady*

database when additional information received or uncovered is *per se Brady* material. DCU shall notify the witness and their agency in writing when a recategorization occurs.

14.07.04 SUBMITTED MATERIALS

Witnesses and their representatives shall use caution when sending information to DCU. Submitted documents may be included within a witness's *Brady* or INFORM entry and thereafter be accessible to all deputies. DCU is not required to upload all submitted materials; DCU retains discretion to exclude inappropriate documents in whole, or in part.

14.08 DEPUTY REFERRALS OF IMPEACHING INFORMATION

Deputies shall refer potentially impeaching information regarding officers and recurrent witnesses to the Bureau of Prosecution Support Operations (BPSO) Bureau Director, as outlined in LPM § 14.08.01. Referrals themselves are confidential inner-office communications and privileged attorney work product. Referrals uploaded into the DCS as source documents shall not be disclosed to the defense. However, underlying non-privileged factual information shall be disclosed to the defense, as appropriate. Deputies shall not seek protective orders on underlying factual information unless there is good cause to do so pursuant to Penal Code section 1054.7.

14.08.01 CONFIDENTIAL DEPUTY REFERRALS

Deputies who learn of potentially impeaching information about an officer or recurrent witness shall promptly inform their supervisor. When a deputy refers potentially impeaching information to their Deputy-in-Charge (DIC), the DIC shall inform their Head Deputy. The Head Deputy shall consult with the witness's agency head, or their designee, to ensure the information is complete and accurate. In consulting with the agency, the Head Deputy shall avoid obtaining information from the officer's personnel file. The Head Deputy, in conjunction with the deputy, shall then evaluate and information and, if appropriate, prepare a referral memorandum through the chain of command to their Bureau Director. Supporting documents shall be attached. Referrals shall focus on the facts, without speculation, nor advocating for or against DCS inclusion. When the Bureau Director receives the referral, the Bureau Director shall reach out to the recurrent witness's employing agency head, or their designee, and inform them of the referral. The Bureau Director shall forward the memorandum to the BPSO Bureau Director. The BPSO Bureau Director, in consultation with the Head Deputy of JSID and DIC of DCU, shall review the information to determine whether it is appropriate for placement into *Brady* or INFORM. If the BPSO Bureau Director determines that a referral involves potential criminal conduct, the BPSO Bureau Director will forward the memorandum to the Head Deputy of the Justice System Integrity Division (JSID) or appropriate Line Operations supervisor.

DCU does not independently review referrals from members of the public or defense counsel. Requests sent to DCU will be forwarded to the original trial unit or JSID for their review, input, and any appropriate action or notification(s) thereafter.

14.08.02 FILINGS AND DECLINATIONS

Deputies shall forward a copy of all filings and declinations in which an officer or recurrent witness is a defendant or suspect to DCU. Forwarded information shall include a copy of the charge evaluation worksheet or complaint and appropriate supporting documentation.

For all filed cases, the Statement of Facts should never describe the content of any officer or recurrent witness's *Brady* or INFORM entry. Although the Statement of Facts is an internal document, it may nevertheless be sent to law enforcement during the filing process or easily viewed by officers and witnesses who borrow the DA file to refresh their recollections.

To properly document that filing deputies have performed a DCS check, filers shall refer to a "DCS check performed" in the Statement of Facts, without mention of the content of any officer's individual entry.

For declinations, if information learned from the DCS is the material factor precluding case filing, deputies may note issues of provability or credibility in the declination. However, deputies shall nevertheless use caution and refrain from using the terms "DCS," "*Brady*," or "INFORM" when discussing an officer's possible credibility issues. Deputies shall not describe the specific content of an officer's DCS entry in a declination, as declinations may be released pursuant to ongoing Public Records Act (PRA) requests.

14.09 DISCOVERY COMPLIANCE MANUAL

Deputies shall consult the Discovery Compliance Manual for additional guidance.

CHAPTER 15

DRUG COURT PROGRAMS

15.01 INTRODUCTION

A defendant charged with a controlled substances offense may be eligible for one of several alternative treatment programs under the law. Depending upon the nature of the charge, the amount of drugs involved, whether there is evidence of drug sales and other variables, a defendant may be eligible for pretrial diversion for narcotics offenders pursuant to PC §§ 1000 et seq., traditional Drug Court under Penal Code § 1000.5, treatment under Penal Code § 1210 et seq. (Proposition 36 - the Substance and Prevention Act of 2000) or, Sentenced Offender Drug Court. Each of the aforementioned treatment alternatives have strict rules of eligibility for those who may participate. The programs are outlined below.

15.02 PRETRIAL DIVERSION FOR NARCOTICS OFFENDERS

Pretrial diversion is an alternative to criminal prosecution available to a defendant charged with an offense listed in Penal Code § 1000(a).

Deferred Entry of Judgment (DEJ) formerly required the defendant to plead guilty prior to entry into the program. Effective January 1, 2018, the statutes providing for DEJ were amended to change the program to "pretrial diversion." A guilty plea is no longer required. It is Office policy that Penal Code §§ 1000 et seq., as amended, applies to defendants regardless of when their applicable crime was committed.

Under Penal Code §§ 1000 through 1000.4, a court may summarily grant pretrial diversion or may refer the defendant to the Probation Department for its evaluation and recommendations if a court determines that a defendant should be granted pretrial diversion, and if the defendant:

- consents to the procedure;
- pleads not guilty to the charge(s);
- waives the rights to a speedy trial and a speedy preliminary hearing (if applicable); and
- waives the right to a jury trial.

If the defendant is granted pretrial diversion, the length of the program is between 12 months and 18 months. Extensions are available to defendants, pursuant to Penal Code § 1000.2(c), upon a showing of "good cause." If the defendant successfully completes the drug program, the court dismisses the charge(s). A motion to dismiss may be made by the defendant, the prosecutor, the Probation Department, or the court itself. If the defendant performs unsatisfactorily in the drug program, is arrested and convicted of any felony or a misdemeanor which reflects a propensity for violence, or is convicted of any felony, the court may terminate the program and return the case to the pre-trial stage of proceedings. A motion for termination may be made by the prosecutor, the Probation Department, or the court itself. As set forth in Penal Code §§ 1000 to

1000.4, a court may only make referrals to designated programs certified by the county drug program administrator.

15.02.01 PRETRIAL DIVERSION ELIGIBILITY

The requirements for pretrial diversion eligibility are set forth in Penal Code § 1000(a). A defendant is eligible for pretrial diversion if all of the following apply:

- Within the last five years, the defendant has no conviction for any offense involving controlled substances other than the offenses that are eligible for pretrial diversion.
- The offense charged did not involve a crime of violence or threatened violence.
- There is no evidence of a contemporaneous violation relating to narcotics or restricted dangerous drugs other than a violation of the offenses that are eligible for pretrial diversion.
- The defendant has no prior felony conviction within five years prior to the alleged commission of the charged offense.

15.02.02 WRITTEN NOTICE

A deputy shall give written notice to the court, counsel, and the defendant whenever the defendant is eligible for pretrial diversion. (PC § 1000(b).) The defendant shall also be given an explanation of the procedure and the role of the prosecuting attorney, the court, and the Probation Department.

The evaluation of a defendant's eligibility for pretrial diversion is to occur as soon as possible after the initial filing of the charges. Therefore, each defendant's eligibility shall be reviewed as part of the filing process. Filing deputies shall complete a declaration. This declaration evaluates both eligible and ineligible defendants and provides the explanation of pretrial diversion procedures. The form shall be provided to the defendant and the defendant's attorney.

If a defendant is ineligible for pretrial diversion, Penal Code § 1000(b) allows a deputy to give either written notice to the defendant or make a statement on the record reflecting ineligibility. It is Office policy to issue a written notice of ineligibility in every case. The sole remedy available to a defendant who is found ineligible for pretrial diversion is a post-conviction appeal.

15.03 PROPOSITION 36

Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, added new Penal Code §§ 1210, 1210.1 and 3063.1 and Health and Safety Code §§ 11999.4, et seq. Proposition 36 did not repeal any existing statutes. To be eligible for Proposition 36 treatment programs, both the offender and the offense must qualify. The law mandates that when the offender and the offense qualify, a court shall initially grant probation. The court must impose drug treatment as a condition of probation and may not order incarceration. The law also sets out procedures to be followed should the defendant violate probation. Depending on the nature of the offense, the law appears to permit revocation if a court makes certain factual findings. For an in-depth analysis

of the proposition and its implementation, deputies should refer to the June 2001 District Attorney publication "Analysis and Implementation Plan for Proposition 36."

A qualifying offender is eligible for Proposition 36 sentencing if the conviction for the qualifying offense occurs after July 1, 2001. Conviction within the meaning of Penal Code § 1210.1 means adjudication of guilt and sentencing. (*In re Delong* (2001) 93 Cal.App.4th 562.) Therefore, even if the offense date, guilty plea, or guilty verdict precedes the effective date of Proposition 36, a qualifying offender may still be eligible for sentencing under Proposition 36.

If a bench officer imposes an illegal sentence in a Proposition 36 case, deputies must immediately report the illegal sentence to their Head Deputy. Head Deputies must report illegal sentences to their Bureau Director for appellate consideration.

15.03.01 QUALIFYING OFFENSES

Nonviolent drug possession convictions occurring after July 1, 2001, are covered under Proposition 36. Any person convicted of a nonviolent drug possession offense shall receive probation with drug treatment as a condition of probation if the offender also qualifies under Proposition 36.

Qualifying offenses include the unlawful possession, use, or transportation for personal use of any controlled substance identified in Health and Safety Code §§ 11054 through 11058 or being under the influence of a controlled substance. (PC § 1210(a).)

15.03.02 QUALIFYING OFFENDERS

Defendants who possess, transport for personal use, or are under the influence of a controlled substance qualify for Proposition 36 sentencing. Under Penal Code § 1210.1(b)(1) - (5), Proposition 36 does not apply to:

- Defendants with one or more prior serious or violent felony convictions unless the nonviolent drug possession offense occurred after a period of five years during which the defendant remained free of both prison custody and the commission of an offense that results in a felony conviction (other than a nonviolent drug possession offense) or a misdemeanor conviction involving physical injury or the threat of physical injury;
- Defendants who are convicted in the same proceeding of any felony or a misdemeanor not related to the use of drugs;
- Defendants who, while using a firearm, were in possession of or were under the influence of cocaine base, cocaine, heroin, methamphetamine or phencyclidine;
- Defendants who refuse treatment as a condition of probation; or
- Defendants who have two separate convictions in which they participated in drug treatment and are found by a court to be unamenable to any and all forms of drug treatment.

15.03.03 SENTENCING

Once a defendant is convicted under Proposition 36, a court must impose probation and drug treatment as a condition of probation. Further incarceration of the defendant is prohibited. (PC § 1210.1(a).)

Penal Code § 1210(b) defines drug treatment as a licensed and/or certified community drug treatment program. Treatment may include outpatient treatment, half-way house treatment, narcotic replacement therapy, drug education or prevention courses and/or limited inpatient or residential treatment as needed to address special detoxification or relapse situations or severe dependence.

Drug treatment services may not exceed 12 months, but additional aftercare services may be required for up to 6 months. (PC § 1210.1(c)(3).)

15.03.04 DISMISSAL OF CHARGES

A defendant may petition the sentencing court for dismissal of the charges upon successful completion of drug treatment. The court shall dismiss the case if it finds that the defendant successfully completed drug treatment and complied with the conditions of probation. (PC § 1210.1(d)(1).)

"Successful completion of treatment" means a defendant has completed drug treatment and, as a result, there is reasonable cause to believe that the defendant will not abuse controlled substances in the future. (PC § 1210(c).)

15.03.05 PROBATION VIOLATIONS

Penal Code § 1210.1(e) distinguishes between drug-related and non-drug-related probation violations.

Non-drug-related probation violations:

- The court may modify or revoke probation if the alleged violation is proved.

Drug-related probation violations:

The court may modify or revoke probation under certain circumstances, depending on the number of prior violations the defendant has suffered.

- For a first time drug-related probation violation, the court may revoke probation if the alleged violation is proved and it is also proved that the defendant is a danger to the safety of others.
- For a second time drug-related probation violation, the court shall revoke probation if the violation is proved and it is also proved that the defendant is a danger to the safety of others or is unamenable to drug treatment.

- For a third time drug-related probation violation, if the alleged violation is proved, the defendant is not eligible for continued probation under Proposition 36.

Commentary

Penal Code § 1210.1(b) defines classes of defendants who are ineligible for Proposition 36 sentencing. Penal Code § 1210.1(b)(5) states that the trial court shall sentence such defendants to 30 days in jail. The language of Penal Code § 1210.1(b)(5) shall not be construed to apply to all classes of defendants ineligible for Proposition 36 sentencing. It appears to be limited to the class of defendants who are not eligible for Proposition 36 sentencing due to prior nonviolent drug possession offense convictions, prior drug treatment and a finding by the court of unamenability to all forms of treatment. The 30 day jail sentence shall not be treated as a sentencing limitation, but rather a sentencing minimum.

15.04 DRUG COURT

Drug Court, codified in Penal Code § 1000.5, is a pre-plea alternative to Proposition 36 and DEJ programs.

Drug court is a specifically designated court that supervises non-violent felony drug defendants who have been referred to a comprehensive and judicially monitored program of drug treatment and rehabilitation services. Criminal proceedings are suspended, without a guilty plea, for those defendants who are participating in the drug court program.

15.04.01 ELIGIBLE DEFENDANTS AND QUALIFYING OFFENSES

Consideration for admission to the drug court program shall be limited to those defendants who have been arrested for violations of Health and Safety Code §§ 11350, 11364, 11365, 11377, or 11550 who:

- Qualify for a pre-guilty plea drug court program as first time offenders under Penal Code § 1000.5;
- Do not qualify for DEJ or diversion under Penal Code § 1000 because of prior conviction(s) of Health and Safety Code §§ 11350 or 11377 or completion of a Penal Code § 1000 diversion program within the past five years, but are otherwise deemed suitable for the drug court program;
- Have qualified for a court-ordered diversion program under Penal Code § 1000 for offenses alleged to have occurred prior to January 1, 1997, but have failed to comply with program requirements; or
- Have violated probation on prior conviction(s) of Health and Safety Code §§ 11350 and 11377 or other non-violent, non-drug trafficking/sales felony or misdemeanor offenses.

15.04.02 INELIGIBLE DEFENDANTS

Defendants with a prior conviction of a violent felony as defined by Penal Code § 667.5, or serious felony as defined by Penal Code § 1192.7, or any offense, whether misdemeanor or felony, involving an act of violence, or any drug trafficking or sales offenses are ineligible.

In unusual cases, a defendant with a prior misdemeanor conviction involving an act of violence may be admitted to the drug court program upon concurrence of all parties and the court.

15.04.03 DETERMINATION OF SUITABILITY FOR DRUG COURT PROGRAM

In determining the defendant's overall suitability for the program, the:

- Probation pretrial services staff shall complete a standardized drug court risk classification assessment for eligible defendants; and
- Drug court treatment counselor shall interview eligible defendants and summarize any background and/or drug history information which may bear on the individual's potential for success in the intensive drug court treatment program.

A final determination on admission to the drug court program shall be made by the drug court judge based on recommendations from the district attorney, public defender, pretrial services staff, and the treatment counselor.

15.04.04 REINSTATEMENT OF CRIMINAL CHARGES

Pursuant to Penal Code § 1000.5(b), a court will reinstate the criminal charge(s) when a defendant:

- Is not performing satisfactorily in the assigned program;
- Is not benefiting from education, treatment, or rehabilitation;
- Has been convicted of a crime specified in Penal Code § 1000.3; or
- Has engaged in criminal conduct rendering the defendant unsuitable for the pre-guilty plea program.

15.04.05 COMPLETION OF THE DRUG COURT PROGRAM

If a defendant has performed satisfactorily during the program, at the end of that period, the criminal charge(s) shall be dismissed and the provisions of Penal Code § 1000.4 shall apply.

15.05 SENTENCED OFFENDER DRUG COURT

The Sentenced Offender Drug Court (SODC) provides an alternative drug treatment program for defendants who have pled guilty or admitted a violation of probation. To be eligible, defendants:

- Must not be charged with a serious or violent felony or probation violation or have a prior serious or violent felony conviction;
- Must have a history of drug abuse and addiction; and
- Must exhibit a sincere desire to get clean and sober.

Because this program assists participants who suffer from substance use disorders, it would be detrimental to recovery if drug dealers were also permitted to participate in the same program. Therefore, candidates who are currently charged with a crime involving the sale, possession for

sale, or transportation for purposes of sale of a controlled substance should generally not be referred to SODC. However, if all parties agree, deputies may refer otherwise eligible candidates who are charged with low level sale, possession for sale, or transportation for sale charges, where there is clear evidence that the sales activity is driven by a documented history of addiction and motivated by the candidate's desire to afford or obtain drugs for personal consumption.

If accepted into the program, defendants are placed on probation for up to five years and receive 12 to 18 months of drug treatment. Defendants spend the first 90 days in custody where they participate in intensive addiction treatment followed by residential or sober living/outpatient treatment. The program is designed to gradually and incrementally move defendants into mainstream society and a regular probation caseload. Pursuant to Penal Code § 1203.4, the defendant can earn a dismissal of the charge. If the charge is a wobbler, the defendant can also seek a reduction to a misdemeanor.

CHAPTER 16

MENTAL DEFENSES AND OTHER PSYCHIATRIC ISSUES

16.01 INTRODUCTION

This chapter covers Office policy and procedure in cases involving mental competence, insanity, sexually violent predators, and other psychiatric issues. Refer to the Office's *Forensic Mental Health Procedures Manual* for a detailed description of the proceedings, procedures and relevant case law in these specialized areas.

16.01.01 ADMONITION TO PSYCHIATRISTS

When a psychiatrist/psychologist is appointed to examine a defendant, the deputy should ask the court to admonish the witness to address only those specific forensic questions immediately at issue and not to volunteer opinions on collateral issues that may arise in a later context.

16.02 MENTAL COMPETENCE - PENAL CODE § 1368

For defendants who are suspected of being incompetent to stand trial based on a diagnosis of Developmental Disability, or a combination of Mental Illness and Developmental Disability, the deputy should object to a finding under Penal Code § 1370.1 unless the defendant is a consumer of the Regional Center. For all cases where a defendant is found to be incompetent under 1370.1, the Regional Center shall prepare a placement report recommending where defendant shall receive competency restoration treatment, as well as all progress reports to the court. If a Developmentally Disabled defendant remains incompetent as they approach the maximum commitment date, or if it is determined that there is no substantial likelihood that defendant will regain competency within the foreseeable future, a civil commitment under Welfare & Institutions Code § 6500 may be filed if defendant is dangerous to their own person or others. These 6500 petitions are filed by the deputies in the Psychiatric Section in the Hollywood Mental Health Court when appropriate and when requested by an authorized party. (WIC § 6502.) Trial on these petitions is by jury unless waived by both sides.

16.02.01 ASSIGNMENT OF COMPETENCY HEARINGS TO THE PSYCHIATRIC SECTION

If a doubt arises in the court's mind as to a defendant's mental competence, the court shall state that doubt on the record and proceed as required by Penal Code § 1368. Pursuant to Los Angeles County Court Rules, rule 2.13(c), all criminal competency proceedings under Penal Code § 1368 that are initiated on or after March 15, 2021, are assigned to the Mental Health Departments of the Probate Division in Hollywood (formerly known as Department 95). Previously, competency proceedings under PC § 1368 held in the Mental Health Departments of the Probate Division only included misdemeanor cases and pre-preliminary hearing cases, while competency proceedings under PC § 1368 in post-preliminary hearing cases were held in the assigned felony trial courts.

All competency proceedings in misdemeanor and felony cases where a doubt was declared on or after March 15, 2021, will be handled by the Psychiatric Section of the Mental Health Division. All post-preliminary hearing criminal competency proceedings where a doubt was declared and the cases were pending in the felony trial courts prior to March 15, 2021, will remain assigned to those felony trial courts until their conclusion.

When the competency proceedings for any felony cases are transferred to the Hollywood Mental Health Court, the hard copy DA case file does not need to be sent to the Psychiatric Section. However, the following documents must be forwarded to the Psychiatric Section: the complaint or information; a copy of the police report; the defendant's rap sheet; and any expert reports that have already been received. These documents can either be emailed to the Psychiatric Section at PSY_NonDDA@da.lacounty.gov or uploaded into PIMS under "F5" of "View e-folder."

16.02.02 PENAL CODE § 4011.6

If a court, whether before or after a preliminary hearing, considers referring the defendant to a facility for 72-hour treatment and evaluation under Penal Code § 4011.6, which is tantamount to an OR release, the deputy shall, in appropriate cases, urge proceeding under Penal Code § 1368 instead. The guidelines for determining whether a Penal Code § 1368 referral is more appropriate than Penal Code § 4011.6 referral include:

- Assessing of the defendant's competence including the ability to obtain necessary time waivers;
- Assessing the value of long-term hospitalization (PC § 1368) compared to short-term hospitalization (PC § 4011.6); and
- Assessing the need for security and public safety.

The deputy shall advise the court that until secure psychiatric hospital facilities are available, a Penal Code § 4011.6 referral is equivalent to an OR release. If the court is unwilling to grant an OR release, it should not make a Penal Code § 4011.6 order. A court may request psychiatric treatment in the jail by contacting Jail Mental Health Services.

16.02.03 CONDUCTING A PENAL CODE § 1368 HEARING

If a court orders a hearing to determine a defendant's mental competence, the procedures for conducting the hearing are set forth in Penal Code § 1369. Criminal proceedings are suspended pending the outcome of the hearing (except as provided in Penal Code § 1368.1).

The prosecution and the defendant both have the right to a jury trial on the issue of mental competence. If both sides waive the right to a jury trial, the issue may proceed by way of a court trial. At trial it shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. (PC § 1369.) In a jury trial, the verdict must be unanimous.

16.02.04 DEFENDANT FOUND MENTALLY INCOMPETENT

Upon a finding that a defendant is mentally incompetent under Penal Code § 1370, the deputy shall:

- Ensure that the findings of the defendant's mental incompetence are put on the record.

- Ensure that the court orders a placement report for a date within 15 court days as required by Penal Code § 1370(a)(2). The Department of State Hospitals (DSH) and the Community Program Director (Gateways) have adopted a procedure to prepare placement reports to comply with Penal Code § 1370(a)(2) and the Los Angeles Superior Court rules. For defendants who are in custody, DSH's Forensic Services Division will prepare a report with a recommendation of either the State Hospital or out-patient. For defendants who are out-of-custody, Gateways Conrep will prepare a report with their recommendation as to whether the defendant can be safely treated for competency restoration on an out-patient basis. All competency proceedings in misdemeanor and felony cases where a doubt was declared on or after March 15, 2021, will be handled by the Psychiatric Section of the Mental Health Division.. Whenever these cases are transferred to the Hollywood Mental Health Court, the assigned deputy shall send a copy of the complaint, police report, rap sheet and any expert reports that have already been received to the Psychiatric Section. These documents can either be emailed to the Psychiatric Section at PSY_NonDDA@da.lacounty.gov or uploaded into PIMS under "F5" of "View e-folder."

Post-preliminary hearing cases in the trial courts (where a doubt was declared and the cases were pending in the felony trial courts prior to March 15, 2021) should be handled as follows:

1. If the defense requests an immediate commitment to the State Hospital without a placement report, the assigned deputy shall object unless the defense agrees to a commitment order to the State Hospital.

2. If the State Hospital is recommended, absent unusual circumstances, the assigned deputy shall submit on the recommendation.

3. Out-of-custody defendants are evaluated by Gateways Conrep for out-patient treatment consideration. Gateways can only recommend out-patient treatment if they determine the defendant is not a danger to the health and safety of others, and the court shall consider defendant's dangerousness when deciding whether to grant out-patient status. (PC § 1602(a)(2).) Unlike a recommendation to the State Hospital, there is a statutory right to a hearing if out-patient treatment is recommended, or if the court is considering granting out-patient treatment in spite of a recommendation by Gateways against it. (PC § 1602 (b).) If there are facts available to refute Gateways' assessment of dangerousness, or if there is no available identified appropriate program, the assigned deputy shall litigate the appropriateness of community placement. Similarly, if the court is considering granting out-patient competency-restoration treatment in spite of a recommendation against it, the

assigned deputy shall litigate the appropriateness of community placement by way of a hearing.

When the defendant is committed, the deputy shall:

1. Request the court to calendar the matter for a 90-day progress report.

2. Request the court to order the hospital medical director or outpatient supervisor to submit a 90-day status report to the court clerk with copies for the deputy and defense counsel which should address the following issues:

   - Is the defendant now able to understand the nature of the proceedings? If not, will the defendant be able to do so in the foreseeable future?

   - Is the defendant now able to cooperate rationally with the defendant's attorney? If not, will the defendant be able to do so in the foreseeable future?

   - If compulsory medication is warranted, can the medication be effectively administered by the agency having custody of the defendant? (PC § 1369(a).)

3. Request the court to order the clerk to provide copies of the 90-day status report to the deputy and defense counsel.

4. Prepare a file to be sent to the facility to which the defendant is committed, which shall contain copies of:

   - The complaint or information;

   - The police reports or a summary of defendant's criminal behavior;

   - The mental health experts' reports upon which the court based its determination of incompetence;

   - The probation report, if any; and

   - Any other information the deputy deems to be relevant.

This information should be directed to the medical director or executive director of the treatment facility to which the defendant is committed. Contact the Psychiatric Section for mental health administrators' contact information.

If a defendant has been returned to court and deemed restored to competency pursuant to Penal Code § 1372, and the defendant's attorney then attempts to declare a new doubt, the deputy shall point out to the judge that the defendant is presumed competent unless the defense presents to the court "a substantial change in circumstances or new evidence casting a serious doubt on the

validity of that [competency] finding." (*People v. Kelly* (1992) 1 Cal.4th 495, *People v. Taylor* (2009) 47 Cal.4th 850, and *People v. Buenrostro* (2018) 6 Cal.5th 367.)

16.02.05 PERIODIC REPORTS ON DEFENDANT'S PROGRESS TOWARD RECOVERY

If the hospital reports, after 90 days, the defendant remains mentally incompetent to stand trial but the defendant may reasonably attain such competence in the foreseeable future, the deputy shall request the court:

- Order the hospital's report be made part of the record of the pending case;
- Order the defendant be retained for continued treatment;
- Calendar the matter for a date six months later; and
- Order a six-month report.

Upon receipt of a report from the hospital medical director or out-patient supervisor stating, "there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future" (PC § 1370(b)(1)), the deputy shall insist on a current, local judicial determination of the defendant's likelihood of becoming competent. A judicial determination of the defendant's status is necessary since this function cannot be delegated to a non-judicial officer.

If the current determination is the defendant has been restored to competence, the criminal process resumes. If the current determination is the defendant remains incompetent, but is likely to become competent in the foreseeable future, and is not yet approaching the maximum term (PC § 1370(c)(1)), the court should order the defendant retained at the hospital or out-patient facility for continued treatment.

16.02.06 INITIATION OF CONSERVATORSHIP PROCEEDINGS

One of the functions of the Psychiatric Section is to maintain conservatorships for violent offenders. A conservatorship is established under Welfare and Institution Code § 5008(h)(1)(B) after a defendant, who has been deemed incompetent to stand trial, has been confined in a treatment facility for *two years* or the maximum term of imprisonment provided by law for the most serious offense charged in the indictment or information, whichever is *shorter*. These conservatorships are commonly referred to as "Murphy" conservatorships. Deputies shall pursue Murphy conservatorships in cases where the defendant is a violent offender and cannot be restored to competency.

In order to pursue a Murphy conservatorship, the defendant must be mentally incompetent per Penal Code § 1370 and all of the following conditions exist:

1. The indictment, information, or complaint with a finding of probable cause pursuant to Penal Code § 1368.1(a)(2) pending against the defendant at the time of commitment, charges a felony involving death, great bodily injury, or a serious threat to the physical well-being of another.

2. The indictment, information, or complaint with a finding of probable cause pursuant to Penal Code § 1368.1(a)(2) has not been dismissed.

3. As a result of a mental disorder, the defendant is unable to understand the nature and purpose of the proceedings and to assist counsel in the conduct of the defense in a rational manner. (WIC §§ 5008(h)(1)(b)(i-iii).)

When calendaring a Penal Code § 1368.1(a)(2) hearing, it is important not to cause a defendant who is being treated at a locked State Hospital treatment facility to be removed from that facility and booked into the county jail. Defendants who are being treated at a locked State Hospital facility should be ordered specially transported to and from that State Hospital facility and court in the same day. In this way, the defendant's treatment is not interrupted, and the hospital witnesses who testify in a conservatorship trial will be able to give up-to-date testimony as to the defendant's psychiatric condition and dangerousness.

In addition to the criteria enumerated in Welfare and Institution Code §§ 5008(h)(1)(b)(i-iii), case law requires the court to find that, by reason of a mental disease, defect, or disorder, the defendant represents a substantial danger of physical harm to others. (*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 176-177.)

When an incompetent defendant is returned to the committing court and meets the above criteria for establishing a conservatorship, the court shall order the conservatorship investigator to initiate conservatorship proceedings. (PC § 1370(c)(2).) In Los Angeles County, this is the responsibility of the Public Guardian of the Department of Mental Health. If the Public Guardian recommends a conservatorship be established under Welfare and Institution Code § 5008(h)(1)(B), County Counsel will file a petition in the Hollywood Mental Health Courthouse, and the MHD's Psychiatric Section shall handle all proceedings. Most importantly, the indictment, information, or complaint must *not* be dismissed, even after a conservatorship has been established. In lieu of dismissal, the deputy shall request that the proceedings be suspended indefinitely for good cause, pending the possible restoration of the defendant's competency. There are two situations that require special attention and handling. First, if a defendant charged with a felony involving death, great bodily injury, or a serious threat to the well-being of another is found to be incompetent *prior to the preliminary hearing* and either the maximum commitment date is near or it has been determined the defendant is unlikely to regain competency before the maximum commitment date, it may be necessary to obtain a Grand Jury indictment or conduct a Penal Code § 1368.1(a)(2) hearing so a conservatorship may be put in place. Having in hand a certified copy of an indictment or certified minute order reflecting that probable cause has been found after a Penal Code § 1368.1(a)(2) hearing at the time the defendant is returned to the committing court allows the handling deputy to request the court to appoint an investigator from the Public Guardian's Office to initiate conservatorship proceedings.

The second situation occurs when the Public Guardian refuses to initiate a conservatorship for a violent, incompetent defendant and either the maximum commitment date is near or it has been determined that the defendant is unlikely to ever regain competency. Under the *Kennebrew* case (*County of Los Angeles v. Superior Court* (2013) 222 Cal.App.4th 434), the court can order the

Public Guardian to file a Murphy conservatorship if it finds that the Public Guardian's refusal to file constituted an abuse of its discretion.

The deputy handling the case shall inform their Head Deputy or Deputy-in-Charge when the deputy becomes aware that an incompetent defendant charged with a felony involving death, great bodily injury, or a serious threat to the well-being of another is either approaching the maximum commitment date or it has been determined that the defendant is unlikely to be restored to competency before the maximum commitment date. It is the responsibility of the Head Deputy or Deputy-in-Charge to make the final determination on whether a Grand Jury indictment or probable cause finding pursuant to Penal Code § 1368.1(a)(2) should be pursued so that a conservatorship could be filed by the Public Guardian.

The following options are available to the court when a civil commitment is desired and the case does not meet the requirements for a Murphy conservatorship:

1. If the defendant is in a State Hospital, the court may order the hospital staff to initiate conservatorship proceedings by applying to the Public Guardian for such a petition (WIC §§ 5008(h)(1)(A) and 5352) or

2. If the defendant is in local custody, the court may order the Forensic Mental Health Unit of the Los Angeles County Mental Health Department to initiate conservatorship proceedings through the Office of the Public Guardian.

In all cases, conservatorship proceedings should be instituted before the maximum term of commitment expires so that the court will still have jurisdiction to keep the defendant in custody pending the conservatorship process. Dismissal of charges will preclude initiation or renewal of any civil commitment per Welfare and Institution Code § 5008(h)(1)(B).

In cases that do not meet the requirements for a Murphy conservatorship, the calendar deputy responsible for the pending case shall prepare a Disposition Report recommending whether civil conservatorship proceedings should be initiated pursuant to the Lanterman-Petris-Short Act (WIC §§ 5008(h)(1)(A) and/or 5350 et seq.). The Head Deputy shall decide whether to request initiation of civil commitment. The charges shall be dismissed only after completion of the civil commitment process.

Juvenile proceedings in this area are governed by Welfare and Institution Code § 705 which authorizes the court to proceed pursuant to Penal Code § 4011.6. In all other respects, the juvenile court deputy shall follow the procedures set forth above.

16.03 GRAVELY DISABLED DEFENDANTS

In some cases involving gravely disabled defendants, such as when a defendant has developed a seriously debilitating medical condition, a deputy may consider a civil conservatorship pursuant to Welfare and Institutions Code §§ 5008(h)(1)(A) and/or 5350 et seq. as an appropriate disposition of a criminal case whether or not the defendant is mentally incompetent. Civil conservatorship may be an appropriate disposition, either pre- or postconviction, and with or

without dismissal of the criminal case, in situations in which it is believed involuntary treatment for a defendant's mental illness will provide adequate social control of the defendant's criminal behavior. Deputies shall be aware that involuntary treatment pursuant to a civil conservatorship does not necessarily include custodial supervision. The lack of custodial supervision shall be a factor in determining whether to agree to civil conservatorship as a case disposition.

The Head Deputy or Deputy-in-Charge shall decide whether to agree to a civil conservatorship. If a civil conservatorship is the agreed upon disposition of the case, the agreement shall be conditioned upon the defendant's agreement not to seek termination of the conservatorship. (WIC §§ 5358 and 5364) during the first year of conservatorship. This condition should be stated on the record in the trial court and in the Hollywood Mental Health Court.

Proceedings in the criminal case should be suspended and the defendant transferred to the Hollywood Mental Health Court. The criminal charges shall only be dismissed after the completion of the civil commitment process which takes place in the Hollywood Mental Health Court under the stewardship of County Counsel.

16.04 INSANITY PLEA - PENAL CODE § 1026

16.04.01 MISDEMEANOR CASES

The issue of a defendant's sanity at the time the defendant committed the offense should be resolved in the trial court where the case is pending.

The entry of an insanity plea in a misdemeanor case is extremely rare.

16.04.02 FELONY CASES

The issue of a defendant's sanity at the time the defendant committed the offense should be resolved in the trial court where the case is pending and should not be transferred to the Hollywood Mental Health Court for this purpose. (Los Angeles Superior Court Rule 2.5(c)(1).)

If such a case is transferred to the Hollywood Mental Health Court over the deputy's objection, the deputy shall immediately call and notify the Psychiatric Section. The deputy may be required to provide additional written information as well.

When a defendant enters a dual plea of not guilty and not guilty by reason of insanity and does not waive jury trial on the issue of guilt, the deputy shall not waive a separate jury trial on the issue of sanity without Head Deputy approval.

Upon a determination of insanity under Penal Code § 1026, the deputy shall prepare a file to be sent to the mental health treatment facility where the defendant is committed which shall contain copies of:

- The complaint or information;
- The police reports or a summary of the defendant's criminal behavior;

- The mental health experts' reports upon which the court's determination of insanity was based;
- The probation report, if any; and
- Any other information the deputy deems to be relevant.

This information should be directed to the medical director or executive director of the treatment facility to which the defendant is committed. The Psychiatric Section has the names and addresses of these mental health administrators.

Post-commitment not guilty by reason of insanity proceedings are to be processed in the Superior Court district in which the original not guilty by reason of insanity commitment order was entered. Such proceedings shall include:

- Out-patient placement (PC § 1603);
- Out-patient revocation by District Attorney (PC § 1609);
- Out-patient revocation by Mental Health (PC § 1608); and
- Restoration of sanity proceedings (PC § 1026.2).

All proceedings to extend commitments of defendants previously found not guilty by reason of insanity (PC § 1026.5) are assigned by local court rules to the Hollywood Mental Health Court. Deputies in the Psychiatric Section shall be responsible for processing these extensions. The case file shall be held by the originating office until requested by the Psychiatric Section.

When a calendar or other deputy receives a report from a state hospital requesting that the Office file a petition to extend defendant's commitment pursuant to Penal Code § 1026.5, the deputy shall immediately notify the Psychiatric Section and forward the report to the Psychiatric Section.

16.05 MENTALLY DISORDERED OFFENDERS

Penal Code §§ 2962 through 2968 provide for the involuntary mental health treatment of a prisoner with a severe mental disorder by the State Department of Mental Health as a condition of parole when certain criteria are met. These sections apply to persons who committed crimes on or after January 1, 1986. Trials for male prisoners are handled by the District Attorney of San Luis Obispo County; trials for female prisoners are handled by the District Attorney of San Bernardino County.

Penal Code §§ 2970 and 2972 provide for a continuation of treatment for a mentally disordered offender who has been receiving treatment as a condition of parole *after* his parole expires. This treatment is ordered in increments of one year and may be renewed indefinitely. These cases are prosecuted by the District Attorney for the county in which the parolee is receiving out-patient treatment, or the District Attorney for the county of original commitment when the parolee is in prison because of a parole revocation or is receiving treatment in a state mental hospital.

Local court rules assign trials for mentally disordered offenders to the Hollywood Mental Health Court.

16.06 INTELLECTUALLY DISABLED DEFENDANTS

In *Atkins v. Virginia* (2002) 536 U.S. 304, 321, the United States Supreme Court held that execution of the intellectually disabled is cruel and unusual punishment under the Eighth Amendment of the United States Constitution. In response to *Atkins*, the California State Legislature enacted Penal Code § 1376 which sets forth the standards and procedures for determining whether a defendant against whom the prosecution seeks the death penalty is intellectually disabled within the meaning of *Atkins*.

Pursuant to Penal Code § 1376, the defendant may request either that the court hear the claim prior to trial or that the jury decide the question following a guilty verdict and special circumstances finding. The trial court may order the defendant examined by one or more qualified experts. The defendant must also submit to an examination by a prosecution expert. At the hearing, the defendant bears the burden of proof by a preponderance of the evidence and any jury verdict must be unanimous.

In re Hawthorne, (2005) 35 Cal.4th 40, sets forth the procedure to be employed by defendants already convicted and sentenced to death who contend that because they are intellectually disabled, they cannot be executed.

The question of intellectual disability presents a question of fact.

16.07 CALIFORNIA REHABILITATION CENTER COMMITMENTS

On January 1, 2015, Welfare and Institutions Code § 30501 was repealed in its entirety, and California Rehabilitation Center Commitments were eliminated.

16.08 GUN RETURNS

Welfare and Institutions Code §§ 8100 et seq. forbid certain individuals from possessing firearms. These individuals include:

- Those who have communicated, to a licensed psychotherapist, a serious threat of physical violence against an identifiable victim;
- Those who have been involuntarily hospitalized pursuant to Welfare and Institutions Code §§ 5150 et seq.;
- Those who are on conservatorships pursuant to Welfare and Institutions Code §§ 5008 et seq.;
- Those who have been declared to be mentally disordered sex offenders pursuant to Welfare and Institutions Code §§ 6300 et seq. (repealed but still applicable to cases that pre-date that repeal);
- Those who are currently certified as incompetent under Penal Code §§ 1367 et seq.; and
- Those who have been found to be not guilty by reason of insanity pursuant to Penal Code §§ 1026 et seq.

Confiscation of firearms from individuals detained for mental health examination pursuant to Welfare and Institutions Code § 5150, or who are described in Welfare and Institutions Code § 8100 or 8103, is mandatory.

The Psychiatric Section has search warrant forms for situations when a law enforcement agency has probable cause to believe that such a person has weapons at a particular location. Following confiscation, the law enforcement agency must notify the individual detained of the procedures for return of the weapon.

Pursuant to local court rules, all hearings for the return of a confiscated weapon or the lifting of the restriction shall take place in the Hollywood Mental Health Court.

CHAPTER 17

POSTCONVICTION PROCEEDINGS

17.01 APPELLATE PROCEEDINGS

Whenever the Writs and Appeals Division prepares a postconviction brief, a copy of that brief shall be forwarded to the trial deputy to be placed in the case file. If the trial deputy's work product is substantially incorporated in the brief, that deputy's name shall appear on the brief with the deputy's consent.

If a trial deputy wishes to assist or speak to a deputy attorney general concerning a case on appeal being handled by that office, the deputy shall write a letter to the attention of the Assistant Attorney General, Criminal Section, Office of the Attorney General in Los Angeles, stating the appellant's name, the Superior Court case number, and the deputy's desire to render assistance or speak with the assigned deputy attorney general about the case.

The Attorney General has agreed to send copies of appellate briefs and decisions to the trial deputy. A copy of all communication to and from the Attorney General's Office should be placed in the case file. When the Attorney General's Office contacts an individual deputy about a case on appeal, the deputy shall provide any assistance requested with Head Deputy or Deputy-in-Charge approval.

Questions regarding the appellate process should be referred to the Writs and Appeals Division and not the Attorney General's Office.

17.01.01 CASES PROCESSED BY THE WRITS AND APPEALS DIVISION

A case being handled by the Writs and Appeals Division may be adversely affected by actions taken in the same case by the trial or calendar deputy. Before deputies take any action which might affect appellate or habeas proceedings, the Writs and Appeals Division shall be consulted.

Normally, absent any time extension, cases on appeal are final 60 days after a decision by the Court of Appeal or 30 days after a decision by the Supreme Court. The Writs and Appeals Division will notify the trial deputy when a case becomes final. A case being handled by the Writs and Appeals Division shall not be settled or dismissed by the trial deputy until such notification has been received.

Victims, upon request, have a right to (1) reasonable notice of, (2) be present at and (3) be heard at any proceedings at which the defendant and prosecutor are entitled to be present and of post-conviction release proceedings or any proceeding in which a right of the victim is at issue. California Constitution Article I, § 28(b)(7) and (8).

17.01.02 HABEAS CORPUS PROCEEDINGS IN SUPERIOR COURT

The Habeas Corpus Litigation Team (HABLIT) has primary responsibility for defending convictions challenged in habeas corpus petitions filed in the Superior Court, or in habeas corpus petitions referred to the Superior Court by the Court of Appeal or the Supreme Court. Upon receipt of a habeas petition or an order to show cause, deputies shall immediately contact HABLIT and send a copy of all court orders and the petition to HABLIT.

HABLIT concentrates its efforts on defending serious and violent felony convictions. Petitions on non-serious and non-violent convictions are directed to the trial divisions for handling. If a court grants a habeas petition and orders a new trial, re-sentencing or other relief, the case will be referred back to the original trial division to effect the court's order. HABLIT is always available for consultation and assistance.

The court may decide the merits of a petition based only upon a review of the legal pleadings submitted by the Petitioner and the People. However, if the pleadings raise factual disputes, e.g., the credibility of a recanting witness or newly discovered evidence, the court will order an evidentiary hearing to assess the believability and reliability of the evidence offered in support of a habeas petitioner's claims. At the evidentiary hearing, the habeas petitioner has the burden of producing evidence and establishing the truth of the claims by a preponderance of the evidence.

Victims, upon request, have a right to (1) reasonable notice of, (2) be present at and (3) be heard at any proceedings at which the defendant and prosecutor are entitled to be present and of post-conviction release proceedings or any proceeding in which a right of the victim is at issue. (Cal. Const. Art. I, § 28(b)(7) and (8).)

When the Office is ordered to respond to a habeas corpus petition, HABLIT will send an e-mail notification to both the trial deputy and the current Head Deputy of the division that was responsible for the case when it was tried. The e-mail will describe habeas proceedings, include future dates of habeas proceedings, and will notify the Head Deputy if the trial division must respond to the petition. A copy of the habeas corpus petition will be attached to the e-mail notice. Since a court will likely grant a habeas petition and set aside a conviction only after a habeas corpus evidentiary hearing has been conducted, the trial deputy and Head Deputy of the division that was responsible for the case when it was tried will also receive an e-mail notification when an evidentiary hearing is scheduled.

Trial deputies are encouraged to contact the HABLIT deputy assigned to litigate the petition and provide insights about the strengths and weaknesses of the evidence and witnesses presented at trial. The trial deputy's input is a valuable and often critical part of evaluating the merits of the claims raised in a habeas petition challenging a conviction.

A deputy should oppose the setting of an evidentiary hearing following the mere filing of a habeas petition or issuance of an order to show cause. The California Rules of Court governing habeas proceedings (Cal. Rules of Court, rules 4.550 - 4.552) give the People the right to file a return within 30 days following the issuance of the order to show cause. The petitioner is then entitled to file a denial, also called a traverse, within 30 days of the filing of the return. The

necessity for an evidentiary hearing is determined by the court following this responsive pleading process. (*People v. Romero* (l994) 8 Cal.4th 728, 739-740.) If the trial court calendars an evidentiary hearing without giving the People an opportunity to file a written response, deputies must immediately notify HABLIT.

17.01.03 MOTION TO VACATE A CONVICTION OR SENTENCE – PENAL CODE § 1473.7

Penal Code § 1473.7 authorizes a defendant to file a motion to vacate a conviction or sentence based on prejudicial error damaging the defendant's ability to meaningfully understand, defend against or knowingly accept the immigration consequences of the conviction. The statute also authorizes the trial court to set aside a conviction based upon newly discovered evidence of the defendant's actual innocence. The statute applies to defendants who are no longer in state custody and whose probation or parole has expired.

The Habeas Corpus Litigation Team ("HABLIT") shall litigate Penal Code § 1473.7 motions alleging claims of actual innocence in the Superior Court.

The trial units which originally prosecuted the case shall litigate all other Penal Code § 1473.7 motions based on alleged error during the plea proceedings. The Head Deputy or Deputy-in-Charge of the trial unit may contact the Assistant Head Deputy of the Writs and Appeals Division for assistance. HABLIT deputies shall be available to consult with the assigned deputy to suggest practical steps to take in defense of the motions.

The statute affords relief to individuals who are no longer in criminal custody, i.e., defendants who are neither in actual custody or whose probation or parole has expired. A party may bring a motion pursuant to Penal Code § 1473.7 (a)(1) even though there is no pending removal proceeding or final removal order, if the moving party proves by a preponderance of the evidence that they have actually or may potentially suffer an adverse immigration consequence as the result of the conviction (e.g., that a federal statute makes the defendant deportable, excludable, or ineligible for citizenship). Further, a motion to set aside the conviction may be brought even if the conviction has previously been set aside pursuant to Penal Code § 1203.4.

A motion under the section will be deemed to have been timely filed at any time in which the petitioner is no longer in criminal custody. However, the motion must be filed promptly after a petitioner learns of the facts which support a claim for relief.

Commonly, a petitioner will assert that the prejudicial error which occurred during plea proceedings was due to ineffective assistance of trial counsel. While the statute requires a court to state the legal basis for its finding that prejudicial error occurred, damaging the party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse consequences of a guilty or no contest plea, the court may make a specific finding that trial counsel was ineffective only if the moving party or the prosecutor gave counsel timely advance notice of the motion. (§ 1473.7 (g).) The court may make a finding of legal invalidity on grounds other than ineffective assistance of counsel. (§ 1473.7 (a)(1).)

All Penal Code § 1473.7 motions that set forth a prima facie case for relief are entitled to a hearing, and, at the request of the moving party, the court may hold the hearing without the personal presence

of the moving party if the court finds good cause for the moving party's absence. The court may not grant the motion without a hearing over the prosecution's objection. (§ 1473.7 (d).)

If the underlying conviction was for a crime committed against an individual, Marsy's Law requires the handling deputy to notify the victim or the victim's next of kin that the conviction may be set aside and that the individual has the right to be informed about, be present and be heard at any post-conviction proceeding.

The following objections shall be made to ensure a full and fair hearing:

- Deputies shall object to a moving party's absence from the Penal Code § 1473.7 hearing;
- Deputies shall object to the admission of hearsay evidence (*In re Fields* (1990) 51 Cal.3d 1063, 1070);
- Deputies shall insist on exercising the right to cross-examine hearsay declarants pursuant to Evidence Code § 1203;
- Deputies shall object to plea withdrawals which do not take place in open court as required by Penal Code §§ 977 and 1018.

If a Court grants a petition on the basis of inadmissible hearsay evidence and denies the People's right to cross-examine the hearsay declarant, or permits a petitioner to withdraw a plea in violation of Penal Code § 1018, the handling deputy shall immediately contact the Writs and Appeals Division for consideration of appealing the trial court's rulings.

Templates for an opposition motion, waiver of the attorney-client privilege and order waiving the attorney-client privilege are available in PIMS.

17.02 LIFER HEARINGS

The Office shall be represented at all hearings before the Board of Parole Hearings regarding life prisoners who were prosecuted by the Office. The Office has the responsibility to ensure that a defendant serving a life sentence is incarcerated as long as the defendant poses an unreasonable risk of danger to society. All notices concerning hearings for life prisoners must promptly be forwarded to the Head Deputy of the Parole Division in the Bureau of Prosecution Support Operations. The Parole Division Head Deputy is responsible for assigning deputies to represent the Office at such hearings.

Board of Parole Hearings Commissioners determine whether a life prisoner is suitable for parole. The assigned deputy shall review the prisoner's Department of Corrections and Rehabilitation central file and the District Attorney's case file before attending the hearing. At the hearing, the deputy's role is to comment on the facts of the case and present an opinion about the appropriate disposition. The deputy shall be prepared to establish how the circumstances of the crime, the inmate's prior criminal record, the inmate's institutional adjustment, psychiatric evaluations, and parole plans (or lack thereof) indicate that the inmate currently poses an unreasonable risk of danger to society.

17.02.01 DISTRICT ATTORNEY'S STATEMENT OF VIEW - PENAL CODE § 1203.01

At the initial parole consideration hearing, which may not occur for many years after the commitment offense, an inmate provides their version of the commitment offense. Unless a District Attorney's Statement of View has been filed, the only version of the facts available to the members of the Board is the inmate's statement, augmented by a probation report. The trial deputy's Statement of View, written shortly after trial, provides a permanent credible record to counter an inmate's often distorted version of the crime(s). A District Attorney's Statement of View shall be filed in every case in which a defendant is sentenced to life with or without the possibility of parole, or death, including life sentences imposed in third strike cases in which the third strike is a serious or violent felony.
Prison officials use the Statement of View to assist in evaluating the danger posed by an inmate within the institution, and the Board of Parole Hearings uses it to determine the inmate's suitability for parole. If the information contained in the Statement of View and supplemental information is not in the prisoner's file 10 days before the parole hearing, the prosecutor cannot refer to it.

The Statement of View shall address the following questions:

Commitment Offense

- Was the offense carried out in a manner that exhibits a callous disregard for life or the suffering of another?
- Was it carried out in a dispassionate or calculated manner?
- Were multiple victims attacked, injured or killed in the same or separate incidents?
- Was the victim abused, defiled or mutilated during or after the offense?
- Did the defendant commit other criminal offenses after the commitment offense, before being arrested?

Prior Criminal History

- Does the defendant have a record of violence or assaultive behavior?
- Does the defendant have an escalating pattern of criminal conduct or violence?
- Has the defendant previously sexually assaulted another person?
- Is there a persistent pattern of tumultuous relationships or criminal behavior that commenced at an early age?
- Has the defendant failed to profit from society's previous attempts to correct criminality, such as juvenile probation, camp, or a commitment to a Secure Youth Treatment Facility (formerly known as the Division of Juvenile Justice (DJJ) or the California Youth Authority (CYA)), county jail, probation, parole, or a prior prison term?
- If the defendant is a gang member, was the commitment offense related to gang activity?
- Does the defendant have a history of drug or alcohol abuse and, if so, did the defendant claim to be under the influence of drugs or alcohol at the time of the commitment offense?

17.02.02 STATEMENT OF VIEW - ADDITIONAL DOCUMENTS

In addition to the documents listed above, the following documents should be attached to the Statement of View:

- Excerpts of testimony from the preliminary hearing or trial transcripts;
- The plea transcript containing the factual basis for the plea or the judge's comments on the nature of the commitment offense or the defendant's conduct before, during or after trial;
- The autopsy report describing defensive wounds or mutilation or other evidence relevant to the nature and circumstances of the crime;
- Crime scene and autopsy photographs;
- Arrest and crime reports, particularly if they contain the defendant's confession; and
- Psychiatric reports which describe a history of psychological problems resulting in criminal activity.

17.02.03 STATEMENT OF VIEW - DISTRIBUTION

A deputy shall submit the Statement of View (with attachments) to their Head Deputy for review and approval. Once approved, the deputy must distribute the original and two copies of the Statement of View (with attachments) as follows:

- The original shall be filed with the clerk of the sentencing court immediately after the probation and sentencing hearing and the clerk will then forward it to the state prison along with the commitment order;
- A copy shall be placed in the case file; and
- A copy shall be sent, through the Bureau Director, to:

  Head Deputy
  Parole Division
  Bureau of Prosecution Support Operations
  Room 16-105 Clara Shortridge Foltz Criminal Justice Center

The Parole Division enters the information from the Statement of View directly into an automated system containing information on all inmates currently serving life sentences for crimes committed in Los Angeles County ensuring that the most current information concerning each inmate's parole consideration status is readily available. This automated system allows immediate retrieval of information on life prisoners from one central repository when inquiries are received from interested persons, including next of kin, victims and witnesses, thus enhancing the quality of the Office's service to the public.

Head Deputies are responsible for ensuring a Statement of View has been filed with the court.

To ensure that the Statement of Views package is received in a timely manner, a deputy may wish to forward a copy directly to the Department of Corrections and Rehabilitation for inclusion in the inmate's central file at the following address:

Department of Corrections and Rehabilitation
Legal Processing Unit
P.O. Box 942883
Sacramento, California 94283-0001

17.02.04 LETTER TO VICTIM OR NEXT OF KIN

When a court sentences a defendant to state prison for a life term, in addition to the Statement of View, deputies shall forward a letter to the victim or victim's next of kin advising them of the right to express their views concerning the defendant's parole eligibility. Deputies must prepare three copies of the letter. Deputies shall mail the original letter to the victim or the victim's next of kin and place one copy in the case file. Deputies shall send the third copy to the Head Deputy, Parole Division, Bureau of Prosecution Support Operations.

The Board of Parole Hearings has requested the Office's assistance in ensuring that victims and their next of kin are informed about their rights concerning parole consideration hearings. It is Office policy to inform each such victim or their kin of the provisions of Penal Code § 3043.

17.02.05 APPEAL OF A PREMATURE RELEASE DATE

A decision by the Board of Parole Hearings to parole a prisoner can be appealed, as can the setting of a premature release date. In cases in which the parole date has already been set, it is possible to file a petition with the Board of Parole Hearings to rescind the date and, if denied, to file a Writ of Administrative Mandamus in the Superior Court of the county where the parole hearing was held. Such petitions and writs may be sought only with prior Chief Deputy approval.

17.02.06 SERIOUS OFFENDER HEARINGS

For any defendant who committed a felony before July 1, l977, the Board of Parole Hearings must determine the length of imprisonment pursuant to Penal Code § 1170.2. The Board must hold a hearing to make this determination. It is Office policy to appear at serious offender hearings and submit written comments to the Board of Parole Hearings before the hearing.

17.02.07 VICTIMS' RIGHTS IN THE PAROLE HEARING PROCESS

Victims have a Constitutional right to be informed of all parole procedures, to participate in the parole process, to provide information to the parole authority to be considered before the parole of the offender, and to be notified, upon request, of the parole or other release of the offender. (Cal. Const. Art. I, § 28(b)(15).)

Additionally, Penal Code § 3043 provides, in part:

> "Upon request, notice of any hearing to review or consider the parole suitability or the setting of a parole date for any prisoner in a state prison shall be sent by the Board of Parole Hearings at least 90 days before the hearing to any victim of a crime committed by the

prisoner, or to the next of kin of the victim if the victim has died. The requesting party shall keep the Board apprised of his or her current mailing address."

The victim, or next of kin, has the right to appear, personally or by counsel, at the hearing for the purpose of expressing their views concerning the crime and the person responsible. The victim notification requirement is only applicable to those prisoners sentenced to life terms under Penal Code § 1168.

17.02.08 LIFER HEARINGS - CRITERIA TO BE CONSIDERED

California Code of Regulations Title 15, Division 2, § 2030 defines the role of the prosecutor in a life prisoner parole consideration hearing as follows:

> *The role of the prosecutor is to comment on the facts of the case and present an opinion about the appropriate disposition. In making comments, supporting documentation in the file should be cited. The prosecutor may be permitted to ask clarifying questions of the hearing panel, but may not render legal advice.*

The California Supreme Court has noted that consideration of public safety is the fundamental criterion in assessing suitability (*In re Dannenberg*, 34 Cal.4th 1061 (2005)). Mental health clinicians generally agree that the best predictor of future violence is past conduct. If there is some evidence in the prisoner's record that the fact finder believes shows the prisoner poses a risk to public safety, then the inmate should be denied parole.

Victims have a constitutional right to have their safety and the safety of their family considered before any parole or other post-judgement release decision is made. (Cal. Const. Art. I, § 28(b)(16).)

Circumstances Tending to Show Unsuitability

The following circumstances each tend to indicate unsuitability for release. (California Code of Regulations Title 15, Division 2, § 2281.) These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate unsuitability include:

1. Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:
    a. Multiple victims were attacked, injured or killed in the same or separate incidents.
    b. The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.
    c. The victim was abused, defiled or mutilated during or after the offense.
    d. The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.
    e. The motive for the crime is inexplicable or very trivial in relation to the offense.

2. Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.
3. Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.
4. Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.
5. Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.
6. Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.

Circumstances Tending to Show Suitability

The following circumstances each tend to show that the prisoner is suitable for release. (California Code of Regulations Title 15, Division 2, § 2281.) These circumstances are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the panel. Circumstances tending to indicate suitability include:

1. No Juvenile Record. The prisoner does not have a record of assaulting others or committing crimes with a potential of personal harm to victims as a juvenile.
2. Stable Social History. The prisoner has experienced reasonably stable relationships with others.
3. Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that the prisoner understands the nature and magnitude of the offense.
4. Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress has built over a long period of time.
5. Battered Woman Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Woman Syndrome, as defined in California Code of Regulations Title 15, Division 2, § 2000(b), and it appears the criminal behavior was the result of that victimization.
6. Lack of Criminal History. The prisoner lacks any significant history of violent crime.
7. Age. The prisoner's present age reduces the probability of recidivism.
8. Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.
9. Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release.

Each prisoner must be given an individualized assessment for parole based upon the factors present. A deputy shall oppose release, however, whenever there is evidence present that suggests a continuing risk to the public based upon the timing and gravity of the commitment offense(s) and/or prior criminality, a record of institutional misconduct, an unfavorable mental health evaluation or risk assessment, a lack of insight into the prisoner's criminality, a lack of

remorse or an inadequate plan for parole release including housing plan, on-going self-help and employment planning.
Deputies shall evaluate each case in advance of the hearing date. In the event a deputy feels that an individual inmate may be ready for parole release without objection by the Office, the deputy shall first consult with the Head Deputy of the Parole Division. Where appropriate, the Head Deputy of the Parole Division shall consult with the Director of the Bureau of Prosecution Support Operations.

17.02.09 LIFETIME PAROLEES

A significant number of prisoners convicted of first or second degree murder are now being granted parole. Murderers sentenced under Penal Code § 1168 are on lifetime parole. (PC § 3000.1.) Subsequent criminal conduct may result in an indeterminate return to custody if after a hearing the Board of Parole Hearings determines the inmate poses a danger to public safety that warrants incarceration beyond one year.

The Office is entitled to express its views at these hearings which are handled by the Parole Division. It is essential that they receive timely notice of the alleged criminal acts by murder parolees so documentation can be gathered to assess the appropriate course of action at the parole violation proceedings.

Filing deputies who are presented with cases involving such defendants should notify the Parole Division as soon as possible. Notification to the Parole Division shall be made whether or not criminal charges are filed. Copies of the filed complaint or rejection shall be forwarded to the Parole Division as well. The Parole Division will review the reports and the defendant's conduct on parole and develop a recommendation regarding the position to be taken at the parole revocation hearing.

17.03 DNA EXPUNGEMENT PETITIONS

Penal Code § 295 et seq. require persons arrested for certain specified offenses, and all felony arrestees, to provide DNA samples at the time of arrest. (PC § 296.) Some arrestees may be eligible for expungement of their DNA samples. The circumstances for expungement eligibility include the lack of a criminal filing, the dismissal of a case, an acquittal, or a finding of factual innocence. (PC § 299 (b)(1)-(4).)

Deputies handling expungement petitions shall not oppose expungement solely on the basis the petitioner has a prior felony conviction. However, deputies shall object to expungement in cases where the petitioner has a current nexus with the criminal justice system (e.g., on parole, PRCS, felony probation, mandatory supervision, PC § 290 registrant, etc.).

Deputies from the Charge Evaluation Division shall evaluate and process all expungement petitions filed in Los Angeles County. Any deputy receiving an expungement petition shall promptly forward the petition to the Head Deputy of the Charge Evaluation Division.

17.04 CDCR INMATE POLYGRAPH REQUESTS

California Department of Corrections and Rehabilitation (CDCR) policy allows, under certain circumstances, non-CDCR persons to request and administer polygraph examinations to inmates. Attorneys and other legal aid groups may request an inmate take a polygraph examination as part of their effort to cast doubt on the inmate's conviction.
In order to grant such a request, CDCR's policy requires the consent of the district attorney of the involved county when the polygraph request is in connection with the guilt or innocence for an offense that resulted in a conviction. (CDCR operations manual, Chapter 1, art. 20, § 14030.9.)

All requests submitted to the Office by CDCR, attorneys or legal aid groups for the Office's consent pursuant to CDCR's polygraph policy shall be referred to the Writs and Appeals Division.

17.05 EARLY PAROLE OF NON-VIOLENT OFFENDERS

Proposition 57 (Prop 57) was enacted to lower inmate population by granting early parole to inmates convicted of non-violent offenses who have successfully completed rehabilitative programs and who have not violated internal prison rules. The Board of Parole Hearings (BPH) evaluates inmates to determine if parole should be granted when the inmate has simply served the imposed base term for the principal commitment offense. Hence, any alternative sentences, such as sentencing under the Three-Strikes law, additional prison time for any prison priors, and sentencing for any consecutive charges is not included for purposes of Prop 57's imposed base term calculation.

Therefore, to effectuate Prop 57 early parole review, the CDCR created a protocol that was implemented by the Board of Parole Hearings (BPH). As part of that protocol, the BPH must request a written response from the Office of the District Attorney in each commitment case. The Office must then provide the written response within 30 calendar days of the date of the BPH's notification letter emailed to the Office.

Upon receipt of any correspondence from the BPH, the Parole Revocation Section (PRS) of the Parole Division shall process the Office's response letter to each notification. Upon receipt of any correspondence from the BPH or CDCR regarding early parole of non-violent offenders, the deputy receiving the notice shall immediately contact the Deputy-in-Charge of the PRS. The PRS shall ensure efforts are made to contact any victim(s) impacted by the potential early release of the inmate and forward any victim response on the matter to BPH with the Office's response.

17.06 PENAL CODE § 236.14 PETITIONS FOR VICTIMS OF HUMAN TRAFFICKING

Penal Code § 236.14 provides that a person who was arrested for, convicted of, or adjudicated a ward of the juvenile court for committing a non-violent offense may petition the court to vacate the arrest, conviction, or adjudication if they can show by clear and convincing evidence that the prior arrest, conviction, or adjudication was the direct result of being a victim of human

trafficking. The petition must be submitted under penalty of perjury and must describe all of the available grounds and evidence that the petitioner was a victim of human trafficking and the arrest, conviction, or adjudication was the direct result of being a victim of human trafficking.

Head Deputy or Deputy-in-Charge approval is required to grant a petition without opposing it in court. The following factors should be considered when evaluating whether to oppose a petition filed under Penal Code § 236.14:

- Whether the petitioner was a victim of human trafficking at the time the non-violent crime was committed;
- Whether the commission of the crime was the direct result of being a victim of human trafficking;
- Whether the petitioner engaged in a good faith effort to distance petitioner from the human trafficking scheme; and,
- It is in the best interest of the petitioner and in the interest of justice.

In evaluating the above factors, the Head Deputy or Deputy-in-Charge should consider the following:

- The age of the petitioner at the time of the commission of the crime;
- The criminal history of the petitioner;
- The circumstances surrounding the commission of the crime, including but not limited to, the petitioner's role in the offense, whether the petitioner benefitted from the crime, number of victims of the crime committed, and whether any victims suffered injuries during the commission of the crime;
- Record of treatment or services that petitioner received from a community based organization such as CAST, etc.;
- Reports by a human trafficking expert, if substantiated;
- Records from the Bureau of Victim Services that indicate the petitioner received services as a result of being a victim of human trafficking;
- Information obtained from the human trafficking data base or the First Step data base;
- Information that is provided by a law enforcement human trafficking task force;
- Whether the petitioner has participated in counseling programs, rehabilitation programs, or has legal employment;
- If the non-violent crime committed by the petitioner involved a victim, the opinion of that victim should be considered in the interest of justice and in accordance with Marsy's Law; and,
- Any restitution owed or paid to the victim of the non-violent crime committed by the petitioner. A restitution order is not vacated under Penal Code § 236.14.

An opposition template to a petition and filed under this section and a notification letter to the victim in accordance with Marsy's Law can be found in PIMS. A disposition report shall be electronically filed in every case in which a petition has been filed.

17.07 JUSTICE CONVICTION REVIEW UNIT

The Justice Conviction Review Unit's (JCRU) responsibility is to review qualifying post-conviction claims of innocence. In order for the JCRU to accept a request to review a conviction, the request must meet the following requirements:

1. The person must have been convicted of a felony;
2. The person convicted must still be in custody on the original commitment offense;
3. New and credible evidence pointing to innocence must be presented which was unknown to defense counsel at the time of the plea, or trial;
4. The appellate process must be complete;
5. There must be no pending state habeas petition.

Once a request to review a conviction is received, the Deputy-in-Charge of the JCRU shall assess whether the claim meets the Office's requirements to review a conviction. To determine if the request meets those requirements, an examination of the case by a JCRU deputy may be necessary.

If the JCRU decides the request meets the aforementioned criteria, the original trial deputy, Head Deputy and Assistant District Attorney of the trial division, as well as the law enforcement agency that originally investigated the matter, will be notified. The trial deputy and/or Head Deputy will be asked to provide a written evaluation of the case as it relates to the request. After consultation with the trial deputy and their chain of command, the JCRU will reject the request or accept it.

If accepted, the request will be assigned to a JCRU deputy and district attorney investigator for investigation. The law enforcement agency originally responsible for the matter will be invited to participate in the investigation. The JCRU will notify the victim that an investigation is underway and victim services will be offered. Upon completion of the investigation, the JCRU will either reject the request or present its findings to the Conviction Review Committee for a decision on whether to vacate the conviction.

The Conviction Review Committee will be comprised of the Office's Assistant District Attorneys, Bureau Directors, and the Chief Deputy District Attorney. The Chief Deputy District Attorney will decide whether to vacate the conviction. The standard upon which to vacate a conviction is whether the Office remains confident in the conviction.

The JCRU will notify the requestor, the victim and the relevant law enforcement agencies of the Office's decision. If the Office decides to vacate the conviction, the JCRU deputy will work in conjunction with the requestor and HABLIT deputies to prepare a habeas corpus petition informing the court of the Office's findings. If the Court issues an order to show cause requiring an evidentiary hearing, the JCRU deputy will work with HABLIT deputies in conducting the hearing.

The JCRU will accept requests to review a conviction submitted by the convicted person, their attorneys, or agencies working on behalf of the convicted person. Requests submitted by relatives of the convicted person will be accepted if consent of the convicted person is

obtained in writing. Requests submitted by others, without the express written consent of the convicted person, will not be reviewed.

Requests to review a conviction shall be in writing. Those interested in making a request should be directed to the Office's public facing website (http://da.lacounty.gov) where the requestor may fill out a Conviction Review Request questionnaire. The questionnaire can be located by selecting Contact > Forms and clicking the link listed under "Conviction Review."

A person may also mail a request to the aforementioned address and a questionnaire will be provided to them. Requests to review a conviction received by other divisions within the Office should be forwarded to the JCRU.

17.07.01 INDEMNIFICATION OF PERSONS WRONGFULLY CONVICTED AND IMPRISONED

A person who is found by the court to have been wrongfully convicted and imprisoned may submit a claim to the California Victim Compensation and Government Claims Board (Claims Board) seeking indemnification of $140 for each day served subsequent to the conviction. (PC § 4904.) Persons who are successful at litigating habeas corpus petitions, motions to vacate judgments and petitions for factual innocence often subsequently make claims before the Claims Board.

The Attorney General (AG) represents the State in these proceedings. Adverse findings made during earlier proceedings in which the Office litigates "factual innocence" motions or habeas corpus petitions are binding in subsequent Claims Board proceedings. Penal Code § 1485.5(b) requires that the District Attorney provide notice to the Attorney General prior to stipulating to facts that will be the basis for the granting of a writ of habeas corpus or a motion to vacate a judgment. The AG's Office has requested that the Office notify the AG's Office when such petitions are pending in the superior court. The point of contact between the Office and the AG's offices is the Head Deputy of the Post-Conviction Litigation & Discovery Division (PC&D). As the potential for a civil action is also a possibility where the County or a County department is named in the suit, notice to the Special Assistant assigned to Employee Relations is also necessary.

The following policy provisions are effective immediately:

- Factual Innocence Petitions: Whenever a defendant convicted of a felony is sentenced to state prison or to county jail pursuant to Penal Code § 1170(h) files a petition for a declaration of factual innocence pursuant to Penal Code § 851.8 or 851.86, and the court grants the petition, the deputy handling the case shall notify their Head Deputy. The Head Deputy shall promptly notify the Head Deputy of PC&D Division and the Special Assistant to the Employee Relations Division. PC&D Division will notify the AG's Office and facilitate communication between the AG's Office and the deputy handling the case.
- Habeas Corpus Petitions: In a felony case, whenever a deputy handling a petition for a writ of habeas corpus or a motion to vacate a judgment contemplates either stipulating to,

or not contesting, the factual allegations underlying one or more of the grounds for granting the writ or motion that would result in setting aside the entire conviction, the deputy shall promptly notify their Head Deputy. The Head Deputy shall then notify the Head Deputy of PC&D Division and the Special Assistant to the Employee Relations Division. PC&D Division will notify the AG's Office and facilitate communication between the AG's Office and the deputy handling the case.

The AG's Office may also request the Office's assistance in other cases when persons who are found to have been wrongfully convicted and imprisoned submit claims to the State for indemnification. In such cases, the AG's Office will contact PC&D Division. PC&D Division will facilitate contact between the AG's Office and the deputy handling the case through the deputy's supervisor.

17.08 PETITIONS FOR CLEMENCY: PARDONS AND COMMUTATIONS

A petition for clemency involves a request for reprieve, pardon or commutation. The authority to grant a reprieve, pardon or commutation is conferred upon the Governor by Section 8 of Article V of the California Constitution. The process for application is set forth in Penal Code sections 4800 et seq.

17.08.01 PARDONS

Pardons may be granted two ways; after obtaining a Certificate of Rehabilitation or through a "direct" or "traditional" pardon. The effect of a pardon is to restore the civil and political rights of citizenship. For example, an individual granted a pardon is eligible for licensing in certain fields, able to serve on a jury and, depending on the underlying charge, may regain firearm rights.

Applicant Requests for Certificates of Rehabilitation are processed in Department 100 of the Clara Shortridge Foltz Criminal Justice Center which is staffed by deputies from Central Trials 13. Applicant Requests for Certificates of Rehabilitation received by outlying offices shall be forwarded to the Head Deputy of Central Trials 13. Applications for pardon via Certificate of Rehabilitation will not generally be considered unless the applicant has been discharged from probation or parole for at least 10 years without further criminal activity during that period. Additional eligibility requirements are set forth in Penal Code § 4852.03 et seq. 2

Applications for Certificates of Rehabilitation are assigned to a District Attorney Investigator who investigates and provides a report to the court. At a hearing, pursuant to Penal Code § 4852.13, the court determines whether the petitioner has demonstrated "his or her rehabilitation and his or her fitness to exercise all of the civil and political rights of citizenship." The Office is represented at these hearings by the Department 100 calendar deputy. If the petitioner has made this showing, the court will make an order declaring that the petitioner has been rehabilitated. The petitioner will then be given a Certificate of Rehabilitation and may apply for a pardon.

If an individual is not eligible to obtain a Certificate of Rehabilitation, the individual can apply for a "traditional" or "direct" pardon via an application available on the Governor's website.

17.08.02 COMMUTATIONS

An inmate currently serving a sentence for a conviction by a California court can petition to have the sentence reduced or eliminated by applying for a commutation of sentence. Penal Code §§ 4804 et seq. govern these applications. There are two types of notifications the Office receives regarding applications for commutation of sentence: Notice of Intent to Apply for Executive Clemency (Notice of Application) and Notice of Investigation.

17.08.03 NOTICE OF APPLICATION FOR COMMUTATION OF SENTENCE

Penal Code §§ 4804 and 4805 require that applicants give notice to the District Attorney of the county in which they were convicted of their intention to file an Application for Commutation of Sentence. The Governor's website provides a form entitled "Notice of Intent to Apply for Executive Clemency" (Notice of Application) to be filled out by the applicant and mailed to the District Attorney's Office. If the applicant uses the State's pre-printed form to give notice, there is a place on the form for the Office to acknowledge receipt and return the form to the Governor's Office. The Office has also received the Notice of Application via e-mail and letter that do not utilize the pre-printed form provided by the Governor's Office. In addition to providing the Office with a Notice of Application, the applicant is required to sign a declaration under penalty of perjury on another preprinted form that the applicant has mailed the Notice of Application to the appropriate District Attorney's Office.

Notices of Application are often mailed directly from the inmate to the deputy who tried the case or the Branch or Area office where the case was tried. If the Notice of Application is received by the deputy or the Branch or Area office where the case was tried, the acknowledgment shall be signed and the form mailed to the Governor's Office at the address provided on the form. The Notice of Application and the acknowledgment form shall be uploaded into the case's eFolder under "section X. Post-Conviction, subsection 9. Clemency Petitions." A copy of the Notice of Application and acknowledgement form shall also be e-mailed to the Parole Division using the e-mail address clemencyreq@da.lacounty.gov. When a Notice of Application is initially received by the Parole Division, receipt shall be acknowledged and mailed to the Governor. A copy shall be forwarded to the trial deputy or the supervisor of the Branch or Area office or special unit that handled the case.

17.08.04 NOTICE OF INVESTIGATION

After the Governor's Office receives an Application for Commutation, a determination is made as to which applications will be investigated by the Board of Parole Hearings (BPH). When an investigation by BPH is opened, the Parole Division receives the Notice of Investigation via e-mail from BPH. Upon receipt of the Notice of Investigation, the Parole Division shall contact the trial deputy and the trial deputy's current supervisor advising that a letter in support of or in opposition to the Application for Executive Clemency shall be written by the trial deputy, if the trial deputy remains in the Office. The trial deputy shall write the letter irrespective of current title, grade or assignment. If the writing of the letter places an unreasonable burden on a trial deputy, the trial deputy's Head Deputy shall confer with the Head Deputy of the Parole Division regarding the writing of the letter. A response date for the letter is included in the Notice of

Investigation. The response time for the letter is 30 days. If a shorter time-frame is provided, an extension may be requested through BPH. A copy of the letter shall be scanned and e-mailed to the Head Deputy of the Parole Division at clemencyreq@da.lacounty.gov. The Head Deputy of the Parole Division shall forward the letter to the Governor's Office and upload the letter into the case's eFolder under "section X. Post-Conviction, subsection 9 Clemency Petitions."

After completing the letter, the trial deputy is not required to appear or argue further in support of the deputy's position. The Parole Division shall be responsible for appearing on any subsequently required hearings.

17.08.05 VICTIM NOTIFICATION

Penal Code § 4805(c) states: "The district attorney *shall* make reasonable efforts to notify the victim or victims of the crime or crimes related to the application and the victims' families." Victims or their families are entitled to submit a recommendation for or against commutation of sentence. Marsy's Law (California Constitution article I, § 28, § (b)) also requires that victims be notified, if previously requested, of any parole or post-conviction activity or release.

Upon receipt of the Notice of Investigation, reasonable efforts to contact the victims or their next of kin shall be made. The victim shall be advised of the right to submit a recommendation for or against commutation. Copies of victim letters shall also be forwarded to the Parole Division using the clemencyreq@da.lacounty.gov e-mail. Victims or their next of kin shall also be notified as to whether commutation was granted or denied.

CHAPTER 18

LENIENCY AND IMMUNITY

18.01 DEFINITIONS

Leniency, as used in this section, includes immunity, prosecution on lesser charges, a reduced sentence, or any other benefit or reward offered in exchange for testimony or information to one who may be subject to prosecution for a crime. Immunity, as used in this section, includes formal immunity pursuant to Penal Code §§ 1324 and 1099 and informal immunity pursuant to an agreement between the Office and a prospective witness. The purpose of immunity is to address a witness's privilege against self-incrimination. Immunity may be either "use" or "transactional." Use immunity prevents the prosecution from using the witness's compelled testimony, and any evidence derived therefrom, against the witness. Transactional immunity more broadly protects the witness from prosecution based on the event concerning which the witness was required to answer or produce evidence.

18.02 APPROPRIATE CIRCUMSTANCES FOR LENIENCY OR IMMUNITY

It is proper to offer a grant of leniency or immunity to a prospective witness in order to prosecute another only if:

- The gravity of the case justifies granting leniency or immunity;
- The prospective witness's testimony is essential to a successful prosecution;
- The prospective witness is less culpable than the other person(s) based on the prospective witness's:
  - involvement in the present case;
  - overall involvement in criminal activity; or
  - cooperation in the present case coupled with the continued viability of other alternatives such as probation revocation, civil commitment, and prosecution on other charges;
- The prospective witness and the other person(s) have similar levels of culpability but the other person(s) are susceptible to a much higher sentence than the prospective witness or pose a much greater danger to society and the prospective witness's testimony is essential to a successful prosecution;
- The testimony is necessary to expose matters of great public interest that outweigh the interests of justice in prosecuting the person offered leniency or immunity; or
- The testimony is necessary to exculpate another who may be unjustly suffering a penalty.

Commentary

It is Office policy not to offer leniency or immunity in any form solely for the purpose of obtaining testimony that may be useful in prosecuting another person for a crime. Exceptions to this policy require considerable caution and discretion and shall not be made without careful evaluation of the interests sought to be secured, balanced against the potentially grave

consequences of offering leniency or immunity. Only in rare and unusual circumstances are these grave consequences outweighed by more substantial interests of justice.

In exercising prosecutorial discretion, it may be necessary to be lenient with one individual so another who is equally or more culpable can be successfully prosecuted. The decision is a tactical one. It is one of the most well recognized examples of prosecutorial discretion and is approved by statute. (*PC § 1324.)*

The discovery procedures set forth in this section are intended to facilitate compliance by all employees with constitutional and statutory discovery obligations (such as Penal Code § 1054.1, Brady, Giglio and their progeny) and are not intended to limit those obligations.

18.03 PERSONS AUTHORIZED TO APPROVE LENIENCY OR IMMUNITY

All requests to offer leniency or immunity shall be submitted in writing through the chain of command for approval as follows:

- Major Crimes/Significant Cases: The Chief Deputy District Attorney.
- Special Circumstances Cases: The Special Circumstances Committee Chair.
- All Other Cases: The deputy's Bureau Director.

Should a case qualify as both a Major Crime/Significant Case and a Special Circumstances Case, all requests for leniency or immunity shall be submitted in writing through the chain of command for approval to The Special Circumstances Committee Chair.

18.04 OBTAINING APPROVAL TO OFFER LENIENCY AND IMMUNITY

In order to obtain approval, a deputy shall submit a preliminary written statement to the person authorized to grant the request containing a general description of the case, the witness's anticipated testimony and the reasons why a grant of leniency or immunity is necessary.

If the deputy receives preliminary approval to proceed with the request, the deputy shall do the following:

- Obtain a complete recorded statement from the prospective witness to assist the evaluation of the proposed offer of leniency or immunity. The prospective witness's statement shall include their complete knowledge of the case and their anticipated testimony in sufficient detail to ensure its admissibility in court.
- Inform the prospective witness that the recorded statement will not be used against the witness in any prosecution whether or not leniency or immunity is granted, unless the statement or any subsequent testimony is perjurious.
- Provide the Bureau Director, Special Circumstances Committee Chair or the Chief Deputy with a memorandum containing the following information:
  - A statement of the case which shall include a description of the offense(s), number of defendants, charge(s) filed against each defendant, and a summary of the admissible

evidence available to prove the charge(s) without the testimony of the prospective witness;
- The charge(s) for which the prospective witness is being given leniency or immunity and any other consideration that is being sought for the witness;
- The reasons justifying the request for leniency or immunity;
- A summary of the recorded statement obtained from the prospective witness;
- The stage of criminal proceedings at which the prospective witness will testify;
- Whether any conflict exists with other jurisdictions which may prosecute the crime; and
- The criminal record of the defendant and the prospective witness.

Once final authorization to grant the party leniency or immunity is obtained, the deputy shall place the memorandum and authorization in the case file. The deputy shall notify the DCU in writing of the date the grant of leniency or immunity was conveyed to the party, the date leniency or immunity was accepted or rejected by the party, the date the witness testified, the date the case was completed, and the final disposition of the case.

In addition, the deputy receiving an approved grant of leniency or immunity shall use best efforts to determine whether the witness is also a witness in any other pending or imminent prosecutions. As part of this determination, the deputy shall perform a search in PIMS. If the witness is also a witness in another pending or imminent prosecution, the deputy shall notify the deputy prosecuting the other case(s) in writing that the witness is the subject of an approved grant of leniency or immunity. The deputy shall document their efforts and notifications to other deputies, if applicable, in the case file.

18.04.01 DOCUMENTS TO BE SUBMITTED TO THE COURT

If the request is approved the following documents shall be prepared and submitted to the Superior Court:

- "Petition and Request for Order Requiring Witness to Answer Questions and Produce Evidence" (PC § 1324);
- "Waiver of Issuance of Order to Show Cause and Hearing" (PC § 1324); and
- "Order Requiring Witness to Answer Questions" (PC § 1324).

Instead of submitting the above-described documents to the Superior Court, the deputy may, with written approval, submit to the prospective witness a letter of intent to grant leniency or immunity.

If a deputy submits a letter of intent directly to the witness, the deputy has an affirmative duty to disclose to the court and the defense any agreement offering the witness leniency or immunity.

18.04.02 OBTAINING APPROVAL TO DISCHARGE A CODEFENDANT

Before a deputy seeks to have a court discharge a codefendant to become a prosecution witness pursuant to Penal Code § 1099, the deputy handling the case shall request a recess and proceed as follows:

- Obtain a statement as set forth above to determine if the anticipated testimony is sufficiently valuable and, if so, determine if the anticipated testimony will be given fully, fairly and in good faith;
- Follow the procedures set forth above to obtain authorization to request the court discharge the defendant; and
- Place the memorandum and authorization in the case file.

18.04.03 LAW ENFORCEMENT REQUESTS FOR LENIENCY OR IMMUNITY

Whenever a deputy is approached by a law enforcement officer seeking leniency, immunity or some other form of consideration for a criminal suspect or defendant who has assisted, or offered to assist, law enforcement, that deputy shall advise the officer that the request shall be submitted in writing. The request shall set forth the specific consideration being sought and the reasons justifying the request. The deputy shall inform the officer that the letter will be treated by the Office as a confidential communication, subject only to disclosure to a judge as needed and following a judge's lawful order.

Leniency requests from local police departments shall be signed by the chief of the department. Requests from the Los Angeles Sheriff's Department and the Los Angeles Police Department, because of the size and decentralized nature of these agencies, may be signed by a captain or higher ranking officer. If the requesting officer is a representative of a state or federal agency, the request may be signed by the local head of that agency.

Upon receipt of the written request, the deputy shall forward it through the chain of command to the appropriate supervisor for approval as provided in Legal Policies Manual §§ 18.03 and 18.04.

Upon receipt of approval, the requesting deputy shall place a copy of the memorandum and authorization in the case file. Once the party accepts the grant of leniency or immunity, the deputy shall notify the DCU in writing and place a copy of the communication to the DCU in the case file.

18.04.04 DEFENSE REQUESTS FOR LENIENCY OR IMMUNITY

Defense attorneys sometimes direct requests for leniency, immunity or other consideration to a Deputy-in-Charge, Head Deputy or someone higher in the District Attorney chain of command. If the supervisor contacted agrees to a meeting to consider the request for leniency or immunity, the supervisor shall notify the assigned deputy and give the deputy an opportunity to attend the meeting. The supervisor shall also advise the defense attorney that the assigned deputy's attendance at the meeting is a prerequisite to granting a meeting.

Commentary

It should be emphasized that the procedures set forth above involve both the granting of formal immunity pursuant to Penal Code § 1324 and informal immunity. Court ordered "use" and "transactional" immunity are specifically authorized under Penal Code § 1324. Case law also recognizes the existence and validity of informal grants of immunity.

18.05 DOCUMENTING WHEN LENIENCY OR IMMUNITY HAS NOT BEEN GRANTED

When a deputy prosecuting a defendant knows the defendant is a necessary witness in a separate, ongoing prosecution, but has not been asked to extend leniency to the defendant, or has been instructed by a supervisor with disposition authority to treat the matter without consideration or regard for the defendant's status as a witness, the deputy shall document that information in the case file. The deputy shall indicate that knowing the defendant was a witness in the other matter did not affect the disposition of the matter and was not communicated to the prospective witness or the Court.

Similarly, when defense counsel requests leniency for a client in a case in which the deputy knows the defendant is a necessary witness in a separate, ongoing prosecution, but the deputy has not been asked to extend leniency to the defendant by another deputy or has been instructed by a supervisor with disposition authority to treat the matter without consideration or regard for the defendant's status as a witness, the deputy shall inform defense counsel that the request for leniency or immunity is denied. Thereafter, the deputy shall document the denial in the file and indicate that the defendant's status as a witness and the request for leniency from the defense attorney did not affect the disposition of the matter and was not communicated to the prospective witness or the Court.

18.06 DOCUMENTING WITNESSES GRANTED LENIENCY AND IMMUNITY

The Leniency and Immunity System (LIS) is an Office database that documents the authorization and acceptance of grants of immunity and leniency. LIS is maintained by the DCU. Access to LIS is obtained by contacting the Systems Division.

18.06.01 PROTOCOL WHEN REQUESTS FOR LENIENCY AND IMMUNITY HAVE BEEN AUTHORIZED

When the Bureau Director, Special Circumstances Committee Chair, or Chief Deputy District Attorney has authorized a grant of leniency or immunity, that individual shall email the memorandum and authorization to the requesting deputy, the deputy's Deputy-In-Charge (DIC) and/or Head Deputy, and to the DCU.

The secretary for the Bureau Director, Special Circumstances Committee Chair, or Chief Deputy District Attorney shall input the name, DOB, CII number, case number of the person authorized to receive immunity or leniency, as well as the memorandum requesting leniency or immunity and corresponding approval into LIS.

Once inputted, an email will be automatically generated and sent to the requesting deputy and the deputy's DIC and/or Head Deputy reminding the requesting deputy to inform the DCU, in writing, of the date the grant of leniency or immunity was conveyed to the party, the date leniency or immunity was accepted or rejected by the party, the date the witness testified, the date the case was completed, and the final disposition of the case.

The DCU will input the information into LIS upon receipt from the requesting deputy.

18.06.02 PROTOCOL WHEN AN AUTHORIZED GRANT OF LENIENCY OR IMMUNITY IS NOT IN LIS

If a deputy is aware of an authorized grant of leniency or immunity that is not contained in the LIS database, the deputy shall provide the name, DOB, CII number, and the case number of the person authorized to receive leniency or immunity, as well as the memorandum requesting leniency or immunity and corresponding approval, if practical, to the Director of the Bureau that authorized the grant, or to the Special Circumstances Committee Chair if the grant was a special circumstance case, or to the Chief Deputy District Attorney if the case was a major/significant case.

If the Bureau Director, Special Circumstances Committee Chair, or Chief Deputy District Attorney agrees the witness was previously authorized to receive leniency or immunity, their secretary shall input the name, DOB, CII number, case number of the person authorized to receive immunity or leniency, as well as the memorandum requesting leniency or immunity and corresponding approval into LIS.

Thereafter, the same protocol will be followed as set forth in Legal Policies Manual § 18.06.01.

18.06.03 RESPONSIBILITIES OF THE PRELIMINARY HEARING, CALENDAR AND/OR TRIAL DEPUTY

The preliminary hearing, calendar or trial deputy shall access LIS prior to any court hearing in which testimony will be given (preliminary hearings, motions, trials) to determine if any of the intended witnesses have received a grant of leniency or immunity. Upon entering the person's name, DOB, or CII number, LIS will indicate whether the witness has previously been offered or granted leniency or immunity.

If the witness has previously been offered or granted leniency or immunity, the preliminary hearing, calendar or trial deputy shall obtain the case number, date the grant of leniency or immunity was authorized, date the grant of leniency or immunity was offered and accepted, a description of the agreement between the parties, and the memorandum requesting the grant of leniency or immunity.

After reviewing the memorandum, the preliminary hearing, calendar or trial deputy shall, if possible, contact the deputy with case responsibility for the matter in which the witness received leniency or immunity to ensure that there is a full and complete understanding of the reasons that leniency or immunity was granted. This contact shall be noted in the file for the

case in which the witness may testify and, if the case for which the witness will receive leniency or immunity is still pending completion, the contact shall be noted in that case file as well.

The preliminary hearing, calendar or trial deputy shall, if possible, personally review the case file for the matter in which the witness received leniency or immunity. Once completed, an entry shall be made in the reviewed case file and the file for the case in which the witness may testify.

Thereafter, the preliminary hearing, calendar or trial deputy shall ensure that discovery of the required information, including that listed in Legal Policies Manual § 18.06.02 above, is provided to the defense pursuant to the Legal Policies Manual and discovery obligations. The confidential leniency and immunity memoranda are work product and should not be provided as part of the discovery process.

CHAPTER 19

JAILHOUSE INFORMANTS

19.01 INTRODUCTION

There is a critical need for consistency in the handling of jailhouse informants; the integrity of the Office and the integrity of justice system depend upon it.

It is the policy of the Office to strictly control the use of jailhouse informants as witnesses. Before a jailhouse informant may be used as a witness, strong corroborative evidence is required. This corroborating evidence shall consist of more than the fact that the informant appears to know details about the crime thought to be known only to law enforcement.

Commentary

It has been the longstanding practice of the deputies in the Office to view skeptically and with caution the proposed testimony of any county jail prisoner. No deputy has ever supposed that such testimony springs from the prisoner's sense of good citizenship or moral duty. On the contrary, a deputy is by virtue of training and experience altogether conscious of the self-interest of the jailhouse informant and actively mindful of the source, his background and his character. Further, since Office is committed to obtaining the truth and seeking justice, the informant's information is viewed through the prism of the Office's ethical mandate.

19.02 OFFICE POLICY

A jailhouse informant is a person in custody who receives a communication from another person in custody about a crime committed by the latter and who chooses to convey this information to authorities. A jailhouse informant does not include a *Perkins* agent.

No jailhouse informant shall be called to testify to a defendant's oral statement, admission or confession unless strong evidence exists which corroborates the truthfulness of the informant.

A deputy wishing to use a jailhouse informant as a prosecution witness shall obtain the prior approval of the Jailhouse Informant Committee. The Committee is comprised of the Chief Deputy, the Assistant District Attorneys and Bureau Directors. All requests to use a jailhouse informant shall be submitted, in writing, to the Chief Deputy through the chain of command.

A written request to use a jailhouse informant shall include:

- A brief description of the crime and the name and criminal history of the informant;
- The evidence being offered by the informant;
- A description of the corroborating evidence;
- An analysis of the strengths and weaknesses of the case if the informant is not used; and
- Any benefit promised to the informant by any member of law enforcement or any employee of the Office for the information offered on the pending case.

The Discovery Compliance Unit (DCU) maintains a Central Index of jailhouse informants who have been used as witnesses. The trial deputy shall contact the Deputy-in-Charge of the DCU and determine whether the informant has testified in any prior case. The information shall be included in the deputy's written memorandum.

The Head Deputy will forward the memorandum with their recommendation to the appropriate Bureau Director. If the Bureau Director agrees with a recommendation to use a jailhouse informant as a witness, the Bureau Director will forward the request to the Chief Deputy for consideration by the Jailhouse Informant Committee. The trial deputy may be asked to appear before the committee to explain the reasons why the request should be approved.

19.02.01 TRIAL DEPUTY RESPONSIBILITIES IF APPROVAL IS GRANTED

If the Committee approves the use of a jailhouse informant, the trial deputy shall comply with the requirements of Penal Code §§ 1127a, 1191.25, and 4001.1.

If the informant testifies, the trial deputy shall notify the Discovery Compliance Unit.

Although Penal Code § 4001.1, if strictly applied, pertains only to "in custody informants" held within a "correctional institution," it is Office policy that its provisions apply to any custodial setting (i.e., jail or prison).

19.02.02 PROHIBITION OF MONETARY PAYMENTS

Penal Code § 4001.1(a) states: "No law enforcement official shall give, offer, or promise to give any monetary payment in excess of fifty dollars ($50) in return for an in-custody informant's testimony in any criminal proceeding." This limitation does not apply to funds properly expended for witness protection, relocation, or travel expenses.

19.03 FABRICATION OF EVIDENCE BY JAILHOUSE INFORMANTS

When a deputy acquires any information that a jailhouse informant is attempting to fabricate or has fabricated evidence, the deputy shall immediately forward a memorandum setting forth all pertinent details to the Office's Discovery Compliance Unit. E-mail or fax transmission is acceptable. This information shall be included in the Leniency, Immunity & Jailhouse Information System (collectively referred to as "LIS"). It is a continuing responsibility of all deputies to ensure that any attempt to falsify evidence is readily known to any deputy considering use of the jailhouse informant involved.

19.04 CRIMINAL CASE INFORMATION SECURITY

The daily flow of confidential information is critical for the Office to operate successfully. Any policy on the disclosure of information shall balance the need for security and the need for the efficient exchange of information within the Office, from the Office to law enforcement agencies, and to members of the public. Information on criminal cases being handled by the Office shall be disclosed, over the telephone, only as follows:

- If the caller is a deputy district attorney, member of law enforcement, or probation officer personally known to the employee possessing the requested information, and the caller has a need to know the information, the information should be disclosed;
- If the caller is not personally known to the employee possessing the requested information, and claims to be a deputy district attorney, member of law enforcement, or probation officer, the employee possessing the information shall request and receive a callback verification number from the caller. If the number is verified, and there is a need to know the information, the information should be disclosed;
- If the caller is seeking information which is generally available to the public (e.g., time and location of a court appearance), that information should be given;
- Under no circumstances should the names, addresses or telephone numbers of witnesses be disclosed over the telephone; and
- Detailed information or prosecution strategy on a case should never be discussed over the telephone. Only the bare minimum facts, on a verified need-to-know basis, should be disclosed telephonically.

19.04.01 FILE NOTATIONS

Any employee who, in compliance with these guidelines, telephonically discloses information of a non-public nature shall make a notation of what was disclosed and to whom it was disclosed. This notation should be placed in the case file or, if the file is not accessible, sent in written form to the deputy handling the case.

If an employee has any doubt about the identity of the caller, the validity of the call-back number, or whether the caller has a need to know, the employee should immediately contact the Assistant Chief of the Bureau of Investigation.

Commentary

It is essential that all employees prevent breaches of office security through the inadvertent disclosure of confidential information to persons not authorized to receive such information. Strict compliance with this policy should ensure that such breaches do not occur.

19.05 PRESERVATION OF JAILHOUSE INFORMANT RECORDS

The following Superior Court order, issued on December 16, 1988, remains in effect:

> TO [THE] DISTRICT ATTORNEY OF LOS ANGELES COUNTY:
>
> You are hereby ordered to preserve all records of jailhouse informants who have been used or consulted by you or your agents while incarcerated from November 1, 1978 to the present until the further order of this court. This order includes, but is not limited to, all notes, memoranda, computer printouts, or any records of promises made, payments made, or rewards given to each such jailhouse informant. The order shall further include all records of the last known location of said informants, all records relating to the cell assignments of such informants within the Los Angeles County jail system and all memoranda describing in whole or in part such informants.

19.06 POLICE INFORMANT RECORDS

A "police informant" is an individual who provides useful and credible information to a law enforcement agency regarding criminal activity in exchange for a benefit, e.g., financial compensation, leniency in a pending criminal case. Police informants have played major roles in the investigation and prosecution of a wide variety of crimes, especially in the area of drug enforcement. However, police informants are often paid for their cooperation and routinely possess criminal histories. If not properly vetted, undisclosed impeachment information from the background of a police informant can result in a *Brady* or Penal Code § 1054.1(e) disclosure violation.

Therefore, prior to relying on information from a police informant as a witness, the assigned deputy must review the police informant's criminal history (rap sheet) and examine the police informant's file maintained by the handling law enforcement agency for potential impeachment information. If the police informant is also a jailhouse informant, see Legal Policies Manual, Chapter 19, "Jailhouse Informants," for additional policies and procedures regarding their use.

Access to the file should be available through the informant's handler. Deputies must be mindful of law enforcement's privilege to protect a *confidential* informant's identity pursuant to Evidence Code §§ 1041 and 1042. Before disclosing any information about a confidential police informant, DDAs must coordinate with handlers to preserve the confidentiality of the informant's identity.

If the police informant's file contains potential impeachment information, the deputy shall inform the DCU, in writing, only of that fact. Information regarding police informants shall be maintained separately from the Discovery Compliance System in the Leniency, Immunity & Jailhouse Informant System (collectively referred to as "LIS"), and Perkins tracking database. Deputies are required to run informants through LIS. (See SD 16-08.)

CHAPTER 20

SEARCH WARRANTS & WIRETAPS

20.01 SEARCH WARRANT MANUAL

Deputies should refer to the most recent edition of the Office's *Search Warrant Manual* for detailed information regarding the preparation and service of search warrants.

20.02 SEARCH OF PREMISES OUTSIDE LOS ANGELES COUNTY

If it is reasonably anticipated that the underlying offense will be prosecuted in Los Angeles County, a search warrant to be executed in another county should be submitted to a magistrate in Los Angeles County.

If it is not anticipated that the underlying offense will be prosecuted in Los Angeles County, a search warrant to be executed in another county shall be submitted to a magistrate in that county.

A magistrate may issue a search warrant for a location in another county if it relates to an offense that is or may be prosecuted in the county where the magistrate sits (e.g., a judge in Norwalk may issue a search warrant for a location in Riverside County if the underlying offense is or may be prosecuted in Los Angeles County). (*People v. Galvan* (1992) 5 Cal.App.4th 866; *People v. Ruiz* (1990) 217 Cal.App.3d 574.)

Authorization to prepare a search warrant for a location outside Los Angeles County shall be obtained from the Head Deputy or Deputy-in-Charge.

The district attorney's office and law enforcement agency within the county where the warrant will be executed shall be notified and if necessary, asked to assist in its execution. It is desirable for officers from the other county to be present and assist in the service of the warrant, particularly if arrests are contemplated. Care must be taken in the execution of such warrants not to compromise an out-of-county investigation.

20.02.01 OUT-OF-COUNTY SEARCH WARRANT RETURNS

Search Warrants Signed by Los Angeles County Magistrates

The return should be handled in the same manner as if the location searched were in Los Angeles County. (PC § 1537.) The recovered property shall be retained by the Los Angeles County peace officer that served the warrant. (PC § 1536.)

Search Warrants Signed by Out-of-County Magistrates

The return shall be made to the magistrate that signed the warrant. If a deputy needs to use the recovered property for a prosecution in Los Angeles County, a court order and supporting

affidavit should be prepared for the transfer of the search warrant documents to the appropriate court in Los Angeles County and the recovered property to the appropriate Los Angeles County peace officer. The named investigating officer of this county should submit the court order and supporting affidavit to the magistrate of the other county who authorized the search warrant, or to the supervising judge of the other county.

20.03 REQUEST FOR SEARCH WARRANT BY OUT-OF-COUNTY AGENCY

A request for assistance with a search warrant from an out-of-county law enforcement agency shall be reviewed and approved by a Head Deputy or Deputy-in-Charge.

If a search warrant relates to an out-of-county prosecution and was signed by an out-of-county magistrate, a Head Deputy or Deputy-in-Charge shall direct the out-of-county agency to the Los Angeles County law enforcement agency having jurisdiction over the location to be searched.

If a search warrant relates to a potential prosecution within Los Angeles County and was signed by a Los Angeles county magistrate, a Head Deputy or Deputy-in-Charge shall review the warrant in the usual manner to ensure the warrant is valid. Also, the Los Angeles County law enforcement agency having jurisdiction over the location to be searched should be notified and should serve the warrant.

20.03.01 LAW ENFORCEMENT AUTHORITY

Only officers from the county where the search warrant was signed have the authority to serve the warrant. Officers from other jurisdictions may only assist in the service of the warrant. A Head Deputy or Deputy-in-Charge should so advise the law enforcement officers who will participate in the service of the warrant. (PC §§ 1529 and 1530.)

20.04 SEARCH OF PREMISES OF PRIVILEGE HOLDERS

20.04.01 PENAL CODE § 1524(C)

Penal Code § 1524(c) places certain restrictions upon the use of search warrants to recover items under the control of legal privilege holders such as lawyers, physicians, psychotherapists and clergy when the privilege holder is not reasonably suspected of engaging or having engaged in criminal activity related to the documentary evidence for which a warrant is requested. Deputies shall read and be familiar with these restrictions and the policy stated herein before requesting authorization to prepare, or assist in the preparation of, such a search warrant.

20.04.02 WHEN THE PRIVILEGE HOLDER IS A SUSPECT

When the privilege holder is, or reasonably could be, a suspect, authorization to prepare a search warrant shall be obtained from the Chief Deputy through the chain of command. If authorization is granted, the affidavit for the warrant and the warrant itself shall be prepared under the direction of the Head Deputy or Deputy-in-Charge.

It is mandatory that the warrant state that the premises to be searched are in the possession of or under the control of a privilege holder. (PC § 1525.)

In some cases it may be possible to obtain a written waiver of the privilege in question (e.g., if a lawyer's client is the victim of a crime committed by the lawyer, the client may be willing to waive the attorney-client privilege). If a written waiver is obtained, it shall be included in the search warrant affidavit.

If the privilege holder/suspect is at the location at the time of the search, the privilege holder/suspect shall be permitted to voluntarily produce the items set forth in the search warrant. If the items sought are not produced or if there is some question whether or not there is full compliance with the request for production, the officers may begin their search and the privilege holder shall be permitted to remain during the search as long as the privilege holder does not interfere with the lawful execution of the warrant.

If the privilege holder/suspect is in custody, it is not necessary for them to be present, but compliance with the order shall be requested of any other person who may have control of the items sought.

20.04.03 WHEN THE PRIVILEGE HOLDER IS NOT A SUSPECT

It is Office policy not to issue search warrants for the premises of non-suspect privilege holders except in unusual circumstances.

It is preferable to solicit lawful and voluntary consent or use the subpoena process, when available, to obtain items in the possession of a privilege holder. However, privilege holders shall not be requested to turn over items to the Office or the police pursuant to their consent alone if doing so might violate the confidential relationship between themselves and a client, patient, or penitent.

Examples of unusual circumstances justifying issuance of a search warrant when the privilege holder is not a suspect are:

- When the privilege holder cannot be shown to be a suspect, but it is nevertheless believed that the privilege holder might destroy or secrete the items sought if presented with a subpoena or a request for the items;
- When a case has not been filed and the privilege holder is willing to turn over the items sought voluntarily, but to do so would violate the attorney-client, physician-patient, psychotherapist-patient or clergy-penitent privilege; or
- When consent or a subpoena would be impractical, such as in an emergency situation in which the privilege holder has indicated that compliance would not be immediately forthcoming.

In unusual circumstances in which the issuance of a search warrant for the premises of a non-suspect privilege holder is justified, authorization to prepare the warrant shall be obtained from

the Chief Deputy through the chain of command. If approved, the affidavit and the warrant shall be prepared under the direction of the Head Deputy or Deputy-in-Charge.

It is mandatory that the warrant state that the premises to be searched are in the possession of, or under the control of a privilege holder. (PC § 1525.)

20.04.04 SEARCH WITH A SPECIAL MASTER

A Special Master is usually required in order to search a non-suspect privilege holder. (PC § 1524(c)(1).) The District Attorney Command Center maintains a current list of Special Masters. The State Bar also maintains a current list of Special Masters on the State Bar's website. Deputies may contact the Special Master directly.

A magistrate may order the search to be conducted without a Special Master if one is not available within a reasonable time. (PC § 1524(d).)

If possible, and if there is no danger that the items sought will be secreted or destroyed, the privilege holder shall be notified of the time and place of the search and be permitted to be present as long as the privilege holder does not interfere with the lawful execution of the search warrant. If the privilege holder turns over all the items sought, no further search should be conducted.

20.05 NEWS MEDIA SEARCHES

20.05.01 POLICY NOT TO USE SEARCH WARRANTS

It is the policy of the Office not to use search warrants to search news media offices or the homes of news media personnel for material or evidence obtained or prepared in their news gathering function except in unusual cases. Deputies shall attempt to use less intrusive measures when available.

20.05.02 CONSENT OR SUBPOENA PREFERRED

If an item believed to be in the possession of the news media is sought by the Office, and that item is not otherwise protected by the newsperson shield law, attempts should first be made to obtain the item by lawful and voluntary consent or by subpoena.

20.05.03 ITEMS NOT PROTECTED BY NEWSPERSON SHIELD LAW

If consent cannot be obtained, and a subpoena is unavailable, a search warrant may be considered for items that are not protected by the newsperson shield law.

20.05.04 AUTHORIZATION REQUIRED

If a case is believed to be sufficiently unusual to justify a news media search warrant, and if the items sought do not fall within those items protected from seizure by Penal Code § 1524(g),

authorization for the preparation of such a warrant shall first be obtained from the Chief Deputy by submitting a written request through chain of command. Media Relations Division should be notified of the request by the person requesting authorization.

If approval is granted, the matter shall be handled by the Head Deputy or Deputy-in-Charge.

20.05.05 MANDATORY SEARCH WARRANT LANGUAGE

If a news media search warrant is approved, the affidavit in support of the search warrant and the search warrant itself shall:

- Clearly state that the location to be searched serves a public news media function;
- Identify with sufficient specificity the items to be seized in order to prevent a search for statutorily protected items; and
- Specify the circumstances which render the search permissible under 42 USC § 2000aa.

The affidavit in support of the search warrant shall also state the reasons why both consent and a subpoena are impractical or unavailable.

20.05.06 NOTIFICATION TO NEWS MEDIA

If a news media search warrant is approved, the person who possesses the items sought shall be contacted before the warrant is served and given an opportunity to produce the items voluntarily unless it is believed that notification would likely result in the destruction or secretion of the items. Notification shall be consistent with the demands of any emergency.

If the person who possesses the items sought does not comply with the request for voluntary production of the items, the person shall be notified of the time and place of the search and that their presence will be allowed during the search so long as it does not interfere with the lawful execution of the warrant.

20.05.07 NON-DISRUPTION OF LAWFUL BUSINESS

Consistent with the demands of each individual situation, the execution of the search warrant should be handled, if possible, so as not to disrupt any lawful business being conducted at the location of the search, in compliance with *Zurcher v. Stanford Daily* (1978) 436 U.S. 547.

Commentary

When items in the possession of the news media are believed to be necessary to complete an investigation or prosecute a filed case, the least intrusive method should be employed to obtain these items. Attempts should first be made to obtain the items by lawful and voluntary consent. If consent cannot be obtained, the next least invasive method, a subpoena, should be issued. However, because a subpoena cannot be issued unless a case has been filed, or a Grand Jury proceeding commenced, the subpoena process may not be available. A search warrant should only be sought when consent cannot be obtained and a subpoena is unavailable.

20.06 SEARCH FOR FINANCIAL RECORDS

20.06.01 CALIFORNIA RIGHT TO FINANCIAL PRIVACY ACT

The methods by which records can be seized or otherwise obtained from financial institutions are set forth in the California Right to Financial Privacy Act, Government Code §§ 7460 through 7493. These methods include:

- Customer authorization;
- Administrative subpoena or summons;
- Lawful search warrant;
- Judicial Subpoena or Subpoena Duces Tecum;
- Police request;
- Voluntary production by financial institution; and
- Certification in writing by a police or sheriff's department or district attorney that a crime report has been filed that involves the alleged fraudulent use of drafts, checks, or other orders drawn upon any bank, credit union or savings association in this state.

20.06.02 CIVIL AND CRIMINAL PENALTIES

Certain provisions of the California Right to Financial Privacy Act establish civil and criminal penalties if such records are not obtained in accordance with the Act. Deputies should familiarize themselves with the Act before attempting to obtain financial records. (See *Burrows v. Superior Court* (1974) 13 Cal.3d 238 and *People v. Blair* (1979) 25 Cal.3d 640, regarding constitutional limitations upon the seizure of financial records.)

20.06.03 GENERAL PROCEDURES FOR NSF CASES

The method used to obtain bank records in non-sufficient funds (NSF) cases depends upon the likely cooperation of the suspect and the bank; the exact nature of the offense; the amount of money involved; and the status of the case (pre-filing or post-filing). Normally, the police will obtain all of the records necessary to file the case pursuant to the written certification and request authorized by Government Code § 7480(b). If additional records are needed prior to filing the case, a search warrant should normally be used. Search warrants may be prepared by police and reviewed by a deputy prior to presentation to a magistrate.

Additional records may be obtained by subpoena duces tecum after the case has been filed. If a subpoena is used to obtain records for court purposes, it should be prepared at the time of filing. After the arraignment, the date and court of appearance should be inserted in the subpoena and the subpoena served.

20.07 WIRETAP MANUAL

Deputies should refer to the most recent edition of the *Los Angeles County District Attorney's Office Wiretap Manual* for detailed information on the Office's wiretap protocol and California wiretap laws.

20.08 WIRETAP PROTOCOL

One of the primary responsibilities of the Major Narcotics Division is to oversee the procedure whereby all wiretap investigations in the Office are reviewed and processed. As such, deputies with questions regarding wiretap requests have historically consulted with the Major Narcotics Division on matters related to the specifics of their cases.

20.09 PROCESSING WIRETAPS

The Major Narcotics Division is responsible for coordinating the approval, preparation and execution of all wiretaps, including emergency wiretaps, issued by the Office.

20.10 WIRETAP REQUESTS DURING BUSINESS HOURS

Any deputy who is contacted by law enforcement during business hours regarding the processing of a wiretap, including an emergency wiretap, shall contact the Major Narcotics Division and direct the law enforcement officer(s) to contact the Major Narcotics Division.

20.11 EMERGENCY WIRETAP REQUESTS AFTER BUSINESS HOURS

Any deputy who is contacted by law enforcement after business hours regarding the processing of an emergency wiretap shall instruct the officer(s) to immediately call the Office's Command Center. The Command Center will contact the Head Deputy of the Major Narcotics Division.

20.12 EXISTING WIRETAPS

Wiretaps pose unique discovery obligations. Failure to comply could jeopardize the admissibility of the wiretap evidence. For this reason, deputies shall consult with the Major Narcotics Division when handling cases involving wiretaps.

20.12.01 AT TIME OF FILING

A filing deputy shall immediately notify the Major Narcotics Division if the filing deputy is presented with a case for filing where a wiretap was used, or is currently being used, as part of the investigation. Notification to Major Narcotics Division should be made prior to filing of the case.

20.12.02 POST FILING

A deputy shall immediately notify the Major Narcotics Division when the deputy learns a wiretap was used, or is currently being used, in a case the deputy is prosecuting.

20.13 NON-NARCOTICS RELATED WIRETAPS

The procedures set forth below shall be followed when the wiretap investigation is based on a crime other than a narcotics related investigation.

20.13.01 NOTIFICATION OF WIRETAP INVESTIGATION TO OTHER DIVISIONS OR UNITS

When the Major Narcotics Division has been requested to assist law enforcement in processing a non-narcotics related wiretap (such as a gang murder, rape, kidnapping, etc.), the assigned Major Narcotics Division deputy processing the wiretap shall notify the Head Deputy, Assistant Head Deputy, or Deputy-in-Charge of the division or unit responsible for prosecuting the crime(s).

20.13.02 HOW NOTIFICATION SHALL BE MADE

The notification shall be via email and shall include the following information:

- The name and telephone number of the investigating officer/affiant
- The law enforcement agency investigating the case
- The name of the target subject of the wiretap investigation
- The name of the criminal street gang if gang related

20.13.03 INSTRUCTIONS TO LAW ENFORCEMENT

The assigned Major Narcotics Division deputy shall also instruct the investigating officer/affiant to contact the Head Deputy, Assistant Head Deputy, or Deputy-in-Charge of the division or unit responsible for prosecuting the crime(s).

20.13.04 NOTIFICATION OF WIRETAP EVENTS

The assigned Major Narcotics Division deputy shall notify the Head Deputy, Assistant Head Deputy, or Deputy-in-Charge of the division or unit responsible for prosecuting the crime(s) when a wiretap order is signed and sealed (this shall include all extensions).

20.13.05 WIRETAP DOCUMENTATION

The assigned Major Narcotics Division deputy shall provide a courtesy copy of the wiretap Confidential Memorandum and all 10-day reports as they arise to the Head Deputy, Assistant Head Deputy, or Deputy-in-Charge of the division or unit responsible for prosecuting the crime(s).

20.14 EAVESDROPPING

The California Invasion of Privacy Act of 1967, Penal Code §§ 630 to 638, prohibits wiretapping (PC § 631) and electronic eavesdropping (PC § 632). However, Penal Code § 633 creates an exception for certain named law enforcement agencies and officers, who are not prohibited from overhearing or recording any communication they could lawfully overhear or record prior to the effective date of the Invasion of Privacy Act. Law enforcement agencies and officers not named in the Act can also use electronic devices to overhear and record communications if they do so under the direction of one of the named law enforcement agencies or officers acting within the scope of their authority.

The District Attorney and any assistant, deputy or investigator of the District Attorney are among the named law enforcement officers. As such, nothing in the Invasion of Privacy Act prohibits the Los Angeles County District Attorney or assistants, deputies or investigators, or any person acting pursuant to their direction and within the scope of their authority, from overhearing or recording any communication that they could lawfully overhear or record prior to the effective date of the Invasion of Privacy Act (1967).

The Office routinely receives requests for authorization to overhear and record communications from law enforcement and regulatory agencies not designated in Penal Code § 633. All such requests shall be in writing. When a deputy or district attorney investigator receives a request to overhear or record communications, the request should be forwarded to the Assistant District Attorney of Special Operations through the chain of command. If appropriate, an agency will be granted approval to overhear or record communications on a calendar year basis and may request renewal annually. Once approved, a written authorization will be provided by the District Attorney or designee. A log of authorizations will be maintained.

Emergency Eavesdropping

Penal Code § 633.8 authorizes peace officers designated by the District Attorney to deploy an eavesdropping device in an emergency situation involving the taking of a hostage or barricade situation of a location. The Major Narcotics Division handles all state wiretap and deployment of emergency eavesdropping devices in hostage and barricade situations for the Office. Once a designated peace officer makes the determination to utilize an eavesdropping device, a written application shall be submitted and signed by the court within 48 hours of the initial use of the eavesdropping device. Similar to a state wiretap, an emergency eavesdropping application consists of: an affidavit from a designated peace officer establishing probable cause existed in an emergency hostage or barricade situation requiring the deployment of an eavesdropping device; an application signed by the District Attorney or Chief Deputy in the District Attorney's absence, or designated Assistant District Attorney in the absence of both the District Attorney and Chief Deputy; a CEO review signed by the designated peace officer's Chief Executive Officer, or designee; a disk or other compatible device containing the communication captured by the eavesdropping device; and a court order signed by the judge approving the use of the eavesdropping device. In Los Angeles County, Judge Larry Paul Fidler is designated to review and approve emergency eavesdropping pursuant to Penal Code § 663.8.

20.15 *HOBBS* ATTACHMENTS

The Office policy for *Hobbs* attachments to search warrants and wiretaps is set forth in Legal Policies Manual § 3.04.01.

20.16 ELECTRONIC DEVICES AND OBTAINING ELECTRONIC COMMUNICATIONS

The California Electronic Communication Privacy Act (CalECPA) sets forth the procedure for searching electronic devices and obtaining electronic communication information. In the

overwhelming majority of cases, a search warrant is needed whenever law enforcement seeks the following types of information:

- Records from telecommunications companies, Internet service providers or social media websites, such as Verizon, Google or Facebook.
- GPS "pings"/cell tower location data from a service provider or any use of an electronic serial number (ESN) identifier;
- Searches of an individual's cellular phone, computer, iPad, hard drive, etc.

The two most significant provisions apply to the manner in which electronic information is described in the search warrant and how information that is unrelated to the investigation for which the search warrant was obtained is to be treated. Any search warrant for electronic information or to search an electronic device must describe with particularity the information to be seized by specifying the time periods covered and, as appropriate and reasonable, the target individuals or accounts, the applications or services covered, and the types of information sought. (PC § 1546.1(d)(1).) Although not explicitly required, the objective of the warrant should be clearly identified and incorporated into the statement of probable cause. (PC § 1546.1(d)(2).)

Any information obtained through the execution of the search warrant that is unrelated to the objective of the search warrant must be sealed. Once sealed, any subsequent review of such "unrelated" information requires a court order. CalECPA fails to provide a definition of "information unrelated to the objective" of the search warrant, and does not specify how or where such unrelated information is to be sealed or maintained to comply with this requirement.

The following language must be added to all search warrants served on an electronic communication provider or to search an electronic device:

> ***It is hereby ordered that any information that is unrelated to the objective of this warrant shall be sealed and not subject to further review, use, or disclosure without a court order. It is further ordered that any such information that is unrelated to the objective of this warrant be kept in the custody of [INSERT NAME OF LAW ENFORCEMENT OFFICER] of the [INSERT LAW ENFORCEMENT AGENCY] until further notice or order of the court.***

CalECPA mandates that search warrants served on service providers shall require the service provider's custodian of records to include an affidavit that will allow the records to be admitted as business records per Evidence Code § 1562. (PC § 1546.1(d)(3).) The following language must therefore be included:

> ***It is further ordered that any records provided by [INSERT NAME OF ELECTRONIC SERVICE PROVIDER] be accompanied by the affidavit of the custodian or other qualified witness in compliance with the requirements set forth in Evidence Code section 1561(a)(1) - (a)(5).***

"Specific Consent"

It is well-recognized that a search conducted pursuant to valid consent is constitutionally permissible. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222.) While CalECPA recognizes consent as a valid means to obtain electronic device information, it imposes significant limitations on its efficacy.

CalECPA defines "specific consent" as consent that is given directly to the government entity seeking information. When a government entity is the intended recipient of an electronic communication, this satisfies "specific consent," even if the person making the communication does not realize that they are communicating with a government agent. (PC § 1546(k).)

However, consent must be given directly to the *entity seeking that information*. Absent a "CalECPA waiver," a police officer would be precluded from searching a cell phone based on the consent provided to probation. Furthermore, caution should be exercised when consent is based upon an employer or similar device owner's Acceptable Use Policy.

Use of Subpoenas

Penal Code § 1546.1(b)(4) prohibits using a subpoena to obtain most electronic communication information, with the following exceptions:

- Electronic communication information and related metadata obtained from an "originator, addressee, or intended recipient of an electronic communication." (PC § 1546.1(i)(1).)
- Electronic communication information obtained from "an entity that provides electronic communications services to its officers, directors, employees, or agents for the purpose of carrying out their duties." (PC § 1546.1(i)(2).)
- Subscriber information. (PC § 1546.1(i)(3).)

Subscriber information

While CalECPA seems to imply a search warrant is not required to obtain what CalECPA strictly defines as "subscriber information," case law suggests otherwise. (*People v. Chapman* (1984) 36 Cal.3d 98, 105-11.) Given this inconsistency between statutory and case law, a search warrant should be used to obtain subscriber information. Such a search warrant would need not comply with CalECPA's requirements for sealing and notification.

CalECPA's requirements would be triggered if the information provided by the service provider included information that went beyond CalECPA's definition of "subscriber information."

Emergency Situations

If law enforcement has a good faith belief that an emergency involving danger of death or serious physical injury to any person requires access to electronic device information without

delay, law enforcement may access electronic device information by means of physical interaction or electronic communication with the device. (PC § 1546.1(c)(5).)

Within three days of obtaining such information, law enforcement shall file with the appropriate court an application for a search warrant, order or motion authorizing obtaining the electronic information or a motion seeking approval of the emergency disclosures and setting forth the facts of the emergency. CalECPA fails to define or differentiate between an order or a motion. The court shall order the immediate destruction of all information obtained and immediate notification in the event the court finds that the facts did not give rise to an emergency or the warrant or order was rejected on other grounds. (PC § 1546.1(h).)

Notification

CalECPA requires immediate notification by law enforcement to the identified targets of the investigation that a search warrant for electronic information was sought or such information was obtained due to an emergency situation. Law enforcement can request a 90-day delay of notification, and extensions may be granted.

Where appropriate, search warrants, orders, and/or motions filed following an emergency should include the following notification delay request:

> ***Your affiant hereby requests an order delaying notification and prohibiting any party providing information from notifying any other party that information has been sought. This request is based on the following: [INSERT INFORMATION WHY NOTIFICATION WOULD RESULT IN DANGER TO THE LIFE OR PHYSICAL SAFETY OF AN INDIVIDUAL, FLIGHT FROM PROSECUTION, DESTRUCTION OF OR TAMPERING WITH EVIDENCE, INTIMIDATION OF POTENTIAL WITNESSES, AND/OR SERIOUS JEOPARDY TO AN INVESTIGATION OR UNDUE DELAY OF TRIAL].***

The warrant, order, or motion must also include an area for the court to sign if a notification delay is requested:

> ***The court has read and considered the request by [INSERT NAME OF AFFIANT]. The court has determined that there is reason to believe that notification may have an adverse result within the meaning of Penal Code §§ 1546(a) and 1546.2(b)(1). The court hereby grants the request to delay notification and prohibit any party providing information from notifying any other party that information has been sought for a period of 90 days from today's date.***

Preservation Letters

Preservation letters, which are authorized pursuant to federal law, permit law enforcement to request a service provider to maintain specified records for 90 days. (18 U.S.C. § 2703(f).) A preservation letter is not a request to search; it is a request not to destroy. Preservation letters are

not affected by CalECPA. However, a search warrant obtained after a preservation letter would trigger CalECPA provisions.

Discovery Issues

As stated above, CalECPA requires that any information obtained through the execution of a search warrant that is unrelated to the objective of the search warrant must be sealed. The review of such "unrelated" information requires a court order. Information that is initially determined to be "unrelated" to the objective of the search warrant may become relevant as the case progresses. For example, the relevance of such information may only become apparent following a hearing or the receipt of defense discovery. This sealed and now relevant information can only be accessed with a court order. CalECPA essentially requires the prosecution to seek a court order to comply with discovery obligations.

Suppression

CalECPA allows **any person** in a trial, hearing, or proceeding to move to suppress any electronic information obtained or retained in violation of its provisions or the Fourth Amendment. The Truth-in-Evidence provisions in Article I, § 28(f)(2) of the California Constitution do not apply to CalECPA because it was passed by a two-thirds majority of the Legislature.

CHAPTER 21

EXTRADITION AND THE RETURN OF FUGITIVES

21.01 INTRODUCTION

The decision to return a fugitive to Los Angeles County depends upon where the fugitive is located, the purpose for the fugitive's return, and whether the fugitive is to be returned as an accused or as a witness.

21.01.01 EXTRADITION SERVICES SECTION

The Extradition Services Section (ESS) is responsible for processing the return of fugitives who have been located in custody outside of California, either within the United States and its territories or in a foreign country.

If the fugitive has been located in custody within the United States or its territories, ESS will process the return pursuant to the Uniform Criminal Extradition Act (PC §§ 1547 et seq.), or the Agreement on Detainers (PC §§ 1389 et seq.). If the fugitive is located in another country, ESS may process the return pursuant to an existing extradition treaty between the United States and the foreign country.

If a fugitive is located in custody within California, the deputy handling the case shall process the return.

21.01.02 CHARGING AND THE RETURN OF FUGITIVES

When felony charges have been or are about to be filed, and the accused is in custody outside of Los Angeles County, the Head Deputy of the office responsible for the filing of the case shall make the decision whether to seek the return of the fugitive. The decision to charge shall be made according to Office policy, and does not depend on whether the fugitive should be returned to Los Angeles County.

21.01.03 TIMELINESS OF RETURN (ACCUSED)

The Head Deputy shall act immediately when it is necessary to return a fugitive who is in custody in another jurisdiction to Los Angeles County for prosecution. A fugitive in custody in another state or country on a detainer or warrant issued from Los Angeles County may only be held for a limited period of time before being released.

If the fugitive is in custody in California or another state and has made a demand for trial, the Head Deputy responsible for the case shall act on the demand for trial within the statutory time limit, or the case will be dismissed.

21.01.04 CRITERIA TO BE CONSIDERED

When a request by law enforcement to return a prisoner from another state is processed, ESS will submit the request for approval to the Head Deputy of the Branch or Division handling the case. A request to return a fugitive from a foreign country shall be approved by the Head Deputy of the Post-Conviction Litigation and Discovery Division.

The criteria to be considered in deciding whether to approve a request to return a fugitive are:

- If a state prison sentence is warranted, the return of the fugitive should usually be sought.
- If a state prison sentence is not warranted but felony probation with a substantial period of local confinement is warranted, the potential cost of returning the fugitive should be weighed against the following factors:
    - The existence of a substantial uncompensated financial loss on the part of the victim(s).
    - The accused's criminal record (including conduct since the filing of the original charges) and the seriousness of the conduct in the charged offense(s).
- If the cost is clearly excessive in relation to these factors, the fugitive's return should not be sought.
- If a substantial period of confinement is unlikely, the fugitive's return generally should not be sought.
- The fact that the accused is presently serving a substantial prison term in another jurisdiction should be considered even though local charges might result in a state prison sentence.
- The local importance of the case and potential deterrence of others shall be of overriding concern regardless of the charges or possible sentence. Significant cases of public interest may fall within this category.

Before a decision to return a fugitive is made, the Head Deputy shall determine if the case against the accused is still prosecutable, particularly if there has been a substantial passage of time since the original charges were filed.

Commentary

The decision to return a fugitive is essentially a balancing test. The nature of the crime committed and the likelihood of a state prison or lengthy county jail sentence must be weighed against the cost of returning the fugitive. These costs can be substantial, especially in international extraditions. Many foreign countries require legal documents to be translated into the language of that country. These costs alone can be as much as $10,000 to $20,000.

In determining whether to return a fugitive who is incarcerated in a prison facility in another state, a deputy should consider whether a new conviction will substantially increase the total period of confinement of the accused. Also, in significant cases of public interest in which the deterrent role of conviction and punishment as well as the public's confidence in the criminal justice system may be jeopardized, return should generally be sought.

21.01.05 CHILD STEALING CASES

Notwithstanding the criteria set forth above, the return of the fugitive shall normally be sought in felony child stealing cases.

21.01.06 EXTRADITION OF ESCAPED OR ERRONEOUSLY RELEASED PRISONERS CAPTURED IN ANOTHER STATE

An escaped or erroneously released prisoner captured in another state shall be extradited absent compelling reasons not to do so. A refusal to extradite an escaped or erroneously released prisoner requires Bureau Director approval.

21.02 FUGITIVES INCARCERATED IN CALIFORNIA

The return of fugitives incarcerated within California is procedurally simple, and, when Sheriff's Statewide Transportation is used, relatively inexpensive. Therefore, the return of fugitives held in custody in California for judicial proceedings in Los Angeles County should generally be sought.

21.02.01 REMOVAL ORDERS

If a prisoner is in a state or local institution within California but outside of Los Angeles County, and the prisoner's return is sought as an accused or as a witness, the return shall be accomplished by means of an "Affidavit and Order for Removal of Prisoner" (PC § 1567.) The Los Angeles County Sheriff's Statewide Transportation Unit will handle transportation. The necessary documents shall be prepared by the deputy handling the case in accordance with the following procedures. The deputy shall:

- Prepare an original and five copies of the "Affidavit and Order for Removal of Prisoner;"
- Obtain the signature of a Superior Court judge and have the clerk stamp the order with the seal of the court;
- Set a date for appearance allowing sufficient time for processing the paperwork and transportation;
- Deliver the original and three copies to the Sheriff's Statewide Transportation Unit (usually through the court's bailiff);
- Leave one copy with the court clerk and place one copy in the case file; and
- Verify that the prisoner has arrived within 30 days of delivery of the order to the Sheriff.

When the fugitive is being returned as an accused, the deputy shall notify the law enforcement agency involved in the case investigation of the date and nature of the accused's expected court appearance.

21.02.02 "ORDERING OUT"

If a prisoner is in Los Angeles County, and the prisoner's return is sought as an accused or as a witness, the deputy handling the case shall "order the prisoner out" as follows:

- If the prisoner is in the Los Angeles County jail, the deputy shall orally request the court clerk to order the prisoner out to court on the required date and time. The Sheriff's Department will transport the prisoner.

- If the prisoner is in a city jail, the deputy shall orally request the police department having custody of the prisoner to transport the prisoner to court on the required date and time.

21.02.03 INMATE DEMANDS - PENAL CODE § 1381

When a prisoner has been convicted of a felony or misdemeanor in this state and is serving a term in state prison (or other specified state institution), or a term of more than 90 days in a county jail, and there is another criminal proceeding pending in Los Angeles County, the prisoner may make a written demand upon the District Attorney for trial or sentencing. Upon receipt of a written demand, the failure of the District Attorney to bring the prisoner to trial or sentencing within 90 days will result in dismissal. (PC § 1381.)

Inmate demands made in cases pending in the Central District of the Superior Court are processed by the Bureau of Central Operations Inmate Demands Unit. Inmate demands made in cases pending in Branch and Area offices are processed by personnel in the office responsible for handling the case. The procedures used to return the prisoner for trial or for sentencing are the same as set forth above.

Commentary

Inmate demands in particular must be handled promptly. Failure to act within statutory time limits will result in dismissal. Therefore, a deputy shall give a demand for trial immediate attention.

21.03 FUGITIVES IN ANOTHER STATE

21.03.01 FUGITIVES DETAINED IN ANOTHER STATE

Fugitives who have been captured and are being held in another state or territory of the United States for crimes committed in Los Angeles County, failure to appear for sentencing, or violation of probation or escape, shall generally be returned to Los Angeles County pursuant to the provisions of the Uniform Criminal Extradition Act, Penal Code §§ 1547 et seq. ESS processes all returns pursuant to the Uniform Criminal Extradition Act.

When a request for extradition is received by ESS, it will be referred via an email generated by ESS database to the Head Deputy of the office or division handling the case. The Head Deputy shall evaluate the case using the criteria set forth in § 21.01.04. The Head Deputy shall notify ESS of the decision via the database, and ESS will process the matter.

If a fugitive contests extradition, ESS shall contact the Head Deputy to request the case file. The Head Deputy shall send the file to ESS as quickly as possible.

Commentary

When a fugitive is captured and being held in another state, the decision to return the fugitive to Los Angeles County shall be made promptly. If the Office does not begin the extradition process in a timely fashion, the fugitive may be released from custody.

21.03.02 FUGITIVE SENTENCED IN ANOTHER STATE

Fugitives who are serving a term of imprisonment in another state, including a federal institution in another state, and whose return is sought for prosecution on an untried indictment, information or complaint in this state, shall be returned pursuant to the Agreement on Detainers, Penal Code §§ 1389 et seq. This statute applies to both fugitives who are making a demand for trial pursuant to article III of the Agreement on Detainers and fugitives whom the Office or other law enforcement agencies seek to return for the purposes of prosecution pursuant to article IV of the Agreement on Detainers. ESS processes all returns of sentenced fugitives, including inmate demands, when the fugitive is incarcerated outside California.

The Agreement on Detainers provides for the return of fugitives who have been sentenced in another state and who are in their permanent place of incarceration outside California, as well as fugitives who are sentenced federal prisoners (wherever located). However, such fugitives can be returned pursuant to the Agreement on Detainers only if untried indictments, informations, or complaints are pending against them.

The Agreement on Detainers usually provides the most suitable method by which such fugitives can be returned and should be used, whenever possible, subject to the exceptions expressed in this chapter.

When a request to return a prisoner for trial is received, or when an inmate makes a demand for trial pursuant to article III of the Agreement on Detainers, ESS shall process the request and refer it to the Head Deputy of the office or division handling the case. The Head Deputy shall evaluate the case for the return of the fugitive using the criteria set forth in § 21.01.04. The Head Deputy shall notify ESS of the decision, and ESS will process the return of the fugitive.

Any fugitive returned to California under the Agreement on Detainers shall not be allowed to return to the original place of imprisonment until the prisoner has been tried and sentenced on all indictments, informations and complaints which are pending against the fugitive in any jurisdiction in California and upon which detainers have been lodged. The return of the fugitive to the original place of imprisonment before the fugitive has been tried and sentenced on all open cases will result in a dismissal with prejudice of those cases.

The Uniform Criminal Extradition Act should be used instead of the Agreement on Detainers when processing a request to return a fugitive for sentencing or for a probation violation. The request will be processed by ESS and referred to the Head Deputy of the office or division handling the case. The Head Deputy shall evaluate the case. If the Head Deputy approves the return, the Head Deputy shall initiate procedures as set forth above.
In probation violation matters, in addition to the other criteria set forth above, a Head Deputy shall consider the age of the case, the type of offense committed, the reason for the probation

violation, the length of time the fugitive was on probation prior to the violation, the amount of jail time already served, and the fugitive's criminal and employment activities since the bench warrant was issued. Unfortunately, not all of this information may be available at the time the decision to return must be made.

A Head Deputy shall also consider that fugitives sentenced in another state must be returned to that state to complete their sentence before they may be returned again to Los Angeles County to serve any time imposed here. Under these circumstances, the Head Deputy should consider the expense of three separate trips to transport the fugitive between this state and the other state.

21.04 FUGITIVES IN FEDERAL CUSTODY

Fugitives in federal custody may be returned to state court by use of the common law Writs of Habeas Corpus Ad Prosequendum or Habeas Corpus Ad Testificandum, or the Agreement on Detainers. The decision regarding which procedure to use will depend on where the fugitive is located, the purpose for the fugitive's return and how quickly the fugitive is needed. ESS processes all returns of federal prisoners pursuant to the Agreement on Detainers when the fugitive is in another state. ESS does not process Writs of Habeas Corpus.

The Agreement on Detainers is limited to untried indictments, informations or complaints. A Writ of Habeas Corpus Ad Prosequendum is not limited to untried indictments, informations or complaints and may be used to return a fugitive for sentencing or probation violations.

Federal authorities will not accept a Writ of Habeas Corpus for the return of a fugitive in federal prisoner in most cases unless and until all federal court proceedings involving that fugitive have concluded. In unusual cases, the United States Marshal having custody of the fugitive may make an exception.

Any fugitive returned to California under the Agreement on Detainers and any fugitive who is a federal prisoner who has been returned pursuant to a writ must not be allowed to return to the original place of imprisonment until the fugitive has been tried and sentenced on all indictments, informations and complaints which are pending against the fugitive in any jurisdiction in California upon which detainers have been lodged. The return of the fugitive to the original place of imprisonment before the fugitive has been tried and sentenced on all open cases will result in a dismissal with prejudice of those cases.

21.04.01 FUGITIVES IN FEDERAL PRISON IN CALIFORNIA

Fugitives who are serving a federal prison sentence in a California federal prison should be returned to court as an accused pursuant to a Writ of Habeas Corpus Ad Prosequendum, or as a witness pursuant to a Writ of Habeas Corpus Ad Testificandum. Detailed procedures for the use of these writs are set forth below.

While it is possible to use the Agreement on Detainers (PC §§ 1389 et seq.) to return a fugitive serving a federal prison sentence in a California federal prison as an accused, it is preferable to

use a writ because the procedure is somewhat simpler and faster than the Agreement on Detainers.

21.04.02 FUGITIVES IN FEDERAL PRISON IN ANOTHER STATE

Fugitives who are in federal prison in another state should be returned as an accused pursuant to the Agreement on Detainers unless time is of the essence, in which case a Writ of Habeas Corpus should be used. The Agreement on Detainers is preferable because the state reimburses the county for the costs of out-of-state returns under the Agreement on Detainers but not for out-of-state returns pursuant to a writ. Thus, it is considerably less costly to the county to use the Agreement on Detainers for the return of fugitives from an out-of-state federal prison.

21.04.03 USE OF COMMON LAW WRITS

The common law Writs of Habeas Corpus Ad Prosequendum and Habeas Corpus Ad Testificandum may be used for the return of a fugitive located in any federal institution in any state. The deputy handling the case for which the fugitive's return is sought shall prepare all necessary paperwork.

The deputy shall determine the exact location and status of the federal fugitive.

- If the fugitive is a sentenced prisoner serving a term in a permanent place of imprisonment, the appropriate writ and other correspondence shall be directed to the warden of that prison.

- If the fugitive is a sentenced prisoner in a temporary federal holding facility pending transportation to a permanent place of imprisonment, the appropriate writ and all correspondence should be directed to the United States Marshal for the federal judicial district where the prisoner is housed.

A deputy may contact the United States Marshal for the Central District by calling Court Operations at (213) 620-8341. Correspondence should be addressed to:

United States Marshal
United States Court House
Custody and Transportation Department
312 North Spring Street
Los Angeles, California 90012

ESS has the names and addresses of federal prisons and wardens. Contact information for federal prisons may also be found on the Federal Bureau of Prisons website: https://www.bop.gov/locations/list.jsp.

21.04.04 DETAINER MUST BE LODGED AGAINST THE PRISONER

If the fugitive is a federal prisoner and is to be returned as an accused, the deputy shall verify a detainer has been lodged against the prisoner at the prison where the prisoner is being held. Federal authorities will not release a prisoner as an accused, whether pursuant to the Agreement on Detainers or a Writ of Habeas Corpus Ad Prosequendum, unless a detainer has been lodged against that fugitive on the charges for which the return is sought. Normally, a law enforcement agency will lodge a detainer upon learning a fugitive is an inmate in a federal prison. However, a deputy may also lodge a detainer by sending the prison a certified copy of the charges against the inmate along with a letter stating the Office intends to prosecute the inmate on the charges reflected in the court documents.

21.04.05 TRANSPORTATION ISSUES

A deputy shall determine who will actually pick up and transport the prisoner and when the transport shall take place.

If the prisoner has made a demand for trial, or is being sought as a witness, the prison warden or United States Marshal will require a certified copy of the appropriate writ and accompanying correspondence, as described below, at least 10 days prior to the scheduled transportation. In urgent cases notification by phone may be acceptable to the federal authorities.

If the prisoner is sought as an accused but has not made a demand for trial, a Writ of Habeas Corpus Ad Prosequendum shall be sent to the warden or United States Marshal and the prisoner at least 30 days prior to the scheduled transportation.

In most cases, the Los Angeles County Sheriff's Statewide Transportation Unit should be used to transport the prisoner since the unit travels throughout the state on a regular basis and is the least expensive means of transporting such prisoners. The Sheriff's Statewide Transportation Unit requires at least two weeks to return a prisoner.

If the Sheriff's Statewide Transportation Unit will be used to pick up and transport the prisoner, the individuals listed on the "Sheriff's Designated Agents" memo are authorized for such duty. This memo is updated periodically and distributed throughout the Office because the names of the designated agents frequently change. Since only designated agents may pick up and transport federal prisoners, the deputy should contact the Sheriff's Statewide Transportation Unit to confirm the names of current agents.

Some wardens require a specific "Designated Agents" memo bearing the name, number, and signature of the specific individual(s) who will pick up and transport the prisoner. Other wardens accept the general "Sheriff's Designated Agents" memo which authorizes certain individuals as agents. Additionally, some wardens require four designated agents, while Sheriff's Statewide Transportation Unit generally sends only two. Deputies should verify all transportation requirements for the institution in question.

If a law enforcement agency other than the Sheriff's Statewide Transportation Unit will be used to transport the fugitive, the specific names, identification numbers, and signatures of the designated agents must be obtained. The deputy shall prepare a special "designated agents" letter which must contain the actual signatures of the agents who will transport the accused.

21.04.06 PREPARATION OF THE WRIT

A deputy shall prepare an "Application, Affidavit, and Writ of Habeas Corpus Ad Prosequendum" or an "Application, Affidavit and Writ of Habeas Corpus Ad Testificandum" and obtain all necessary signatures (i.e., prosecutor, Superior Court judge and Superior Court clerk). The deputy shall obtain a certified copy of the writ and place an additional copy in the case file.

The deputy shall prepare a cover letter addressed to the same person to whom the writ is directed. The deputy shall then prepare a package consisting of the certified copy of the writ, the cover letter, and a copy of the appropriate "designated agents" memo or letter. This package is to be mailed to the warden or United States Marshal indicated on the writ at least 10 days before the scheduled transportation. In urgent cases, telephonic notification of the pending transportation may be accepted by the federal authorities.

The deputy shall deliver the original writ, a copy of the cover letter and a copy of the appropriate "designated agents" memo or letter to either:

- The Sheriff's Statewide Transportation Unit; or
- The law enforcement agents who will pick up the prisoner.

If Sheriff's personnel will be transporting the prisoner, materials clearly marked "Sheriff's Statewide Transportation Unit" may be given to the court bailiff with a request to forward the documents to the transportation unit.

The deputy shall inform the designated agents that the deputy is to be notified as soon as the prisoner is in the Los Angeles County Jail and that the designated agents must book the prisoner into County Jail on the state charges. The deputy shall also inform the designated agents that they must specifically alert County Jail personnel that the prisoner is a sentenced federal prisoner and is not to be released on bail or for any other reason or returned to the federal prison without the specific permission of the deputy who signed the writ.

The deputy shall verify the prisoner was returned to Los Angeles County on or about the anticipated date and shall resume prosecution in a timely manner.

21.05 FEDERAL INMATE DEMANDS

Whenever a defendant is serving a term of imprisonment in a federal institution and an untried indictment, information or complaint is pending against the defendant in this county, the defendant may make a demand to be returned to this county for completion of those proceedings. Such a demand may be made:

- Pursuant to the Right to Speedy Trial of Person in Federal Custody Within California (PC § 1381.5); or
- Pursuant to the Agreement on Detainers (PC §§ 1389 et seq.).

21.05.01 PENAL CODE § 1381.5

Upon receipt of a demand for trial or sentencing, a deputy shall promptly inquire of the warden whether and when the federal prisoner can be released for trial or for sentencing. Records officers require a 30-day notice before the warden will approve a fugitive's return to Los Angeles. If the warden agrees to release the prisoner for trial or for sentencing, the deputy shall bring the prisoner to trial or sentencing within 90 days. Failure to do so will result in the dismissal of the case. (PC § 1381.5.)

Generally, the courts will consider any demand for trial by a federal prisoner within California as a demand under Penal Code § 1381.5, leaving the Office only 90 days to bring the defendant to trial.

When time is short, the deputy shall use the Writ of Habeas Corpus Ad Prosequendum procedure for federal prisoners held within California to ensure the prisoner's return for trial within the 90-day time limit.

21.05.02 PENAL CODE § 1389

A demand pursuant to Penal Code § 1389, the Agreement on Detainers, may only be made if there is an untried indictment, information, or complaint pending against the fugitive who is a prisoner in federal custody.

Under the Agreement, the District Attorney has 180 days to bring the fugitive to trial after receiving written notice of the demand. Failure to bring the fugitive to trial within 180 days will result in dismissal of the case with prejudice. If a fugitive in federal custody has made a demand for trial under the Agreement on Detainers, but for whatever reason, the procedure for getting physical custody of the fugitive by use of the Agreement on Detainers cannot be completed in time to ensure the prisoner's return and trial within 180 days, the deputy may use a Writ of Habeas Corpus Ad Prosequendum to produce the fugitive.

ESS processes all demands for trial pursuant to the Agreement on Detainers if the fugitive is in federal prison outside of California.

Commentary

A Writ of Habeas Corpus Ad Prosequendum is a faster method to obtain physical custody of a federal prisoner than the Agreement on Detainers but should normally not be used for out-of-state federal prisoners since it is considerably more expensive than the Agreement on Detainers.

21.06 FUGITIVES IN FOREIGN COUNTRIES

ESS shall process all returns of fugitives from foreign countries. All requests for extradition involving fugitives in foreign countries shall be referred to ESS for review. The Head Deputy of the Post-Conviction Litigation and Discovery Division is responsible for the approval of all international extraditions.

International extraditions involve many special considerations, including preparing documents in accordance with the applicable treaty between the United States and the foreign government as well as with the laws of the applicable country; translating documents; the possible need to meet the requirement of making a prima facie showing of guilt without recourse to hearsay evidence; paying attorney(s) to represent Los Angeles County at the extradition proceedings in the foreign county; possible expenses associated with sending witnesses to hearing(s) in the foreign country; officers' travel costs which are not covered by the State of California, and other restrictions which may be placed upon the prosecution's case as a condition of the surrender.

Extradition of international fugitives should be approved only when the case is of such significant interest to the deputy, investigating agency, victim and public and where the case will remain prosecutable while the extradition is pending. In some cases, this process can take several years. Once the Office initiates formal action, the matter is handled through the United States Department of Justice, Office of International Affairs (OIA), and the State Department. Extradition becomes a matter of international relations between the United States and the foreign government. OIA and the State Department retain an interest in everything that happens to international extradition requests. Therefore, the Office must not lose interest in these cases.

21.07 PROCEDURE UPON CONVICTION, DISMISSAL OR ACQUITTAL

If the fugitive was a prisoner in state or federal custody and was returned to Los Angeles County pursuant to a Writ of Habeas Corpus Ad Prosequendum, the Agreement on Detainers, or executive agreement in which the return to the original place of incarceration was promised (PC § 1549), the court must order the fugitive returned to the original place of incarceration upon conclusion of the case.

If the fugitive is convicted of the offense(s) for which the fugitive was returned to Los Angeles County, sentence should be imposed but may not be served until after the fugitive has been returned to the original place of incarceration for completion of sentence there. The deputy shall send written notice of the conviction and sentence to the prison from which the fugitive was returned. If ESS arranged for the return of the fugitive, notification shall also be sent to ESS.

If the fugitive is acquitted or the case dismissed, the deputy shall send written notice of the acquittal or dismissal to the prison from which the fugitive was returned. This letter shall be prepared by the deputy handling the case. If ESS arranged for the return of the fugitive, notification shall also be sent to ESS.

If the fugitive also has other detainers lodged from other California counties, arrangements must be made with the District Attorney of those counties and the United States Marshal or warden

from whose custody the fugitive was taken to transfer the fugitive to the other counties for prosecution on their cases prior to the return to the original place of incarceration. The deputy is responsible for ensuring appropriate transportation back to the original institution. Only appropriately "designated agents" may be used for transportation.

When handling a case in which the fugitive was returned from a state or federal prison outside California, the deputy shall promptly send copies of the minute orders or dockets showing the disposition of the case to ESS. ESS will carry out the final provisions of the applicable agreements.

21.08 RETURN OF PRISONERS AS WITNESSES

Whenever it becomes necessary to return a prisoner as a witness, the deputy handling the case shall seek Head Deputy approval. The Head Deputy will promptly review the matter and take appropriate action.

21.08.01 CRITERIA TO BE CONSIDERED

The return of a prisoner as a witness should usually be sought in all felony cases.

In misdemeanor cases, the potential cost of returning the prisoner should be weighed against the following facts:

- The existence of a substantial uncompensated financial loss on the part of the victim(s);
- The seriousness of the defendant's conduct in the charged offense(s);
- The defendant's criminal record including conduct since the filing of the original charges; and
- The probable length of any jail sentence the defendant is likely to receive.

If a defendant is presently serving a substantial prison term, the return of a prisoner as a witness should usually not be sought even though conviction on the new charges might result in a felony sentence. The local importance of the case and potential deterrence of others shall be of overriding concern regardless of the charges or possible sentence. Major crimes and significant cases of public interest may fall within this category.

The Head Deputy shall determine if the case is still prosecutable before seeking the return of a prisoner as a witness, particularly if there has been a substantial passage of time since the original charges were filed. The deputy handling the case will prepare the necessary paperwork.

21.08.02 PRISONER IN ANOTHER STATE

Prisoners incarcerated in another state who are sought as witnesses must be returned to this state pursuant to the Uniform Act to Secure the Attendance of Witnesses, Penal Code §§ 1334 et seq. Prisoners in federal custody must be returned by means of a Writ of Habeas Corpus Ad Testificandum.

CHAPTER 22

FOREIGN PROSECUTION AND INTERNATIONAL INVESTIGATIVE ASSISTANCE

22.01 FOREIGN PROSECUTION

Some countries, including Mexico, Nicaragua and China, have laws that assert jurisdiction to prosecute an accused for crimes committed anywhere in the world. Typically, these laws require either the accused or the victim be a citizen or national of that country. Although there is a strong preference for the extradition of fugitives for prosecution in California, occasionally, extradition is either impossible or impractical, due to the absence of an extradition treaty with a foreign country, treaty restrictions regarding charges or evidence, or other complications. Under such circumstances, the Office may agree to waive our prosecutorial jurisdiction and allow a foreign country to prosecute crimes committed in Los Angeles County.

Whenever a deputy is contacted by any law enforcement agency requesting a waiver of jurisdiction in order to pursue foreign prosecution, the deputy shall immediately contact the Coordinator of Extradition Services Section (ESS). The ESS Deputy-in-Charge shall refer the request, through the chain of command, to the Assistant District Attorney of Administration and the Assistant District Attorney overseeing the Bureau responsible for the prosecution of the case. The Assistant District Attorneys will review the request and determine whether approval for foreign prosecution is appropriate. The Chief Deputy shall have final approval of all foreign prosecutions decisions.

22.02 FOREIGN PROSECUTION NOT A BAR TO PROSECUTION IN CALIFORNIA

Penal Code §§ 656 and 793 were amended effective January 1, 2005. These sections no longer bar a subsequent prosecution in California for a crime that was prosecuted in a foreign country. If a Los Angeles County fugitive, who has been prosecuted pursuant to Article IV of the Mexican Federal Penal Code or the foreign prosecution laws of any other country, voluntarily returns to the United States after a foreign conviction or acquittal, the fugitive is still subject to prosecution in California. Therefore, all warrants are to remain active and case files open. If the fugitive is located anywhere in the United States after a foreign prosecution in Mexico or any other country, standard procedures to detain and extradite the accused to Los Angeles County should be followed.

22.03 INVESTIGATIVE ASSISTANCE IN FOREIGN COUNTRIES

If a trial deputy requires investigative assistance in a foreign country, the trial deputy shall contact the ESS Deputy-in-Charge. An ESS deputy will be assigned to advise the trial deputy on available foreign investigative tools and international protocols. Such investigative assistance may include:

Mutual Legal Assistance Treaty (MLAT): A MLAT request is a formal request for the assistance of a foreign government to obtain evidence, including witness statements, physical evidence, or documents, located in a foreign country. The trial deputy will draft the MLAT request in consultation with an assigned ESS deputy. The ESS deputy will submit the MLAT request to the United States Department of Justice, Office of International Affairs (OIA).

Interpol Notices: Interpol is an international police organization comprised of over 190 member countries. The organization maintains an international database of legal notices, which can assist in the location, detention, or, in some cases, arrest, of fugitives.

- **Red Notice**: used to locate a fugitive in a criminal case with an outstanding arrest warrant. Depending on the foreign country, a red notice may have the effect of an arrest warrant and may commit the Office to the extradition of the arrested fugitive.
- **Blue Notice**: used to collect information about identity, location or activities of a fugitive in relation to a crime.
- **Yellow Notice**: used to locate missing persons.

A trial deputy needing assistance in locating a missing person or fugitive in a foreign country shall contact the ESS Deputy-in-Charge to determine whether an Interpol notice is appropriate. The trial deputy shall be responsible for drafting and submitting yellow and blue notices to Interpol after consulting with ESS. The trial deputy will assist the assigned ESS deputy in drafting a red notice. However, in light of the Office's potential obligation to extradite a fugitive that has been detained on the basis of a red notice, ESS is solely responsible for the submission of red notices directly to Interpol.

CHAPTER 23

PUBLIC RECORDS ACT

23.01 CALIFORNIA PUBLIC RECORDS ACT

The California Public Records Act (PRA), Government Code §§ 7920.000 et seq., permits any member of the public to inspect and copy records prepared, owned, used or retained by any state or local governmental agency regardless of physical form or characteristics, for any reason. The definition of records includes documents, computer records and e-mail.

The PRA and this policy apply to all Office records, in any form, including felony, misdemeanor and civil case files. However, juvenile case files are confidential and cannot be disclosed to the public without a court order. (WIC § 827(a)(4)).)

The PRA also contains a number of exemptions from the general rule of disclosure. The *Public Records Act Manual*, available on LADAnet, explains these exemptions and provides guidance in their application. The Special Assistant for Line Operations is available to provide recommendations and legal advice in processing requests.

23.02 STRICT TIME LIMITS

The PRA sets strict time limits for the response to a request. If some or all of the records are exempt from disclosure under the PRA, the exemptions must be claimed within these time limits. Failure to respond and claim the exemptions within the time limits may be deemed a waiver of the exemptions.

Upon receipt of a PRA request, the Office has 10 calendar days to respond. In unusual circumstances, this time limitation may be extended up to 14 additional calendar days upon written notice to the requestor setting forth the reasons for the extension and the expected response date. (Gov. Code § 7922.535.)

Unusual circumstances include:

- The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;
- The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request;
- The need for consultation, which shall be conducted as quickly as possible, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein; or
- The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

The initial response required under the PRA is the determination whether the records exist and whether they will be disclosed or are exempt from disclosure. This response does not necessarily include the actual production of the records within the 10-day period. If the records exist but require separation or redaction of non-disclosable material, or require computer analysis or extraction, or are voluminous, the response should be made as soon as possible within the time limits and indicate when the Office expects the records to be available for inspection.

23.03 RESPONDING TO PRA REQUESTS

23.03.01 NOTIFICATION/TRACKING

The employee receiving a PRA request shall immediately forward it to the Litigation Coordinator at PRA@da.lacounty.gov where the request will be logged into the IBM Notes PRA database and tracked. The employee shall also forward a copy of the request to the Head Deputy or Deputy-in-Charge. In the Bureau of Investigation, PRA requests shall be forwarded to the Divisional Captain and a response will be prepared by the Special Assistant for Line Operations.

23.03.02 PROCESSING - RECORDS EXIST

The Head Deputy, Deputy-in-Charge or Captain shall promptly determine whether the requested records exist and, if they do exist, where they are located.

The Head Deputy, Deputy-in-Charge or Captain shall review the records and determine whether the records should be disclosed or whether they are exempt from disclosure under the PRA or other statutory or case law.

If the records are exempt from disclosure, the Head Deputy, Deputy-in-Charge or Captain shall promptly notify the requestor in writing within the statutory time limits. The written notification shall state the reasons for non-disclosure. The Head Deputy, Deputy-in-Charge or Captain shall upload a copy of the letter to the PRA database.

If the Head Deputy, Deputy-in-Charge or Captain determines that the records are not exempt, that individual shall promptly notify the requestor in writing within the statutory time limits and indicate when and where the records will be made available for inspection, email the records for no costs, or send a letter indicating costs of providing a hard copy of the documents. If the records themselves are not exempt from disclosure, but contain information that is exempt, the Head Deputy, Deputy-in-Charge or Captain shall cause the exempt information to be separated or redacted from the records. The Head Deputy, Deputy-in-Charge or Captain shall upload the letter and copy of the redacted and unredacted documents into the PRA database.

If the Head Deputy, Deputy-in-Charge or Captain determines that the request should have been delivered to a different office or unit within the Office or to another government agency, that individual shall immediately forward the request by email to the Litigation Coordinator at PRA@da.lacounty.gov.

The Head Deputy, Deputy-in-Charge or Captain is also responsible for deciding whether to disclose law enforcement investigative records under the guidelines set forth below. When records are disclosed, a copy of the response letter should be placed in the case file indicating which documents were disclosed.

23.03.03 PROCESSING – RECORDS DO NOT EXIST

If the Head Deputy, Deputy-in-Charge or Captain determines that the requested records do not exist, that individual shall promptly notify the requestor in writing on letterhead. The Head Deputy, Deputy-in-Charge or Captain shall update the PRA log with a copy of the response.

23.03.04 PROCESSING – LAW ENFORCEMENT PERSONNEL RECORDS & RECORDS OF INCIDENTS

Personnel records of peace officers and custodial officers and related investigatory reports involving the following incidents are disclosable records: (1) the discharge of a firearm at a person, (2) the use of force against a person resulting in death or in great bodily injury, (3) a *sustained* finding by any law enforcement or oversight agency that an officer engaged in sexual assault involving a member of the public, or (4) a *sustained* finding by any law enforcement agency or oversight agency of dishonesty directly relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of, misconduct of another peace officer. (PC § 832.7 (b)(1).)

All responsive records in the possession of the Office, regardless whether the records pertain to officers employed by the Office or another public agency and regardless whether the Office or another public agency created the records, shall be disclosed. (See *Becerra v. Superior Court* (2020) 44 Cal.App.5th 897, 934.) All applicable exemptions and privileges shall be asserted.

If the Head Deputy, Deputy-in-Charge, or Captain determines that law enforcement records requested under Penal Code §§ 832.7 and 832.8 and Government Code § 7923.625 exist and are not subject to any exemptions from disclosure, that individual shall promptly disclose the records within the statutory time limits:

(a) Records that are not the subject of an active criminal or administrative investigation shall be disclosed within 10 calendar days with an extension of up to 14 additional calendar days in unusual circumstances;

(b) Records that are subject of an active criminal or administrative investigation shall be disclosed within 60 days of the incident involving categories (1) and (2) referenced above. Disclosure may be delayed for a maximum period of 18 months if disclosure would interfere with a criminal enforcement proceeding. Notice to the requester with an explanation of why disclosure could reasonably interfere with a criminal enforcement proceeding shall be given at each 180-day intervals. If criminal charges are filed relating to the use of force, disclosure may be delayed until a plea of guilty is entered or a verdict is returned; and

(c) Video and audio recordings for incidents in categories (1) and (2) referenced above that are related to an active criminal investigation may be *delayed* for up to 45 days after the Office knew or reasonably should have known about the incident if disclosure would substantially interfere with the investigation. If there is "clear and convincing evidence" that disclosure would substantially interfere with the investigation and the public interest in disclosure is outweighed by the necessity for delay, disclosure may be delayed beyond one year. (See Gov. Code § 7923.625.)

In addition to the procedures set forth in GOM 19-142, if the PRA is for records in an *open* case, the handling deputy shall (1) note the PRA request in the case file, (2) upload a copy of the request to eFolder, and (3) retain a copy of the disclosed records in the case file. Any deputy receiving a PRA request seeking law enforcement personnel records shall forward a copy of the request to the Special Assistant for Line Operations and the Litigation Coordinator at PRA@da.lacounty.gov.

23.04 CLAIMING PRA EXEMPTIONS

Office personnel shall promptly respond to all PRA requests. However, in sensitive cases or when the release of information might jeopardize victims or witnesses or interfere with pending cases or investigations, a deputy shall claim all appropriate exemptions. Some common exemptions include:

- Law enforcement investigative files and police reports even if a case or investigation has concluded. (Gov. Code §§ 7923.600-7923.625 and *Williams v. Superior Court* (1993) 5 Cal.4th 337, 355.)
- Records containing attorney work product. (C.C.P. §§ 2018.020 and 2018.030; Pen. Code § 1054.6.)
- Records that reveal the deliberative process of the Office. (Gov. Code § 7922.000 and *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.)
- Records for which the public interest served by not disclosing the records outweighs the public interest in disclosure. (Gov. Code § 7922.000 and *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.)

Charge Evaluation Worksheets (declinations), shall be disclosed in accordance with the opinion in *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 231. The Office does not impose a limitation on the period of time to make a PRA request following the disposition of a matter referred to the Office. However, consistent with *Fredericks*, consideration should be given to the burdensomeness of a request. The *Fredericks* court observed that while there can be no arbitrary time limit, an agency may still deny a request which would be overly burdensome either because of fiscal constraints or the time needed to comply with a request. (Id. at p. 234.) When assessing whether a request is overly burdensome, it is important to note that appellate courts have been hostile to the argument that it would take too much time or cost too much to comply with a PRA request. When a PRA request is denied on the basis that the request is overly burdensome, the employee should be prepared with facts to support such a claim. (*Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, 748-749 [40 hours of employee time at cost of $3,400 was not burdensome]; *CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 909.)

Prior to disclosure, the Charge Evaluation Worksheet must be edited to remove all confidential law enforcement identification numbers (e.g., criminal identification and information (CII) numbers), rap sheets, employee identification numbers, victims' and witnesses' addresses, telephone numbers and any other identifying information and any confidential attorney work product.

Office publications including General Office Memoranda and Special Directives may be disclosed, and court documents and records including pleadings, motions or reporter's transcripts may be disclosed unless they have been sealed by court order.

23.04.01 MANDATORY EXEMPTIONS

The following exemptions shall be asserted in all appropriate cases:

- Probation Reports: Probation reports are barred from disclosure for any reason 60 days after judgment is entered. (PC § 1203.05.)
- Criminal History Information: It is a criminal offense to disclose state summary criminal history information (rap sheets) maintained by the California Department of Justice to any person not authorized by law to receive such information. (Gov. Code § 7927.705; PC §§ 11140 et seq. and 13300 et seq.)
- Victim Identifying Information: No law enforcement officer or employee of a law enforcement agency shall disclose to any arrested person, or to any person who may be a defendant in a criminal action, the address or telephone number of any person who is a victim or witness in the alleged offense. (Gov. Code § 7927.700 and Penal Code § 841.5.)

23.05 WAIVER OF EXEMPTIONS

Once an exemption is waived and a record disclosed to any requestor pursuant to the PRA that exemption is forever waived as to that record and to all requestors.

Commentary

There may be situations in which it might seem appropriate to disclose certain records to certain requestors even though a PRA exemption could be claimed. Be aware that once that record is disclosed to one requestor it must be disclosed to all other requestors. Once waived, a claim of exemption is forever waived.

23.06 RELEASE OF PIMS INFORMATION

California Attorney General Opinion 06-203 clarified what information the Office can release to the public, that is contained in the Prosecutors Information Management System (PIMS). This opinion is entitled to great weight. Compliance with the Attorney General's opinion is mandatory for all employees as it is a misdemeanor to disclose protected information. (PC § 13302.)

The release of government records, such as the criminal history information maintained in PIMS, is governed by two competing statutory schemes. The first, the PRA, is based on the premise that the people's right to evaluate the performance of its government requires access to records maintained by any agency. (Gov. Code § 7920.000 et seq.) By contrast, Penal Code § 13300 et seq. were enacted to limit public access to "local summary criminal history information." The information barred from release under § 13300 et seq. includes: "records reflecting the 'name, date of birth, physical description, dates of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data' about any given person." (Ops.Cal.Atty.Gen. 06-203, p. 8.)

According to the opinion, when a member of the public, including the news media, seeks information from PIMS, Penal Code § 13300 et seq. controls. The Attorney General's opinion makes it clear that § 13300 et seq. applies not only to information taken directly from PIMS but also to lists or databases of cases derived from PIMS and maintained by individual offices or units. The wide-ranging opinion considered a number of specific requests which are set forth below.

23.06.01 PENAL CODE § 13300 ET SEQ.

Specific examples of information barred from release under § 13300 et seq. follow:

PRA request (oral or written) seeking to know if an individual is on probation or parole.

An employee cannot search PIMS and based on that information disclose to a member of the public whether or not an individual is on probation or parole.

Exception - Police Agencies: A police agency must, in response to a timely public inquiry, disclose whether or not an arrestee is subject to a parole or probation *hold*. This does not allow a police agency to disclose that a defendant is on parole or probation if a hold is not in place.

Exception - Bureau of Investigation Arrests: If the subject of the inquiry was arrested by the District Attorney's Bureau of Investigation, the Office must, in response to a timely public inquiry, disclose whether or not an arrestee is subject to a parole or probation *hold*. If the arrestee was not the subject of a parole or probation hold, nothing else about the arrestee's parole or probation status can be released to the public.

Note - Systems Similar to PIMS: An employee cannot disclose case history information stored in an individual office-authorized database. These systems are merely derivative of information stored in PIMS, such that release of data from them would defeat the bar on disclosure of local summary criminal history information.

PRA request for an individual's local criminal history, including all arrest and case dispositions.

An employee cannot provide a list of cases in PIMS revealing the cases or case numbers filed against a specific individual.

PRA request seeking to learn the disposition of matters referred to the district attorney for filing of criminal charges. (Disposition includes filed or rejected cases.)

In response to a request for information, an employee may access PIMS to disclose whether or not charges were filed or rejected against a specific defendant in a specific case. In accordance with the opinion in *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 231, the Office does not impose a limitation on the period of time to make a PRA request following the disposition of a matter referred to the Office. However, consistent with *Fredericks*, consideration should be given to the burdensomeness of a request. The *Fredericks* court observed that while there can be no arbitrary time limit, an agency may still deny a request which would be overly burdensome either because of fiscal constraints or the time needed to comply with a request. (Id. at p. 234.) When assessing whether a request is overly burdensome, it is important to note that appellate courts have been hostile to the argument that it would take too much time or cost too much to comply with a PRA request. When a PRA request is denied on the basis that the request is overly burdensome, the employee should be prepared with facts to support such a claim. (*Weaver v. Superior Court* (2014) 224 Cal.App.4th 746, 748-749 [40 hours of employee time at cost of $3,400 was not burdensome]; *CBS Broadcasting Inc. v. Superior Court* (2001) 91 Cal.App.4th 892, 909.)

If the case was filed, then the charges may also be disclosed. If the case was rejected, the employee may give an explanation such as "insufficient evidence" or "no corpus." However, this information is not required, as there is no obligation to disclose "any information reflecting the analysis or conclusions" of the investigating officer. (Gov. Code § 7923.605, subd. (b).) There is also no obligation to turn over attorney work product or records which reflect the deliberative process of the Office. (C.C.P. §§ 2018.020 and 2018.030; Pen. Code § 1054.6; Gov. Code § 7922.000; *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.)

Note - Once Disclosed Always Disclosed: Under the PRA, once a public agency has supplied information to a requestor pursuant to the Public Records Act, then the same material must be furnished to anyone else seeking it. (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656, 657.) Consequently, if a contemporaneous disclosure is made revealing whether charges have been filed or rejected against a specific defendant in a specific case, then the same information must be supplied to a subsequent requestor even if that request is made after the request is no longer contemporaneous. However, the "once disclosed always disclosed" rule only applies to records disclosed pursuant to a Public Records Act request. Reject/declination letters would not have to be disclosed if they were furnished in confidence to another government agency with the understanding that they would be kept confidential. (Gov. Code, § 7921.505, subd. (c)(5).) All disclosures of PIMS records, or information obtained from PIMS, should be fully documented in the case file by inclusion of the letter sent to the requestor.

Note - Requests for a Class of Defendants: Requests are often received seeking case dispositions via a search of PIMS for the identities of a specific class of defendants (e.g. lawyers). Such requests must be declined as they seek a large body of protected data related to numerous individuals. (*Westbrook v. County of Los Angeles* (1994) 27 Cal.App.4th 157.) The Attorney General cautioned that district attorneys should not make "general or comprehensive compilations" of data "available to members of the public . . ." (Ops.Cal.Atty.Gen. 06-203, p.

10.) This concern is not present, however, when the requestor seeks contemporaneous information on a specific defendant for a specific case. As well, a requestor can be provided with "statistical or research information" such as the number of cases, charges and dispositions filed against a particular class of defendants as long as the identity of the defendants is not revealed. (PC §§ 13300 (h) & 13305 (a).) Consequently, it would not be a violation to respond to an inquiry seeking to learn the number of attorneys charged with a crime and the disposition of those cases as long as the identity of the defendants is not released.

Note - Reject/Declination Letters from Special Units: Certain special units often send either a citizen or another government agency a reject/declination letter when charges are not filed. These letters explain the reasons for not pursuing a particular case. Such letters are public records which must always be disclosed in response to a specific request for them. Therefore, if a requestor wants to learn why charges were not filed against a specific individual, the disclosure of a previously released declination letter does not violate the prohibition on the release of local summary criminal history information. However, a request for all declination letters by a special unit for a period of time is barred by Penal Code § 13300 et seq. (*Westbrook v. County of Los Angeles*, supra, 27 Cal.App.4th 157.)

PRA request seeking a list of all cases in which a specific witness testified.

An employee cannot access PIMS and release the case numbers of matters in which a specific witness testified or was listed as a subpoenaed witness.

PRA request seeking "numerous criminal histories associated with a request for the names and identities of defendants charged with particular specified criminal conduct over a period of years."

An employee may not access PIMS to release information about the identity of defendants charged over a period of time with a particular offense, e.g., robbery or three strikes. However, it is not a violation to release "statistical or research information" concerning the number of defendants charged with a specific offense over a particular time period. (E.g., 200 defendants were charged with robbery in Los Angeles County between January and February.)

It is not a violation to release information from PIMS, including case names and numbers, if the request is made for a "scholarly or journalistic purposes." (PC § 13300.) Requests under this section only require the media to state that the, "request is made for scholarly or journalistic purpose." No further justification, explanation or declaration is necessary. All disclosures of information for scholarly or journalistic purposes in response to these types of requests must be approved by the Chief Deputy. Any letter accompanying the dissemination of this information must also be signed by the Chief Deputy. Monthly statistical information provided by JSID and PID requires approval by the Assistant District Attorney of Support & Special Projects, and responsive letters can be signed by the Head Deputy of the Assistant Head Deputy of those units

23.06.02 DISCLAIMERS RELATED TO PIMS SENTENCING INFORMATION

Sentencing information is available in PIMS, and it is commonly requested by members of the public. However, the original source of this information is data which is manually entered into the computer by court personnel and imported electronically into PIMS. Therefore, the Office cannot confirm the accuracy of sentencing information unless the file is reviewed.

Therefore, whenever criminal history information from PIMS is being disclosed which relates to sentencing information, the following disclaimer must be included:

"In most instances, the Los Angeles County District Attorney's Office (LADA) does not directly input sentencing information into its computer system. This information is often imported from court databases. Further, the Los Angeles Superior Court's recent migration to a new case management system has resulted in some data interface errors which occasionally produce inaccurate results. The LADA cannot verify the accuracy of this imported information. All sentencing information should be verified by the court."

23.07 REQUESTING LAW ENFORCEMENT RECORDS UNDER SB 1421 AND THE PRA

Pursuant to Senate Bill (SB) 1421, as codified in Penal Code § 832.7(b), and as guided by Penal Code § 832.8, certain peace officer and custodial officer personnel records and records relating to specified incidents, complaints, and investigations involving these officers are available for public inspection. Records of complaints and investigations related to the following four categories of incidents are *no* longer confidential and are subject to disclosure pursuant to a PRA request:

1. Discharge of a firearm at a person;
2. Use of force against a person that resulted in death or great bodily injury;
3. A *sustained* finding by a law enforcement agency or oversight agency of having engaged in sexual assault involving a member of the public;
4. A *sustained* finding of dishonesty relating to the reporting, investigation, or prosecution of a crime, or directly relating to the reporting of, or investigation of misconduct by, another peace officer or custodial officer, including, but not limited to, any *sustained* finding of perjury, false statements, filing false reports, destruction, falsifying, or concealing of evidence.

Effective immediately, deputies have the discretion to make a PRA request via the SB 1421 PRA Request Application to obtain disclosable SB 1421 information from the personnel file of a peace officer or custodial officer on pending cases which the deputy is handling.

SB 1421 PRA Request Application

The SB 1421 PRA Request Application enables deputies to: (1) search to determine whether there was a prior PRA request made on a particular officer; (2) generate PRA requests for disclosable information from the personnel file of a particular officer on a pending case that the deputy is handling; (3) track the status of pending PRA requests for a particular officer, whether

issued by the individual deputy or by another deputy; and (4) review responsive PRA documents produced by law enforcement agencies for a particular officer.

Deputies may access the SB 1421 PRA Request Application through the "MyApps" icon in the Network Applications Folder on their computer workstation, or by copying and pasting the following link into an internet browser: https://myapps.da.lacounty.gov. Deputies are the only Office personnel authorized to access the SB 1421 PRA Request Application and may do so only as necessary to perform their official duties. A security log is built into the application which tracks all inquiries. Misuse of the application may subject an employee to disciplinary action.

DCU Responsibilities with SB 1421 Information

The issued PRA request instructs the law enforcement agency to send responsive information to the Discovery Compliance Unit (DCU) rather than directly to the individual deputy who generated the request. This is to ensure that any fees assessed by the law enforcement agency for the requested information are paid by the Office through the DCU. However, if the responding agency submits PRA information directly to the individual deputy rather than to the DCU, the individual deputy shall forward the information to DCUPRA@da.lacounty.gov or via county mail to: LADA - DCU, 320 W. Temple Street, Suite 540, Los Angeles, CA 90012.

Additionally, the DCU has and will routinely submit comprehensive PRA requests to agencies seeking SB 1421 information. Upon receipt of responsive information from either a PRA request generated by the DCU or an individual deputy, the information will be manually uploaded into (1) the SB 1421 PRA Request Application and, if appropriate, (2) the Discovery Compliance System (DCS). Deputies will not be able to generate a PRA request seeking the production of SB 1421 records that were previously provided to our Office by a law enforcement agency, pursuant to either the terms of a prior PRA request or Memorandum of Understanding.

The DCS Manual has been updated to explain the processing of information pursuant to a SB 1421 PRA request issued by a deputy. It has been uploaded to LADAnet under Library>Office Manuals>DCS Manual. Step-by-step instructions explaining how to use the application have been uploaded to LADAnet under Library>Office Manuals>MyApps>SB 1421 PRA Request Application User Guide. An instructional video will soon be available to assist in accessing and utilizing the application. Any questions shall be directed to the DCU.

CHAPTER 24

VICTIM-WITNESS RELATIONS

24.01 COMMUNICATION WITH VICTIMS AND WITNESSES

All witnesses are entitled to be treated with dignity, respect, courtesy and sensitivity. Navigating through the complicated maze of the criminal justice system and the courthouse environment may be confusing for civilian witnesses. Deputies shall be sensitive to the concerns of victims and their families in all cases. Deputies shall be especially sensitive to the emotional needs and problems of families of homicide victims, as well as sex crimes and domestic violence victims. Keeping victims or their next of kin informed of case developments and addressing their concerns is paramount. The experience of being a witness and all that it entails is a challenging one under the best of circumstances. Victim's rights shall be honored and protected by prosecutors in a manner no less vigorous than the protections afforded to criminal defendants. (PC § 679.)

Deputies should refer victims to the Bureau of Victim Services (BVS) for available services. BVS offices are located at the Foltz Criminal Justice Center and various locations throughout the county. A victim services representative (VSR) should be notified immediately upon the filing of all murder cases and other sensitive cases such as those involving sexual assaults, domestic violence, gang violence, hate crimes, and crimes involving elderly or very young victims.

Proposition 9, otherwise known as "Marsy's Law," amended Article I, § 28, of the California Constitution, enumerating crime victims' rights. The safety and security of all Californians, including victims, is a top priority for the Office.

24.02 COMMUNICATING RIGHTS AND OBLIGATIONS

Clear and consistent lines of communication must be established with victims.

24.02.01 MARSY'S LAW VICTIM NOTIFICATIONS

It is the policy of this Office that **all** victims who have suffered direct or threatened physical or financial harm shall be notified of their Marsy's Law rights in **all felony, misdemeanor and juvenile filings.** (See LPM § 2.13)

24.02.02 OFFICE PERSONNEL RESPONSIBILITIES

For responsibilities of employees at time of filing see Legal Policies Manual § 2.13.

Victim Services Representatives (VSR): In offices that have a full-time VSR, the VSR is responsible for forwarding all Victims' Rights Request forms received via FAX and U.S. mail to the assigned deputy.

Restitution Enhancement Program Paralegals: Restitution Enhancement Program Paralegals are placed in offices throughout the County. Program paralegals will assist deputies with any type of restitution problem regardless of whether the case is a felony or a misdemeanor. Program paralegals will assist by contacting victims to obtain loss documents; by obtaining statements of loss through the use of the Victim Restitution Request Form (already in use) in the instance where the victim has not provided that form; and, by providing general assistance with regard to any restitution issue. Program Paralegals will also assist deputies when monetary assistance has been provided to the victim through the Victims Compensation Board and the Board is seeking to recover monies from the defendant following conviction.

Assigned Deputy: The assigned deputy is responsible to advise the court when a victim has requested (1) to have "my safety" and the safety of "my family" considered in setting bail for the defendant; (2) to be present at the proceedings; (3) to be heard at the proceedings; (4) to make a statement to be considered at the time of sentencing; or (5) restitution. In cases in which the victim is requesting restitution, the assigned deputy shall determine whether assistance is needed by the Restitution Enhancement Program (REP) and may refer the case to a Restitution Paralegal for the purpose of determining the amount of restitution; gathering proof of loss documents; and, contacting the victim regarding restitution related issues.

All employees: In the event a victim or next of kin contacts the local District Attorney's Office, the employee who spoke with the victim shall:

(1) ensure that the pertinent parts of the conversation are recorded in the District Attorney (DA) file. This can be accomplished by either writing directly in the Notes section in the DA file, or by electing to use the Marsy's Law Victim Intake Form and providing the completed form to the assigned deputy to place in Section A6 of the DA file;

(2) update PIMS to enter the victim in PIMS when the victim is requesting notification of upcoming court dates or disposition; and

(3) prominently mark the outside of the DA file with a "Marsy's Law" stamp.

Each step is critical to ensure that successively assigned prosecutors are knowledgeable about any specific requests with respect to victims' exercise of their rights.

Probation/Mandatory Supervision Violations, Parole Hearings, Certificates of Rehabilitation/Pardon and other Post Conviction Hearings (Prop 47 resentencing, Prop 36 resentencing, GOM 15-107 Early Parole, Writs, etc.)

Victims, *upon request*, have a right to reasonable notice, and to be present and heard at all public proceedings involving a post-arrest release decision, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue. (Cal. Const. Art. I, §§ 28(b)(7), (8) and (12).)

When a victim has asserted Marsy's Law rights, and the defendant subsequently violates probation, mandatory supervision or there is a public proceeding in which a right of the victim is

at issue, every reasonable effort must be made to notify the victim of the hearing to allow the victim an opportunity to be present and be heard. It is the responsibility of the assigned deputy to check the DA file and/or PIMS to determine whether a victim has requested this notification and then provide notification of the hearing or proceeding.

24.02.03 VICTIM'S RIGHT TO BE REASONABLY PROTECTED

Victims have a Constitutional Right to be reasonably protected from the defendant and persons acting on the defendant's behalf, and to have their safety and the safety of their family considered in setting bail and release conditions. (Cal. Const. Art. I §§ 28(b)(2) and (3).) All employees are reminded that "[t]horough and timely communication between all members of the prosecution team is essential in the pursuit of justice in all cases. It is vital that open and active lines of communication exist between law enforcement, Victim Services Representatives (VSRs), support staff and attorney staff. While this is particularly true in VIP-category cases, it is an important aspect in every case we prosecute." (LPM § 11.20) It is essential that any employee who learns that a victim or witness is expressing fear or has personal safety concerns immediately notify the assigned deputy in writing with a summary of the conversation and copy the prosecutor's supervisor, Head Deputy, and/or Deputy-in-Charge. In the event the victim's safety concern is communicated to a filing or handling deputy, appropriate notations shall be made to the file along with any protective measures taken or suggested. The employee may elect to use the Victim's Exercise of Marsy's Law Rights Intake Form and give the completed form to the assigned deputy to be placed in the file in lieu of making notations directly in the file.

24.02.04 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art. I § 28(b)(1).)

District Attorney personnel should be mindful of a victim's right to respect for their privacy and dignity at all stages of the criminal justice process. This includes the decision to maintain the anonymity of the victim's name in court proceedings and on any document submitted to the court.

The deputy upon request of the victim, may enforce a victim's constitutional rights when they are not inconsistent with our mission or the law. (Cal. Const. Art. I § 28(c).)

District Attorney personnel should take protective measures to prevent the insensitive handling, dissemination, and retention of victims' private documents, photos, and personal mementos. It is our responsibility that when victims and witnesses participate in the criminal justice system they are not caused undue emotional trauma, harassment or embarrassment. Examples include the disclosure of confidential information or the unnecessary dissemination of distressing photos or physical evidence. With the advent of the internet, posted information can never truly be recalled or retracted. When disclosure of confidential information is necessary, it is our responsibility to ensure that the information is sufficiently protected with appropriate Protective Orders.

Protection of Sensitive Documentary Records

Prosecution of criminal cases may involve documentary records that are sensitive in nature that victims may want protected. Examples of sensitive information are medical records, photos of victims' injuries (including sexual assault photos), psychological records, financial information, and other sensitive records. When these types of records are entered into evidence they are *presumed* to be open unless confidentiality is required by law. California Rules of Court § 2.550(c).

When feasible, the victim should be contacted and advised before sensitive documents are made public in court; and before such documents subpoenaed to the court by the defense, are reviewed *in camera* or opened in court. As prosecutors, we can only act on the request of a victim in this regard to the extent that we can maintain our ethical obligations and prosecutorial independence and discretion. If the prosecution's interests are different from or are otherwise in conflict with the victim's privacy interests, the victim may wish to retain a private attorney to represent their interests in the matter to prevent the disclosure of the victim's otherwise confidential or personal information. Ultimately, when the victim's right to privacy conflicts with the People's or defendant's right to due process and fair administration of justice, best practice is to request an *in camera* hearing for the court to decide whether disclosure is required; and if so, the protective measures to be ordered to minimize the damage to the victim's right to privacy.

There are specific methods a prosecutor can use to protect sensitive documentary information such as photos which depict injuries, photos of genital or other private areas, medical records, financial records, employment or school records, psychological records, or cell phone records from public disclosure. Images of child pornography may only be disclosed pursuant to the provisions set forth in Penal Code § 1054.10. The following is a description of methods that can be employed to protect a victim's right to respect for their privacy both during and after the prosecution of a criminal matter:

- Protective Orders. When considering whether medical records (including genital photos) should be disclosed, the court must "weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services". If the court allows disclosure of the medical information, disclosure and dissemination shall be limited by a court order to "assure that no information will be unnecessarily disclosed and that dissemination will be no wider than necessary." (PC § 1543.) A Protective Order can be used during the pendency of the case and following its close to ensure that defense attorneys do not disclose medical records.

- Sealing records pursuant to California Rules of Court §§ 2.550 and 2.551. California Rules of Court § 2.550 (d-e) states that: "The court may order that a record be filed under seal only if it expressly finds facts that establish: (1) There exists an overriding interest that overcomes the right of public access to the record; (2) The overriding interest supports sealing the record; (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and (5) No less restrictive means exist to achieve the overriding interest. The rule further requires that: An order sealing the record must (i) specifically set forth the

facts that support the findings and (ii) direct the sealing of only those documents and pages, or if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file." (*NBC Subsidiary Inc. v. Superior Court* (l999) 20 Cal.4th 1178 [Rules related to the sealing of records apply to both civil and criminal courts.] Courts must find an "overriding interest" that supports the sealing of records in order to overcome the 1st Amendment right of access to court files and evidence. California Rules of Court § 2.551 sets forth the procedure for sealing records. These rules do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings. Prosecutors should remember that unless confidentiality is otherwise required, the records are presumed open.

Victim's Right to Privacy and Dignity: Anonymity

Several statutes protect victims of domestic violence, sexual assault, trafficking, stalking, child abuse and hate crimes and provide that they may request that their names be withheld or de-identified through redaction of the last name under certain circumstances as provided for by statute. (PC §§ 293, 293.5, and Gov. Code § 6254(f)(2).) However, these laws do not change criminal discovery obligations imposed under Penal Code § 1054.1. Penal Code § 1054.1(a) requires the provision of "…names and addresses of all persons the prosecution intends to call as witnesses at trial." Law enforcement must affirmatively inform victims of sexual assault or trafficking that their name will become public record unless they request that it not become public record and that this notification be included in the police report. (PC § 293.)

Victims in cases other than those listed above may also wish to remain anonymous. As an example, the Crime Victims' Rights Act, 18 U.S.C. 3771(a)(8), provides Federal crime victims with the right "to be treated with fairness and with respect for the victims' dignity and privacy." In United States v Belfort, 2014 US. Dist. Lexis 80117, 2014 WL 2612508, (E.D.N.Y. June 11, 2014), the court found that victims can suffer embarrassment at being identified as a victim of fraud and that victims may receive unwelcome media contacts or be targeted for victimization by scam artists. As a result, the court withheld victims' identifying information to protect their privacy rights.

Victim's Right to Respect and Dignity: General

Victims, witnesses, experts and law enforcement personnel are often brought into District Attorney Offices for interviews, while waiting to go to court or in preparation for testimony. The environment that victims see when coming to a District Attorney Office must also reflect respect for their privacy and dignity as human beings. Evidence from cases, especially gruesome crime scene photos or photos of victims should not be displayed on walls or left openly displayed for anyone to view. Such pictures or other "evidence" out in the public view may cause the victim or witness discomfort or give the impression that our office does not safeguard all victim's right to privacy.

The following sample protective order motions are located in PIMS:

- Protective Order for Discovery Containing Images Child Pornography
- Protective Order
- Motion to Seal Records

24.02.05 ADDITIONAL BEST PRACTICES

The following policies reflect best practices for deputies in all cases and are actively encouraged to the extent practicable. In every VIP-category case, however, deputies shall comply with the following procedures:

- Make contact with victims as soon as feasible after each court appearance to keep them abreast of the current status of the case and the next court date. Telephonic contact is preferred, but written communication is acceptable if telephone contact cannot be established.
- Notify the victim of any important occurrence(s) on the case and attempt to preserve open lines of communication in order to build rapport and maintain good relationships with the victims in each case.
- Make every effort reasonably possible to notify victims and law enforcement before a case settlement offer is tendered and before a defendant is released from custody. If prior notification has not occurred, deputies shall do so as soon as possible following the court appearance.
- Document all contacts with, or efforts to contact, the victim in the case file.

In addition, deputies shall explain the legal rights and obligations of victims and witnesses, including what to expect when testifying (direct and cross-examination), possible court delays, and other similar matters.

Subpoenaed witnesses are entitled to certain protections and benefits. Witnesses who suffered monetary losses as a result of a crime may be concerned about incurring additional costs as a result of testifying in court. All employees who are involved in obtaining the appearance of witnesses in court shall be mindful of victims' rights, Office policies and best practices:

- Penal Code § 1326 authorizes the use of subpoenas for witnesses who are required to appear before a court or magistrate. The law does not authorize the use of a subpoena for the sole purpose of conducting an interview.
- Witnesses have a right to be informed, as soon as feasible, that a court proceeding to which the witness has been subpoenaed as a witness will not proceed as scheduled. (PC § 679.02(a)(1).)
- It is illegal for any employer to take any action against a witness who misses work because of attending court after receiving a subpoena. (Labor Code § 230.)
- All employees who have contact with witnesses shall advise witnesses of the importance of keeping track of days missed from work as a result of testifying to ensure recovery of lost wages.

- Deputies shall fill out witness fee forms for all witnesses, including seeking mileage, parking and meals. (PC § 1329, WIC § 431 and Gov. Code § 68093.)

"Witnesses Information Sheet - Criminal" and "Witnesses Information Sheet - Juvenile Cases" documents have been created to provide practical and helpful assistance to witnesses. The documents may be downloaded from the Lotus Notes DA Filing Forms database in advance so the documents may be handed to witnesses as needed. An extended version of the documents is also available on the Office's public-facing website.

Deputies shall inform interested victims or witnesses of the reasons for declining to charge, charging lesser offenses, settling a case or taking any other action in relation to that particular case.

Prosecutors have a mandatory obligation to advise victims of specified sexual assault offenses of the right to HIV/AIDS testing and disclosure of results. (PC §§ 1524.1, 1202.1; H&S 121055.) See Legal Policies Manual § 12.21 for a full discussion of this topic.

Penal Code § 679.03 places a duty on prosecutors to assist victims, next of kin, and witnesses who were threatened by the defendant after the defendant's arrest in obtaining information from the California Department of Corrections and Rehabilitation (CDCR). This statutory obligation arises when a defendant is convicted of a violent offense as defined in Penal Code § 29905 and sentenced to state prison. Victims, next of kin, and threatened witnesses are notified that they can use a CDCR 1707 form to request this information from the CDCR. In all cases where defendants are sentenced to the CDCR, victims, next of kin, and threatened witnesses shall be sent the CDCR 1707 form so that they are kept apprised of the custody status of the defendant, regardless of whether the commitment offense is a violent offense pursuant to Penal Code § 29905.

The use of the CDCR 1707 form has become significantly more important in light of changes in the law that are currently resulting in early release of defendants sentenced to state prison. Many victims, next of kin, and threatened witnesses are unaware that defendants are subject to release at a much earlier date than they might have expected based upon the original sentence imposed. If victims, next of kin, and threatened witnesses do not register the CDCR 1707 form with the CDCR, the CDCR will not notify them of the release of the defendant, execution of the defendant, the death of the defendant, or the escape of the defendant. The CDCR will also not collect restitution or impose requested parole conditions.

Deputies present at sentencing shall alert support staff to send a CDCR 1707 form to each victim, next of kin, and threatened witness. Deputies shall notify support staff via the Disposition Report by checking the "CDCR 1707 Form Required" checkbox. Deputies shall inform the victims, next of kin, and threatened witnesses that they will be receiving an explanatory notice about the CDCR form. Deputies shall indicate in the case notes that such notice was given. If the victims, next of kin, and threatened witnesses cannot be reached, that shall be noted in the case notes. Deputies shall confirm the contact information of the victims, next of kin, and threatened witnesses and alert support staff to make any necessary changes or additions.

Support staff shall send the CDCR 1707 form and the explanatory notice (available in English and Spanish, Attachments 2 and 3, respectively) to the appropriate victims, next of kin, or threatened witnesses within 30 days of sentencing. If no address is listed for a victim, next of kin, or threatened witness, or if the address is listed as "Care of I/O," the documents shall be sent directly to the investigating officer. If the notice is later returned to the Office, support staff shall staple the envelope to the back of the returned documents and place the materials in the case file under Section H. Copies of the notice shall be kept in the case file.

Victim Service Representatives (VSR) and Restitution Paralegals who meet victims, next of kin, or threatened witnesses in matters where the defendant was sentenced to state prison shall inquire of them whether they completed and submitted the CDCR 1707 form. If the victim, next of kin, or threatened witness wants to register with the CDCR, but has not, or is unsure whether they have submitted the form, it is the responsibility of the VSR and the Restitution Paralegal to assist the victim, next of kin, or threatened witness in filling out and submitting the form. The assistance with the form shall be recorded in databases kept by the Bureau of Victim Services and the Restitution Enhancement Program.

Deputies shall personally notify the victim(s) if the case is dismissed or the defendant is acquitted in the following types of cases: serious and violent felonies; hate crimes; domestic violence; child abuse; elder and dependent adult abuse; stalking; and sexual assault. A victim services representative may notify the victim(s) on behalf of the deputy handling the case, but the deputy must explain the reasons for the dismissal or acquittal to the victim(s). (See Penal Code §§ 1192.7(c) and 667.5(c) for a complete listing of serious and violent felonies.)

24.02.06 MEASURES TO MINIMIZE TRAUMA TO CHILD VICTIMS AND WITNESSES

Every reasonable effort shall be made to minimize trauma to all victims and witnesses.

Witnesses in child abuse cases are entitled to up to two support persons while they testify. *See* P.C. § 868.5(a).

All child victims shall be referred to the Bureau of Victim Services to receive appropriate assistance. If a Kids in Court program or similar program is available to assist the child in understanding the court process, deputies are encouraged to have the child participate in the program. *See* P.C. § 13835.5 *and* LPM § 24.01 (Communication with Victims and Witnesses).

Deputies are encouraged to consider requesting a Victim Services K9 Unit facility dog to assist child victims during interviews and while testifying. In the event a child requests a facility dog be present when the child testifies, deputies shall consider filing a motion to request a facility dog accompany the child to the witness stand.

24.03 PREFERENCE FOR VICTIM AND WITNESS INTERVIEWS

Victims and witnesses shall be personally interviewed by the assigned deputy as soon as practical to acquaint the deputy with the facts and nuances of the case. A third party, preferably

an investigator, shall be present during interviews to prevent the deputy from becoming a witness in the deputy's own case. Witnesses shall be interviewed separately. The substance of any interview shall be documented. A victim may have a support person of the victim's choosing present during the interview.

During an investigation or prosecution of crimes involving child victims and witnesses, deputies shall consider a multi-disciplinary team approach and forensic interviews, when available, for conducting pre-filing or post-filing interviews of child victims and witnesses.

Multi-Disciplinary Team Coordination

When possible in cases involving child victims or witnesses of sexual assault, physical abuse, endangerment or neglect, human trafficking, child abduction, or kidnapping, deputies are encouraged to pursue a multi-disciplinary team (MDT) approach to interviewing the child victims or witnesses. An MDT response to child abuse allegations typically includes representation from law enforcement, child protective services, prosecution, mental health, medical and victim advocacy professionals.

The purpose of interagency collaboration is to coordinate intervention and share information that optimizes results and reduces potential trauma to children and their families. It also improves services, while preserving the rights and obligations of each agency to pursue their respective mandates. Multi-disciplinary interventions, particularly when provided in a neutral, child-focused setting, are associated with less anxiety, fewer interviews, increased support, and more appropriate and timely referrals for needed services.

Multi-disciplinary interview centers (MDIC) are child-friendly facilities where law enforcement, child protective services, prosecution, mental health, medical and victim advocacy professionals work together to investigate abuse, help children heal from abuse, and hold offenders accountable. MDICs also provide forensic interviews of children.

See VIP Manual Chapter VII "Child Interviews and Testimony" for suggestions on how to minimize trauma to child witnesses.

See Legal Policies Manual § 4.01.02 for specific Office policy concerning interviews of sexual assault victims.

Forensic Interviews

When children are victims or witnesses, deputies are encouraged to consider scheduling a forensic interview of the child. A forensic interview is a developmentally sensitive and legally sound method of gathering factual information regarding allegations of abuse or exposure to violence, conducted by a competently trained, neutral professional utilizing research and practice-informed techniques as part of a larger investigative process, and are best conducted within a multidisciplinary team context, when available. These recorded forensic interviews can be very persuasive evidence at trial and often facilitate pre-trial dispositions. 8

In determining whether to schedule a forensic interview the following factors may be considered:

1. Level of sensitivity of the case;
2. Length of the criminal activity;
3. Age of the child;
4. Developmental abilities of the child; and
5. Availability of a forensic interviewer in the child's preferred language.

Deputies shall check the Electronic Suspected Child Abuse Report System (ESCARS) prior to scheduling a forensic interview of a child. (*See* LPM § 4.03.03 Suspected Child Abuse Reports (SCARs)). SCARs may provide important background information on previous incidents that may need to be addressed in the interview as well as a more complete picture of the family dynamics and reasons that a child might not be forthcoming.

Child forensic interviews are confidential and NOT public record pursuant to Penal Code § 11166.4. They are NOT subject to disclosure in response to a Public Records Act request and all recordings of child forensic interviews as part of an MDT response may only be provided to the defense if there is a court order. Once ordered by the Court to turn over a copy of the forensic interview, the assigned deputy should then request the court to issue a protective order prohibiting defense counsel from releasing a copy of the forensic interview or any of its contents therein to any individual not associated with the criminal case. The protective order shall include the following provisions:

- The recording be used only as part of the criminal case.
- No copies, photographs, duplicates, or reproductions may be made, except as a written transcript that does not reveal the identity of the child, unless otherwise ordered by the court.
- The recording NOT be given, displayed, or provided to a third party, except as permitted or as necessary in preparation for or during trial.
- The recording must remain in the exclusive custody of the attorneys, their employees, or agents, including expert witnesses by either party, who shall be provided a copy and instructed to abide by the protective order.
- Attorneys must return all copies of the recording upon disposition of the matter after all appeals and writs of habeas corpus have been exhausted.

Defendants representing themselves *in pro per* are only entitled to reasonable access. If a court has appointed an investigator, the court may order a copy of the recording be provided to the investigator with the protective order AND the investigator must return the recording to the court upon conclusion of the case.

24.03.01 VICTIM NOTIFICATION OF RIGHT TO SUPPORT PERSONS

Deputies handling the preliminary hearing or trial of a case involving a violation of Penal Code §§ 187, 203, 205, 207, 211, 215, 220, 240, 242, 243.4, 245, 261, 262, 273a, 273d, 273.5, 273.6, 278, 278.5, 285, 286, 288, 288a, 288.5, 288.7, 289, or 647.6, former § 277 or 647a, § 314(1), or § 368(b), (d), or (e) when the prosecuting witness is the elder or dependent adult, shall inform

the victim they have a right to have present up to two support persons of their own choosing, one of whom may be a witness, during their testimony at the proceeding. (PC § 868.5.)

24.03.02 WITNESSES WITH CULTURAL BARRIERS TO PROSECUTION

Witnesses may have cultural mores or norms that make cooperation with the investigation and prosecution of a criminal case difficult. Deputies shall be sensitive to cultural mores and norms and attempt to accommodate witnesses.

24.04 UNCOOPERATIVE WITNESSES

24.04.01 WITNESS FAILS TO APPEAR

A properly subpoenaed witness who fails to appear may be subject to punishment for contempt. (PC §§ 1331 and 1331.5.) The subpoena must state that disobedience of the subpoena may be punishable as a contempt of court.

If a properly subpoenaed witness fails to appear for a preliminary hearing and the court determines that the witness is a material witness, the court shall issue a bench warrant for the arrest of the witness, and upon the appearance of the witness, the court may commit the witness into custody. (PC § 881(b).) However, a material witness shall remain in custody no longer than 10 days. (PC § 881(d).)
If a properly subpoenaed witness fails to appear for trial, the witness can be punished for contempt. Punishment for contempt is a fine of up to $1,000 and/or imprisonment for up to five days or until the witness has performed the act that is the subject of the contempt. (Code of Civil Procedure §§ 1218 and 1219(a); PC §§ 1331 and 1331.5.)

When a court has good cause to believe by proof on oath that a material witness will not appear and testify unless security is required, the court may also order that a material witness enter into a written undertaking that the material witness will appear and testify at the time and place ordered by the court. (PC § 1332(a).) If the material witness refuses to comply with the court's order, the court may incarcerate the witness until the witness complies or is legally discharged. (PC §§ 881(a) and 1332(b).) If the material witness is a minor, the witness will be committed to the custody of the probation officer or other appropriate agency.

<u>Use of Body Attachments to Secure the Attendance in Court of Uncooperative Victims of Domestic Violence or Sexual Assault</u>

Reluctance to cooperate is common in domestic violence and sexual assault cases. However, a victim's lack of cooperation in this context is usually born of factors extraneous to the merits of the case, such as embarrassment, sympathy, fear, or financial dependence.

Consequently, in all cases in which a victim of domestic violence or sexual assault is refusing to obey a properly served subpoena or court order to return, the assigned deputy shall consult with their Head Deputy or Deputy-in-Charge to determine whether to seek issuance of a body attachment. The supervisor's decision to approve or deny the request for a body attachment shall

be made on case-by-case basis and after consideration of any relevant factor, including but not limited to:

- The defendant's criminal record;
- The severity of the present injuries;
- The likelihood of continued abuse of the present victim or others;
- Whether the charge(s) can be proved independently;
- Whether a reasonable case disposition can be achieved without compelling the victim's attendance in court.

When a body attachment is issued for a witness, Code of Civil Procedure § 1993(a)(1) allows the witness to be brought directly to court. Thus, if the request for a body attachment is approved, the assigned deputy shall seek its issuance on a date and time that allows the investigating officer to immediately attempt to locate the victim and produce the victim directly in court for testimony. This practice reduces the likelihood of incarcerating a domestic violence victim overnight for failing to appear. All deputies shall ensure that a body attachment is promptly quashed once the victim testifies, the case is dismissed, or otherwise resolved.

24.04.02 WITNESS REFUSES TO TESTIFY

A witness who refuses to testify may be subject to punishment for contempt of court. (CCP § 1219(a).) A witness can remain in custody until the witness complies or the proceeding is concluded. However, sexual assault victims and domestic violence victims cannot be incarcerated for refusing to testify regarding the sexual assault or domestic violence crime. (CCP § 1219(b).) Juvenile witnesses under the age of 16 can only be incarcerated for refusing to testify if the court complies with the procedures set forth in Code of Civil Procedure § 1219.5. It is Office policy that minor sex trafficking victims shall not be incarcerated for refusing to testify concerning the facts which form the basis for a prosecution of a defendant for human trafficking.

Sexual Assault Victims

A sexual assault victim may not be incarcerated for refusing to testify concerning the sexual assault. (CCP § 1219(b).) "Sexual assault" means any act made punishable by PC §§ 261, 262, 264.1, 285, 286, 288, 288a, or 289. (CCP § 1219(c)(1).)

Domestic Violence Victims

A domestic violence victim may not be incarcerated for refusing to testify concerning the domestic violence crime. (CCP § 1219(b).) "Domestic violence" as used above is defined in Family Code § 6211.

Once a domestic violence case is filed, it shall not be dismissed because the victim is uncooperative. As long as there remains legally sufficient evidence to support a conviction, the prosecution shall proceed until the defendant either pleads guilty or guilt is determined by the trier of fact.

Every reasonable effort shall be made to secure the cooperation of the victim of domestic violence. If the domestic violence victim refuses to testify, the court may refer the victim for consultation with a domestic violence counselor before finding that victim in contempt. All communications between the victim and the domestic violence counselor that occur as a result of that referral shall remain confidential under § 1037.2 of the Evidence Code. However, should the victim refuse to testify and be found in contempt for refusing to testify, the court may not place the victim in custody. (CCP § 1219(b).)

Juvenile Witnesses

A juvenile witness (under 16 years) who refuses to testify cannot be sanctioned until a court ordered probation report is completed with a recommendation regarding an appropriate sanction. (CCP § 1219.5(a).) The court may not impose a sanction prior to the receipt of the probation report unless the court enters a finding supported by specific facts, stated on the record, that the minor would be likely to flee if released before a probation report is completed and recommendation made. (CCP § 1219.5(c).)

Minor Sex Trafficking Victims

Notwithstanding the section above on juvenile witnesses, a minor sex trafficking victim shall not be incarcerated for refusing to testify concerning the facts which form the basis for a prosecution of a defendant for Human Trafficking pursuant to Penal Code § 236.1 or Pimping or Pandering pursuant to Penal Code §§ 266h, 266i or 266j. "Minor sex trafficking victim" means any person under the age of 18 described in Penal Code § 236.1.

24.05 SCHEDULING ISSUES

24.05.01 GENERAL POLICY

Deputies are to issue subpoenas for victims or witnesses only when the individual is required to be present in court. It is an abuse of discretion to issue a subpoena merely to conduct an interview with a witness.

24.05.02 FAMILY REPRESENTATIVE FOR HOMICIDE CASES

In all homicide cases, the filing deputy shall include the name of a family representative of the homicide victim on the subpoena list in order to keep family members informed of scheduled court appearances.

24.05.03 PRELIMINARY HEARING WITNESSES

Deputies should only subpoena witnesses who are necessary for the preliminary hearing and whom they intend to call. Deputies should consider using Proposition 115 hearsay testimony at the preliminary hearing when appropriate. (See the section on preliminary hearings in the *Felony Case Management* chapter of this manual.)

Minor Witnesses

When a minor witness is necessary, service of the subpoena shall be made to the minor's parent or guardian. (PC § 1328(b).) Deputies should be aware that subpoenas for minors in juvenile hall require special handling.

Peace Officer Witnesses

Deputies should only subpoena police officers who are necessary for the preliminary hearing. When an officer is subpoenaed to court, the officer must be pulled out of the field if on duty or paid overtime if not on duty. In either case, the public is not well served when an officer is subpoenaed unnecessarily.

Coroner/Pathologist Witnesses

If an extended interview with a pathologist is necessary, a deputy should conduct the interview at the pathologist's convenience prior to the preliminary hearing.
Deputies should give the Coroner's Department at least 24-hours' notice prior to the time a pathologist is needed in court.

Deputies should schedule the pathologist as the first witness in the afternoon session of the preliminary hearing. Such scheduling will least disrupt the daily operation of the Coroner's Department.

Doctor/Psychiatrist/Psychologist Witnesses (Percipient, Not Expert)

The following policy applies to physicians who are called to testify as percipient witnesses and not paid experts.

Many physicians who are called to testify are often reluctant to come to court because of potential long periods of waiting prior to testifying necessitating rescheduling of patients and loss of income. The following guidelines have been established to alleviate this situation and create a more harmonious relationship between the medical community and the Office.

Subpoenas for all physician witnesses shall identify the following:

- Name of the patient
- Patient's date of birth
- Dates the patient was treated
- Patient's medical record number

The name of the patient treated, the patient's date of birth, the treatment date(s) and the patient's medical record number shall be included on the Police Data Worksheet at the time a case is filed.

When a court date is set, a witness coordinator shall check the physician's availability. The physician should be given the assigned deputy's name and phone number. The deputy should

establish personal contact with the physician or physician's staff in order to ascertain the most convenient time for the physician's appearance. If possible, the physician should be the first witness in either the morning or afternoon session. If necessary, the deputy shall ask the judge to allow the testimony of another witness to be interrupted in order to accommodate the physician's schedule unless the prosecution of the case would suffer.

In the event of an uncooperative physician witness who has been personally served, and after all attempts to secure attendance have failed, after receiving Head Deputy approval, the deputy shall request a body attachment and notify the physician's office of such fact.

24.06 CUSTODIAN OF RECORDS

As a general rule, it is neither necessary nor advisable to name a specific individual in a subpoena for records. The subpoena should be addressed to the "Custodian of Records." The entity will designate the appropriate individual to appear.
If however, the custodian of records is a percipient witness, that individual should be subpoenaed by name and not title.

24.06.01 OFFICE OF ASSESSOR BUSINESS RECORDS

Subpoenas for Office of Assessor business records should be directed to and served at:

Custodian of Records
Los Angeles County Office of Assessor
Kenneth Hahn Hall of Administration
500 West Temple Street, Room 209A
Los Angeles, California 90012
Attention: Legal Services Section

The Assessor's Office will designate the appropriate custodian of records to appear. The Assessor's Office requests two weeks' notice on subpoenas, if possible. If there are time constraints, the deputy should phone the Assessor's Office at (213) 974-3116 to discuss the production of records.

24.07 CONTINUANCES

Penal Code § 1050 establishes as a matter of public policy that all proceedings in criminal cases shall be set and heard at the earliest possible time. Penal Code §§ 1050 et seq., limit or prohibit continuances except under specified conditions and only after compliance with statutory procedures.

All deputies shall comply with both the letter and spirit of Penal Code §§ 1050 et seq. Unnecessary and unjustified continuances waste resources, burden witnesses and negatively impact the People's case.

24.07.01 GOOD CAUSE

Deputies shall resist defense continuances unless good cause is shown and there is compliance with all statutory requirements. Similarly, deputies shall not request continuances unless good cause exists and all statutory provisions are met.

24.08 PENDING DISPOSITION

Deputies shall explain and discuss proposed case settlements with victims. Communication of the results of a case to the victim(s) shall be made as soon as possible. Before a case settlement offer on a felony Victim Impact Program category case is communicated to defense counsel, all reasonable efforts shall be made to notify the victim and to provide the victim with an opportunity to be heard. The following sets forth general Office policy regarding notification to victims.

24.08.01 VICTIMS OF VIOLENT CRIMES

In all cases involving violent felonies listed in Penal Code § 667.5, crime victims shall be notified by the Office of a pending pretrial disposition before a change of plea is entered. (PC § 679.02(a)(12).) In murder cases, notification shall be made to the victim's next of kin.

24.08.02 VICTIMS OF ALL OTHER CRIMES

In all cases involving non-violent felonies, a victim may request to be notified by the Office of any pretrial disposition. If it is not possible to notify the victim of a pretrial disposition before the change of plea is entered, the deputy or the probation officer shall notify the victim as soon as possible. The victim may be notified by any reasonable means.

Notifications to named victims, pursuant to Marsy's Law, shall be made on all cases impacted by Prop 47 that result in a reduction to a misdemeanor. (Cal. Const., Art. I, § 24.)

Nothing in this chapter is intended to affect the right of the People and the defendant to an expeditious disposition as provided by Penal Code § 1050.

24.09 LIFER HEARINGS

The victim, or the victim's next of kin, shall be informed of the provisions of Penal Code § 3043 concerning victim notification of parole consideration hearings. The Board of Parole Hearings puts great weight on the victim's views concerning the crime when deciding whether to give the life prisoner a parole date.

24.09.01 VICTIM NOTIFICATION

Penal Code § 3043 provides, in part, that upon request, the Board of Parole Hearings shall send written notice of any parole consideration hearing to the victim, or the victim's next of kin, at

least 30 days before the hearing. The requesting party should keep the Board apprised of their current mailing address.

Whenever a conviction results in a defendant being sentenced to state prison for a life term, the deputy handling the case shall notify the victim or the victim's next of kin of the right to express their views concerning the defendant's parole eligibility. See the section on Lifer Hearings in the *Postconviction Proceedings* chapter of this manual for further discussion.

24.10 WITNESS PROTECTION PROGRAM

24.10.01 GENERAL RULE

Any statements made by Office personnel to witnesses, which could be construed as a promise of security, may create potential civil liability issues for the department and the County of Los Angeles. Deputies who are prosecuting cases with endangered witnesses shall not make any commitments to provide any level or type of security for those witnesses. If, in the opinion of the deputy, witness security may be needed, the deputy should communicate that concern to the investigating officer. The investigating officer may discuss the matter with the Head Deputy who will determine if the officer should contact the Bureau of Investigation for information about the Witness Protection Program.

In the event a defendant has escaped, or been erroneously released, the trial deputy shall contact the investigating officer on the case to determine if the suspect-at-large presents a danger to the safety of any witness. If such a danger exists, the investigating officer and trial deputy shall contact Bureau of Investigation Witness Protection Program Director or take whatever additional action is deemed necessary to provide appropriate witness protection.

24.10.02 THE WITNESS PROTECTION PROGRAM

Witness relocation is a form of witness assistance for which a witness may qualify. Guidelines are set by the State of California. Witness relocation is neither a reward nor an incentive for testifying.

In Los Angeles County, the witness relocation program is called the Witness Protection Program and is administered by the Office's Bureau of Investigation. The program is intended to assist local agencies and prosecutors who do not have other available resources to protect witnesses, by providing funds for witness relocation on a reimbursable basis.

Witness protection funds are limited to endangered witnesses only and cannot be used for indigent witnesses who are not endangered.

The Bureau of Investigation Witness Protection Program Director will determine if the witness qualifies for relocation assistance. If the witness qualifies, the program director will authorize reimbursement in a specified amount for costs incurred by the law enforcement agency to relocate the witness. Relocation costs typically are moving expenses and first and last month's rent.

24.11 WITNESS TRANSPORTATION

24.11.01 BUREAU OF INVESTIGATION

The Office does not have the resources to provide routine transportation of witnesses to court. The Bureau of Investigation shall only be contacted to provide witness transportation in emergencies. The Bureau of Investigation is able to provide transportation for witnesses whose testimony is needed at the felony trial level in limited situations.

Witness transportation will usually be provided for a felony trial when the following circumstances apply:

- The witness is unable to obtain transport to court due to age or physical disability and has no friends or relatives available to assist in transport;
- The witness has arrived at the airport and public transportation is not feasible;
- The witness does not have a car, cannot secure private transportation, and public transportation is not available; or
- The witness has been intimidated or is endangered.

Deputies shall obtain the approval of the Bureau of Investigation before making any commitments regarding witness transportation by district attorney investigators. As much advance notice as possible shall be given when making transportation requests. Alternative means of transportation such as providing bus tickets and utilization of investigating officers should be considered first and used whenever feasible.

24.11.02 TRANSPORTATION OF NON-AMBULATORY/HOSPITALIZED WITNESS

When a witness is hospitalized or non-ambulatory, and is to appear in court, the deputy shall ask the judge to approve payment to a private ambulance service to transport the witness to court. Bureau of Victim Services advocates can facilitate arrangements for this type of transportation.

24.11.03 TRANSPORTATION OF WITNESSES TO PRELIMINARY HEARINGS

If witness transportation is necessary for preliminary hearings, it is the responsibility of the investigating officer to arrange for transportation. The Bureau of Investigation does not provide transportation for witnesses attending preliminary hearings. Deviation from this policy shall occur only upon prior Head Deputy approval.

24.12 VICTIM RESTITUTION

24.12.01 VICTIM'S RIGHT TO RESTITUTION

Victims have a Constitutional Right to restitution. (Cal. Const. Art. I § 28(b)(13).) Court ordered victim restitution is mandatory when a victim has experienced financial loss because of a crime. "[I]n every case in which a victim has suffered economic loss as a result of the

defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. If the amount of loss cannot be ascertained at the time of sentencing, the restitution order shall include a provision that the amount shall be determined at the direction of the court. The court shall order full restitution." (PC § 1202.4(f).)

When a victim of child pornography has filed a Victim Impact Statement via NCMEC, it is the assigned prosecutor's responsibility to obtain a copy of that Victim Impact Statement and submit it to the court for consideration at time of sentencing and/or the restitution hearing. For information on NCMEC, see Legal Policies Manual § 2.13. Victims in child pornography cases are entitled to restitution under the Federal Mandatory Victim Restitution Act, § 2289. (*Paroline v. United States* (2014) 134 S. Ct. 1710.) At present, there is no case in California that has dealt with the issue of wide dissemination of pornographic images and the valuation of the harm to the child victim.

In light of the specific rights granted to a victim by both the California Constitution and statutory law, deputies handling matters where the victim is entitled to court ordered restitution shall, whenever possible, obtain a restitution order from the court.

Victims may appear and be heard at the restitution proceeding. (Cal. Const. Art. I §§ 28(b)(7) and (8).) In lieu of appearing, however, the victim may provide documents to support the restitution request. (PC §§ 1191.15, 1203.1(d).) All the victim's confidential information should be redacted prior to any document being submitted to the court, the defendant and/or the defense attorney. (Cal. Const. Art. I § 28(b)(4).) This includes, but is not limited to the victim's address, telephone numbers, medical provider information, doctor's name/address. Essentially, all that should be visible is the victim's name, description of item, the amount, and information necessary to describe the loss.

If a victim chooses to retain their own attorney, the assigned deputy shall remain in the courtroom during all proceedings related to restitution and shall correct or augment the record as necessary in the interests of justice. (*People v. Dehle* (2008) 166 Cal. App. 4th 1380, 1386-1389; *People v. Smith* (2011) 198 Cal. App. 4th 415, 439.) Deputies shall ensure that the court record, both oral and written, is clear and states both the amount ordered by the court and the name of the victim(s).

In addition to the right to court ordered restitution, victims of crime have other rights connected with restitution to enable them to both obtain court ordered restitution and to enforce the judgment of restitution. The following is a summary of the three most important rights a victim has related to restitution:

1. a victim has a right to receive a certified copy of the restitution order. If asked by the victim for a certified restitution order, deputies shall obtain the order for the victim;
2. a victim has a right to enforce the criminal restitution order as a civil judgment; and
3. a victim has the right to obtain court ordered restitution (a) through pro per direct application; (b) through a privately retained attorney; (c) via a legal representative; and, (d) by relying on the prosecuting attorney to make the request.

The Restitution Enhancement Program is available to assist deputies in obtaining loss documents and handling any issue or matter related to obtaining court ordered restitution.

24.12.02 HARVEY WAIVERS

In cases in which restitution on uncharged or dismissed counts should be sought, the deputy shall be prepared to take the appropriate waivers in compliance with *People v. Harvey* (1979) 25 Cal.3d 754.

When *Harvey* waivers are taken, it is essential that the deputy notify the Probation Department by placing a memo in the case file. The Probation Department should conduct an investigation as to the proper amount of restitution to be ordered by the court.

At the time of sentencing, the deputy shall be prepared, if necessary, to introduce evidence and testimony of witnesses to substantiate any claimed loss to the victim(s).

24.12.03 RESTITUTION COLLECTED FROM STATE PRISON INMATES

When a victim has provided current contact information to the California Department of Corrections and Rehabilitation (CDCR) and there is a restitution order, CDCR will automatically collect money from state prison inmates. CDCR has requested the assistance of prosecutors in ensuring that all such victims are made aware of this process. Victims may access additional general information on the restitution collection process on the CDCR website: http://cdcr.ca.gov/Victim_Services/restitution_collections.html. Victims may also access the CDCR 1707 form for restitution and victim notification on the CDCR's Request for Victim's Services website: http://www.cdcr.ca.gov/victim_services/application.html.

These procedures apply in all cases when the victim has a direct order of restitution and the defendant is sentenced to state prison immediately or after a probation violation.

24.12.04 CDCR RESTITUTION MANDATE

Penal Code § 2085.5 mandates CDCR to collect direct order victim restitution from all offenders sentenced to CDCR who have been ordered by the court to pay such restitution. CDCR collects up to 50% of inmates' wages, and sums deposited on inmates' prison accounts, and applies it to victim restitution orders. CDCR uses the sentencing documents received at the time of the offender's commitment to determine the amount of restitution owed and to whom the collected sums should be distributed.

24.12.05 DEPUTY DISTRICT ATTORNEY AND SUPPORT STAFF RESPONSIBILITIES

Restitution letters and forms are available in PIMS. These forms can be accessed by clicking on the Library > Other Publications > Restitution Judicial Benchguide and New Forms.

- Filing Deputy:

At the time of filing, the filing deputy shall verify with law enforcement that victim contact information, especially the name and address of all victims, is listed on the worksheet, unless this information needs to be kept confidential or is designated "in care of the investigating officer."

- Sentencing/Restitution Hearing Deputy:

When any defendant is sentenced to prison, the deputy shall seek a restitution order for all victims entitled to restitution. (PC §§ 1202.4(f) and 2085.5(b); WIC § 730.6.) Restitution may be ordered at sentencing, following a restitution hearing, probation violation hearing or by stipulation. The deputy shall provide relevant information to the court regarding the correct spelling of each victim's name who incurred a recompensable loss as a result of the crime and the specific amount owed to each victim to be included in the restitution order. The deputy shall also complete the "Restitution Ordered" section on the Disposition Report. The deputy shall then fill out the CDCR Restitution Collection Notice Mailing form with the victim's last known address and give it to support staff with instructions to issue the "Victim Notification of State Prison Collection on Restitution Orders" letter to the victim(s) listed on the form.
Note: If a victim's contact information is designated as "confidential" or "in care of the investigating officer," the deputy shall not fill out the "Mailing List" form. The deputy shall discuss alternative methods to make the CDCR restitution notification to these victims with their Head Deputy, Deputy-in-Charge or designated supervisor.

- Support Staff:

Upon receipt of the "CDCR Restitution Collection Notice Mailing" form, support staff shall make four copies of the "Victim Notification of State Prison Collection on Restitution Orders" letter. Two copies of the letter shall be mailed to each victim listed on the Mailing form. The letter advises the victim(s) to mail one copy of the letter to CDCR in order to receive any restitution payments that CDCR collects from their offender. The third copy of the CDCR letter shall be placed in the Bureau of Victim Services (BVS) referral box for the assigned Victim Services Representative (VSR). In offices without an assigned VSR, support staff shall mail the third copy to: BVS Central Victim Site, Clara Shortridge Foltz Criminal Justice Center, Suite 12-514, Los Angeles, CA 90012. The fourth copy of the letter shall be placed in the case file.

24.12.06 THE BUREAU OF VICTIM SERVICES

Upon receipt of BVS' copy of the CDCR Notification letter, assigned VSRs at offices throughout the county shall separate out the notices involving victims of violence and threat of violence so that follow-up services can be conducted. The VSRs shall conduct outreach and provide direct assistance to the victims within its service criteria who wish to complete the CDCR 1707 form and/or forward their contact information confidentially to CDCR for restitution or other notification purposes.

A VSR assigned to the Clara Shortridge Foltz Criminal Justice Center serves as the CDCR/BVS Liaison. This VSR facilitates requests from CDCR to directly contact with victims to advise

them of CDCR's need for contact information so that restitution payments already collected from the inmate offender can be sent to the victim(s). The CDCR Liaison VSR shall assist victims, at their request, with forwarding their contact information to CDCR for restitution and other notification purposes.

24.12.07 THE RESTITUTION ENHANCEMENT PROGRAM (REP)

REP paralegals shall assist deputies and victims in obtaining direct restitution orders to recover economic losses suffered as a result of the crime. REP paralegals shall also assist the California Victim Compensation Board (CalVCP) to recover amounts paid to victims from the state victim compensation fund for crime-related losses. Direct victims' losses must meet a $2,500 minimum threshold for REP paralegals to assist with restitution orders. REP does not have representatives in every office location. REP paralegals shall verify the accuracy of restitution orders in cases where REP paralegals have provided assistance and work with deputies to correct any errors. When a CDCR request for assistance involves a case not previously handled by REP, REP paralegals shall, as resources permit, work with deputies to correct faulty orders and obtain the appropriate direct restitution orders. REP paralegals may forward a certified copy of any restitution order in cases where REP assisted CDCR in correcting orders to CDCR, or at the request of CDCR, a copy of any existing restitution order omitted from the inmate's commitment documents. REP paralegals shall also notify victims named in direct restitution orders of CDCR's mandate to collect restitution payments and the need to provide their contact information in order to receive any payments CDCR may have collected.

24.13 SECURING THE ATTENDANCE OF WITNESSES FOR OTHER STATES

On occasion, the Office receives requests to secure the attendance of witnesses for appearances in criminal proceedings in other states. The procedure is authorized by the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases. (PC §§ 1334 et seq.)

Department 100 of the Central District of the Los Angeles Superior Court handles all out-of-state requests to secure the attendance of witness.

In these matters, time is of the essence. All telephone calls, correspondence and documents from the out-of-state jurisdiction shall be immediately forwarded to the calendar deputy in Department 100. Fax notification is acceptable, but the original documents shall also be forwarded as soon as possible to Department 100.

24.14 SECURING THE ATTENDANCE OF WITNESSES FROM OTHER STATES

If an out-of-state witness is willing to return to Los Angeles to testify, it is not necessary to compel the witness's attendance.

When necessary, however, a deputy may compel the attendance of a witness from another state pursuant to the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases. (PC §§ 1334 et seq.)

A deputy shall discuss the need to compel the attendance of a witness with the Head Deputy before using this procedure. If the Head Deputy approves, the deputy shall contact the district attorney's office in the other state to determine what documents are required by the other state.

If certified documents are required, fax transmission will not be acceptable. Overnight mail or other form of express delivery should be considered.

24.15 WITNESSES LOCATED IN FOREIGN COUNTRIES

A deputy shall consult with their Head Deputy regarding the return of a witness from a foreign county. The costs of transportation and accommodations shall be considered when weighing the need to return a witness to Los Angeles County.

Upon Head Deputy approval, a deputy may contact the United States Department of Justice, Office of International Affairs, for guidance in the proper steps to be taken to attempt to coordinate the return of a material witness from a foreign country. Each country has different procedures for the return of a witness to the United States. In some instances there may be no mutual legal assistance treaty between the United States and the foreign country where the material witness is located and there may be no assistance available from that country's law enforcement agencies.

A deputy may be required to show due diligence in attempting to secure the return of a material witness from a foreign country if the deputy intends to establish that the witness is unavailable for purposes of using prior preliminary hearing or trial testimony. It may be insufficient simply to claim that a material witness is unavailable because the witness is currently residing in a foreign country or is a foreign national. (*People v. Sandoval* (2001) 87 Cal.App.4th 1425.)

At a minimum, the following steps should be taken to establish due diligence in attempting to secure the return of a material witness from a foreign country:

- Contact the witness and invite the witness to return to the United States to testify. If the Office will need to pay for the witness's travel expenses, the deputy shall first obtain Head Deputy approval.
- Enlist the aid of the foreign country's law enforcement authorities (if possible) to assist in securing the return of the witness.

24.15.01 MATERIAL WITNESSES LOCATED IN MEXICO

A deputy may contact the Bureau of Investigation to assist in coordinating the return of a material witness from Mexico for trial. The Bureau of Investigation's Policy and Procedures Manual outlines steps to be taken in securing the return of a witness from Mexico.

24.16 U, T AND S VISA CERTIFICATION REQUESTS

Pursuant to federal law, foreign nationals who are victims of specified criminal activity and who assist in the detection, investigation or prosecution of that criminal activity may apply for and

receive temporary immigration benefits through the issuance of U visas. Penal Code § 679.10 provides direction as to the processing of U visa certification requests in the State of California.

In order to receive a U visa, a victim must demonstrate to the United States Citizenship and Immigration Services (USCIS) that the victim has been helpful, is being helpful, or is likely to be helpful to the detection, investigation, or prosecution of qualifying criminal activity. For purposes of determining helpfulness, there is a rebuttable presumption that a victim is helpful, has been helpful, or is likely to be helpful to the detection, investigation, or prosecution of that qualifying criminal activity if the victim has not refused or failed to provide information and assistance reasonably requested by law enforcement. (PC § 679.10 (f).)

A victim of a severe form of human trafficking may also be eligible for a T visa, which provides relief similar to that accorded by a U visa. To qualify for a T visa, the victim must have complied with any reasonable request for assistance from law enforcement in the investigation or prosecution of human trafficking (or is a minor, or is unable to cooperate due to physical or psychological trauma), and would suffer extreme hardship involving unusual and severe harm if removed from the United States. (8 U.S.C. § 1101(a)(15)(T).) Key witnesses and informants may be eligible for S Visas. S Visas provide permission to remain in the United States for the purpose of cooperating in active investigations or prosecutions. S Visas must be submitted by a law enforcement agency.

The protocols for certification of a T visa form (Form I-914B) and for certification of a S visa form (Form I-845A), shall be the same as the procedures required for a U visa certification, with the exception that the Bureau Director is to consult with the Head Deputy of the Organized Crime Division prior to issuing or denying a T visa certification.

Processing Requests for Certification of Visa Documents

All applications received for U, T, or S Visa should be directed to the U Visa Coordinator at uvisa@da.lacounty.gov. The U Visa Coordinator will ensure the application is tracked, directed to appropriate personnel for review and prepare for an ultimate decision.

In addition, a deputy who receives a request for U visa certification shall immediately notify their Head Deputy or Deputy-in-Charge (DIC) and forward the original request to their Bureau Director. The Head Deputy or DIC shall designate a deputy to review the case file and any other relevant information, such as law enforcement reports and court records, and, within 21 days of receiving the certification request, or within three days, if the requestor is in removal proceedings, the handling deputy shall prepare and submit a memorandum to the Bureau Director, through their Head Deputy or DIC. If the handling deputy is required to review sealed juvenile records in order to prepare the memorandum, all information contained within the sealed juvenile records is confidential and may not be shared with any outside agency or individual. Pursuant to Penal Code § 679.10, a certifying entity is required to process a U visa certification request within 30 days, unless the petitioner is in removal proceedings, in which case the certification must be processed within seven days of the first business day following the day the request is received. The memorandum shall include all the following information, if available:

- The name and date of birth of the victim, and any known alternate names and dates of birth indicated in police reports, the case file, PIMS, and Bureau of Victim Services (BVS) records;
- A summary of the facts of the case, including the victim's role and any injuries, including mental abuse, sustained by the victim;
- Whether any request for information or assistance from the victim has been made by the Office or at the direction of the Office;
- Facts supporting the victim's helpfulness, or lack thereof, to the detection, investigation or prosecution of qualifying criminal activity;
- A statement from the BVS as to whether an advocate was assigned to the victim and whether the BVS advocate possesses any additional information regarding the victim's helpfulness;
- The original charges filed;
- The charges upon which the defendant was ultimately convicted;
- The stage of the proceedings during which the conviction occurred;
- The sentence imposed;
- Whether the petitioner is in removal proceedings (if known).

If the U visa request is initially received by a Bureau Director, they shall forward a copy to the Head Deputy or DIC of the office where the prosecution took place, noting whether the petitioner is in removal proceedings (if known). The same procedure shall then be followed as described above.

Upon receipt of the U visa certification request and accompanying memorandum, the Bureau Director shall determine whether a sufficient basis exists to establish that the requestor was the victim of qualifying criminal activity and, if so, whether the victim was helpful or is likely to be helpful to the detection, investigation, or prosecution of the criminal activity in consideration of the presumption of helpfulness established by Penal Code § 679.10. Directors are required to maintain the database of all U visa requests, logging: the date the request was received; the name of the victim and the suspect or defendant; the case number, if any; whether certification was granted or denied; and the date the certification was signed or the decision to decline to sign the certification was made

A copy of the memorandum prepared by the handling deputy and any notification of the Director's certification decision shall be placed in the case file and emailed to the U Visa Coordinator. If the case is an open prosecution, the Director shall notify, in writing, the handling deputy of the decision to grant or deny certification.

If the petitioning victim subsequently fails to provide assistance or otherwise becomes uncooperative, the handling deputy shall prepare a supplemental memorandum that is to be sent to the U Visa Coordinator and to the appropriate Director, through the Head Deputy or DIC, detailing the victim's refusal to assist in the investigation or prosecution of the qualifying criminal activity of which they were a victim when reasonably requested to do so. (PC § 679.10 (j).) The Director must then notify the USCIS of the victim's failure to cooperate through a written statement that identifies the petitioner by name, date of birth, and A-number (if available).

Request for Updated Certification

The Office may receive a request for an updated certification, even after a request for certification has already been granted, submitted by a victim who failed to deliver their application to the USCIS in a timely manner, or by a recipient of a U visa who is filing for permanent resident status. In these instances, the same procedures described above shall be followed. The supplemental memorandum shall include the following information:

- Whether any additional requests for information or assistance from the victim have been made by or at the direction of the Office since the date of the original memorandum.
- Any additional facts supporting the victim's helpfulness, or lack thereof, to the detection, investigation, or prosecution of qualifying criminal activity since the date of the original memorandum.
- Any additional statements from the BVS as to whether an advocate was assigned to the victim and whether the BVS advocate possesses any additional information regarding the victim's helpfulness.
- Any changes in the status of the original case since the date of the original memorandum.

Discovery Obligations

Brady v. Maryland and Penal Code § 1054.1(e) mandate that potentially exculpatory evidence be provided to the defense. A request for U visa certification by a victim or the victim's representative during the pendency of the case is considered discoverable pursuant to constitutional and statutory obligations. If a request for certification is made during the pendency of the case to the Office or the handling law enforcement agency, this information shall be disclosed to the defense. Any decision regarding the request for certification shall also be disclosed. The handling deputy shall document the request for certification and all disclosures to the defense in the case file. In an abundance of caution, if the victim requesting U visa certification in a current case was previously the victim of the same defendant in a prior case for which the victim also requested a U visa certification, it is recommended that such information be disclosed to the defense. Post-conviction certification requests do not need to be disclosed to the defense.

24.17 CRIMINAL PROTECTIVE ORDERS

Penal Code § 136.2 governs the issuance of pretrial protective orders. Although the plain language of the statute suggests that an order should issue in every case involving a crime of violence, California courts have limited the reach of the law, finding that its sole purpose is to protect the integrity of the proceedings pending trial. Given this stated purpose, courts will issue a general criminal protective order only upon a good cause showing that the defendant intimidated or dissuaded the protected party. See *Babalola v. Superior Court* (2011) 192 Cal.App.4th 948; *People v. Stone* (2004) 123 Cal.App.4th 153.
In practice, the judge may decline to issue the order at the arraignment but permit the People to set the matter for a hearing to establish good cause. At the hearing, a mere finding of past harm

to the victim or witness does not rise to the level of good cause without additional evidence. *Babalola*, at 964.

Recognizing these legal hurdles, it is Office policy that deputies shall request the court to issue a criminal protective order in any case in which the defendant has intimidated or dissuaded or is likely to intimidate or dissuade any witness. The deputy shall use the most recent version of the court-approved form (CR-161) and maintain the victim's confidentiality by using CLETS-001 if the victim invokes the right to maintain confidentiality under California Constitution Article 1 § 28(b)(4) or Penal Code § 293.5 (the right for victims of sexual assaults to use the moniker, Jane Doe, to protect privacy). The deputy shall be prepared to establish good cause to support the protective order.

CHAPTER 25

MEDIA RELATIONS

25.01 INTRODUCTION

The public is entitled to know what occurs in the criminal justice system. The public gets this information through the news media. It is a deputy's responsibility to ensure that the public is accurately, truthfully, and fully informed, while acting within the confines of the law, established principles of professional ethics, and the protection of victims and witnesses. To achieve this goal, it is vital that open lines of communication be maintained between the Office and the news media, and that a deputy's attitude toward the news media be open, frank, and cooperative.

25.02 CASES TO BE REPORTED TO THE MEDIA RELATIONS DIVISION

Major crimes and significant cases of public interest are of prime concern to the news media. Deputies shall keep the Media Relations Division informed of all significant events in such cases. These cases include:

- Crimes that are particularly serious, brutal, or heinous, such as multiple murders, serial killings, kidnappings, and violent or bizarre crimes against the person;
- Crimes capable of arousing widespread public interest or concern;
- Crimes offending public sensibilities;
- Extraordinary white collar crimes;
- Negligent deaths or serious bodily injuries to workers;
- Environmental crimes that may have serious consequences to the public;
- Crimes involving any prominent person, including public officials and law enforcement officers;
- The killing or serious injury of a law enforcement officer or firefighter while on duty;
- The maiming or killing of any animal or serious animal attacks on humans; and,
- The escape or erroneous release of an incarcerated prisoner.

Any major crime or significant case should be reported as soon as possible to the Media Relations Division. When a major crime or significant case is filed, the filing deputy/assigned deputy shall prepare a confidential memorandum (or e-mail) summarizing the facts of the case and include the name, age, address, and occupation of the defendant, as well as the name and age of the victim, unless disclosure is precluded by law. This memorandum shall be forwarded through the chain of command to the appropriate Bureau Director and the Media Relations Division. The memorandum shall clearly designate any confidential information that should not be made public.

Deputies are expected to be available to consult with Media Relations Division personnel and to cooperate with the news media. Media Relations Division is to be kept advised of important developments in major crimes or significant cases, including cases investigated by the Bureau of

Investigation. Details of current investigations and pending cases are not to be disclosed to the news media without Bureau Director approval.

25.03 STATEMENTS TO THE NEWS MEDIA

25.03.01 TRIAL PUBLICITY

Statements to the news media must comply with the State Bar Rules of Professional Conduct, Rule 3.6 (Trial Publicity). Should there be a conflict between a provision of the Legal Policies Manual and a mandatory provision of Rule 3.6, the latter controls. Should there be a conflict between the Legal Policies Manual and a discretionary provision of Rule 3.6, deputies shall attempt to comply with both.

25.03.02 DISCLOSURE OF WARRANT PROHIBITED

Penal Code § 168 provides:

(a) Every district attorney, clerk, judge, or peace officer who, except by issuing or in executing a search warrant or warrant of arrest for a felony, willfully discloses the fact of the warrant prior to execution for the purpose of preventing the search or seizure of property, or the arrest of any person, shall be punished by imprisonment in the state prison or in a county jail for not more than one year.

(b) This section shall not prohibit the following:
(1) A disclosure made by a district attorney or the Attorney General for the sole purpose of securing voluntary compliance with the warrant.
(2) Upon the return of an indictment and the issuance of an arrest warrant, a disclosure of the existence of the indictment and arrest warrant by a district attorney or the Attorney General to assist in the apprehension of a defendant.
(3) The disclosure of an arrest warrant pursuant to Penal Code § 14201.6(a)(1).

25.03.03 OFFICE GUIDELINES

Subject to Penal Code § 168, at the time of arrest, the issuance of an arrest warrant, the filing of a complaint, or the public revelation of an indictment, the following information may be released:

- The accused's name, age, residence, occupation, and family status;
- Identity of the victim, if not otherwise precluded by law;
- If the accused has not been arrested, any information necessary to aid in the accused's apprehension;
- The facts and circumstances of the arrest, including the time and place of arrest, resistance, pursuit, and/or use of weapons;
- The identity of the investigating and arresting officer or agency and the length of investigation;
- Description of physical evidence seized;

- Nature, substance, or text of the charge, including a brief description of the offense charged;
- Quotes from public records of the court;
- Schedule and explanation of the judicial process; and
- Request for assistance in obtaining evidence.

The following information shall not be released:

- The name of an accused juvenile, unless the minor is deemed a 602 ward and charged with a serious and violent felony as enumerated in Welfare and Institutions Code § 676, in which case the policy set forth in LPM 25.09 applies;
- Information regarding a confession, admission, or statement given by the accused;
- Prior criminal record;
- Possibility of a guilty plea to the offense charged or a lesser offense;
- Any opinion as to the accused's guilt or innocence or to the merits of the case or evidence;
- The performance of any tests or examinations or a suspect's refusal or failure to submit to examinations or tests, unless it is a matter of public court record and there is an overriding public interest in its release which outweighs potential prejudice to the accused;
- Identity, testimony, or credibility of prospective witnesses;
- Inflammatory statements that might prejudice an accused's right to a fair trial;
- Statements that violate existing gag orders or statutory rules of confidentiality;
- The existence of a Grand Jury, Grand Jury transcript, or indictment without prior judicial approval; and
- The contents of a probation report.

25.04 NEWS MEDIA REQUEST FOR STATEMENTS

Media requests for statements concerning a pending case may be handled by the assigned deputy, the Head Deputy or Deputy-in-Charge, or referred to the Media Relations Division.

The Media Relations Division should be notified of reporters' inquiries and the responses given.

25.05 CONTACTS WITH THE NEWS MEDIA

Significant news media inquiries shall be reported promptly by telephone to the Media Relations Division. The Media Relations Division is responsible for briefing the District Attorney, the Chief Deputy, and other appropriate management personnel of news media inquiries in District Attorney cases.

25.06 REQUIRED NOTIFICATIONS - LOCAL STORIES OF INTEREST

Branch and Area Head Deputies and Deputies-in-Charge shall immediately notify the Media Relations Division of stories in local newspapers involving the Office (e.g., criticism of Office

action or policies, requests for investigations by local government agencies, or citizens' groups and cases of local interest).

25.07 MEDIA REQUESTS TO INSPECT RECORDS - PUBLIC RECORDS ACT

Copies of Public Records Act requests submitted by the news media to inspect documents contained in case files shall immediately be forwarded to the Media Relations Division and to the Director of the Bureau of Prosecution Support Operations for entry into the Public Records Act log. A response shall be prepared consistent with the statutory requirements of Government Code §§ 6250 et seq. and Office policy and provided to the party making the request after notification to the Bureau of Prosecution Support Operations and Media Relations Division.

25.08 GRAND JURY MATTERS

All Criminal Grand Jury matters are confidential. A deputy may not publicly comment on proposed or ongoing Criminal Grand Jury hearings without the prior approval of the Chief Deputy and the Supervising Judge or Assistant Supervising Judge of the Criminal Division, who oversees the Criminal Grand Jury. Deputies who are approached by the news media regarding pending Criminal Grand Jury matters shall refer such questions, including inquiries for confirmation of information already known by the news media, to the Criminal Grand Jury Legal Advisor who will consult with the Media Relations Division. Only the Criminal Grand Jury Legal Advisor may discuss the policies and procedures of the Criminal Grand Jury.

A limited exception to this policy exists for cases where a deputy is seeking a "Murphy" conservatorship (WIC § 5008(h)(1)(B)) for an incompetent defendant. Since a pending information or indictment is a necessary element in proving such cases, the deputy may inform the Supervising Judge and counsel that an indictment is being sought by the Office and then, when the indictment is obtained, the deputy may make reference to the indictment with the defendant's true name in the conservatorship proceedings.

When an indictment is returned, it is marked secret by the Grand Jury and sealed by the court. The indictment remains secret until the accused is arraigned or the court orders the indictment unsealed. It is a criminal offense for a district attorney, clerk, judge, or peace officer to disclose the fact that an indictment has been returned and arrest warrant has been issued before the accused is arrested. (PC § 168.)

Within 10 days of the indictment, the court reporter must deliver a transcript of the Grand Jury proceedings to the court clerk. This transcript shall remain sealed and not open to the public until 10 days after the defense attorney, for a one-defendant case, or the last defense attorney, in a multi-defendant case, picks up the transcript from the court reporter in the Criminal Grand Jury offices. Thereafter, by operation of law, the transcript shall be open to the public unless the court, on its own motion or motion by a party, orders it to remain sealed. Deputies shall object to such a motion unless there is a reasonable likelihood that making the transcript public may prejudice the defendant's right to a fair trial. (PC § 938.1.)

Occasionally, a press release or public statement may clarify for the public the value of the Grand Jury's investigatory role in the charging process. Whenever the District Attorney believes

that the public should be advised of Grand Jury proceedings, the Chief Deputy shall contact the Supervising Judge for approval for release of information concerning a pending Grand Jury matter.

Deputies who present cases to the Grand Jury are given a copy of the *Grand Jury Manual* which discusses in greater detail District Attorney policy on public comments concerning Grand Jury matters.

Deputies should refer to the *Grand Jury Manual* for general procedures in bringing a case before the Grand Jury.

Commentary

The Grand Jury is an independent body. Its criminal proceedings are sensitive in nature. The confidentiality of Grand Jury proceedings protects the investigatory nature of the hearings and the identities of victims, witnesses, and suspects.

25.09 JUVENILE PROCEEDINGS

District Attorney Juvenile court proceedings, records and case files are confidential and may be inspected or disseminated only under specifically enumerated circumstances. In most instances, the rehabilitation and protection of the minor outweighs the public's right to know. The governing Welfare and Institutions Code (WIC) sections are 204.5, 827, 827.5, 827.9 and 676. In addition, any such disclosures are subject to the State Bar Rules of Professional Conduct, Rule 3.6, and Penal Code (PC) § 168, and must conform to California Rules of Court, Rule 1410.

The following shall guide disclosure of information pertaining to minors.

Minor is Charged with a WIC § 676(a) Offense

- Information that is released in open court that was available to the public during public proceedings may be disclosed after the conclusion of the hearing. This includes the name of the minor, the case number, charges filed, upcoming court dates and disposition.

- After charges are filed but before any court hearing, media may be told
  - Charges are under review;
  - Charges were filed (which charges were filed should not be disclosed);
  - The court location where charges were filed and the court date;
  - The court will post a list of cases open to the public outside of the courtroom;
  - The media may petition the court for access to the court during the hearing on the case; and
  - WIC §§ 676 and 827 govern media access in Juvenile proceedings

Exceptions to Disclosure when a Minor is Charged with a WIC § 676(a) Offense

- No records or information may be released where any party has successfully petitioned the court to prohibit the disclosure to the public of any file or record pursuant to WIC § 676(e).

- No records or information may be released when the court has ruled that the proceedings are closed pursuant to WIC § 676(b), except the minor's name may be disclosed if the petition charges an offense listed in PC § 1192.7(c) and the minor is 14 years old or older.

If the Petition is Sustained

- The name of the minor may be disclosed to the public if the minor is 14 years or older and a charge was sustained for a serious (PC § 1192.7) or violent (PC § 667.5) felony.

- The name of the minor, the petition, the minute order reflecting that the charges were sustained, orders of adjudication and orders of disposition may be released if the petition is sustained for a crime enumerated in WIC § 676(a). No other documents may be released.

The Minor is Not Charged with a WIC § 676(a) Offense

- If the minor is not charged with an offense enumerated in WIC § 676(a) and is not charged with a serious (PC § 1192.7) or violent (PC § 667.5) felony, no information about the case or the minor may be released. It is permissible to respond that the LADA reviewed the charges and that charges were filed, the case was declined, or the case was referred back to the law enforcement agency for further investigation. It is not permissible to state what charges were filed or to release information that could be paired with other information known to the media that might lead to identification of the minor.

- Media may be told that they may petition the court for access to information pursuant to WIC § 827, California Rules of Court 5.552 and Local Rules 7.2 and 7.3. Media may access Juvenile court records only through petitioning the Presiding Judge of the Juvenile Court via a JV-570 Request for Juvenile Records form. The form may be obtained on the Judicial Council Website http://www.courts.ca.gov/formnumber.htm.

A Minor's Case is Sealed

If a minor's case has been sealed, information in Juvenile Case Management or in the district attorney file may not be commented on to the media, even if the charges qualified for disclosure under the authorities listed above prior to sealing. A minor's case may be sealed pursuant to WIC §§ 781, 786, 786.5 and 793.

25.10 EXTENDED MEDIA COVERAGE

Pursuant to California Rules of Court, Rule 980, ". . . photographing, recording, and broadcasting of courtroom proceedings may be permitted as circumscribed in this rule if executed in a manner that ensures that the fairness and dignity of the proceedings are not adversely affected."

The decision whether to allow extended media coverage rests with the judge before whom the court proceedings are conducted. Counsel may object to such coverage and ask that it be refused, limited, or terminated. California Rules of Court, Rule 980(e)(3) sets forth the factors to be considered by a court in making a determination whether to allow extended media coverage.

Deputies shall not object to extended media coverage consistent with the provisions of Rule 980 unless such coverage would adversely affect the presentation of the People's case. Whenever possible, a deputy should propose the use of less intrusive alternatives (e.g., fixed cameras, or a prohibition against showing the faces of witnesses or disclosing the identities of witnesses) as opposed to a total ban on media coverage of court proceedings.

Prior written approval from the deputy's Bureau Director shall be obtained before a deputy may object to extended media coverage. The memorandum requesting Director approval should clearly describe the manner in which the extended media coverage would adversely impact the People's case. The Media Relations Division shall be notified if a deputy receives approval to oppose extended media coverage.

25.11 GAG ORDERS

As a matter of Office policy, deputies shall not make a motion for a gag order. If a motion for a gag order is made by the defense, the deputy handling the case shall oppose the motion.

25.12 REQUESTS TO SEAL COURT RECORDS

Unless confidentiality is required by law, court records are presumed to be open to the public. All requests to seal court records shall comply with California Rules of Court, Rules 243.1, 243.2, 243.3, and 243.4. Rules 243.1 and 243.2 provide standards and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. These rules apply to both civil and criminal cases and recognize the First Amendment right of access to documents used at trial or as a basis of adjudication.

The rules do not apply to records that courts must keep confidential by law. Examples of confidential records to which public access is restricted by law are records of the family conciliation court (Family Code § 1818(b)) and *in forma pauperis* applications (California Rules of Court, Rule 985(h)). The rules concerning sealed records do not apply to discovery proceedings, motions, and materials that are not used at trial or submitted to the court as a basis for adjudication. (See *NBC Subsidiary*, *supra*, 20 Cal.4th at 1208-1209, fn. 25.)
Rule 243.1 provides, in pertinent part, as follows:

The court may order that a record be filed under seal only if it expressly finds that:

- There exists an overriding interest that overcomes the right of public access to the record;
- The overriding interest supports sealing the record;
- A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- The proposed sealing is narrowly tailored; and
- No less restrictive means exist to achieve the overriding interest.

An order sealing the record must:

- Specifically set forth the factual findings that support the order; and
- Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.

Rule 243.2 provides, in pertinent part, as follows:

- A record must not be filed under seal without a court order.
- The court must not permit a record to be filed under seal based solely upon the agreement or stipulation of the parties. A party requesting that a record be filed under seal must file a noticed motion for an order sealing the record. The motion must be accompanied by a memorandum of points and authorities and a declaration containing facts sufficient to justify the sealing.
- A sealed record must not be unsealed except upon order of the court.
- A party or member of the public, or the court on its own motion, may move to unseal a record. Notice of the motion to unseal must be filed and served on the parties.

All requests to seal court records must have prior Head Deputy approval.

25.13 "NEWSPERSON SHIELD LAW"

The newsperson shield law, codified in the California Constitution, Article I, § 2 and Evidence Code § 1070, immunizes newspersons from being held in contempt by any judicial, legislative or administrative body, or any other body having power to issue subpoenas, for refusing to disclose:

- The source of information obtained for communication to the public; or
- Unpublished information obtained or prepared for communication to the public. "Unpublished information" is defined as information not disseminated to the public and includes, but is not limited to, all notes, outtakes, photographs, tapes, or other data of whatever sort not disseminated to the public through a medium of communication.

25.13.01 POLICY NOT TO ISSUE SUBPOENAS

The shield law exempts a newsperson from disclosing both the source of information obtained for news purposes and any unpublished information obtained or prepared for news purposes, even if the unpublished information was not obtained from a confidential source.

Deputies shall not use a criminal subpoena or subpoena *duces tecum* to obtain information protected by the shield law.

25.13.02 SEARCH WARRANT PROHIBITED

Penal Code § 1524(g) prohibits the issuance of a search warrant for any items protected by the newsperson shield law (i.e., items described in Evidence Code § 1070). Accordingly, a search warrant cannot be used to obtain the source of any news information or unpublished news information in the possession of the news media.

25.13.03 REQUEST FOR CONSENT

If a deputy believes that items protected by the shield law are essential to the People's case, the deputy may attempt to obtain the items by consent. Any such attempt shall be approved by the deputy's Head Deputy or Deputy-in-Charge who shall immediately notify the Media Relations Division of the request for consent.

25.13.04 NEWSPERSON AS PERCIPIENT WITNESS

The shield law does not preclude the subpoena of a newsperson who was a percipient witness to a crime or the subpoena of published information. Deputies intending to subpoena a newsperson for such purpose, or subpoena published information from a newsperson or news source, shall first obtain Head Deputy approval and notify the Media Relations Division prior to issuing the subpoena.

For a discussion of the scope of immunity accorded newspersons see *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 95 Cal.Rptr.2d 620; *Miller v. Superior Court* (1999) 21 Cal.4th 883, 89 Cal.Rptr.2d 834; *New York Times Co. v. Superior Court* (*Sortomme*) (1990) 51 Cal.3d 453, 273 Cal.Rptr. 98; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 268 Cal.Rptr. 753; and *Dalitz v. Penthouse International, Ltd*. (1985) 168 Cal.App.3d 468, 214 Cal.Rptr. 254.

25.14 NEWS MEDIA SEARCHES

It is the policy of the Office not to use search warrants to search news media offices or the homes of news media personnel for material or evidence obtained or prepared in their news gathering function, except in unusual cases. Deputies shall attempt to use less intrusive measures, such as consent or a subpoena, when available.

For a detailed discussion of Office policy on News Media Searches, see Legal Policies Manual § 20.05.

Commentary

When items in the possession of the news media are believed to be necessary to complete an investigation or prosecute a filed case, the least intrusive method should be employed to obtain these items. Attempts should first be made to obtain the items by lawful and voluntary consent. If consent cannot be obtained, the next least invasive method, a subpoena, should be issued. However, because a subpoena cannot be issued unless a case has been filed or a Grand Jury proceeding has commenced, the subpoena process may not be available. A search warrant should only be sought when consent cannot be obtained and a subpoena is unavailable.

25.15 RELEASE OF PIMS INFORMATION

Penal Code §§ 13300 et seq. were enacted to limit public access to "local summary criminal history information." The information barred from release under § 13300 et seq. includes: "records reflecting the 'name, date of birth, physical description, dates of arrests, arresting agencies and booking numbers, charges, dispositions, and similar data' about any given person."

Note however, that Penal Code § 13300(j) permits the release of local criminal history information, specifically for a scholarly or journalistic purpose. If the request is made for a "scholarly or journalistic purposes," § 13300 permits the release information from PIMS, including case names and numbers. Requests under this section only require the media to state that the "request is made for scholarly or journalistic purpose." No further justification, explanation, or declaration is necessary. All disclosures of information for scholarly or journalistic purposes in response to these types of requests must be approved by the Chief Deputy. Any letter accompanying the dissemination of this information must also be signed by the Chief Deputy. Monthly statistical information provided by JSID and PID requires approval by the Assistant District Attorney of Special Operations, and responsive letters can be signed by the Head Deputy of the Assistant Head Deputy of those units.

25.15.01 DISCLAIMERS RELATED TO PIMS SENTENCING INFORMATION

Sentencing information is available in PIMS and is commonly requested by members of the public. However, the original source of this information is data which is manually entered into the computer by court personnel and imported electronically into PIMS. Therefore, the Office cannot confirm the accuracy of sentencing information unless the file is reviewed.

Therefore, whenever criminal history information from PIMS is being disclosed which relates to sentencing information, the following disclaimer must be included:

"In most instances, the Los Angeles County District Attorney's Office (LADA) does not directly input sentencing information into its computer system. Some sentencing information may have been imported from the court into the LADA system. The LADA cannot verify the accuracy of this imported information. The sentencing information provided may be inaccurate. All sentencing information should be verified by the court."

CHAPTER 26

GENERAL POLICIES

26.01 AFTER HOURS DUTY

26.01.01 IN GENERAL

The Office provides legal advice to law enforcement agencies after regular office hours through the After Hours Duty Program. Law enforcement agencies are encouraged to seek the advice of deputies whenever necessary. Law enforcement agencies have been advised and trained to make use of search and arrest warrants whenever possible, and deputies are available to assist them in this regard.

The Office maintains a roster of deputies assigned to provide after-hours services. Two deputies are assigned to After Hours Duty each weeknight, weekends, and holidays. The duty deputies may be contacted through the Bureau of Investigation Command Center. The Command Center telephone number is (213) 974-3607. A district attorney investigator is stationed at the Command Center after hours to receive calls for service from law enforcement agents and to contact the duty deputies to handle the calls.

26.01.02 ADMINISTRATION

The program is administered by the Training Division, which is charged with the responsibility of ensuring that deputies are on duty and available at all times during their duty assignments and that they comply with the requirements and conditions of the program. Only Grade III and Grade IV deputies are eligible to participate in the program. Eligible deputies who wish to participate should submit a written memorandum to the Training Division Head Deputy. Grade III and Grade IV deputies who are interested in, or are currently participating in the After Hours Duty program shall attend mandatory After Hours Duty training.

Participation in After Hours Duty is voluntary. Volunteers must be willing to "roll out" when required in the course of providing service (e.g., when a deputy provides on-the-scene advice during the course of an investigation or in the service of a search warrant).

26.01.03 AFTER HOURS DUTY ASSIGNMENT SCHEDULE

The Training Division prepares an After Hours Duty assignment schedule on a quarterly basis. When a deputy assigned to After Hours Duty has a scheduling conflict and cannot work an assigned shift, it is that deputy's responsibility to arrange an assignment trade with another deputy who is on the current duty roster. All schedule changes shall be reported to the Command Center and to the Training Division. Deputies who are unable to arrange an assignment trade shall notify the Training Division as early as possible. Another deputy will be selected to take the assignment. Deputies may not give assignments away, nor take them from other deputies without a trade.

26.01.04 HOURS OF ON-CALL SERVICE

The duty hours are from 6 p.m. to 6 a.m. on weeknights, and from 6 a.m. to 6 a.m. on Saturdays, Sundays, and holidays.

Compensatory time is earned at the rate of four hours for weeknight duty and eight hours for weekend and holiday duty. If the actual time worked is less than the four hours or eight hours, the deputy will receive the four hours or eight hours compensatory time. If the actual time worked is greater than the four hours or eight hours, the deputy will receive compensatory time for the actual time worked.

Saturday Seminars count as four hours actual work time. This time is not added to the eight hours After Hours Duty time. A duty deputy who attends a Saturday Seminar may only claim eight hours compensatory time unless the actual time worked is greater than eight hours.

Deputies who are on a leave of absence or on sick time on their assigned duty day are not eligible to participate in the program on that date and cannot be credited with any overtime that would have otherwise been earned.

26.01.05 INSTRUCTIONS TO DEPUTIES ASSIGNED TO AFTER HOURS DUTY

Duty deputies shall check in with the Bureau of Investigation Command Center at the beginning of their shifts. Deputies who fail to check in by 7:00 p.m. on weeknights or 9:00 a.m. on weekends and holidays, or who cannot be reached promptly by the Command Center during their shifts, will be replaced by a back-up deputy and will be denied overtime credit for that shift. Repeat occurrences will result in removal from the duty roster.

The duty deputy shall remain available to take calls for service at the telephone number(s) given to the Command Center throughout the duty shift. The duty deputy will be provided a telephone calling card and PIN number and is authorized to make duty related long distance and toll calls using the calling card. Deputies shall keep the telephone calling card and PIN numbers confidential. Unauthorized use of the telephone calling card will result in disciplinary and/or legal action.

When law enforcement agents request advice, the duty deputy should first determine whether there is probable cause to have an identified suspect arrested. The deputy may then give an opinion as to whether or not specific postulated facts do or do not support the actions contemplated by the agents, under prevailing legal authorities.

26.01.06 AFTER HOURS DUTY LOG

The duty deputy shall complete an After Hours Duty Log recording all service rendered, even if no requests for service were received. The log shall be forwarded to the Training Division on the next workday after a duty assignment. The logs are designed to protect deputies. If there is later litigation regarding advice provided, the logs may prove to be useful.

26.01.07 RESPONSIBILITIES OF DUTY DEPUTIES

All duty deputies shall be thoroughly familiar with the law and procedures relating to search warrants. The duty deputy shall have a current *Search Warrant Manual* and search warrant and supporting affidavit forms available for use by law enforcement. When law enforcement agents request assistance in obtaining search warrants, the duty deputy shall first determine whether there is probable cause to have an identified suspect arrested. The deputy may then review the proposed warrant and give an opinion as to whether the recited facts do or do not support submission of the warrant application to a magistrate. This assistance may be done over the telephone but, if necessary, the duty deputy shall make personal contact with the officer seeking the warrant either at a police facility or other appropriate location.

The duty deputy shall also be thoroughly familiar with procedures relating to telephonic and fax search warrants and oral affidavits. The deputy shall first determine whether there is probable cause to have an identified suspect arrested. The deputy may then inform the officer of the statutory procedure for obtaining a telephonic or faxed warrant, or for using an oral affidavit, and may give an opinion as to whether or not specific postulated facts do or do not support submission of the warrant application to a magistrate. It is not necessary for an emergency situation to exist in order to employ telephonic or fax search warrant and oral affidavit procedures. Such procedures shall be used whenever they are the most appropriate means of obtaining a search warrant.

In the event it becomes necessary to "roll out," the duty deputy shall travel to the appropriate location(s) as the circumstances require. If the deputy uses their own vehicle for such travel, the deputy will be reimbursed for mileage.

26.01.08 COMMAND CENTER SUPPORT

The Bureau of Investigation Command Center maintains a list of judges who are available by telephone or fax to review and approve search and arrest warrants at night and on weekends and holidays. The Command Center also has the necessary equipment to set up and record telephonic search warrants.

26.02 LINEUPS

It is Office policy that all deputies shall be familiar with the law relating to lineups.

All lineups conducted in Sheriff's Department facilities are coordinated and supervised by Sheriff's personnel. Information about the Los Angeles County Sheriff's Department policy and procedures relating to lineups may be obtained from the Lineup Detail at (213) 893-2406.

26.02.01 SCHEDULING THE LINEUP

An investigating officer shall contact the Sheriff's Lineup Detail to request and schedule a lineup. The lineups are conducted Mondays through Thursdays between the hours of 1:30 p.m. and 3:00 p.m. and 7:00 p.m. and 8:00 p.m.

26.02.02 ATTENDANCE AT LINEUPS

Deputies who attend lineups shall familiarize themselves with Sheriff's Department policy and procedures relating to lineups.

Upon the request of the Sheriff's Department, the Director of the Bureau of Central Operations may occasionally assign a deputy to attend a lineup during office hours.

Any deputy may, with Head Deputy or Deputy-in-Charge approval, attend a pre-filing or post-filing lineup. Lineup attendance is strongly encouraged if the case has been assigned to the deputy.

26.02.03 RESPONSIBILITIES OF THE DEPUTY DISTRICT ATTORNEY

Because the Sheriff's Lineup Detail is charged with conducting all lineups held in Sheriff's Department facilities, a deputy who attends a lineup is essentially an observer. All final decisions regarding the lineup rest with the Sheriff's Lineup Detail and neither the deputy nor the defense attorney has a legal right to alter the line.

By attending a lineup as an observer or advisor, a deputy could become a potential prosecution or defense witness, subject to the provisions of Rule 5-210 of the Rules of Professional Conduct and the recusal statute, Penal Code § 1424. Attendance at lineups should be for identified, compelling reasons, and should occur after a determination that there is probable cause for the arrest of an identified suspect.

A deputy attending a lineup need not prepare a written report unless there is a significant or unusual development to record (i.e., unusual conduct or admissions, etc., on the part of the accused or their attorney). If a deputy prepares a written memorandum relating to any significant or unusual developments, the memorandum should be placed in the case file or given to the investigating officer if the case has not yet been filed. Non-work product information in the memorandum is discoverable.

A deputy attending a lineup should obtain a copy of the report prepared by the Lineup Detail and have the report placed in the case file if a case has been filed or forwarded to the office or division which will receive the case for filing.

Pursuant to Sheriff's Department policy, there shall be no interviews conducted in the show-up room before or after the lineup is completed.

Photographs, video and audio recordings may be made by an authorized representative of the law enforcement agency investigating the case. If one is not available, the Lineup Detail will photograph the line. Due to security reasons, no other photographs, video or audio recordings are permitted.

26.02.04 NEED FOR COURT CERTIFIED INTERPRETER

The Lineup Detail has personnel who will admonish witnesses in English or Spanish. If a different language is needed, a court certified interpreter must attend the lineup. Arrangements for the court certified interpreter should be made by the law enforcement agency investigating the case.

At the lineup, the court certified interpreter will translate the witness admonition and instructions from English into the target language. The interpreter will translate witness responses from the target language into English. The witness card used for identification purposes is in English. The interpreter will sign the card to indicate that a true and correct interpretation occurred. The court certified interpreter's name should be added to the District Attorney witness list.

26.02.05 CANCELLATION OF COURT ORDERED LINEUP

Pursuant to Sheriff's Department policy, whenever the court orders a lineup, the lineup may only be canceled with the concurrence of the investigating officer and both attorneys, or by the judge who ordered the lineup.

26.03 COURT ORDERED LINEUPS ON MOTION OF DEFENDANT

In *Evans v. Superior Court* (1974) 11 Cal.3d 617, the California Supreme Court held that in certain circumstances an accused is entitled to have a pretrial lineup upon request.

Deputies shall be familiar with the law relating to *Evans* lineups and shall carefully review defense motions requesting such lineups.

An investigator must request an *Evans* lineup. The Sheriff's Lineup Detail does not schedule lineups through attorneys.

26.04 COURT ORDERED LINEUPS OF SUSPECTS NOT IN CUSTODY

The Sheriff's Department will not place a suspect in a lineup unless the suspect is in custody. The Sheriff's Department will accept a suspect into temporary custody for the purposes of a lineup if presented with a court order.

Deputies shall familiarize themselves with the procedures required by the Lineup Detail for processing out-of-custody suspects for lineups.

26.05 JUVENILE LINEUPS

A juvenile may not appear in a lineup without a court order permitting the juvenile to commingle with adults. In addition, if the juvenile is housed at Juvenile Hall, there must be a court order for transportation to and from the juvenile facility.

If a juvenile lineup is held at the Men's Central Jail, the lineup must contain all juvenile "fillers." A court order must be obtained to permit the transportation of multiple juveniles to the Central Jail for participation in the lineup. The order must have the full name and date of birth for each juvenile participating in the lineup.

26.06 COMMUNICATION WITH THE LEGISLATURE AND GOVERNOR

26.06.01 LEGISLATIVE PROPOSALS

Deputies are encouraged to take an active part in the legislative process. Deputies are uniquely qualified to recognize problems in the criminal justice system and propose legislative solutions. Many legislative proposals passed into law were drafted in whole or in part by deputies.

Deputies who desire to support the Office in its efforts to improve criminal justice legislation may do so by sending their legislative proposals, suggestions or comments to the Chief Deputy. Deputies who participate in the Office's legislative program may identify themselves by official title and use district attorney stationery and other indicia of official sponsorship, support or opposition. Participation in this capacity must be approved by and coordinated through the Chief Deputy and the District Attorney's legislative office in Sacramento.

Deputies occasionally receive requests from legislators and other government officials to draft or analyze legislation. When deputies respond to these requests or draft legislative proposals on their own, it is often assumed by persons outside the Office that the position taken by the deputy is the official position of the District Attorney or the Office. This can obviously lead to confusion and embarrassment when it is not.

If a deputy wishes to participate in the legislative process on their own behalf, no approval is required. However, in order to avoid any confusion the deputy must clearly state that the position taken is the personal position of the deputy, and does not necessarily reflect the position of the District Attorney or the Office. The deputy may not use District Attorney stationery or other indicia of official sponsorship by the Office.

Commentary

This policy is not intended to limit in any way a deputy's right to draft personal legislative proposals or express personal legislative opinions. It is only intended to avoid the problems that can result if the source of these proposals and opinions is not made clear to the person or persons to whom they are released.

26.06.02 OTHER COMMUNICATION WITH LEGISLATORS OR THE GOVERNOR

Other communication with legislators, the Governor's office staff, or appearances before any legislative committee on behalf of the Office or as a representative of the Office must be authorized by the Chief Deputy.

26.07 COMMUNICATION WITH THE STATE BAR

Deputies are encouraged to report their observations of unethical conduct by an attorney, including violations of California Rules of Professional Conduct 8.3, through the chain of command to the State Bar. All communication with the State Bar regarding complaints of unethical conduct by attorneys are to be prepared for the signature of the Chief Deputy, with an accompanying explanatory memorandum, and submitted through the chain of command for the Chief Deputy's approval and signature.

If a deputy chooses to report unethical conduct by an attorney directly to the State Bar, without the approval of the Chief Deputy, the deputy shall not use District Attorney stationery or letterhead and shall inform the State Bar that the deputy is acting on the deputy's own behalf and not on behalf of the Office.

If a deputy believes the misconduct of an attorney goes beyond conduct that is unethical and may be criminal, the deputy shall notify their Head Deputy or Deputy-in-Charge as provided in § 3.05 of this manual.

26.08 COMMUNICATION WITH JURORS

California Rules of Professional Conduct, Rule 3.5 (Contact with Judges, Officials, Employees, and Jurors), controls the conduct of all attorneys in their communication with jurors. Deputies shall comply with Rule 3.5.

> Rule 3.5. Contact with Jurors
>
> (A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.
> (B) During trial a member connected with the case shall not communicate directly or indirectly with any juror.
> (C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the member knows is a juror in the case.
> (D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.
> (E) A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.
> (F) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.
> (G) A member shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is a either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.
> (H) This rule does not prohibit a member from communicating with persons who are members of a venire or jurors as a part of the official proceedings.

(I) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

26.09 INCOMPATIBLE PUBLIC OFFICE

26.09.01 ELECTED DISTRICT ATTORNEY

The elected District Attorney may not simultaneously hold the office of District Attorney and another incompatible public office.

26.09.02 DEPUTY DISTRICT ATTORNEY

A deputy performs the duties of the District Attorney and under the law is one and the same person as the deputy's employer. Therefore, a deputy may not simultaneously hold a second public office incompatible with the duties of the District Attorney. A public official's mere acceptance of a second incompatible public office automatically terminates the authority of that official to hold the first public office as effectively as a resignation. (*People Ex. Rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 644.)

26.09.03 GOVERNMENT CODE §§ 1126 THROUGH 1128

Pursuant to Government Code §§ 1126 through 1128, a case-by-case review will be made to determine if the second public office is in fact incompatible with the first office (position of deputy district attorney).

26.09.04 NOTIFICATION TO THE CHIEF DEPUTY DISTRICT ATTORNEY

Any deputy who is considering seeking another public position, who has been offered another public position, or who currently holds another public position, shall promptly inform the Chief Deputy by memorandum so that a determination can be made whether such public position is a public office incompatible with a position as a deputy.

See also the "Political Activity" section of the Office's *Personnel Policies Handbook*.

26.10 PUBLICATION

26.10.01 ARTICLES WRITTEN DURING OFFICE HOURS

Whenever a deputy wishes to research and write an article, manuscript, book, etc., during office hours, prior written approval for the project must be secured from the Chief Deputy. The final content of a project written during office hours shall be reviewed by the Chief Deputy and becomes the property of the Office.

26.10.02 MATERIALS IDENTIFYING THE WRITER AS A DEPUTY DISTRICT ATTORNEY

Whenever a deputy submits for publication any article, manuscript, book, or treatise which identifies the author as a deputy district attorney, the Chief Deputy shall be advised.

26.10.03 USE OF DISTRICT ATTORNEY LETTERHEAD

District Attorney letterhead shall only be used for the official business of the Office. District Attorney letterhead shall not be used for personal matters or any other matter that is not the official business of the Office.

Commentary

Nothing contained in this policy is intended to discourage publication of articles, manuscripts, and treatises by deputies. In fact, the publication of such items is encouraged.

26.11 CASE CLOSING, FILE RETENTION, AND DIGITAL ARCHIVING

26.11.01 FELONY CASE CLOSING PROCEDURES

Head Deputies or Deputies-in-Charge shall review each completed case file to ensure that the deputy with responsibility for closing the case has properly organized the contents. After reviewing and signing the Disposition Report, the Head Deputy, Head Deputy's designee, or Deputy-in-Charge shall give the file to support staff for case closing.

Support staff shall review all closed files and:

- Ensure that all contents of each file are appropriately secured within the file; and
- Review and compare the sentencing information on the Disposition Report with the information contained in PIMS and TCIS:
  - enter strikes, priors and special allegation information manually into PIMS, and
  - notify the Head Deputy if there is a significant discrepancy between the information contained on the Disposition Report and that in PIMS and TCIS.

Support staff who have the responsibility for closing cases shall follow the procedures set forth in the *PIMS Adult Closing Procedures for Felony Case Filings and ACM Closing Report Function* manual. This manual can be found on the LADAnet under Library > Office Manuals > Closing Procedures > Case Closing Procedures - PIMS Adult.

Non-Scannable Materials

Deputies shall place photographs, audiotapes, DVDs, CDs or other loose items in a manila envelope with the case number, defendant's name and a description of the contents written on the outside, two-hole punched and secured in section H. At the time the case is prepared for scanning, Archives will remove and retain these items at the warehouse.

Voluminous Files

Support staff shall create felony case folders for all cases at the time of filing. Accordion folders and boxes may be used to supplement the standard file when necessary. While the case is pending, each felony case folder shall contain:

- Section A: Attorney Notes, Case Chronology, Statement of Facts, Disposition Report;
- Section B: Complaint, Information, Felony Filing Worksheets, Plea and Waiver Forms, Bail Computation Forms, and OR Report;
- Section C: Rap Sheets & Criminal History Information, Priors Worksheets;
- Section D: Police Warrant Worksheet;
- Section E: Master Witness List, Information Pleading Instructions; and
- Section F: Asset Forfeiture Documents.

At the time of closing a voluminous case, deputies shall organize documents into the appropriate section (A through H). Deputies shall place all documents into one or more accordion files or box(es), and place a hard copy of the relevant section divider page with the applicable bar code into the accordion file or box at the appropriate location.

When either accordion file(s) or box(es) are used for supplemental storage purposes, deputies shall remove the contents of the felony case folder and place the documents behind the appropriate section divider at the time of case closing. Deputies shall place the shell of the felony case folder at the front of the accordion file or box. Deputies shall remove and organize all documents contained in other storage systems (such as binders, manila folders, etc.) prior to giving the case to support staff for case closing. Archives will not accept documents in binders.

In addition, deputies shall examine the contents of any case file boxes prior to sending the case to Archives. Deputies shall remove any improper items such as personal items or trash. Archives will return any improper items to the sending office location.

Archives does not accept oversized items. Deputies shall return any charts or items created by the Trial Support Division to Trial Support.

Deputies shall return any item that was provided the Office by a law enforcement agency (other than audio/video evidence) to that agency. This includes items that may have been entered into evidence but later returned to the Office by the Superior Court. Archives will not accept evidence items and will return such items to the sending office.

26.11.02 FILE RETENTION POLICY

All misdemeanor case files shall be retained for a minimum of 5 years from the date the case is closed.

All felony case files shall be retained for a minimum of 25 years from the date the case is closed.

All felony case files in which a defendant was sentenced to life, life without parole or death shall be retained indefinitely.

26.11.03 DIGITAL ARCHIVING OF DOWNLOADED OR LOOSE DOCUMENTS

Downloaded Documents

When any portion of a digitally archived electronic case has been printed and no changes requiring retention have been made to the documents, do not send the downloaded case documents to Archives. In the event a downloaded document is modified and needs to be added to a previously scanned file, deputies shall complete the Digital Archiving for Loose Documents form, staple or affix the form to the documents and forward the documents to Archives for inclusion with the previously digitized case file. The form is available in LADAnet under Library > Other Publications > Informational Documents and Flyers > Digital Archiving Instructions for Loose Documents.

Loose Documents

Deputies shall not send loose documents (e.g., supplemental probation reports, demands for trial, post-conviction registration records) to Archives. Deputies shall request the file from Archives, insert any loose documents and return the file to Archives. In the event the case has been scanned, deputies shall complete the Digital Archiving for Loose Documents form, staple or affix the form to the documents and forward the documents to Archives for inclusion with the previously digitized case file. The form is available in LADAnet under Library > Other Publications > Informational Documents and Flyers > Digital Archiving Instructions for Loose Documents.

26.12 SERVICE OF PROCESS ON DISTRICT ATTORNEY PERSONNEL

26.12.01 CIVIL CASES

Office personnel are sometimes served with subpoenas, summons and complaints or other legal process in civil cases regarding events or transactions they perceived or investigated in the course of their official duties. The receipt and handling of these documents is managed by the Assistant District Attorney, Administration, through the Litigation Coordinator. Documents are logged and maintained in the Civil Subpoena Database. All such documents shall be served at District Attorney Headquarters: 211 West Temple Street, Los Angeles 90012. Process servers attempting to serve documents at any other location shall be informed that service is only accepted at District Attorney Headquarters.

The Assistant District Attorney or designee will review each matter and forward the matter to the proper Branch Office, Area Office, or Specialized Unit for a response or when appropriate, forward the subpoena to the Los Angeles County Counsel's Office. In unusual circumstances, County Counsel may represent the interests of the Office or Office employees.

When the County Is a Party

When a subpoena is received for an Office employee in a civil matter in which the county is a party, the party who issued the subpoena is not required to pay witness fees.

When the County Is Not a Party

When a subpoena is received for an Office employee in a civil matter in which the county is not a party, the party who issued the subpoena must reimburse the county for the full cost of the employee's salary or other compensation during the time that the employee prepares for the appearance, travels to and from the place of appearance, and remains in attendance at the place of appearance pursuant to the subpoena. The party who issued the subpoena must also reimburse the county for the actual, necessary and reasonable traveling expenses incurred by the employee in complying with the subpoena. (Gov. Code § 68096.1.)

The party who issued the subpoena shall, at the time the subpoena is served, tender witness fees in the amount of $275 for each day the employee is required to remain in attendance pursuant to the subpoena. If witness fees are demanded at the time the subpoena is served, but not tendered, the witness shall not be compelled to attend until the fees are paid. (Gov. Code § 68097.)

Any amount less than $275 should not be accepted, as acceptance could be deemed a waiver of the county's entitlement to the full amount. A check should be made payable to the Los Angeles County District Attorney's Office and forwarded to the office of the Assistant District Attorney, Administration.

If the actual expenses later prove to be less than the amount tendered, the excess amount shall be refunded by the county. If the actual expenses later prove to be more than the amount tendered, the difference shall be paid to the county by the party who issued the subpoena.

If an employee is required to attend a court proceeding or deposition beyond one day, the additional time should be reported to the office of the Assistant District Attorney, Administration.

Federal Subpoenas

The rules in federal court are different. If the civil case was filed in federal court, the party who served the subpoena shall, at the time the subpoena is served, tender witness fees in the amount of $40. Any amount less than $40 should not be accepted, as acceptance could constitute a waiver of the county's entitlement to the full sum. All other procedures for accepting and processing the subpoenas are the same as in state subpoenas.

Subpoenas for Documents

The fee for reproduction of documents for both state court and federal court is $15.

Cases of a Private Nature

Subpoenas, summons and complaints and other legal process are sometimes served upon personnel in civil matters of a private nature that do not relate to the employee's official duties. No employee of the Office is authorized to accept service of process on behalf of another employee in civil cases that do not relate to the employee's official duties.

26.12.02 CRIMINAL CASES

Case Prosecuted by the Office

Office personnel are sometimes served with subpoenas in criminal cases regarding events or transactions they perceived or investigated in the course of their official duties. If the subpoena relates to a case prosecuted by the Office, the subpoena need not be served at Office headquarters.

The employee served shall immediately notify the employee's supervisor. The supervisor shall promptly notify the Head Deputy or Deputy-in-Charge of the office or division that handled or is handling the case.

If the subpoena is served at District Attorney Headquarters, the subpoena will be forwarded to the named employee.

Cases Prosecuted by Another Office

If the subpoena does not relate to a case prosecuted by the Office, such as a federal or City Attorney case, the subpoena should be served at Office headquarters.

The Assistant District Attorney or designee will review each matter and, when appropriate, forward the subpoena to the Los Angeles County Counsel's Office. In unusual circumstances, County Counsel may represent the interests of the Office or its employees.

Except in unusual cases, such as out of county proceedings, all fees pursuant to Penal Code § 1329 shall be waived.

Cases of a Private Nature

Subpoenas are sometimes served upon Office personnel in criminal matters of a private nature that do not relate to the employee's official duties or a case being prosecuted by the Office. No Office employee is authorized to accept service of process on behalf of another employee in a criminal case of a private nature that does not relate to the employee's official duties.

26.13 USE OF CLETS

26.13.01 INTRODUCTION

The California Law Enforcement Telecommunications System (CLETS) provides access to a number of automated criminal records systems operated by the Department of Justice. Office personnel make hundreds of official CLETS inquiries on a daily basis.

The Bureau of Investigation regularly monitors all CLETS inquiries originating from access terminals within the Office. In addition, the Sheriff's Department monitors all CLETS inquiries. State officials conduct periodic and random audits at terminal sites in order to detect and discourage misuse of their systems.

All personnel are reminded that, besides being unlawful, unauthorized use of CLETS can result in disciplinary action against the individual abuser and interruption of continued access for the entire department. All personnel who are authorized to access CLETS should have their own personal access codes. Access codes shall not be shared. Any employee who shares an access code with another will be held responsible for all unauthorized or illegal transactions.

26.13.02 MANDATORY TRAINING

It is the responsibility of all city, county, state, and federal agencies that use information supplied via CLETS to participate in the Department of Justice (DOJ) training and certification programs. All Office personnel must be trained in CLETS operation, policies, and procedures. Training can only be provided by DOJ's training staff or the user agency's certified CLETS/NCIC trainers.

The Policies, Practices and Procedures (Section 1.8) of the California Law Enforcement Telecommunications System (CLETS) and the National Crime Information Center (NCIC) Operating Manual (Section 4) mandates the following requirements for CLETS/NCIC training:

- Initially (within six months of employment or assignment) train, functionally test, and affirm the proficiency of operators to ensure compliance with CLETS/NCIC policy and regulations.
- Provide functional retesting and reaffirm the proficiency of all access operators every two years in order to ensure compliance with CLETS/NCIC policies and regulations.

Personnel shall not operate CLETS equipment or access Criminal Offender Record Information (CORI) until a background investigation is completed and approved. Following approval of the background investigation, a memorandum or other notation should be placed in the employee's personnel file indicating that authorization has been granted to operate CLETS equipment and/or to access CORI.

26.13.03 SANCTIONS

A violation of the Government Code or Penal Code or CLETS/NCIC rules, regulations, or operating procedures may result in any of the following sanctions for the employee and/or the office depending on the circumstances of the incident:

- Criminal prosecution (PC §§ 13300 et seq.);
- Letter of censure/administrative sanctions;
- Suspension of CLETS service (may be for varying lengths of time and/or may include suspension of a specified database or other system services);
- Removal of CLETS service.

26.13.04 DEPARTMENTAL SECURITY PROCEDURES

Employees may apply for authorization to utilize one or more computer systems by completing a Computer Access Authorization Request form. Completed forms should be sent to the employee's Bureau Director for approval. Approved requests will be forwarded to the Systems Division and employees will be assigned a computer access code.

Any person who believes their computer access codes are being used by other persons should change the password immediately and contact the Systems Division.

All transactions or inquiries (CII, JAI, PHI, ACHS, NCIC, DMV, etc.) shall be recorded on a log sheet.

26.13.05 DEPARTMENT OF JUSTICE SECURITY PROCEDURES

The Department of Justice requires that criminal history inquiries from a Justice Data Interface Controller (JDIC) terminal or personal computers using JDIC IP Emulation be documented in the following manner:

> The operator must enter his or her name and justification for the inquiry into the field designated "Requesting Officer and File No. (or charge)." The work location shall be entered into the field designated "Unit." These fields are identical and should be treated in the same manner on both the Criminal History Numeric ID Inquiry (RAPS1) and the Criminal History Name Inquiry (RAPS) formats.

When the inquiry relates to a case already filed, the justification for the inquiry will be shown by entering the case number. If no case number exists, the justification will be shown by simply entering the penal code section being investigated or by entering the abbreviation "WIT" indicating that the subject of the inquiry is a witness.

<u>Inquiries from Outside Agencies</u>

From time to time, Office personnel are asked to make CLETS inquiries for persons outside the Office (e.g., an FBI agent) or individuals from outside agencies may seek to personally use an

Office terminal. A log of such transactions shall be maintained, clearly reflecting the name of the individual seeking the CLETS data and the person's department, office, or agency. This requirement applies to inquiries made from all terminals and personal computers.

Training Practices

It is clearly improper to make an inquiry using one's own name or the names of public officials, celebrities, relatives, or acquaintances simply out of curiosity or for training purposes. The real names of real defendants, suspects, or witnesses should always be utilized for training purposes.

Consequences of Misuse

It must be emphasized that any misuse of automated records systems is impermissible and could result in criminal charges, administrative sanctions, the loss of the use of these systems by the Office.

26.14 CONCEALED WEAPONS IN THE WORKPLACE

All employees, other than sworn peace officers within the Bureau of Investigation, who have the legal authority to carry a concealed weapon and intend to carry a weapon onto court property or into the Office are required to notify the Chief Deputy District Attorney. This includes CCW permit holders, retired peace officers with CCW privileges, and reserve peace officers.

Possession of weapons not issued by the department at the work site, without the written permission of the Chief Deputy District Attorney or designee, may constitute a violation of this policy which may subject the employee to disciplinary action. (Personnel Policies Handbook § 8.01.00.)

Accordingly, all employees, other than sworn peace officers within the Bureau of Investigation, who are legally authorized to carry a concealed weapon and intend to carry a weapon onto court property or into the Office shall complete and return a Confidential Notification of CCW Permit form to the Chief Deputy on an annual basis. A copy of the CCW permit or other documentation authorizing the carrying of a concealed weapon shall be returned with the completed form. The documents may be scanned and sent by email or county mail to the Special Assistant to the Chief Deputy District Attorney.

26.15 SOCIAL MEDIA POLICY

The Office's social media policy covers all use of social media sites or other means of electronic dissemination of information, including, but not limited to: posting by an individual user on an internet site; blogging; posting comments, photos, links to any website; and posting status updates, comments, or any sharing on social media sites.

The policy provides both standards and guidelines to Office employees, whether or not employees are posting under their own names or anonymously. Where no specific policy exists,

employees should exercise good judgment and, if necessary, consult with the employee's supervisor.

26.15.01 INTERNET USE

Prior to logging onto the County Internet, all Office employees shall accept an online acknowledgment, certifying compliance with the County's Internet policy. The policy states: "County information technology resources, including Internet access, are established to be used for County business purposes." (Board of Supervisors Policy (BOSP) #6.105 (emphasis added); BOSP #6.101, Personnel Policies Handbook (PPH) 7.05.00-7.05.01.) Use of County internet and computers to post on social media sites or for any other private use is inconsistent with the intent behind the above policies. Note that internet usage is monitored and logged.

26.15.02 USE OF SOCIAL MEDIA SITES

Employees may not reveal confidential information, including information regarding any criminal case or law enforcement investigation on either closed or open cases on any social media site or by mass dissemination via any means of electronic distribution (e.g., Twitter).

A. Be conscious of an online identity.

Office employees are free to express opinions as individuals on matters of public interest. This includes posting an opinion on a social media site. However, if the posting identifies the employee as a member of the Office on a matter related to the Office, the employee must include a statement that the employee is speaking as an individual. (See PPH 7.16.00.)

Office employees may not use official badges, identification, business cards or other items bearing the seals of Los Angeles County or the District Attorney's Office for purposes other than the employees' official duties. (See PPH 7.04.00; LPM § 26.10.02.) This includes the use of these images and symbols on any social networking sites.

Office employees should be aware that "friending" or "following" witnesses, bench officers, victims or jurors may violate ethical rules. (See CA Rules of Prof. Conduct, Rules 4.2 (Communication with a Represented Person), 3.5(a) - (c) (ex parte contact with judges); CA Rules of Prof. Conduct, Rules 3.5(a), (g) - (l) (contact with jurors); LPM § 26.08.)

B. Be respectful.

Office employees are required to maintain respect for courts of justice and judicial officers, even when posting on social media sites. (Bus. & Prof. Code § 6068(b).) Office employees must also take care when posting comments about other parties in the criminal justice system, including defense attorneys, bench officers and law enforcement agencies. Office employees must treat witnesses and parties with courtesy and respect, even during non-working hours. (See PPH 7.15.00; Bus. & Prof. Code § 6068(b); LPM § 24.01; See also PPH 13.05.00, 8.00.00.)

Employees are required to complete an acknowledgement of the Los Angeles County Policy of Equity which prohibits "discrimination, unlawful harassment, retaliation, and inappropriate conduct toward others based on a protected status in the work place or in other work-related settings." Postings to blogs, websites, etc., under certain circumstances, may constitute a violation of the Policy of Equity and may subject the employee to discipline. All Office employees are bound by the Policy of Equity. (See Personnel Policies Memorandum 11-04.)

C. Keep confidential information confidential.

Office employees may not reveal confidential information, including information regarding any criminal case or law enforcement investigation on either closed or open cases on any social media site or by mass dissemination via any means of electronic distribution (e.g., Twitter). (PPH 7.12.00, Bus. & Prof. Code § 6068(e).)

Caution should be exercised when using Wi-Fi without an office-issued VPN (Virtual Private Network) at a library, coffee shop, or even in the courthouse. These networks may not be secure and your information could be subject to interception.

Digital communication (e-mail, text messages, etc.) between employees and witnesses, including victims and investigators, is always retrievable and may be subject to discovery through Penal Code § 1054 et seq. and/or a Public Records Act request. Such communication should be limited to matters concerning scheduling and other logistics, rather than substantive, case-related conversations.

D. Remember rules regarding pretrial publicity.

Office employees are obligated to follow State Bar rules regarding pretrial publicity when posting on social media sites. (See CA Rules of Prof. Conduct, Rule 3.6 (Trial Publicity); Media Relations Policy; LPM § 25.03; See also PPH 13.05.00, 8.00.00 [employees may be disciplined for not complying with California Rules of Professional Conduct].)

Office employees subject to a "gag order" from the court may not post anything regarding that specific case on the internet while the order is in effect. Failure to adhere to the provisions of the "gag order" may lead to sanctions by the court and discipline by the Office. Note that gag orders typically extend to all employees of the Office.

E. Deputies must investigate ethically.

Social media sites may provide valuable information to deputies during the investigation or pendency of their cases. However, deputies must not violate ethical standards in their use of social media for investigative purposes. Deputies are not permitted to use a ruse or false profile to "friend" a potential defense witness, defendant, or juror. (See the Sixth and Fourth Amendments of the United States Constitution; San Diego County Bar Assoc. Legal Ethics Opinion 2011-2 [interpreting California Rule of Professional Conduct 2-100, which has since been renumbered to Rule 4.2 (Communication with a Represented Person)]; *Office of Lawyer*

Regulation v. Hurley (2/11/2009) 2007AP478-D (Supreme Court of Wisconsin); *In the Matter of Paulter* (Colo. 2002) 47 P.3d 1175 [prosecutor impersonating a deputy public defender]; NY State Bar Assoc. Comm. on Professional Ethics 402 (1975).)

26.15.03 SOCIAL MEDIA BEST PRACTICES

The following are suggested best practices for use of social media sites by Office employees:

- Ensure that privacy settings are as restrictive as possible. Review these settings regularly, as social media sites are continuously evolving their user account default security settings.
- Enable HTTPS (Hypertext Transfer Protocol Secure). HTTPS provides authentication between the web site and the web server and encryption of communications. Activating HTTPS enables secure browsing and minimize the possibility of an account from being compromised. Most social media sites and major personal e-mail services have a setting under Account Security/Secure Browsing.
- An employee should use caution when identifying as a District Attorney employee on a social networking site.
- Regularly screen postings to blog or social media sites to make sure that there are no postings that would cause embarrassment anyone, including co-workers, or place an employee in danger.
- Always consider the possibility that information posted on the internet may become accessible to unintended viewers.
- Remember that members of the defense and media increasingly use the internet to investigate the personal lives of adverse parties and witnesses, including prosecuting attorneys.
- All employees should assume their speech and related activities on social media sites will reflect upon the Office.
- Remember that content posted on the internet is public and permanent.
- Use common sense before posting information about promotional exams, transfers, personnel issues, and other office-related subjects.
- When in doubt, seek guidance from a supervisor.

26.16 REPORTING JOB RELATED THREATS

Any employee who receives a threat while at work, or becomes aware of a job-related threat against any Office employee, shall immediately notify the Head Deputy or Deputy-in-Charge. As soon thereafter as possible, the employee shall notify the Supervising Investigator of the Bureau of Investigation's Operations Division by calling the Command Center at (213) 974-3607. The employee shall also notify the Supervising District Attorney Investigator and any District Attorney Investigators assigned to the office or unit.

An employee who receives a job-related threat while at home or away from work shall immediately notify both the local law enforcement agency and the Bureau of Investigation's Command Center at (213) 974-3607. The Command Center will notify the on-duty Captain who will take whatever action is appropriate and necessary to ensure the safety of Office employees.

An employee who receives or becomes aware of a threat to any other member of the justice system including victims, witnesses, law enforcement officers, judges or defense attorneys, shall immediately notify the Head Deputy or Deputy-in-Charge. As soon thereafter as possible, the employee shall notify the Supervising Investigator of the Operations Division. The Bureau of Investigation will determine the appropriate course of action and notify the appropriate parties and agencies involved.

26.17 CRIMINAL CASE INFORMATION SECURITY

The daily flow of confidential information is critical for the Office to operate successfully. Any policy on the disclosure of information must balance the need for security and the need for the efficient exchange of information within the Office, from the Office to law enforcement agencies, and to members of the public. Information on criminal cases being handled by the Office shall be disclosed, over the telephone, only as follows:

- If the caller is a deputy district attorney, member of law enforcement, or probation officer personally known to the employee possessing the requested information, and the caller has a need to know the information, the information should be disclosed;
- If the caller is not personally known to the employee possessing the requested information, and claims to be a deputy district attorney, member of law enforcement, or probation officer, the employee possessing the information must request and receive a callback verification number from the caller. If the number is verified, and there is a need to know the information, the information should be disclosed;
- If the caller is seeking information which is generally available to the public (e.g., time and location of a court appearance), that information should be given;
- Under no circumstances should the names, addresses or telephone numbers of witnesses be disclosed over the telephone; and
- Detailed information or prosecution strategy on a case should never be discussed over the telephone. Only the bare minimum facts, on a verified need-to-know basis, should be disclosed telephonically.

26.17.01 FILE NOTATIONS

Any employee who, in compliance with these guidelines, telephonically discloses information of a non-public nature must make a notation of what was disclosed and to whom it was disclosed. This notation should be placed in the case file or, if the file is not accessible, sent in written form to the deputy handling the case.

If an employee has any doubt about the identity of the caller, the validity of the call-back number, or whether the caller has a need to know, the employee should immediately contact the Assistant Chief of the Bureau of Investigation.

Commentary

It is essential that all employees prevent breaches of office security through the inadvertent disclosure of confidential information to persons not authorized to receive such information. Strict compliance with this policy should ensure that such breaches do not occur.

26.18 APPOINTMENT OF EXPERT WITNESSES

26.18.01 EXPERT APPOINTMENT AND EXPENSE REQUEST FORM, AND EXPERT WITNESS AGREEMENT FORM

All deputies shall obtain prior written approval from the Head Deputy for the appointment of an expert by completing an "Expert Appointment and Expense Request" form. The maximum authorized fee for services shall be fixed at the time the expert is engaged and the expert must complete the "Expert Witness Agreement" form. These forms are available in the "DA Forms" Lotus notes database.

If the total maximum authorized fee, excluding travel expenses, exceeds $5,000, prior written approval of the Bureau Director also is required. Travel, meal and hotel expenses shall be reimbursed in accordance with the travel expense reimbursement rates set forth in the attachment to SD 01-08.

The expert's fee rate shall not exceed the rates set forth in the "Expert Fee Schedule" attachment to SD 01-08 unless sufficient justification is shown for the deviation and prior written approval is obtained from the Head Deputy and the Bureau Director. While the case is pending, if the assigned deputy and expert agree that the original maximum authorized fee is insufficient, additional request and agreement forms must be completed and approved.

Experts may be retained to assist in the investigation of a pending case, to analyze defense evidence, or to testify in the prosecution's case-in-chief, rebuttal, penalty phase or sentencing hearing. The use of experts in pre-filing investigation is not subject to this protocol. Deputies shall continue to use the "District Attorney Expense Request" form to obtain authorization to use expert witnesses for pre-filing investigation. This form is available in the "DA Forms" Lotus notes database.

26.19 APPROVAL OF EXPERT WITNESS REQUESTS

The Head Deputy shall carefully review the facts of the case and the need for the assistance of an expert witness. Authorization shall be granted if all of the following circumstances apply:

1. The expert is necessary to the investigation and/or successful prosecution of the case, consistent with the ends of justice.
2. There is no percipient witness available to provide similar expert testimony, e.g., an emergency room physician who conducted the initial examination.
3. There is no employee of a public agency who could provide the requisite level of expertise.
4. The requested expert is qualified to conduct the investigation or to provide the anticipated testimony.
5. The expert's anticipated testimony is expected to be admissible under existing rules of evidence, e.g., *Kelly/Frye*.

The Head Deputy shall immediately notify the Bureau Director if an expert fails to comply with the requirements of this policy.

The requesting deputy shall notify opposing counsel, as soon as possible, if the information received from the expert is exculpatory, consistent with established prosecutorial "*Brady*" obligations.

The Head Deputy is responsible for maintaining all "Expert Appointment and Expense Request" forms and "Expert Witness Agreement" forms pending completion of the expert's services and receipt of a final invoice. After the services of an approved expert have been rendered, the deputy shall submit the Expert Appointment Form, along with an invoice from the expert detailing the services provided, to the Bureau of Administrative Services for the processing of payment.

26.19.01 PACE MANAGEMENT FORMS

PACE Management forms ("PACE forms") are reserved for experts retained or appointed for the benefit of defendants, as well as for experts appointed by the court for its own benefit ("court-needed experts"). PACE forms are not the appropriate means of requesting compensation for expert witnesses who are either retained or appointed at the request of Office to support the prosecution of a case. Experts retained or appointed at the request of the Office should not use PACE forms or otherwise seek compensation directly from the court.

Because PACE forms are used by court-needed experts seeking compensation through the court, it is important to distinguish between an Office-retained expert and a court-needed expert. Generally, Office-retained experts are called to testify as to pertinent subject matters in the prosecution of a case or are retained to advise and assist the Office in the litigation of issues or cases. In contrast, court-needed experts are appointed to assist the court in the performance of a judicial function.

In 2004, the California Attorney General issued an opinion identifying five specific evaluations performed by experts acting as court-needed experts:

1. The appropriateness of a suspended sentence for a defendant convicted of lewd or lascivious conduct on a child. (PC § 288.1.)
2. A defendant's mental competence in a criminal proceeding. (PC § 1368.)
3. Involuntary commitment of a felony-convicted defendant as a narcotics addict (WIC § 3051.)
4. Involuntary commitment of a narcotics addict when no criminal proceedings are pending (WIC § 3100.)
5. Involuntary commitment for dangerousness to others (WIC §§ 5150, 5250, and 5300.) (87 Ops.Cal.Atty.Gen. 62, pp. 2-5.)

If an expert is appointed by the court to perform any of these five evaluations for the benefit of the court, compensation should be sought from the court using a PACE form. However, when an expert has been appointed to conduct one of these five evaluations, but that expert was appointed

the request of the Office in order to assist the Office in litigating the issues surrounding the evaluations (as opposed to simply providing an evaluation report to the court) an "Expert Appointment and Expense Request" form shall be used to secure compensation for the expert.

By statute, experts appointed for sanity evaluations conducted as a part of a plea of insanity are not compensated as court-needed experts. (PC § 1027 (a).) Experts appointed by the Office to evaluate a defendant for purposes of a plea of insanity should be approved and compensated by completing the appropriate Office forms.

26.20 E-FOLDER

eFolder is the first step toward electronic filing and exchange of discovery as it provides a digital repository where police reports and other documents may be housed and reviewed county-wide. Deputies are immediately able to identify helpful information about other cases which have been filed or declined, including the existence of other evidence that may be admissible pursuant to Evidence Code §§ 1101(b), 1108, and 1109. Case materials, such as motions, photographs, transcripts, and law enforcement reports, may also be uploaded into eFolder allowing deputies throughout the Office to review documents quickly and securely.

PIMS-created documents are regularly uploaded into eFolder overnight. By selecting to "Expedite Documents" under the Case Folder drop-down menu, the documents will be uploaded into eFolder within 30 minutes.

Unless a case is restricted, eFolder will allow electronically-created declinations and felony statements of facts, in addition to other electronically-created or uploaded information, to be viewed throughout the Office. Deputies are cautioned to take care when uploading images of a sensitive nature into eFolder. Evidence such as child pornography images or sexual assault examination photographs should never be uploaded into eFolder. Like PIMS, eFolder usage logs will be maintained and will record the identifying information of each person who views, uploads or downloads case materials. Please consult with your Head Deputy or Deputy-in-Charge for guidance regarding whether or not to upload sensitive materials into eFolder or whether to restrict access to the materials in a particular case.

As with PIMS, restricted cases in eFolder may not be viewed unless a deputy or staff member is a member of the "team" assigned to prosecute the case. The restricted status of the case will be indicated on the eFolder page. Deputies who require access to a restricted eFolder will need to contact a member of the team for authorization. In addition, certain documents, privileged materials or sensitive images may be restricted to a specific folder (Z Folder) within the eFolder. Deputies must request that they be added to the team in order to view the restricted items.

26.21 PC § 26206 CHALLENGES TO DENIALS OF CONCEALED CARRY LICENSES

Effective January 1, 2024, Penal Code § 26206 provides the right for persons denied a license or license renewal to carry a concealed weapon to challenge that denial through a petition to the

court. All petitions filed in Los Angeles County pursuant to the above section are heard in Department 50 in the Clara Shortridge Foltz Criminal Justice Center.

The People of the State of California are represented by LADA in these proceedings. The law enforcement agency that denied the request must file any records or reports on which it relied in making its decision with the court, or a declaration summarizing the relevant information, within 14 days of being notified by the court clerk of the request for a hearing. At the hearing, the People have the burden of showing by a preponderance of the evident that applicant is a disqualified person under Penal Code § 26202.

All Penal Code § 26206 petitions and related filings should be emailed to the Head Deputy or Assistant Head Deputy of the Preliminary Hearing Division (PHD) for assignment to the Department 50 Calendar Deputy.

Inquiries regarding these petitions, including questions from law enforcement agencies, should be directed to the Head Deputy or Assistant Head Deputy of PHD.

26.22 GENERATIVE ARTIFICIAL INTELLIGENCE POLICY

26.22.01 DEFINITIONS

Generative Artificial Intelligence (GenAI)

Generative AI is a subset of AI that focuses on systems capable of generating new content, such as text, images, code, or audio, based on patterns learned from large datasets. Examples include text generation tools like Microsoft Copilot and image generation models. These systems can produce creative content, assist in decision making, and automate certain tasks but require human oversight to ensure accuracy and appropriateness.

Large Language Model (LLM)

LLMs are a specific type of GenAI model that has been trained on vast amounts of text data to understand and generate human-like language. These models, like GPT (Generative Pre-trained Transformer), are capable of processing, interpreting, and generating natural language responses. LLMs are used in various applications, including chatbots, document generation, and content summarization.

Hallucinations

In the context of GenAI, hallucinations occur when an AI system generates inaccurate, misleading, or entirely fabricated content that may appear plausible but is not factually correct. These errors can arise from the model's inability to accurately process or retrieve information. Hallucinations can pose risks in business settings if not properly reviewed and corrected by humans.

26.22.02 DATA SECURITY AND PRIVACY

Only GenAI tools that have been vetted and approved by the LADA Chief Information Officer (CIO) may be used within the District Attorney. Approved tools will offer enterprise-grade security and compliance measures, ensuring data privacy, and protection while integrating seamlessly into existing systems. These tools are customized for specific business needs and adhere to all relevant regulatory standards, including HIPAA, GDPR, and CJIS.

The use of public GenAI tools (e.g., ChatGPT, Grammarly, Copilot for the web) is prohibited for processing sensitive, confidential, or regulated data. These tools may not provide the necessary security, and data processed by such platforms could be stored, shared, or retained in ways that compromise confidentiality. Public AI tools do not guarantee compliance with industry-specific regulations like HIPAA, CJIS, or GDPR, and their data retention policies are often unclear.

26.22.03 CONFIDENTIAL DATA

No sensitive information, including Personally Identifiable Information (PII), Criminal Justice Information (CJI), or Protected Health Information (PHI), should be input/uploaded into AI systems that have not been explicitly approved for handling such data.

LADA employees must not upload internal and confidential case information into GenAI programs that are not approved by the LADA CIO. Commercially available public tools such as ChatGPT and Grammarly may use consumer data to train their algorithm. Confidential information provided to these tools may be vulnerable to a cyberattack. Breaches in privacy could pose a serious threat to the security of confidential information. As outlined in the Technological Directive (TD) 24-04 established by LA County's GenAI Governance Board, privacy is a crucial guiding principle in GenAI policies to not only ensure public safety but also develop trust in GenAI. (See TD 24-04.)

In addition, the uploading of a defendant's criminal history information into non-approved GenAI programs may potentially violate rules governing the use of such confidential information. (See LPM § 26.13 Use of CLETS)

26.22.04 ACCOUNTABILITY

GenAI tools should complement, not replace, human judgment. Human oversight is necessary as a safeguard to potential erroneous information provided by AI-assisted research. Deputies must be vigilant to check all legal authorities submitted to the court to prevent the presentation of hallucinations as fact. A hallucination is a false or misinformed response generated by GenAI models due to limitations in data. Hallucinations include the citation of cases that are fictional, quotations with no citation, or misrepresented facts.

As the large language models (LLMs) powering GenAI are still learning, there is no guarantee that any program is free from hallucinations. In his 2023 Year-End Report on the Federal Judiciary, Chief Justice Roberts noted the dangers of hallucinations, urging lawyers to have "caution and humility" while using AI. Hallucinations can lead to severe ethical consequences in

legal work, and it is important to emphasize the importance of human oversight when working with GenAI.

This directive aligns with California State Bar's Guide for GenAI use. All deputies and paralegals using AI-assisted research tools must carefully review AI outputs, especially when conducting critical tasks like legal research, document drafting, and case analyses. This includes limiting usage to GenAI programs that provide citations, which can be verified. (See Rules Prof. Conduct, rule 3.3(a)(1)).

26.22.05 ETHICAL CONSIDERATIONS FOR USE OF GENAI

Employees must actively assess GenAI-generated content for bias or unfair representations, especially in sensitive legal contexts. GenAI tools may inadvertently produce outputs that reflect biases present in training data. All users are responsible for reviewing GenAI outputs to ensure they are fair, equitable, and in compliance with anti-discrimination laws and ethical standards.

Employees must be aware that the integration of GenAI tools does not exempt them from ethical responsibilities, including adherence to confidentiality, accuracy, and professional conduct standards

26.22.06 GENAI PROFICIENCY

While employees are encouraged to explore leveraging GenAI technologies in their work, all employees who wish to use LADA-approved GenAI programs should have a foundational understanding of AI and its ethical implications.

26.22.07 LIMITS ON THE USE OF GENAI

GenAI tools are designed to assist with tasks such as legal research, drafting documents, and summarizing information. However, final decisions, legal judgments, and any actions that could impact the legal standing of a case or an individual's rights must be made by human professionals, not AI systems.

GenAI-generated recommendations or outputs must be reviewed and validated by employees before they are submitted, presented, or acted upon.

GenAI tools may not be used to automate any decision-making processes that could lead to material consequences, including but not limited to hiring, firing, legal prosecution decisions, or determinations of innocence or guilt.

GenAI is not to be used to bypass or automate ethical duties such as due diligence, client communication, or the exercise of professional judgment. Employees must continue to fulfill these responsibilities independently of GenAI tools.

The use of GenAI does not absolve employees of legal and ethical obligations, including accountability for the content they produce or decisions they make based on GenAI assistance.

CHAPTER 27

PERKINS OPERATIONS

27.01 MISSION STATEMENT/PURPOSE

A properly conducted *Perkins* Operation is a vital investigative tool that can yield valuable information, both inculpatory and exculpatory, without compromising the constitutional rights of a target. The purpose of this *Perkins* protocol is to establish uniform procedures for the appropriate use of this investigative technique, to safeguard the constitutional rights of all defendants, to ensure the safety of all parties involved in the operation, and to promote the ethical and fair prosecution of criminal cases. In order to optimize the use of limited resources and minimize security concerns, except in unusual situations, *Perkins* Operations should only be used in homicide cases.

27.02 DEFINITIONS

Perkins Operation: Undercover operation based on the United States Supreme Court case of *Illinois v. Perkins* (1990) 496 US 292. In a *Perkins* Operation, an undercover officer or *Perkins* Agent is fitted with a recording device, or enters a recorded environment, and engages a target in conversation at the request of law enforcement in an attempt to gain information regarding criminal activity.

Perkins Agent (PA): Individual working at the request of law enforcement who is placed in proximity to a target in order to obtain information. The PA engages in conduct or conversation with the target in an attempt to obtain information. A PA can be either a non-law enforcement individual (Civilian PA) or an Undercover Officer (UCO).

Undercover Officer (UCO): Law enforcement officer who is placed in proximity to a target in order to obtain information. The target must be unaware that the UCO is a law enforcement officer. The UCO engages in conduct or conversation with the target in an attempt to obtain information.

Listening Post: A *Perkins* Operation differs from a "listening post" situation in which the agent simply listens to what is said but does not attempt to engage the target in a conversation to gain information. A *Perkins* Operation also differs from a jailhouse informant situation as defined below. Different rules apply to *Perkins* Operations, "listening post" situations, and jailhouse informants.

Jailhouse Informant: A jailhouse informant is a person in custody who receives a communication from another person in custody about a crime committed by the latter and who chooses to convey this information to authorities. A jailhouse informant differs from a PA in several significant respects: Whereas a jailhouse informant is always in custody, a PA may not be in custody; any operation involving a PA is instigated by law enforcement; the PA always works at the request of law enforcement; and conversations between a PA and a target are recorded. Further, a PA is not an in-custody informant or "jailhouse informant" within the

meaning of Penal Code § 1127a and is not subject to the provisions of Penal Code §§ 1127a, 1111.5, or 4001.1, based on the purpose and legislative history of those sections. The reliability concerns inherent in a jailhouse informant situation are therefore virtually nonexistent in a *Perkins* Operation. (See LPM Chapter 19 for the Jailhouse Informant policy.)

Consideration: Any benefit received by, or promised to, a PA, directly or indirectly, in exchange for work in a *Perkins* Operation, including but not limited to money, security-related expenses, leniency in any case, and any special benefits while in custody.

Corroboration: Any evidence that supports the information obtained by the PA during the *Perkins* Operation.

Handling DDA: Deputy District Attorney assigned to the case after filing. This may be the filing deputy if the case is filed in a special unit, a calendar deputy, or the trial deputy.

Perkins Coordinator: Assistant Head Deputy specifically assigned to compile and maintain all *Perkins*-related information, including motions, discovery packets, and any other confidential information related to the PAs. The *Perkins* Coordinator also acts as a liaison with the PA's law enforcement handler, provides training to deputies and other law enforcement personnel, handles referrals from Head Deputies on *Perkins* issues, refers issues to the *Perkins* Committee, and answers questions from prosecutors or other law enforcement officers related to legal or practical issues in *Perkins* Operations. The *Perkins* Coordinator also supervises the *Perkins* Paralegal team (PerkinsCoordinator@da.lacounty.gov).

Perkins Committee: A three-person committee consisting of the *Perkins* Coordinator, the Head Deputy of the Gang Homicide Division, and the Director of Specialized Prosecutions. The *Perkins* Committee is responsible for authorizing the handling deputy's request to use the PA as a witness at *any* hearing and approving any substantial deviations from this protocol.

27.03 FILING PROCEDURES

When reviewing a case for filing, the filing deputy shall inquire of the law enforcement officer if a *Perkins* Operation was conducted. If a *Perkins* Operation was conducted, the filing deputy shall make a notation in either the Statement of Facts or Attorney Notes.

Except in extraordinary circumstances, if insufficient evidence exists to file the case without the *Perkins* statement, the filing deputy shall listen to the *Perkins* recording before filing the case. If sufficient evidence exists to file the case without the *Perkins* statement, the filing deputy does not need to listen to the recording. The filing deputy does not need to listen to the entire recording; the filing deputy need only listen to the incriminating statement(s) of the suspect(s). Further, a filing based only on a *Perkins* statement, without corroboration, requires *Perkins* Coordinator approval.

Whenever a case involving a *Perkins* Operation is presented for filing, the filing deputy shall immediately complete a Perkins Filing Checklist and email a copy to the *Perkins* Coordinator (PerkinsCoordinator@da.lacounty.gov). The *Perkins* Filing Checklist shall be completed and

emailed to the *Perkins* Coordinator whether or not the case is filed. Similarly, law enforcement officers shall notify the *Perkins* Coordinator whenever they conduct a *Perkins* Operation, even when a case is not presented for filing (see Perkins Operations Recommendations for Law Enforcement).

Due to the security considerations inherent in any *Perkins* Operation, the filing officer shall **not** disclose the identity of the *Perkins* Agent to the filing deputy or the handling deputy. The filing deputy, however, shall instruct the filing officer to immediately contact the *Perkins* Coordinator to provide the identity of the *Perkins* Agent to the *Perkins* Coordinator (see *Perkins* Operation Tracking Checklist). This will ensure compliance with the obligations set forth in Penal Code §§ 1054 et seq. and *Brady v. Maryland* (1963) 373 US 83.

If the *Perkins* Operation is not disclosed in the reports provided at the time of filing, the filing deputy shall instruct the investigating officer to prepare a supplemental report detailing, at a minimum, that a *Perkins* Operation was conducted, the date and general location of the operation, and a summary of the *Perkins* statement. The investigating officer shall provide this supplemental report and a copy of the recording of the *Perkins* statement to the handling deputy. The handling deputy is responsible for providing this supplemental report and recording to the defense in accordance with Penal Code §§ 1054 et seq. and *Brady v. Maryland*. Any statement of a defendant made during a *Perkins* Operation must be provided to the defense.

If the *Perkins* Operation was conducted post-arraignment or post-indictment, it may violate *Massiah v. U.S.* (1964) 377 US 201. The statement, and any information obtained as a result of the statement, may therefore be inadmissible as to the crime on which the defendant has been arraigned or indicted. Any such operation shall be immediately reported to the *Perkins* Coordinator.

Due to safety considerations, any *Perkins* discovery provided to the filing deputy should not be included in the original defense discovery packet. This discovery shall first be reviewed by the handling deputy for any safety or security issues and shall be provided to the defense by the handling deputy in accordance with Penal Code §§ 1054 et seq. and *Brady v. Maryland*.

27.04 GENERAL PROCEDURES

Due to safety and security considerations, the handling deputy should not call the PA as a witness. In a standard *Perkins* Operation, the PA will not need to testify because the investigating officer or PA handler can lay the foundation for the recorded conversation between the PA and the target.

Before the handling deputy may use the PA as a witness, the handling deputy shall obtain prior written approval from the *Perkins* Committee. All requests to use a PA as a witness must be submitted in writing. Approval by the *Perkins* Committee is required before the PA can be called to testify at *any* hearing.

Because of the inherent reliability of the *Perkins* information, including but not limited to the fact that the operation was recorded, PAs are not jailhouse informants and do not fall within the

requirements of Legal Policies Manual Chapter 19. Moreover, a PA is not an in-custody informant within the meaning of Penal Code § 1127a and is not subject to the provisions of Penal Code §§ 1111.5, 1127a, or 4001.1, based on the purpose and legislative history of those sections. Sample motions on these issues can be obtained from the *Perkins* Coordinator.

A *Perkins* Operation conducted after the filing of the complaint shall be referred by the handling deputy through the *Perkins* Coordinator to the *Perkins* Committee before the *Perkins* statement can be used.

The handling deputy and law enforcement shall be cautious when considering the use of a *Perkins* Operation when the target is a juvenile. In the rare event that a *Perkins* Operation is utilized with a juvenile target, law enforcement should use a UCO (and not a civilian PA), the operation should be videotaped, and all reasonable efforts to avoid even the appearance of coercion or intimidation should be employed. Handling deputies and law enforcement must also be mindful of Penal Code § 859.5 and Welfare and Institution Code § 625.7.

The handling deputy shall insist that all motions by the defense related to *Perkins* Operations be noticed in writing and shall submit written Points and Authorities in response. The *Perkins* Coordinator can provide sample briefs on common *Perkins* issues.

If a defense attorney requests the name of a PA for a conflict check, the request shall be referred to the *Perkins* Coordinator for assistance.

27.05 DISCOVERY

The handling deputy is responsible for providing discovery in accordance with Penal Code §§ 1054 et seq. and *Brady v. Maryland*.

Due to safety and security considerations, the handling deputy shall listen to the *Perkins* recording before providing the recording to the defense. If there are concerns regarding safety issues, the quality of the recording, *Brady* issues, or if the recording contains confidential or privileged information, the handling deputy shall immediately notify the *Perkins* Coordinator.

The handling deputy shall inform the *Perkins* Coordinator whenever the defense is seeking the identity of the PA to ensure that the appropriate opposition motion is filed. The name of the PA shall only be disclosed if required by Penal Code §§ 1054 et seq., *Brady v. Maryland*, or court order. If the PA is not called as a witness, disclosure of the identity of the PA is not required under Penal Code § 1054.1, and the handling deputy need only provide the recording of the *Perkins* Operation to the defense. If the court orders disclosure of the PA's identity over the handling deputy's objection, the handling deputy shall consider requesting a brief continuance to consult with their Head Deputy and the *Perkins* Coordinator.

The handling deputy shall not disclose any identifying information of a PA without express authorization from the *Perkins* Coordinator. The handling deputy shall not write the name of the PA in the DA file or in any report. All references to the identity of the PA shall be subject to a protective order.

If the PA is to be called as a witness at any hearing, after approval for the testimony is obtained from the *Perkins* Committee, the handling deputy shall contact the *Perkins* Coordinator for the discovery packet. The discovery packet will include the name and DOB of the PA; transcripts of prior testimony; any pending cases or cases in which the PA is subject to probation or parole; any felony convictions or crimes of moral turpitude; any consideration, plea agreements, or letters of consideration; and any other evidence required by Penal Code §§ 1054 et seq. or *Brady v. Maryland*. To ensure the safety of the PA, the discovery packet shall only be disclosed with a protective order and shall be Bates-stamped and watermarked.

Recordings of *Perkins* Operations conducted by the PA in other filed cases in Los Angeles County are available for the defense to review upon request. The recordings will not be copied due to safety considerations.

The handling deputy shall immediately inform the *Perkins* Coordinator of any *Brady* evidence related to a *Perkins* Operation.

27.06 VIDEO POLICY

The handling deputy must determine if a video of the *Perkins* Operation exists. If such a video exists, the handling deputy must notify the defense in writing. If a video exists, the video must be provided directly to the *Perkins* Coordinator by law enforcement. The handling deputy must never have an unredacted copy of the video. If any such unredacted copy is in the possession of the handling deputy or in the case file, it must be immediately turned over to the *Perkins* Coordinator. If the video also contains the audio of the *Perkins* Operation, the audio only will be provided to the handling deputy by the *Perkins* Coordinator to be turned over in accordance with Penal Code § 1054.

The handling deputy must review a redacted copy of the video by making an appointment with the *Perkins* Paralegal. If the video shows any potential *Brady* evidence, the handling deputy must immediately notify the *Perkins* Coordinator.

The handling deputy must oppose any request by the defense seeking review or disclosure of the video. The video content may only be disclosed if required by Penal Code § 1054 et seq., *Brady v. Maryland,* or court order. A video of the *Perkins* Operation is generally not a statement of the defendant; therefore, disclosure is not required under Penal Code § 1054.1, and the handling deputy need only provide notice of the existence of the video to the defense.

A redacted copy of the video may be used by the handling deputy in the prosecution of the case as a last resort and only with prior written approval of the *Perkins* Coordinator.

If the redacted *Perkins* video is to be used at any hearing, the handling deputy must request a copy of the redacted video in writing to the *Perkins* Coordinator via email to PerkinsCoordinator@da.lacounty.gov. If the court orders production of the video over the handling deputy's objection, the handling deputy must request a brief continuance to consult with their Head Deputy and the *Perkins* Coordinator. A redacted copy of the video must only be turned over as a last resort. In the event the court orders an unredacted copy of the video to be

turned over to the defense, the handling deputy must immediately notify the *Perkins* Coordinator and their Head Deputy before any further action is taken.

27.07 CONCLUSION

A properly conducted *Perkins* Operation is a vital investigative tool that can yield valuable information without compromising the constitutional rights of a suspect or a defendant. There is a critical need for consistency in the handling of *Perkins* Operations; the integrity of this Office and the integrity of our system of justice depends on it. The goal of this *Perkins* protocol is to provide consistency and transparency in the procedures used while ensuring the safety and security of all parties involved.

CHAPTER 28

MENTAL HEALTH DIVERSION AND ALTERNATIVE DISPOSITION COURT PROGRAMS

28.01 MENTAL HEALTH DIVISION - INTRODUCTION

In Los Angeles County, defendants with a diagnosed mental illness may be incarcerated in the county jail for significant periods of time as a result of the mental illness. Many also suffer from related problems, such as co-occurring substance use disorders and chronic homelessness. When positive interventions solve these underlying problems, this favorably impacts not only the criminal defendants themselves, but also their family members, prospective victims whose future harms can be prevented, and the community as a whole. When mental health treatment can safely take place in the community rather than the county jail, diversion serves the interest of justice and may reduce recidivism. Accordingly, all filed cases, in which it is reasonably clear a defendant's mental illness significantly contributed to the commission of the alleged crime should be closely examined.

In the criminal justice system, the term "diversion" is often used either as a legal term of art to describe a statutory scheme which was enacted to prevent someone from suffering a criminal conviction, or to refer to a dedicated, specialized court at a particular location. The Office uses the term "diversion" much more broadly to include diverting a defendant from the justice system, county jail or state prison into treatment and/or services in the community. Diversion can occur at any stage of the criminal justice process from the presentation and initial evaluation of charges through trial or plea, sentencing and subsequent revocation proceedings. Mental health diversion does not refer to any one particular program or specialty court. Deputies can and should take into account the existence of mental illness in their discretionary decision-making at all stages of the criminal justice process.

Currently, criminal defendants may be considered for a variety of diversion and Alternative Disposition Court programs designed to reduce recidivism, and to assist defendants with their underlying problems which can contribute to criminal conduct. Additional programs are being piloted on an ongoing basis, both in specialty and criminal courts, interceding on behalf of defendants who are veterans or homeless persons, who suffered prior trauma, or who suffer from mental illness, substance use disorders or co-occurring disorders.

The Office policy outlined in this Chapter is intended to inform and empower deputies and their supervisors to make decisions which consider all underlying circumstances of a crime, including mental illness. In addition, this policy is intended to be interpreted consistent with existing office case settlement policy, to encompass programs operating in any criminal court countywide, and to include any future programs of a similar nature.

28.01.01 MENTAL HEALTH DIVERSION (PENAL CODE § 1001.36)

Pursuant to Penal Code § 1001.36, diversion may be granted to any defendant who has a qualifying mental health disorder at any time after the filing of an accusatory pleading, unless the following crimes are alleged:

1. Murder;
2. Voluntary Manslaughter;
3. An offense for which a defendant would have to register pursuant to Penal Code § 290 (unless the charged offense is Penal Code § 314);
4. Rape;
5. Lewd or lascivious act on a child under 14 years of age;
6. Assault with intent to commit rape;
7. Sodomy or oral copulation, in violation of Penal Code § 220;
8. Commission of rape or sexual penetration in concert with another person in violation of Penal Code § 264.1;
9. Continuous sexual abuse of a child, in violation of Penal Code § 288.5; or
10. An offense involving a weapon of mass destruction in violation of subdivision (b) or (c) of Penal Code § 11418.

Diversion may only be granted if the following six factors are met:

1. The defendant suffers from a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM), excluding antisocial personality disorder and pedophilia;
2. The defendant's mental disorder played a significant role in the commission of the charged offense;
3. The defendant's symptoms motivating the criminal behavior would respond to mental health treatment in the opinion of the mental health expert;
4. The defendant consents to diversion and waives the right to a speedy trial;
5. The defendant agrees to comply with the treatment as a condition of diversion; and
6. The defendant will not pose an unreasonable danger to public safety if treated in the community.

If these requirements are met, then the court must determine whether the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant. Within two years of being granted pretrial mental health diversion, a defendant may have their case dismissed if the defendant has successfully followed all rules and regulations established by court and the treatment provider.

Misdemeanors

The Mental Health Division does not handle misdemeanor mental health diversion motions. All misdemeanor PC § 1001.36 (hereafter referenced as the "Diversion Statute") motions made in a Branch and Area Office will be handled by the supervising Head Deputy or designee, and the decision will be final.

When evaluating a defense motion for pre-trial mental health diversion, deputies must familiarize themselves with the statutory requirements enumerated in the Diversion Statute, as well as our obligations pursuant to Marsy's law. If the statutory requirements in the Diversion Statute have been established and the deputy cannot articulate specific reasons to overcome the presumption that the mental health diagnosis significantly contributed to the criminal offense, and/or cannot articulate specific public safety concerns, as defined in the Diversion Statute, the deputy will submit or join in the defense motion.

The case name, case number, the position taken on the motion by the responsible deputy, and the court's ruling on the motion must be forwarded to MHD for statistical tracking.

Felonies

In all felony pretrial mental health diversion motions, the Head Deputy/designee is responsible for deciding whether to agree to, or oppose, a motion made within a Branch or Area Office or Division. Should the defense decide to appeal the determination to oppose the pretrial mental health diversion request, the Mental Health Division (MHD) Head Deputy/designee will make the final decision on whether submission on the mental health diversion motion is appropriate.

When evaluating a defense motion for pre-trial mental health diversion, deputies must familiarize themselves with the statutory requirements enumerated in the Diversion Statute, as well as our obligations pursuant to Marsy's law. If the statutory requirements in the Diversion Statute have been established and the deputy cannot articulate specific reasons to overcome the presumption that the mental health diagnosis significantly contributed to the criminal offense, and/or specific public safety concerns, the deputy will submit or join in the defense motion.

In all cases where the Branch and Area or Division Head Deputy/designee has made the decision to submit, the case name, case number, and the court's ruling on the motion must be forwarded to MHD for statistical tracking.

28.01.02 OFFICE OF DIVERSION AND REENTRY COURT

The Office of Diversion and Reentry (ODR) is a division within the Department of Health Services that was established by a Los Angeles County Board of Supervisors' motion in 2015. Their mission is to develop and implement a county-wide criminal justice diversion program for individuals living with a mental and/or substance use disorders and to provide reentry support services to vulnerable populations, because providing treatment specifically tailored to a specific need would improve the health of those in the criminal justice system and reduce recidivism. ODR actively evaluates inmates in the Los Angeles County Jails living with a mental illness to determine if they can be removed and placed in ODR housing.

In 2016, the Superior Court created the ODR Court that currently operates out of Department 44 in the Criminal Justice Center downtown. Defendants eligible for the ODR Court must be:

- Charged with a felony offense;
- In custody;

- Homeless;
- Suffer from a serious mental illness; and
- Enter into a negotiated plea.

Suitability is at the discretion of the court after hearing input from the prosecution and the defense. A defendant admitted into the ODR Court will be placed on probation for a minimum of two years, will be physically transported from the county jail by ODR personnel, receive interim housing, with the possibility of obtaining permanent housing, and will be treated by mental health professionals daily in a structured setting; unauthorized absence from the residence, and failure to follow the directions of the treatment provider or take prescribed medication is a violation of probation. A defendant who successfully completes their probation can get their case reduced to a misdemeanor or dismissed.

In addition to the above, since 2020, the ODR Court takes individuals who would also qualify for pretrial mental health diversion pursuant to PC § 1001.36. If a person successfully completes diversion pursuant to PC 1001.36, then the case is dismissed.

- **ODR Hub Courts**

  In March 2019, ODR established the ODR Hub Courts in an effort to service, countywide, those individuals charged with a felony and who are living with a mental illness . The Hub Courts operate out of Department 44 downtown, the Airport Courthouse, and the Van Nuys Courthouse. The downtown Hub Court, while continuing to take cases from within the courthouse, will take cases from Norwalk, Pomona and Pasadena; the Airport Hub Court will service cases from within its courthouse and all of the South Bay area courts; and the Van Nuys Courthouse will service cases originating from within the Courthouse as well as the San Fernando Courthouse. The Antelope Valley Courthouse continues to have its own court that specializes in handling those cases that qualify for pretrial mental health diversion. The criteria for admittance into all the Hub Courts still requires the following: the defendant must be homeless, charged with a felony, suffering from a severe mental illness, and enter a negotiated plea. In general, the pleas must be taken in the sending court, not the Hub Court, but this requirement can vary in some Hub Courts. Additionally, all Hub Courts take individuals who qualify for pretrial mental health diversion pursuant to PC § 1001.36.

For all future and existing felony cases that are pending in the ODR Courts that are supervised by MHD, if the originating court's Head Deputy/designee agrees with the defendant's plea and sentence to ODR, that decision will be final and MHD will relay that information to the court. If the court finds that the defendant is not appropriate for ODR, the case will return to the originating court for handling. If the Head Deputy/designee does not agree with an ODR resolution because of a specific public safety concern, then the MHD Head Deputy/designee will be consulted and review the case. The MHD Head Deputy/designee will make the final determination on whether to submit on the defendant's request for ODR. If the court finds that the defendant is not appropriate for the ODR court, the case will return to the originating court for handling.

After consultation with the Branch and Area, or Division Head Deputy/designee, MHD will make the final decision on pretrial mental health diversion motions on cases submitted to the ODR courts.

28.02 ALTERNATIVE DISPOSITION COURT PROGRAMS

The following Alternative Disposition Court (ADC) programs are currently employed in Los Angeles County:

- Sentenced Offender Drug Court (SODC) (See LPM § 15.05)
- Co-Occurring Disorders Court (CODC);
- Second Chance Women's Re-Entry Court (WRC);
- Veterans Court; and
- Community Collaborative Courts (CCC).

28.02.01 OFFICE POLICY FOR ALTERNATIVE DISPOSITION COURT (ADC) PROGRAMS

Through this unified policy, it is the specific intent of the Office to encourage program participation in all diversion and ADC programs when appropriate.

Deputies may refer a candidate who is eligible and suitable under the parameters of the program to any ADC program. Deputies shall obtain prior Head Deputy or Deputy-in-Charge approval by the referring office when otherwise required by the Office Felony Case Settlement policy as delineated in Legal Policies Manual Chapter 12. If a candidate would otherwise be disqualified from participation due to the additional court-imposed parameters which exist for each ADC program, deputies may deviate from the general ADC program parameters upon the agreement of the court and justice partners, without additional Office supervisor approval. (See LPM Chapter 12.)

28.02.02 OFFICE POLICY FACTORS FOR CONSIDERATION

ADC programs typically assist participants who suffer from substance use disorders, therefore it would be detrimental to recovery if drug dealers were also permitted to participate in the same programs. Candidates who are currently charged with a crime involving the sale, possession for sale, transportation for purposes of sale of a controlled substance should not be referred to an ADC program, unless the case involves low level sales, possession for sale, or transportation for the purposes of sale, and there is clear evidence that the candidate has a documented history of addiction and the sales activity was motivated by the candidate's desire to afford or obtain drugs for personal consumption.

In all cases, deputies should also consider the following factors:

- Defendant's background;
- Severity of the defendant's addiction;

- Existence and nature of the defendant's mental health issues and/or substance use disorder;
- Defendant's attitude toward treatment;
- Whether the defendant has attempted treatment in the past;
- Seriousness of the current offense(s) and/or prior offense(s);
- Remoteness of any prior strike offense(s);
- Use of a firearm or deadly weapon in the commission of the current or prior offense(s);
- Extent of any injury to any victim(s) in the current or prior offense(s);
- Violence or threat of violence in the commission of the current or prior offense(s); and
- Existence of any other aggravating or mitigating factors.

Candidates referred to a particular ADC program should also be considered for any other appropriate programs.

28.02.03 ALTERNATIVE DISPOSITION COURT DESIGNEE PROGRAM AND COORDINATOR

To ensure the effective implementation of the ADC programs, the Office has appointed an ADC Coordinator who is assigned to the Bureau of Central Operations and staffs the Drug Court and ADC programs located at the Clara Shortridge Foltz Criminal Justice Center. The ADC Coordinator is an expert who serves as a countywide resource, not only for our deputies but also to other justice stakeholders and agencies outside of the Office.

The Head Deputy for each branch office in Line Operations shall designate a particular deputy as an ADC Designee. That person shall serve as an information resource for deputies within that location and as a contact person for deputies from other locations. The duties of the ADC Designees include:

- Staffing Drug Court and ADC programs at the particular branch or area office location;
- Attending relevant trainings, including presentations by the ADC Coordinator on the current criteria, procedures and resources for each of the programs;
- Serving as a resource to all deputies assigned to the branch or area office regarding eligibility criteria and procedural referrals for each of the programs;

28.02.04 ALTERNATIVE DISPOSITION COURT PROGRAM GENERAL PRACTICES

Each of these programs is based on the collaborative Drug Court model using a team approach to decision-making and requiring voluntary participation by a defendant in a court-supervised treatment program. Frequent interaction between the judicial officer and the participants is combined with rigorously monitored rehabilitation services and progress reports. The courts use graduated sanctions for minor program violations and rewards for successful progress in the program. Repeated or more serious violations can be subject to more serious sanctions up to, and including, termination from the ADC program.

Appropriate referrals to any diversion or ADC program can be made at any stage of the proceedings, but should be made at the earliest possible time. In order to transfer a case to the receiving court, all parties (deputy district attorney, defense attorney and judge) from both the home court and the receiving court must agree and an *Arbuckle* waiver must be taken. Charged serious or violent felony prior conviction allegations should not be dismissed by either the referring or receiving court in order to make a defendant eligible for ADC, absent the agreement of all of the justice partners.

Typically, participants will be supervised by the court for a specified period of time upon a grant of probation. Upon successful program completion, the bench officer may terminate probation early and/or dismiss the case, pursuant to Penal Code § 1210 for Proposition 36 cases, or pursuant to Penal Code § 1203.4 in all other cases. If the charge is a wobbler, the bench officer may reduce the charge to a misdemeanor pursuant to Penal Code § 17(b). However, the plea agreement can also specify additional terms and conditions, including continued probation supervision, which may differ from the ordinary dismissal and reduction process. If the participant is terminated from the ADC program, the defendant will be sentenced based on all relevant sentencing factors or according to any agreed upon disposition.

28.02.05 ALTERNATIVE DISPOSITION COURT PROGRAM COURT EXCLUSIONS

As a matter of court policy, defendants will generally not be accepted into any ADC program if they:

- Have a current charged or prior conviction for a serious or violent felony;
- Are a registered sex offender;
- Are a registered arson offender;
- Are an active gang member;
- Have an excessively violent criminal record;

If a candidate would otherwise be disqualified from participation in any ADC program due to its individual court-imposed parameters, but appears to be a good candidate for the program, deputies can deviate from these general parameters upon the agreement of the court and justice partners, without additional Office supervisor approval.

28.02.06 CO-OCCURRING DISORDERS COURT (CODC)

The CODC is a post-conviction, court supervised treatment program designed to rehabilitate defendants who are experiencing co-occurring mental illness and substance use disorders and have a history of homelessness, are at risk of homelessness, or reside in County Service Areas 4 or 6 (downtown Los Angeles, Compton or West Hollywood).

The CODC program accepts men and women with co-occurring mental health and substance use disorders who have criminal cases involving:

- Proposition 36 eligible charges (PC § 1210);

- Low-level, non-violent pending felony charges or probation violations;
- Non-violent misdemeanors.

Pursuant to Proposition 36, the defendant cannot have a prior conviction for a serious or violent felony unless a five-year washout period has been met. (See LPM § 15.03.)

CODC participants must participate in 90 days of intensive residential mental health treatment followed by three to six months of mental health treatment in supervised sober living. Treatment services include integrated treatment for co-occurring disorders, psychiatry and medication management, individual and group therapy, random drug testing, emergency and transitional housing linkages, intensive case management, benefits establishment and recovery-oriented peer groups.

28.02.07 SECOND CHANCE WOMEN'S RE-ENTRY COURT (WRC)

The Second Chance Women's Re-Entry Court program is a post-conviction, court supervised treatment program designed to serve women who would benefit from substance use disorder treatment and services, in lieu of incarceration. The WRC program serves:

- Women charged with non-serious, non-violent felonies and who do not have a serious or violent prior felony conviction or
- Women who have a pending non-serious, non-violent felony probation violation and do not have a serious or violent prior felony conviction.

However, a current charged first degree residential burglary or prior conviction for first degree residential burglary that does not involve violence will not automatically disqualify an otherwise qualified candidate. An allegation that a victim was present during the commission of the residential burglary makes the charge a violent crime.

Program participants are placed on two to five years of probation supervision and are supervised by either a probation officer assigned to the treatment provider and currently receive four months of residential mental health and/or substance use disorder treatment services followed by outpatient treatment and aftercare services.

28.02.08 VETERANS COURT

The Veterans Court program is a post-conviction, court supervised treatment program designed to assist felony defendants who have served honorably in the United States military, who suffer from qualified disorders that are related to their military service, and who are eligible for Department of Veteran's Affairs (VA) benefits. (See PC § 1170.9 and GOM 11-038.) The five qualifying disorders are:

- Post-traumatic stress disorder;
- Traumatic brain injury;
- Substance use disorder;
- Sexual trauma; and

- Mental health issues.

The Veterans Court program serves:

- Veterans charged with non-serious, non-violent felonies and who do not have a serious or violent prior felony conviction or
- Veterans who have a pending non-serious, non-violent felony probation violation and do not have a serious or violent prior felony conviction.

Participants are placed on two to five years of probation supervision, ordered to complete a residential or outpatient mental health and/or substance use disorder treatment program designed by the VA, and are supervised by VA representatives who report on the participants' progress to the court.

The felony Veterans Court program is entirely separate from misdemeanor military pretrial diversion. (See GOM 15-126.) Misdemeanor military diversion is available in any criminal court pursuant to operation of law. (See PC § 1001.80 (k).)

28.02.09 COMMUNITY COLLABORATIVE COURTS (CCC)

The Community Collaborative Court program (CCC) is a post-conviction, multidisciplinary, resource intensive response to the most vulnerable populations involved in the criminal justice system. This includes veterans, persons who are homeless, persons suffering from mental illness, persons with substance use disorders, victims of human trafficking, and transitional aged and at-risk youth.

The CCC program is primarily designed for felony offenses and serves:

- Defendants charged with non-serious, non-violent felonies and who do not have a serious or violent prior felony conviction or
- Defendants who have a pending non-serious, non-violent felony probation violation and do not have a serious or violent prior felony conviction.

Currently, CCCs operate in the following courthouses: Clara Shortridge Foltz Criminal Justice Center, Compton, Long Beach and Van Nuys. Inter-district service throughout the county is provided through case transfer to these courts based upon a predetermined assignment matrix. In cases referred from outside of a CCC courthouse, the defendant shall enter a plea to an agreed-upon disposition before the case is transferred to the CCC. This plea shall include an *Arbuckle* waiver. The case shall then be referred to the CCC. If the defendant is accepted into the CCC, then the case shall be handled as described below. If the defendant is not accepted into the CCC, the case can be settled per the disposition agreement. Cases referred from within a CCC courthouse can be transferred at any time with the consent of all of the justice partners. CCCs also accept case referrals for other Alternative Disposition Court programs if available in that courthouse.

Defendants will typically be placed on probation for a period of two to five years. Terms and conditions of probation include the treatment plan agreed upon by the collaborative team, which may include treatment in county jail, residential treatment, sober living with outpatient treatment and/or community aftercare.