SPECIAL DIRECTIVE 20-06

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: PRETRIAL RELEASE POLICY

DATE: DECEMBER 7, 2020

This Special Directive addresses issues of Bail and Own Recognizance in Chapter 8 of the Legal Policies Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of Chapter 8 of the Legal Policies Manual.

INTRODUCTION

The purpose of this memo is to outline the new policies and protocols that will guide our recommendations for pretrial release and the use of cash bail moving forward. While these policies will take effect immediately, there will be ongoing opportunities for staff to give valuable feedback about how we can best operationalize these changes. We will continually monitor and review data collected on the implementation of these policies and we will regularly review these policies with office staff and members of the community to ensure that they are effective and successful. These new policies capture our shared vision of justice for all in Los Angeles County.

THE UNFAIRNESS OF CASH BAIL

Across the nation, bail reform is a topic of much debate. While some jurisdictions have passed statewide bail reform (New York and New Jersey), others have changed local bail setting practices by reducing reliance on cash bail. Although California voters chose not to implement SB10 through the passage of Proposition 25, the conversation about bail reform remains active and robust.

While it is nearly certain that legislation seeking to eliminate cash bail will once again be put to voters, we will not wait for statewide reform before imposing meaningful changes in the use of cash bail. We must seek to protect the public while ensuring that our practices–particularly with regard to the utilization of cash bail–do not lead to periods of unnecessary incarceration that harm individuals, families and communities.

Cash bail creates a two-tiered system of justice - one where those with financial resources are able to remain free, while those who lack such resources are incarcerated. While most justify the use of cash bail to incentivize an individual to return to court, evidence suggests that no such incentives

are required: it is exceptionally rare that individuals willfully flee prosecution or commit violent felony offenses while released pretrial and the overwhelming majority of people will return to court, even when they have no financial interest at stake.[1] In addition, appearance rates for those people who are not detained are improved when they receive effective court reminders, transportation assistance and referrals to community-based services when they are in need.

Disparities in bail setting, unduly impact low-income communities of color and set the wheels of mass incarceration in motion: individuals detained pretrial are more likely to plead guilty to a case, in turn receiving a criminal record; those with criminal records face obstacles for future employment opportunities; and those people who cannot be employed see their opportunities for economic mobility and advancement severely hindered. The negative impacts of incarceration extend well beyond an incarcerated individual into their families and communities. Jobs are lost, people are evicted and deported, children lose contact with their primary caregivers, and those who were detained return to their communities destabilized by the traumatizing conditions in our jails.

The negative consequences of cash bail have fallen unequally on the shoulders of low-income communities of color in Los Angeles County. Of the 5,885 people detained pretrial in August 2020, 84% were people of color and nearly half (42%) were incarcerated for non-serious, non-violent offenses[2]. These individuals jailed pretrial spend, on average, 221 days in jail[3] without having been convicted of a crime. While COVID-19 led to substantial declines in the Los Angeles County Jail population, early releases were not proportionate across all race categories and subpopulations, including those who are most vulnerable. Specifically, while Black people were 29% of the pre-COVID jail population, only 24% of them were released early, and, when looking at the pretrial population with mental health needs, Black and Hispanic people received early release at a significantly lower rate than white people.

The US Constitution guarantees every person – regardless of race, class or origin – the right to be presumed innocent during the pretrial phase of a criminal proceeding. America's promise is to provide for everyone "equal justice under the law". While one might argue that pretrial detention doesn't remove these rights, our detention practices and the use of unaffordable cash bail eviscerates the bedrock of our democracy and undermines our principles of justice, fairness, and equality under the law.

It's time for a change. We must adopt a more just approach to prosecution by seeking to undo the legacy of cash bail while still fulfilling our obligations to protect public safety. Freedom should be free.

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[1] For a pilot project conducted by The Bail Project in Compton, 300 people had bail paid for them. 93% of clients included in the pilot were people of color. The outcomes of the pilots favor own recognizance release: 96% returned for every court date and, of clients whose cases are now disposed, 33% had their cases dismissed and 97% of those individuals who received a conviction required no additional jail time as part of their sentence.

[2] Charges at the time of booking

[3] This reflects the average number of pretrial days spent in jail to-date on 8/19/20, which is likely an underestimate. Many people will remain detained long after the date of analysis. A truer measure would be the average number of days an individual spends from being placed in custody to being released or their case disposed, though such information is not currently available.

It is our duty as stewards of public safety to mitigate all public safety risk, and this includes ensuring that our office's prosecutorial actions do not inflict needless harm on court-involved individuals through unnecessary incarceration. We must, and can do better, than to continue to impose cash bail where it is not required, as evidence suggests that cash bail is neither effective nor required to keep communities safe or to ensure return to court for future appearances.

For all the reasons mentioned above, it is time to re-evaluate our policies and procedures regarding the use of cash bail and pretrial detention before conviction. The policies outlined in this memo are merely a starting point as we begin to better balance the well-being of the accused with our obligations to maintain public safety during this pretrial period. By minimizing the utilization of cash bail, reducing unnecessary pretrial detention, seeking the least restrictive conditions of release possible, and utilizing community-based support programs and interventions, the long-term safety of all Los Angeles County residents can be improved and the system will be made more fair and just.

Pretrial release recommendations shall be guided by the following principles and policies:

I. ELIMINATION OF CASH BAIL

A. The presumption shall be to release individuals pretrial.

B. All individuals shall receive a presumption of own recognizance release without conditions. Conditions of release may only be considered when necessary to ensure public safety or return to court.

1. Pretrial release conditions, if any, shall be considered in order from least restrictive (No Conditions) to most restrictive (Electronic Monitoring / Home Detention). Release with no condition shall be the initial position. The least restrictive condition or combination of conditions for release must be determined to be inadequate to protect public safety and to reasonably ensure the defendant's return to court before considering the next least restrictive condition.
2. All pretrial release conditions requested shall be reasonably related to the charges, and necessary to protect the public and to reasonably ensure the defendant's return to court.

3. Only after all pretrial release conditions have been thoroughly evaluated and determined to be inadequate to protect public safety and to reasonably ensure the defendant's return to court shall bail or pretrial detention be considered.

C. Pretrial Detention Procedures
1. Pretrial detention shall only be considered when the facts are evident and clear and convincing evidence shows a substantial likelihood that the defendant's release would result in great bodily harm to others or the defendant's flight.
    a) The substantial likelihood of the defendant's flight may include felony holds from other jurisdictions. Release conditions or detention may be considered for the limited purpose of ensuring the defendant is not removed to another jurisdiction. Considerations

shall include but are not limited to a comparison of the seriousness of the charges locally and for the hold, the uncertainty of when the defendant will be returned, and maintaining joinder of co-defendants.

2. DDAs shall not request cash bail for any misdemeanor, non-serious felony, or non-violent felony offense.

3. If pretrial release conditions have been found insufficient to ensure return to court and public safety, DDAs may consider requesting bail at arraignment for:
    a) Felony offenses involving acts of violence on another person; or
    b) Felony offenses where the defendant has threatened another with great bodily harm; or
    c) Felony sexual assault offenses on another person.

D. When cash bail is being requested under the limited circumstances delineated in this memo, DDAs shall recommend cash bail amounts that are aligned with the accused's ability to pay. There should be a presumption of indigency when the court has determined that a client is entitled to court appearance counsel.

E. For those individuals who are indigent, DDAs shall avoid the selection of restrictive conditions of release that include fees and costs for their administration (e.g., paying a licensing fee for electronic monitoring) unless no alternative restrictive condition or combination of conditions can be applied to meet the same need.

F. Conditions of release shall be evaluated based on all available information about the accused. Individuals with underlying conditions, such as behavioral health conditions, shall not receive overly restrictive release conditions based solely on the presence of such issues. Scores from risk assessment tools may never be the sole basis for a recommendation for detention.[4] All pretrial release conditions requested shall be reasonably related to the charges and necessary to protect the public and ensure the defendant's return to court.

G. If defense counsel requests a review of release conditions, the DDAs will not oppose defense counsel motion to the court to remove or modify the conditions of release, if the accused's conduct has demonstrated that a threat to a specific identifiable person or persons and/or any evidence of the accused's intention to willfully evade prosecution has been eliminated.

H. **Covid-19 Addendum:** Regardless of charge, release with least restrictive conditions is the presumptive position when the accused belongs to a vulnerable/high risk group (as defined by the CDC and the LA County Department of Public Health) where incarceration could result in serious illness or death due to Covid-19 exposure.

[4] There are well-documented concerns among social science researchers that risk assessment tools cannot predict what they aim to predict and perpetuate racial bias. *See* Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns.

II. APPEARANCES AND VIOLATIONS OF CONDITIONS OF RELEASE

A. DDAs shall not oppose defense counsel's requests to waive client appearances at non-essential court appearances. The burden of appearing for short, non-consequential hearings can be hugely impactful to individuals who have to arrange to take off from work, arrange for childcare, and find their way to court. Many court appearances require minimal involvement from the accused and due to overburdened court calendars can result in extensive wait times before short appearances are held.

B. In the event of non-appearance, DDAs will not oppose defense counsel's request for a bench warrant hold when no clear and convincing evidence exists that the non-appearance occurred as a result of the accused's willful evasion of prosecution.

III. RETROACTIVITY OF POLICY

DDAs shall not object to the release of anyone currently incarcerated in Los Angeles County on cash bail who would be eligible for release under the policies outlined in this memo.

TABLE 1
PRETRIAL RELEASE CONDITIONS FROM LEAST TO MOST RESTRICTIVE

LEAST RESTRICTIVE	● Own Recognizance Release
	● Release to community member, friend, family member or partner with promise to accompany the accused to court
	● Phone/text/online check-ins with designated agency
	● Travel Restrictions - order to not leave state, passport surrender
	● Driving prohibitions or restrictions
	● Stay away order
	● AA/NA meeting attendance (or similar community support groups)
	● Order to surrender weapon(s) to law enforcement
	● Ignition Interlock Device

MORE RESTRICTIVE	● In-person check-ins with designated agency
	● Mental health treatment
	● Alcohol abuse treatment
	● Substance abuse treatment
	● Drug and alcohol testing
	● Residential treatment program
	● Home relocation during case pendency
	● Secure Continuous Remote Alcohol Monitoring
	● Electronic monitoring/GPS
	● Home detention

The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.

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SPECIAL DIRECTIVE 20-14

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: RESENTENCING

DATE: DECEMBER 7, 2020

This Special Directive addresses issues of the Bureau of Prosecution Support Operations in Chapter 1.07.03 and Probation and Sentencing Hearings in Chapter 13 and Postconviction Proceedings in Chapter 17 of the Legal Policies Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of Chapter 13 and Chapter 17 of the Legal Policies Manual.

INTRODUCTION

Today, California prisons are filled with human beings[1] charged, convicted and sentenced under prior District Attorneys' policies. Effective today, District Attorney George Gascón has adopted new charging and sentencing policies.

Justice demands that the thousands of people currently serving prison terms imposed in Los Angeles County under earlier, outdated policies, are also entitled to the benefit of these new policies. Many of these people have been incarcerated for decades or are serving a "virtual life sentence" designed to imprison them for life. The vast majority of incarcerated people are members of groups long disadvantaged under earlier systems of justice: Black people, people of color, young people, people who suffer from mental illness, and people who are poor. While resentencing alone cannot correct all inequities inherent in our system of justice, it should at least be consistent with policies designed to remedy those inequities.

The new Resentencing Policy is effective immediately and shall apply to all offices, units and attorneys in the Los Angeles County District Attorney's Office (hereinafter "Office"). While particular attention will be paid to certain people as discussed herein, every aspect of existing sentencing or resentencing policy will be subject to examination. The intent of this Resentencing Policy is that it will evolve with time to ensure that it reflects the values of the District Attorney, and by extension, the people of Los Angeles County.

[1] We will seek to avoid using dehumanizing language such as "inmate," "prisoner," "criminal," or "offender" when referencing incarcerated people.

LENGTH OF SENTENCE

The sentences we impose in this country, in this state, and in Los Angeles County are far too long. Researchers have long noted the high cost, ineffectiveness, and harm to people and communities caused by lengthy prison sentences; sentences that are longer than those of any comparable nation. DA-elect Gascón campaigned on stopping the practice of imposing excessive sentences.

With regard to resentencing, the Model Penal Code recommends judicial resentencing hearings after 15 years of imprisonment for all convicted people:

> The legislature shall authorize a judicial panel or other judicial decision maker to hear and rule upon applications for modification of sentence from prisoners who have served 15 years of any sentence of imprisonment.

(American Law Institute (2017) Model Penal Code Sentencing, Proposed Final Draft, p. 681.)

National parole experts Edward Rhine, the late Joan Petersilia, and Kevin Reitz have endorsed this recommendation, adding: "We would have no argument with a shorter period such as 10 years." … These time frames correspond with criminological research showing that people age out of crime, with most "criminal careers" typically lasting less than ten years." (Rhine, E. E., Petersilia, J., & Reitz, R. 2017. "The Future of Parole Release," pp. 279-338 in Tonry, M. (Ed.) *Crime and Justice*, Vol, 46, p. 294.)

Accordingly, this Office will reevaluate and consider for resentencing people who have already served 15 years in prison. Experts on post-conviction justice recommend that resentencing be allowed for all people (not just those convicted as children or as emerging adults) and some experts recommend an earlier date for reevaluating continued imprisonment.

APPLICATION OF SENTENCE ENHANCEMENT POLICY FOR OPEN/PENDING CASES

For any case that is currently pending, meaning that judgment has not yet been entered, or where the case is pending for resentencing, or on remand from another court, the Deputy District Attorney in charge of the case shall inform the Court at the next hearing of the following:

> "At the direction of the Los Angeles County District Attorney, in accordance with Special Directive 20-08 concerning enhancements and allegations, and in the interest of justice, the People hereby
>
> 1. join in the Defendant's motion to strike all alleged sentence enhancement(s); or
> 2. move to dismiss all alleged sentence enhancement(s) named in the information for all counts.

FURTHER DIRECTIVES FOR OPEN/PENDING CASES

The following rules apply to any case where a defendant or petitioner is legally eligible for resentencing or recall of sentence, including but not limited to:

- Habeas corpus cases.
- Cases remanded to Superior Court by the Court of Appeal or Supreme Court.
- Cases referred to the Superior Court under Penal Code section 1170(d)(1).
- Cases pending resentencing under Penal Code sections 1170.126, 1170.127, 1170.18, 1170.91, and 1170.95.
- Cases pending under Penal Code section 1170(d)(2).
- All cases where the defendant was a minor at the time of the offense.
- Any other case that may be the subject of resentencing not specified here.

Any Deputy District Attorney assigned to a case pending resentencing or sentence recall consideration under any valid statute shall comply with the following directives until further notice.

1) If the defendant or petitioner is serving a sentence that is higher than what he/she would receive today, due to operation of law or by operation of the District Attorney's new Sentencing Policy, the deputy in charge of the case shall withdraw any opposition to resentencing or sentence recall and request a new sentence that complies with current law and/or the District Attorney's new Sentencing Policy. This policy applies even where enhancements were found true in a prior proceeding. This policy shall be liberally construed to achieve its purposes.

2) If the defendant or petitioner is seeking relief under Penal Code section 1170.95, the DDA may concede that the petitioner qualifies for relief. If the assigned DDA does not believe that the petitioner qualifies for relief, the DDA must request a 30 day continuance, during which time the assigned DDA shall review the case in light of the Office's specific Penal Code 1170.95 Policy, *see below.* If the DDA continues to oppose relief, the DDA shall submit the reasons in writing to the Head Deputy. The Head Deputy shall then seek approval from the District Attorney or his designee in order to determine whether the Office will continue to oppose relief.

3) If a defendant or petitioner would not qualify for a reduced sentence by operation of law if convicted today or under the Office's new Sentencing Policy, then the DDA in charge of the case may seek a 30-day continuance. During that time, the deputy shall evaluate whether to support or oppose the resentencing (or sentence recall) request. If the deputy believes that compelling and imminent public safety concerns justify opposition to revisiting the sentence, then the deputy must submit those concerns in writing to her Head Deputy who shall then seek approval from the District Attorney or his designee.

4) All laws concerning victim notification and support shall be honored.

PENAL CODE § 1170.95/SB 1437 RESENTENCING POLICY

1. We start with a position of respect for our co-equal branch of government, the legislature. Like the courts, we presume that laws passed by the legislature are constitutional. "[U]nder long-established principles, a statute, once enacted, is presumed to be constitutional." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1119.) We will no longer seek to delay implementation of laws by making arguments that laws that provide retroactive relief are unconstitutional.

2. The Office's position is that defense counsel should be appointed when the petition is filed and there should be no summary denials by the court. (*People v. Cooper* (2020) 54 Cal.App.5th 106; *People v. Tarkington* (2020) 49 Cal.App.5th 892, 917, review granted Aug. 12, 2020, S263219 [dis. opn. of Lavin, J.].)

3. Many people accepted plea offers to manslaughter, made by this Office in order to avoid a conviction for murder. It is this Office's policy that where a person took a plea to manslaughter or another charge in lieu of a trial at which the petitioner could have been convicted of felony murder, murder under the natural and probable consequences doctrine, attempted murder under the natural and probable consequences doctrine, or another theory covered by Senate Bill 1437, that person is eligible for relief under section 1170.95. Such a position avoids disparate results whereby a person who this Office has already determined to be less culpable -- as evidenced by allowing a plea for manslaughter -- serves a longer sentence than a similarly situated person who is now eligible for relief under section 1170.95.

4. Section 1170.95 (d)(2) states, "[I]f there was a prior finding by a court or jury that the defendant did not act with reckless indifference to human life or was not a major participant in the felony, the defendant is entitled to have his or her murder conviction vacated." This prior finding includes cases where a magistrate found that there was insufficient evidence of major participation in a felony or reckless indifference to human life following a preliminary hearing, or at any stage in the proceedings.

5. The Office's position is that, consistent with the definition of "prima facie," the court must not engage in fact finding at the prima facie stage. (*People v. Drayton* (2020) 47 Cal. App. 5th 965.)

6. The Office's position is that if the person was an accomplice to the underlying felony, and had a special circumstance finding that was decided before *People v. Banks* (2015) 61 Cal 4th 788 or *People v. Clark* (2016) 63 Cal. 4th 522, then the filing of a Penal Code section 1170.95 petition is adequate to trigger the section 1170.95 process. There is no requirement that the petitioner file a separate habeas petition first. (*People v. York* (2020) 54 Cal. App. 5th 250, 258.) The next stage is an evidentiary hearing.

7. The Office's position is that if allegations pursuant to Penal Code section 190.2 (a) (17) were dismissed as part of plea negotiations and the petitioner was not the actual killer, this Office will not attempt to prove the individual is ineligible for resentencing. This Office will stipulate to eligibility per section 1170.95(d)(2).

8. The Office's position is that, consistent with *People v. Medrano* (2019) 42 Cal. App. 5th 1001, 1008, rev. granted, that a person who was convicted of attempted murder under the natural and probable consequences doctrine is eligible for resentencing under section 1170.95. Among other reasons, this avoids the great disparity that arises when one who was convicted of murder under the now abolished natural and probable consequences doctrine is able to be resentenced but one who was convicted of attempted murder is not.

9. If the client has previously won relief under *People v. Chiu* (2014) 59 Cal. 4th 155, the Office will not attempt to argue that the petitioner is ineligible for resentencing, or could be convicted as a direct aider and abettor.

10. If the jury was never instructed on direct aiding and abetting, implied malice murder, or any other intent-to-kill theory, or if the trial prosecutor never argued one of these theories, this Office will not argue that the petitioner can now be convicted under one of these theories during 1170.95 proceedings. Theories must remain consistent.

11. Relatedly, if a jury was not even instructed on implied malice murder or some other theory of homicide not covered by section 1170.95, the prosecution cannot now meet our burden of proof beyond a reasonable doubt that the petitioner is ineligible for resentencing.

12. If the petitioner was convicted of murder and the petitioner's jury was instructed on the natural and probable consequences theory doctrine and/or a first or second degree felony murder instruction at trial, then it may have been possible that petitioner was convicted under one of these theories and this Office will not seek to rebut petitioner's prima facie showing. The case must proceed to the evidentiary hearing.

13. Because jury deliberations are secret, in the absence of special findings, it is not possible to determine the actual basis of a jury verdict when multiple theories were before the jury. Therefore, at an evidentiary hearing, if the petitioner was convicted of murder and the petitioner's jury was instructed with a felony murder or a natural and probable consequences doctrine instruction along with other theories, there is a reasonable doubt that the jury convicted petitioner under the old felony murder rule or the now abolished doctrine of natural and probable consequences. Because the statute allows for the introduction of "new or additional evidence," the deputy district attorney may introduce evidence to show, for example, that the petitioner was the actual killer, or acted as a major participant with reckless indifference to human life, or was convicted under a still-valid theory on which the jury was instructed. See below for this Office's position on evidence that we will and will not seek to admit.

14. At an evidentiary hearing pursuant to section 1170.95 (d)(3), the prosecution must prove beyond a reasonable doubt that the petitioner is ineligible for resentencing. A deputy district attorney may not argue that the standard for the court to determine whether a petitioner is ineligible for resentencing is whether there is "sufficient evidence" to uphold the conviction. This is a standard of proof for an appellate court affirming a conviction. It is not the standard of proof for a trial court in a section 1170.95 proceeding. (*People v. Lopez* (2020) 56 Cal.App. 5th 936, 949-950.)

15. It is this Office's position that the Evidence Code applies to any evidentiary hearing pursuant to section 1170.95. Statements made after promises of leniency or threats of punishment (express or implied) are unreliable. A parole hearing is a coercive environment and therefore statements made in them are unreliable and involuntary. This Office will not seek to introduce statements by a petitioner made in parole hearing transcripts into court for any purpose.

16. As a matter of due process, it is this Office's policy that a petitioner has a right to confrontation at a hearing under section 1170.95. Accordingly, this Office will not seek to admit statements of a declarant when the petitioner did not have an opportunity to cross-examine the declarant or when a purported expert's opinion is based on inadmissible hearsay. (See *People v. Sanchez* (2016) 63 Cal.4th 665.)

17. The Office will comply with all of our obligations under *Brady v. Maryland* and its progeny during resentencing procedures.

18. The Office's position is that any defendant who was under the age of 25 when the crime occurred is entitled to present mitigation documents pursuant to *People v. Franklin* and Penal Code section 3051.

19. The Office's position is that a person's age and the "diminished culpability of youth," a person's mental illness, or cognitive impairment, or a person's intoxication is relevant to the determination whether a petitioner meets the standard of "reckless indifference to human life."

20. On resentencing, this Office will dismiss enhancements consistent with our current enhancement policies and otherwise not seek a sentence that is inconsistent with this Office's current sentencing policies.

RESENTENCING UNIT

This Office declares that new Sentencing, Enhancement and Juvenile policies must apply with equal force to sentences where the judgment is final. Accordingly, this Office commits to a comprehensive review of cases where the defendant received a sentence that was inconsistent with the charging and sentencing policies in force after Tuesday, December 8, 2020, at 12:01 AM.

In such cases, this Office shall use its powers under Penal Code section 1170(d)(1) to recommend recall and resentencing. While priority shall be given to the cases enumerated below, the ultimate goal shall be to review and remediate every sentence that does not comport with the new Sentencing, Enhancement and Juvenile Policies.

Specifically, this Office commits to an expedited review of the following categories of cases, which are themselves a subset of a universe of 20,000-30,000 cases with out-of-policy sentences:

- People who have already served 15 years or more;
- People who are currently 60 years of age or older;
- People who are at enhanced risk of COVID-19 infection;
- People who have been recommended for resentencing by CDCR;

- People who are criminalized survivors;
- People who were 17 years of age or younger at the time of the offense and were prosecuted as an adult.

In formulating this policy, we rely on current statistical data from the California Department of Corrections and Rehabilitation (CDCR). (See Appendix.) Over time, the data may be subject to change; the urgency of our mission will not be. In seeking resentencing under 1170(d)(1), this Office shall argue that resentencing is necessary to eliminate disparity of sentences and to promote uniformity of sentencing.

At all types of resentencing hearings, filing deputies shall assist the Resentencing Court by setting forth any and all postconviction factors that support resentencing, including, but not limited to: mitigation evidence; CDCR disciplinary records and record of rehabilitation and positive programming while incarcerated; evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the risk for future violence; evidence that reflects that circumstances have changed since the original sentencing so that continued incarceration is no longer in the interest of justice; and post-release reentry plans, demonstrating any family or community support that is available upon release. (See e.g. Assembly Bill 1812, Pen. Code § 1170, subd. (d).)

LIFER PAROLE HEARINGS

This Office recognizes that parole is an effective process to reduce recidivism, ensure public safety, and assist people in successfully rejoining society. The CDCR's own statistics show that people paroled from life terms have a recidivism rate of less than four percent.

We are not experts on rehabilitation. While we have information about the crime of conviction, the Board of Parole Hearings already has this information. Further, as the crime of conviction is of limited value in considering parole suitability years or decades later, (see *In re Lawrence* (2008) 44 Cal.4th 1181; *In re Shaputis* (2008) 44 Cal. 4th 1241, 1255), the value of a prosecutor's input in parole hearings is also limited. Finally, pursuant to Penal Code section 3041, there is a presumption that people shall be released on parole upon reaching the Minimum Eligible Parole Date (MEPD), their Youth Parole Eligible Date, (YEPD), or their Elderly Parole Date (EPD). Currently, sentences are being served that are much longer than the already lengthy mandatory minimum sentences imposed. Such sentences are constitutionally excessive. (See *In re Palmer* (2019) 33 Cal.App.5th 1199.)

This Office's default policy is that we will not attend parole hearings and will support in writing the grant of parole for a person who has already served their mandatory minimum period of incarceration, defined as their MEPD, YEPD or EPD. However, if the CDCR has determined in their Comprehensive Risk Assessment that a person represents a "high" risk for recidivism, the DDA may, in their letter, take a neutral position on the grant of parole.

This Office will continue to meet its obligation to notify and advise victims under California law, and is committed to a process of healing and restorative justice for all victims.

YOUTH AND CHILDREN[2]

Currently, there are thousands of people from Los Angeles County serving sentences in the CDCR for crimes they committed as children. As recent developments in adolescent brain science teach us, young people are uniquely capable of rehabilitation and can lead productive lives as contributing members of society without serving long sentences.

Under new Juvenile Directives, available here, people who are 17 or younger at the time of their offense, will not be transferred to adult court and will remain committed to the youth system until they are mature enough to reenter society. Accordingly, any person who was a minor at the time of the offense and meets the eligibility requirements for recall and/or resentencing in adult court, including but not limited to actions pursuant to Penal Code sections 1170(d)(2), or 1170(d)(1), falls within this Office's policy to oppose transfer of minors to adult court. In such cases, DDAs shall join in any defense motion seeking to transfer the person to juvenile court for further proceedings, and the deputy on the case shall state the reasons for supporting such transfer, consistent with this Office's policies, on the record.

[2] We will refer to "youth," "child," or "children" instead of "juvenile(s)." The word "juvenile" is used almost exclusively as a way to describe children who are in the criminal legal system or as police descriptors. As a result, it has become a way to mark certain children as "other." To the extent possible, we will refer to the children in the criminal legal system as we would to all children, as "young person(s)" or "children." In accordance with Penal Code § 3051, we will refer to persons age 18 to 25 as "youths."

APPENDIX

A. Current CDCR Population from Los Angeles County

Table A.1: Descriptive Statistics for Demographic and Other Data

Variable	Level	Number	Percentage
Total CDCR Prison Population Originating in Los Angeles County = 29,556* *(*excluding LWOP and condemned cases)*			
Gender			
	Female	1,078	3.65%
	Male	28,478	96.35%
Race/Ethnicity			
	Black	11,139	37.69%
	Latinx/Hispanic	14,683	49.68%
	White	2,263	7.66%
	Other	1,471	4.98%
Age Group			
	Less than 20	31	0.10%
	20-29	5,945	20.11%
	30-39	9,098	30.78%
	40-49	6,489	21.95%
	50-59	5,043	17.06%
	60+	2,950	9.98%
Offense Category			
	Crimes Against Persons	25,391	85.91%
	Drug Crimes	461	1.56%
	Property Crimes	2,230	7.54%
	Other Crimes	1,474	4.99%
Time Served			
	Less than 5	8,307	28.11%
	5 to less than 10	6,762	22.88%
	10 to less than 15	5,123	17.33%
	15 to less than 20	3,446	11.66%

	20+	5,918	20.02%
Sentence Type			
	2nd Strike	8,106	27.43%
	3rd Strike	2,395	8.10%
	Determinate Sentence	9,841	33.30%
	Life with Parole	9,214	31.17%

Table A.1: Time Served, Age at Time of Offense, Current Age, Classification Scores, and Serious Rules Violation Reports (RVRs) Received in Past 3 Years

	Count/ Percentage of Total LAC Prison Population
Served 20 Years or More	5,918 (20.02%)
Served 15 Years or More	9,364 (31.68%)
Served 10 Years or More	14,487 (49.02%)
Served 7 Years or More	18,206 (61.60%)
Currently 60 Years or Older	2,950 (9.98%)
Currently 65 Years or Older	1,367 (4.62%)
Age 25 or Younger at Time of Offense	13,410 (45.37%)
Age 18 or Younger at Time of Offense	3,291 (11.13%)
Age 17 or Younger (Under 18) at Time of Offense	1,557 (5.27%)

Age 16 or Younger at Time of Offense	778 (2.63%)
Age 15 or Younger at Time of Offense	255 (0.86%)
Classification Score of 25 or Below	12,297 (41.61%)
Classification Score of 19 or Below	10,700 (36.20%)
No Serious RVRs in Past 3 Years	25,501 (86.28%)
CS of 25 or Below with No Serious RVRs in Past 3 Years	12,016 (40.66%)
CS of 19 or Below with No Serious RVRs in Past 3 Years	10,490 (35.49%)

Table A.3: Eligibility by Offense Type and Time Served (mix of lower-level offenses)

Offense Type	Served 10 Years or More		Served 7 Years or More		All	
	Frequency	*Percentage of **Total Prison Population Originating in LAC****	*Frequency*	*Percentage of **Total Prison Population Originating in LAC****	*Frequency*	*Percentage of **Total Prison Population Originating in LAC****
Drug Offenses	132	0.45%	158	0.53%	461	1.56%
Residential Burglaries	476	1.61%	688	2.33%	1,643	5.56%
Robberies	2,045	6.92%	2,828	9.57%	5,297	17.92%
Residential Burglaries & Robberies	2,521	8.53%	3,516	11.90%	6,940	23.48%
Non-Sex Offenses	12,393	41.93%	15,618	52.84%	26,029	88.07%
Non-Murder & Non-Sex Offenses	5,731	19.39%	7,937	26.85%	17,048	57.68%
All Non-Violent, Non-Serious, Non-Sex Crimes	527	1.78%	644	2.18%	2,236	7.57%
All Non-Non-Non Crimes (with Residential Burglaries)	1,003	3.39%	1,332	4.51%	3,879	13.12%
All Non-Non-Non Crimes (with Res. Burglaries & Robberies)	3,048	10.31%	4,160	14.07%	9,176	31.05%
All Incarcerated*	14,463	48.93%	18,167	61.47%	29,556	100.00%

**The total prison population originating in LAC in this table excludes all LWOP and condemned cases.*

B. Background on Our Incarceration Crisis

Our ballooning prison population did not result from an increase in crime. In fact, our crime rate has declined dramatically since the early 1990's. Rather, harsher sentencing laws like Life Without the Possibility of Parole, an increase in mandatory minimum sentences for indeterminate sentences, Three Strikes sentencing, and requirements that that restrict people to complete 85% of their imposed time now keep people in prison for longer than ever before, long after they pose any safety risk to their community.

There are currently more people serving life sentences in America than were locked up in prison at all during the 1970s. One in seven people behind bars is serving a life sentence.

California has led the way in this explosion. We had 23,000 people incarcerated in 1980. By 2000, we had over 160,000 people. By 2010 we had 164,000. In the last 10 years, spurred by a United States Supreme Court decision holding that California's overcrowded prisons constituted cruel and unusual punishment, as well as by a growing public awareness that we are incarcerating too many people for too long, we have moved to reduce our prison population. However, we have five times as many people incarcerated as we had in 1980.

California spent a shocking $15.7 billion on prisons in 2019-2020. This represents 7.4% of all state funds. This is occurring while people are sleeping in our streets, our parks are trash-ridden, our schools are in need of repair, our once-free public universities are underfunded and tuition rises, people are hungry, and we need major infrastructure repair to even do things like provide clean water to the people of California.

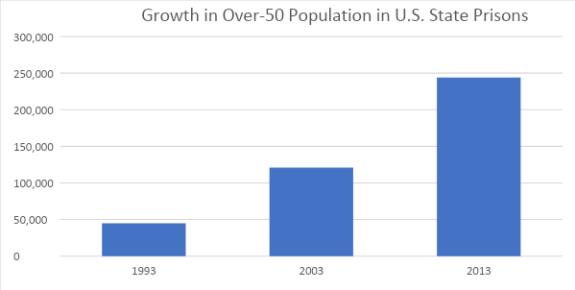
In Los Angeles County alone we currently have almost 30,000 people in CDCR.

Nationally, our criminal justice policies have disproportionately impacted minority populations. 60% of people in prison are Black, despite making up just 13% of the population. One out of every five Black persons behind bars has a life sentence.

Almost 93% of people sent to prison from Los Angeles County are Black people and people of color. Black people are approximately 9% of Los Angeles's population. They constitute 38% of Los Angeles's state prison population. We can no longer deny that our system of hyper-criminalization and incarceration is anything other than racist.

The incarceration rate of women is also on the rise. In 1980, there were 13,206 women in prison; in 2017, there were 111,360.

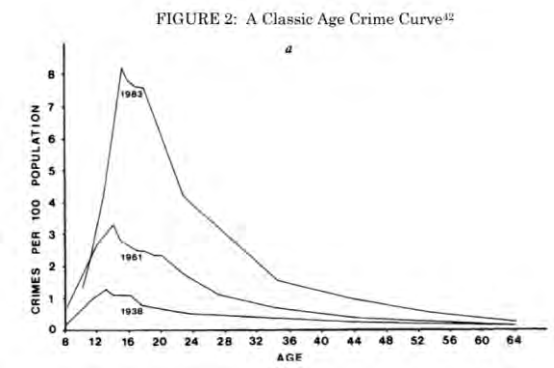
Harsh sentencing laws have also meant that the prison population is old. If we continue at current rates, one in three people behind bars in state prisons will be over 50 by 2030. In 1993, there were 45,000 people over 50 in U.S. state prisons. Twenty years later, there were 243,800. The growth in the aging prison population has continued. Since 1999, New York has decreased its prison population by 30 percent but during that same time span saw a doubling of its over 50 population. Between 2001 and 2014, 29,500 people over 55 died in federal and state prisons.



Current estimates show that the U.S. spends upwards of $16 billion a year to care for its elderly population. In 2013 in Virginia, **nearly half of the Department of Corrections budget** for prisoner health care went to caring for the elderly.

Recidivism and the Age-Crime Curve

Research consistently shows that individuals age out of crime, even those convicted of the most serious offenses. By the time individuals reach their thirties, their odds of committing future crimes drop dramatically. Much of this is due to neurological changes, which take place in profound ways up until an individual turns 26. The prefrontal cortex, which is highly involved in executive functioning and behavior control, continues to develop until age 26, making it harder for young people to make what adults consider logical and appropriate decisions.



Given these changes, it makes little sense to sentence children and adolescents to lengthy terms of incarceration without any meaningful opportunity for review, as the odds are extremely high that those children can be rehabilitated and reenter society.

Likewise, incarcerating an aging population makes little penological sense. Those aged 50-64 have far lower recidivism rates than the national average: seven percent compared to 43.3 percent. And those over 54 have just a four percent recidivism rate. In other words, we are spending billions to lock up people, 96% of whom will not even commit a technical violation once released.

Jurisdictions that allow for a "second look" or increased parole opportunities

"Look back" provisions allow sentenced individuals to petition for a reduced sentence after they have shown meaningful signs of rehabilitation that indicate an ability to return to society. While several jurisdictions have parole eligibility, only California has enacted a robust "look back" Act thus far. Delaware has implemented one to address those sentenced under habitual offender laws.

Federal: Los Angeles Congresswoman Karen Bass and United States Senator Cory Booker introduced a bill for people serving in federal prison to reevaluate cases involving people **over 50 years old and for those who have served at least ten years of a sentence**, creating a rebuttable presumption of release for those over 50.

District of Columbia: Recently, the District of Columbia passed Second Look Sentencing for youths. This month, the Council is poised to expand this second look resentencing to all who were under the age of 25 at the time of the crime.

Oregon: in January 2020, Oregon's Second Look Resentencing, for minors SB 1008 goes into effect.

Florida: Florida allows a second look for children who were sentenced as adults for offenses committed before their 18th birthday.

Delaware: People convicted before their 18th birthday of a first-degree murder may petition for modification after 30 years, and after 20 years for any other offense.

Colorado: Senate Bill 16-180 requires the Department of Corrections (DOC) to create a program for kids sentenced as adults for a felony and presumes release upon participation after 3 years.

California: has made many of its recent changes retroactive, including resentencing for those convicted of a third strike, Proposition 47, SB 1437, Penal Code section 1170, subsection (d), among others. California also provides automatic parole review when a person commits the crime before the age of 26 and has served 15, 20, or 25 years, depending on the controlling offense. California has also expanded elderly parole this year with AB 3234 so that people who are 50 and have served at least 20 years are eligible for parole consideration.

The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.

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SPECIAL DIRECTIVE 20-13

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: CONVICTION INTEGRITY UNIT

DATE: DECEMBER 7, 2020

This Special Directive addresses issues of Bureau of Prosecution Support Operations, Conviction Integrity Unit (formerly known as the Conviction Review Unit) in Chapter 1.07.03 of the Legal Policies Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of Chapter 1.07.03 of the Legal Policies Manual.

INTRODUCTION

The CIU shall conduct strategically collaborative, good-faith case reviews designed to ensure the integrity of challenged convictions, remedy wrongful convictions, and take any remedial measures necessary to correct injustices uncovered, within the bounds of the law. The CIU will also study and collect data on the causes of wrongful convictions in L.A. County, in service of informing office wide policies and procedures designed to prevent such injustices going forward and strengthen community confidence in the criminal legal system overall. The CIU is committed to seeking the truth and ensuring transparency in the review process and shall openly and regularly report its case review numbers to the public. To fulfill its mission, the CIU will operate independently from litigation units in the office and approach its review and investigation in a non-adversarial manner to ensure that justice prevails in each and every case.

GUIDING PRINCIPLES

"The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants."

-American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2(b)

"When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor's jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit...When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."

-American Bar Association, Model Rules of Professional Conduct, Standard 3.8(g)-(h); California Rules of Professional Conduct (F)-(G)

POLICIES GOVERNING CIU CASE REVIEW

In view of the growing body of evidence demonstrating that wrongful convictions occur with greater frequency than is acceptable in our criminal legal system, as well as the legislature's recent revisions to the Penal Code that expand the legal avenues available for review of new evidence supporting claims of wrongful conviction, and based on a review of best practices employed in CIUs in other jurisdictions, the policies governing this office's CIU shall be as follows:

The CIU shall be an independent unit that reports directly to the District Attorney or his designee. It shall be staffed with specially trained deputies, investigators, paralegals and other staff who are committed to its mission.[1] The CIU shall be comprised of members with diverse backgrounds and experiences.

The CIU has a broad mandate to review a wide range of issues relating to wrongful convictions but shall prioritize claims of actual innocence brought by individuals who are currently in custody. The CIU shall not reject any case because a conviction is based on a guilty plea, an appeal is pending, the case is in active litigation, or where the applicant has completed his or her sentence. The CIU shall be authorized to fast-track cases submitted by applicants who are represented by counsel, including innocence organizations, where those cases have undergone substantial, reliable investigation and where new evidence supporting the wrongful conviction claim is presented.

CASE REVIEW CRITERIA

The CIU shall accept for review cases in which:

(1) the applicant was prosecuted by the Los Angeles County District Attorney's Office; and,

[1] The CIU shall work with defense organizations and members of the post-conviction legal community, including innocence organizations, as well as relevant experts, to develop and implement trainings on best practices for conducting post-conviction investigations.

(2) there is a claim of actual innocence or wrongful conviction; and,

(3) the CIU identifies one or more avenues of investigation that have the potential to substantiate the applicant's claim(s) of actual innocence and/or wrongful conviction.

The intake criteria shall always include an "interest of justice" exception. Under this exception, the CIU shall be authorized to undertake a review and investigation in cases that do not meet the intake criteria, if doing so is in the interests of justice. The interests of justice may be met where the applicant alleges and/or the CIU concludes that further investigation is warranted to determine whether:

1. There is a reasonable probability that the applicant is actually innocent[2];
2. Some or all of the evidence relied upon to obtain the conviction is no longer deemed credible;
3. There is evidence the prosecution or conviction was tainted by racial discrimination, whether or not a court previously agreed with the applicant's assertion of racial discrimination;
4. The prosecution failed to disclose material evidence in the possession of any law enforcement agency that was favorable to the defense, whether exculpatory, impeaching, or mitigating;
5. The fact-finding process was so corrupted as to deny the applicant a fair adjudication of his or her guilt or innocence at trial;
6. A manifest injustice rendered the trial fundamentally unfair; and/or,
7. Had the office known at the time of trial what it now knows about the evidence, the office would not have chosen to prosecute the case, or would have charged the case differently.

The above list is intended to be illustrative; it is not exhaustive.

The CIU shall pay special attention to cases where the applicant claims the conviction was obtained based on any of the following high-risk factors, or common causes of wrongful conviction, which shall not be rejected without meaningful review and investigation:

1. The applicant was convicted based, in whole or in part, on eyewitness identification evidence or testimony, particularly where it was a stranger identification or cross-racial identification, or both[3];

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[2] *See*, Rule 3.8 Special Responsibilities of a Prosecutor (Rule Approved by the Supreme Court, Effective June 1, 2020).

[3] Both at the application stage and in the investigation of cases accepted for review, the CIU shall verify that eyewitness identifications supporting a conviction comport with standards and research accepted by the scientific community and do not run afoul of the best practice and recommendations in the 2019 Third Circuit Eyewitness Identification Report. The CIU shall assess the reliability of eyewitness identification evidence in light of the non-exhaustive lists of system and estimator variables set forth in *State v. Henderson* (N.J. 2011) 27 A.3d 872, and continually examine and apply emerging research related to eyewitness identifications, including but not limited to the American Psychological Association white papers Policy

2. The applicant was convicted based, in whole or in part, on the applicant's confession and there are allegations that this confession was false or coerced[4];
3. The applicant was convicted based, in whole or in part, on testimony that has since been recanted as false or coerced;
4. The applicant's conviction is alleged to have been borne from official misconduct, including witness tampering, misconduct in interrogations, fabricated evidence and confessions, the concealment of exculpatory evidence, and misconduct at trial[5];
5. Law enforcement personnel involved in the investigation or arrest of the applicant were subsequently discharged or relieved of their duties for misconduct;
6. Law enforcement personnel involved in the investigation or arrest of the applicant who have been adjudicated by a court or an internal investigation by a law enforcement entity to have been committed an act of dishonesty or sexual assault as defined by Cal. Penal Law Section 832.7 (b) (B) and (C);
7. The applicant was convicted based on forensic evidence grounded in methodologies that have since been largely or wholly discredited as unreliable, including but not limited to bloodstain pattern analysis, comparative bullet lead analysis, forensic odontology (bitemarks), hair microscopy for the purpose of determining whether known/unknown hairs share a common source, Shaken Baby Syndrome (SBS). The CIU shall review the forensic methods used to analyze the evidence and ensure that forensic evidence used to obtain a conviction is foundationally valid and valid as it was applied in the case[6];

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and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence (2020) and Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads (1998).

[4] The CIU shall consult the 2010 American Psychological Association white paper on police interrogation and confessions, and any emerging literature or research regarding false confession and recanting witnesses, to inform its review of convictions supported by statements obtained during custodial interrogations that have since been recanted or disavowed by the person who allegedly made the statement. https://web.williams.edu/Psychology/Faculty/Kassin/files/White%20Paper%20-%20LHB%20(2010).pdf

[5] The CIU shall consult the National Registry of Exonerations report *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement* (2020), and any emerging literature or research regarding official misconduct, to inform its review of convictions alleged to have resulted in whole or in part from official misconduct.

[6] The use of unreliable and misleading forensic evidence, which we know is a common cause of wrongful convictions, imperils the integrity of the criminal legal system. The CIU shall critically and continually examine emerging scientific literature, which may also call into question older forensic methods, and train staff about these changes, so that case review criteria can be updated as needed. The CIU shall ensure that forensic evidence supporting a conviction complies with the findings, recommendations, and best practices set forth in specific reviews of the relevant sciences, including but not limited to:

I. American Association for the Advancement of Science (AAAS) reports on Fire Investigation (2017) and Latent Fingerprint Examinations (2017)
II. American Statistical Association (ASA) Position on Statistical Statements for Forensic Evidence (2019)
III. National Academy of Sciences (NAS) report *Strengthening Forensic Science in the United States: A Path Forward* (2009)

8. The applicant was convicted based on forensic evidence that the LACDA has generally accepted as reliable, but the particular conclusions or opinions presented to the jury in support of the prosecution's case exceeded the bounds of what is now recognized to be valid science – for example, through testimony purporting to "identify" an applicant as the unique source, or through expert testimony implying or stating a statistical basis for the likelihood of a particular conclusion that is not verifiable or otherwise valid;
9. A conviction was based either on the factors identified above but corroborated only with jailhouse informant testimony or testimony by an informant that has been used by law enforcement or this office on more than one occasion;
10. The conviction was based, in whole or in part on jailhouse informant testimony or testimony by an informant that has been used by law enforcement or this office on more than one occasion;
11. The conviction was based in whole or in part on the testimony of witnesses who received benefits from this office or law enforcement in exchange for, or close in time to, their testimony against the applicant;
12. A gang allegation was found true by a jury where the only evidence of gang membership was presented by a gang expert, and that evidence would now be deemed inadmissible hearsay under *People v. Sanchez* (2016) 63 Cal. 4th 665, and the evidence of gang membership served as the only evidence of motive used to obtain the conviction;
13. Evidence based on analysis by crime labs that were not accredited when the analysis was conducted, and/or have been implicated in scandals related to their handling and testing of evidence;
14. Evidence supporting the conviction was corroborated by one or more of the above types of unreliable evidence;
15. The applicant was convicted after one or more retrials, following a hung jury;
16. Defense counsel was disbarred or otherwise disciplined after the challenged conviction was obtained, and/or presented no evidence to counter the prosecution's case at trial, and/or was found by a court to have provided ineffective assistance of counsel in one or more other cases.

IV. National Institute of Standards and Technology (NIST) report on Latent Print Examination and Human Factors (2012), Working Group on Human Factors in Handwriting Examination (2020), and Scientific Foundation Studies on DNA mixture interpretation, bitemark analysis, firearms examination, and digital evidence (forthcoming)

V. President's Council of Advisors on Science and Technology (PCAST) report *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016).

SPECIAL CONCERNS IN EVALUATING FORENSIC EVIDENCE

In cases involving forensic evidence, the CIU shall request or permit the applicant's counsel to conduct forensic testing, when doing so could be probative, in that it may tend to identify the identity of the perpetrator of the crime or may exculpate the applicant seeking review of their conviction. The CIU shall request that forensic results be expressed in reports and testimony using clear and comprehensible language, to inform the CIU's own decision making and that of other legal actors. Where such testing is conducted, the CIU shall permit any forensic analysts retained by the CIU to speak freely and independently with the applicant's counsel and shall make the analysts' underlying data and case materials available to the defense.

The CIU shall not raise procedural challenges or defenses to oppose, nor shall it oppose, requests for seeks forensic testing, including but not limited to DNA testing, fingerprint analysis, firearms comparison, GSR, toxicology, where the testing may lead to evidence relevant to the applicant's claim of actual innocence or wrongful conviction, including but not limited to testing that is capable of identifying the perpetrator of a crime. The CIU shall assist applicants in ascertaining the status of physical evidence by facilitating contacts between individuals seeking testing and/or their attorneys and the crime lab and/or law enforcement personnel needed to search evidence and property rooms to locate the evidence in question.

The CIU shall carefully scrutinize cases in which experts or others opined or testified by using terms like "reasonable degree of scientific certainty," which have no accepted scientific meaning yet convey an unsupported measure of reliability or conclusiveness to the factfinder. The CIU shall request that all information concerning the limitations of forensic techniques should be disclosed alongside the results of any analyses. All forensic methods have limitations, and none are error free. Where error rates for a method are not known or have not been adequately measured, reports shall state that fact. The CIU shall carefully scrutinize any conviction based in whole or in part upon testimony that states or implies a "zero error rate" or which purports to provide an error rate that has not been independently validated. The CIU shall similarly make those limitations clear in communications with the applicant and/or their counsel and the court. The CIU shall also request that all methods of forensic analyses be documented in the first instance to permit the CIU's review and disclosure of all steps followed and the methodology used to arrive at the conclusions reached.

The CIU shall ensure that the applicant and/or their counsel receive not just certificates or reports of forensic analyses, but also complete documentation of the methods used, and the results reached. The CIU shall disclose the applicant and/or their counsel all inconclusive and exculpatory forensic results, in addition to any information about corrective actions taken in a laboratory or proficiency testing of individual analysts. The CIU shall also make routine requests to preserve forensic evidence, especially where the applicant and/or their counsel seek preservation for potential future testing.

The CIU shall facilitate a CODIS, AFIS or NBIN search of evidence that may help demonstrate an individual was wrongly convicted.

PRO SE APPLICANTS

When a case accepted for review is submitted by a *pro se* applicant, the CIU shall determine whether appointment of independent legal representation would promote justice and facilitate review of the case, such as in cases involving high-risk factors, listed above. In the absence of those factors, the determination as to whether appointment of counsel would promote justice shall be determined on a case-by-case basis. In such cases, the CIU shall recommend that the applicant seek legal representation and, if requested, assist by referring the individual to an appropriate innocence project, law school clinic, *pro bono* counsel, or public defender office. The CIU shall also consider whether to file a joint petition for writ of habeas corpus stipulating that an order to show cause should issue and counsel should be appointed pursuant to Penal Code section 1484.

Where an applicant is represented by counsel, the CIU shall use joint discovery and/or limited disclosure agreements, in appropriate cases, to share work product information. The CIU will seek to conduct investigations jointly and collaboratively with counsel, sharing exculpatory or improperly withheld information as quickly as practicable. Any attorney-client or work-product privileged information that is shared between a claimant and the CIU shall not be shared with other units in the office and shall not be used at trial or in post-conviction proceedings by other units for any purpose.

COMMUNICATIONS WITH APPLICANT'S COUNSEL

This Office respects the sanctity of the attorney-client privilege between an applicant and defense counsel. An applicant who alleges Ineffective Assistance of Counsel may have, unwittingly, impliedly waived some portion of the attorney-client privilege as to communications with their trial counsel. This waiver is not absolute, however, and is extremely limited.

The CIU shall err on the side of caution and notify an applicant before seeking to contact defense counsel or seeking to obtain counsel's file and provide the applicant with a chance to object or modify a claim to avoid an inadvertent or implied waiver of the attorney-client privilege. The CIU shall not seek disclosure of anything beyond that which is strictly necessary and legally allowable under California and Federal law, including information that exceeds the limited scope of the ineffective-assistance-of-counsel claim.

The CIU shall not encourage any attorney to violate their ethical duties of confidentiality and loyalty to former clients, as articulated in the California Rules of Professional Conduct; rather, CIU attorneys or investigators speaking to defense counsel must remind defense counsel of the attorney-client privilege prior to the start of a substantive interview.

ACCESS TO DISCOVERY

If the CIU accepts a case for review, the CIU shall assist the applicant in obtaining all discovery the applicant is entitled to under P.C. 1054.9, as well as any and all *Brady* materials in the constructive possession of the office. The CIU shall also allow applicants and/or their attorneys

to have access to all non-privileged and non-sensitive information in the case files under review, including information in police reports and lab reports concerning the testing of forensic evidence.

Recognizing that certain categories of otherwise privileged information and work product prepared by this office may contain exculpatory or impeachment information relevant to an applicant's claims, and the benefit to the truth-seeking process of having both parties review this material, the CIU shall err on the side of disclosing the complete LACDA trial file to the applicant's counsel for independent review, subject only to reasonable and necessary disclosure agreements. Any redactions shall be limited to those deemed strictly necessary to protect victim or witness privacy.

The CIU shall not condition its review of a case or its own disclosures on any reciprocal commitment by the part of the applicant to waive any aspect of the attorney-client or work-product privilege or waive such privileges generally. Where otherwise privileged information may be necessary for the CIU to fully investigate and consider an applicant's claims for relief – for example, to speak with the applicant's trial counsel or review portions of the trial file to determine if certain *Brady* information was or was not timely disclosed – the CIU shall limit its waiver requests to only those necessary to investigate the claim or issue. Similarly, where the CIU seeks to interview the applicant or the applicant's prior counsel, the CIU shall afford the applicant's current counsel the opportunity to be present (or waive counsel's presence) at the interview.

The CIU shall proactively seek to obtain complete files from law enforcement agencies pertaining to the case, including forensic evidence and files maintained by laboratories and coroner or medical examiner's offices. In the event the CIU discovers that the case file(s) have been lost in whole or in part, the CIU shall immediately inform the person seeking review of their conviction, or their counsel, that the file(s) has been lost. The CIU shall work with the Discovery Unit to reconstruct the file by obtaining records from:

- The LACDA's internal files;
- The LAPD, LASD, LAFD, and/or any other law enforcement agency or emergency services provider involved in the case;
- Crime labs;
- The coroner's office, in homicide cases;
- The original trial deputy's personal file;
- The superior court file;
- The courthouse exhibit room;
- The court of appeal; and
- Any other source reasonably likely to have relevant materials, records, and/or evidence, such as medical records, where appropriate releases are provided, 911 dispatch call recordings, etc.

The CIU shall review every case previously rejected by the former CRU, whether at the screening stage or after an investigation, in light of all of the above.

INVESTIGATIONS IN CLAIMS OF WRONGFUL CONVICTION

CIU investigations often require looking into convictions that are decades old, where witnesses' memories have faded, and/or that involve reluctant or recanting witnesses, and therefore often require specialized knowledge and training on issues such as memory science, eyewitness identifications, and police practices used at the time that are no longer considered best practices. CIU deputies and investigators shall consult with outside experts, as needed, to obtain relevant materials concerning best practices regarding conducting CIU investigations.

These investigations shall not be undertaken as a means of "protecting" a conviction, nor shall they be adversarial in nature. Thus, for example, investigators shall not engage in tactics designed to dissuade a recanting witness and shall not threaten to charge that witness with perjury; rather the paramount goal of a CIU investigation shall be to determine the reliability and truthfulness of the recantation. Using a high-pressure, coercive, or intimidating approach in these investigations wastes time and resources and sends a mixed message to office staff about the CIU's mission and undermines the CIU's credibility with the public.

CIU deputies and investigators shall also make all reasonable efforts to avoid *un*intentional witness intimidation. These efforts shall include, but are not limited to, conducting interviews in non-threatening or neural locations (rather than in this office or another law enforcement entity's office or station), if possible, and the concealing of the investigator's weapon, if one is carried, except where specifically required to do so by law, or if approved by the elected District Attorney.

CIU deputies and investigators shall understand what confirmation bias is—also referred to as tunnel vision—and how to avoid it. Studies have shown that confirmation bias is pervasive in the reinvestigations in wrongful conviction cases. It can occur, for example, when original police reports are viewed deferentially and/or treated as unassailable accounts of the truth of what transpired in the case, when research shows that police reports are often incomplete and contain inaccuracies, sometimes due to the fast-pace at which criminal investigations unfold, following serious felony offenses. CIU deputies and investigators shall test and probe information in police reports, witness accounts, and other new evidence presented by an applicant, in a manner designed to uncover the truth.

INDEPENDENCE OF THE CIU

To the extent possible the CIU shall not disclose or discuss ongoing investigations with other units within this office, other than the elected District Attorney and/or his designee. Nor will the CIU share information from ongoing investigations with other governmental entities, except where specifically required to do so by law, or if approved by the elected District Attorney. In addition, to ensure a full and fair review of each case, investigations and case reviews shall be conducted independently by CIU deputies and investigators, without consultation or input from the original trial deputy, Head Deputy, or Assistant District Attorney of the trial division, except as needed to obtain historical information about the case.

The trial deputies who handled the original prosecution shall be afforded a reasonable opportunity to respond to any challenges that have been made to the prior handling of the case, but

shall not take part in the office's determination as to whether to accept a case for review or whether to recommend that relief from a conviction be granted. This unique investigative and litigation perspective underscores the need for CIU independence from other areas of the office and should be read to encourage collaboration with an applicant seeking review of a conviction wherever possible.

CASE RESOLUTION & REMEDIAL OPTIONS

Once a case that has been accepted for review undergoes a full investigation, the CIU shall make a recommendation to the District Attorney as to whether it is in the interest of justice to seek relief from the applicant's conviction or sentence.

If the CIU concludes that it is not in the interests of justice to revisit the conviction and/or sentence, the CIU shall inform the District Attorney of its conclusion and recommendation. The District Attorney shall have final decision-making authority to determine whether it is in the interest of justice for the office to seek relief from a conviction or sentence. If the determination is made that relief is not warranted, the CIU shall communicate the reasons for its decision, in writing, to the applicant with an explanation as to why and how the decision was reached, including what investigative steps were taken.

If the determination is made that relief is warranted, the CIU shall determine and consider all available and appropriate remedies, including seeking dismissal of the case pursuant to P.C. 1385, moving for a reduction of sentence pursuant to P.C. 1170(d), joining the applicant in filing a joint petition for writ of habeas corpus that stipulates to the need for an issuance of an order to show cause, advocating before parole boards for early release, supporting a petition for the restoration of rights, seeking expungement of the case, and/or supporting a request for clemency or pardon, where such remedies are in the interest of justice.

The CIU shall not delay the release of those persons whose entitlement to post-conviction relief has been established, for any reason; it is the duty of the CIU to immediately arrange for conditional release of those individuals pending the formalization of the conviction being vacated.

VICTIM OUTREACH & ADVOCACY

The CIU shall comply with all statutes and rules governing victims' rights and may engage a victim representative at any stage in the investigation when doing so may be in the best service of the investigation and/or the victim. The CIU will be respectful of victims and institute a culture of keeping victims abreast of investigation outcomes, when the outcome affects or changes the nature of the conviction and/or sentence. Upon the District Attorney's decision to seek relief in a case, the CIU shall engage a victim representative to liaise with the victim or victims.

REENTRY ASSISTANCE & COMPENSATION ASSISTANCE

Where the CIU determines that a conviction should be overturned and a case dismissed based on actual innocence, the CIU shall assist in securing necessary support and documentation,

such as a finding of actual innocence, that facilitate successful reentry into the community and will support the enactment of systems of compensation for those wrongfully convicted.

FINDINGS OF FACTUAL INNOCENCE

This office recognizes that monetary compensation is essential to a wrongfully convicted person's ability to rebuild their life. Under California law, wrongfully convicted persons who are innocent of the crimes for which they were convicted may file a claim for compensation with the California Victim Compensation and Government Claims Board (CVCGC Board), under California Penal Code section 4900.

Where the CIU determines that an applicant has demonstrated their innocence, the CIU shall proactively assist the applicant in seeking the statutory compensation to which they are entitled, including filing in the superior court, jointly with the applicant, if requested, a motion "for a finding of factual innocence by a preponderance of the evidence that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her." Cal. Pen. Code 1485.55 (b). The court's "finding of factual innocence," is binding on the CVCGC Board and this office's joint request for that finding will expedite and facilitate the compensation process. The CIU shall also assist the applicant by supporting their claim before the CVCGC Board, when filed, if requested.

Under current law, to obtain a "finding of factual innocence" in the superior court, a wrongfully convicted person must demonstrate that they are innocent by a preponderance of the evidence. The burden is on the wrongfully convicted person to prove their innocence. Because that standard is antithetical to the bedrock principle of our criminal justice system, which presumes a person is innocent until they are proven guilty beyond a reasonable doubt,[7] it shall be the policy of this office, absent extenuating circumstances and with supervisor approval, to move jointly for and/or concede in the superior court that "a finding of factual innocence" should be made, where the conviction has been overturned, the charges have been dismissed, and there no longer exists constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt.

TRANSPARENCY

The CIU will conduct business in the most transparent manner possible, with biannual updates to the website on the number of cases submitted, under review, rejected, and outcomes. The CIU shall have open discussions with a designated ethics officer about critical case-related

[7] "Absent conviction of a crime, one is presumed innocent." *Nelson v. Colorado.* (2017) 137 U.S. 1249, 1255 (explaining that once a criminal conviction is erased, the presumption of innocence is restored and holding that the state "may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions"), citing *Johnson* v. *Mississippi* (1988) 486 U. S. 578, 585 (1988) (holding that after a "conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge"); *Coffin* v. *United States* (1895) 156 U. S. 432, 453 ["axiomatic and elementary," the presumption of innocence "lies at the foundation of our criminal law."

decisions; the pursuit of justice and the interest in avoiding and remedying wrongful convictions shall be at the forefront of each decision.

The CIU's expansive scope of review and transparent practices are designed to remedy past individual wrongful convictions and enhance community confidence in the justice system, as well as provide a tool for improving office wide practices in a manner that reduces the likelihood of errors occurring again in the future.

"LEARNING ORGANIZATION"

The outcomes of CIU investigations are intended to provide a critical opportunity to identify systemic gaps that go beyond just one individual's error and can reinforce the idea that the District Attorney's office is a "learning organization." The CIU will have a clear avenue for recommending policy and procedural changes, as well as enhanced training, to address any deficiencies that are uncovered, including but not limited to:

- Consistent with its commitment to ensure that the forensic evidence underlying convictions is scientifically sound and accepted, the CIU shall develop appropriate systems, curricula, and CLE opportunities to help ensure that forensic evidence is used appropriately office-wide, prospectively, at every stage of criminal and post-conviction proceedings.
- Consistent with its commitment to the use of best practices in policing, the CIU shall develop appropriate systems, curricula, and CLE opportunities to help ensure that, officewide, deputies are regularly trained on what constitutes best practices in policing and rely on evidence obtained through policies and procedures reflecting the use of best practices in policing prospectively, at every stage of criminal and post-conviction proceedings.
- The CIU shall develop and maintain a database to track errors and other causes of wrongful convictions uncovered in the course of its case reviews. On a periodic basis, not less than once a year, the CIU shall review and synthesize the data collected to proactively recommend policy and procedural changes officewide. The CIU shall develop a well-defined method to develop, implement, and train the office on these changes. The CIU shall publish these findings and policy changes on the website not less than once a year.
- The database shall track official misconduct, including the names of law enforcement officers, prosecuting attorneys, agents of law enforcement including jailhouse informants and crime lab analysts, expert witnesses, and any other actor found to have committed misconduct or whose testimony has otherwise been proven to be unreliable. Not less than once a year the CIU shall use the data compiled in the database to compile a list of all other cases office wide, past and present, in which those actors participated in a case that resulted in a plea or conviction. The CIU shall review each of those cases and notify the applicant and/or defense counsel that their case is being reviewed and the reason for the review.

The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.

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SPECIAL DIRECTIVE 20-12

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: VICTIM SERVICES

DATE: DECEMBER 7, 2020

This Special Directive addresses issues of Bureau of Victim Services in Chapter 1.05.02 and Victim-Witness Relations in Chapter 8 of the Legal Policies Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of Chapter 1.05.02 and Chapter 8 of the Legal Policies Manual.

INTRODUCTION

Supporting victims in their journey to becoming survivors is fundamental to community safety. When a person has been harmed, wronged, or experienced loss at the hands of another, they need justice and healing. The criminal justice system must ensure that they have the rights and resources necessary to defend themselves, as well as services to facilitate their re-entry to the community. Attention and resources must be directed to the victims whose lives may be forever changed by the act of another, as crime victimization takes away a person's power and safety and many endure the effects of trauma long after the justice system has completed its role. It is a sad reality that the vast majority of victims do not find justice in the system, as many offenders are not known, arrested, charged, or convicted. It is important for us to have a system that takes care of victims and survivors *regardless of the outcome of the criminal case.*

The Los Angeles County District Attorney's Office will pursue a system of parallel justice, where we not only seek legal prosecution of offenders, but also provide support services for victims in their evolution to becoming survivors. Below are the policies that shall be implemented immediately in connection with other services currently provided by the Bureau of Victim Services.

POLICY

1. The Bureau of Victim Services (BVS) will contact all victims of violent crime within 24 hours of receiving notification. This includes sexual assault, homicide, attempted homicide, domestic and intimate partner violence. Support will be provided to both victims/survivors as well as any children witnessed or were indirectly affected by violence and crime.

2. BVS will also contact the families of individuals killed by police and provide support services including funeral, burial and mental health services immediately following the death regardless of the state of the investigation or charging decision.
3. BVS will support survivors and all others harmed by violence and crime regardless of immigration status, reporting, cooperation or documentation.
    a. Immigration status will not be asked or needed to secure Advocacy services, California Victims of Crime Compensation or Restitution.
4. BVS will establish a Victim Emergency Fund to provide immediate financial resources to victims and family members impacted by violent crime. to
    a. This fund will help to compensate for expenses not covered by the California Victims of Crime Compensation (Cal VCB) including relocation, funeral and burial costs, and essential needs such as food, shelter, clothing expenses.

Additionally, BVS shall not require cooperation as a condition of offering services.

Furthermore, DDAs are directed to immediately stop seeking body attachments for victims.

The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.

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SPECIAL DIRECTIVE 20-11

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: DEATH PENALTY POLICY

DATE: DECEMBER 7, 2020

This Special Directive addresses issues of Special Circumstances Cases in Chapter 7 of the Legal Policies Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of Chapter 7 of the Legal Policies Manual.

A sentence of death is never an appropriate resolution in any case. The office will strive to ensure that all actions taken are consistent with this policy, including refraining from filing letters stating an intention to seek the death penalty, filing briefs, seeking discovery, or making arguments in court that indicate that the death penalty is an appropriate sentence.

INTRODUCTION

Racism and the death penalty are inextricably intertwined.[1] Numerous studies have found that race influences who is sentenced to die in this country and in California; this includes both the race of the defendant and the race of the victims.[2]

Los Angeles County has historically been one of the nation's most prolific death penalty counties,[3] and it exemplifies how racism infects death penalty proceedings. There are currently 215 people on California's death row who were sentenced to death as a result of capital prosecutions in Los Angeles County.[4] An astonishing 85% of those people are people of color.[5] This makes Los

[1] Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty* (1995) 35 Santa Clara L. Rev. 433, 439; see also Equal Just. Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 5 (3d ed. 2017), <https://lynchinginamerica.eji.org/report/>.
[2] Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty* (2020) 51 Colum. Hum. Rts. L. Rev. 983 [collecting and describing studies].
[3] Death Penalty Info. Ctr., *Outlier Counties: Los Angeles County Has Nation's Largest – and Still Expanding – Death Row* (Nov. 21, 2016), <https://deathpenaltyinfo.org/news/outlier-counties-los-angeles-county-has-nations-largest-and-still-expanding-death-row>.
[4] Brief of Amicus Curiae The Honorable Gavin Newsom in Support of Defendant And Appellant McDaniel, *People v. McDaniel* (S171393, app. pending), Attachment A, at p. 79, <https://www.gov.ca.gov/wp-content/uploads/2020/10/10.26.20-Governor-Newsom-McDaniel-Amicus-Brief.pdf>.
[5] *Ibid.*

Angeles County an outlier even within the state's flawed system; the rest of California's death row is populated by 59% people of color.[6]

In light of its unequal application to people of color, the death penalty inflicts an extraordinary amount of harm to the moral authority of our justice system. In addition, the death penalty serves no penological purpose as state sanctioned killings do not deter crime,[7] and any retributive value of the death penalty is undermined by California's dysfunctional death penalty system. California has executed 13 people since 1978, while over 11 times that number of people have died of other causes awaiting execution.[8]

The death penalty is also costly and makes no fiscal sense from the prospective of public safety. The strains upon the state's and the county's financial health are extraordinary. Los Angeles can no longer waste huge taxpayer resources to pursue the death penalty when so many needs are unmet. California has spent more than $5 billion since 1978 prosecuting death penalty cases, defending death judgments, and maintaining a death row that houses approximately 712 people.[9] These funds are better spent on programs that improve the quality of life and safety of the Los Angeles County community. A majority of Los Angeles County residents agree.[10]

Finally, by imposing the death penalty, there is a real risk of executing innocent people. According to a peer-reviewed study published in the National Academy of Sciences, one in 25 people sentenced to death in the United States from 1973 to 2004 was erroneously convicted.[11] This "conservative estimate"[12] would mean that at least 9 people currently on death row who were convicted in Los Angeles County are innocent. Maintaining a system of capital punishment when

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[6] *Ibid.*

[7] Michael L. Radelet & Traci L. Lacock, *Do Executions Lower Homicide Rates: The Views of Leading Criminologists*, (2009) 99 Journal of Criminal Law and Criminology 489, 501 ["88.2% of the polled criminologists do not believe that the death penalty is a deterrent"]; National Research Council of the National Academies, *Deterrence and the Death Penalty*, 70-71 (Daniel S. Nagin & John V. Peppers eds., 2012) [finding deterrent effect as justification for capital punishment is "patently not credible" based on meta-analysis of studies conducted].

[8] Cal. Dept. of Corr. & Rehab, *Condemned Inmates Who Have Died Since 1978*, <https://www.cdcr.ca.gov/capital-punishment/condemned-inmates-who-have-died-since-1978/>.

[9] Judge Arthur L. Alarcón and Paula M. Mitchell, *Costs of Capital Punishment in California: Will Voters Choose Reform this November?* (2012) 46 Loy. L.A. L. Rev. S1 [concluding that California had spent over $4 billion on the death penalty from 1978-2011 and estimating that the state's death penalty system costs approximately $184.2 million annually]; Cal. Dep't of Corr. & Rehab., *Condemned Inmate List (Secure*) (Nov. 16, 2020), https://www.cdcr.ca.gov/capital-punishment/condemned-inmate-list-secure-request/ (listing 712 people on death row).

[10] Rachel Lawler, Public Policy Institute of California, *Is Momentum Growing to End California's Death Penalty?*, (Apr. 9 2019), https://www.ppic.org/blog/is-momentum-growing-to-end-californias-death-penalty/ [polling data that 62% of Los Angeles County voters prefer life in prison over the death penalty]; California Secretary of State, November 8, 2016 General Election – Statement of Vote, State Ballot Measures p. 71, < https://elections.cdn.sos.ca.gov/sov/2016-general/sov/65-ballot-measures-formatted.pdf> [52.3% of Los Angeles County voters voted in favor of Proposition 62 in 2016]; California Secretary of State, November 6, 2012 General Election – Statement of Vote, State Ballot Measures p. 67, <https://elections.cdn.sos.ca.gov/sov/2012-general/15-ballot-measures.pdf> [54.5% of Los Angeles voters voted in favor of Proposition 34 in 2012].

[11] Samuel R. Gross, Barbara O'Brien, Chen Hu, & Edward H. Kennedy, *Rate of false conviction of criminal defendants who are sentenced to death*, 111 Proceedings of the National Academy of Sciences of the United States of America 7230-7235 (2014), <https://www.pnas.org/content/pnas/111/20/7230.full.pdf>.

[12] *Id*. at p. 7234.

there is a significant risk that an innocent person will be executed is intolerable. (See policy memo on Conviction Integrity for additional steps that will be taken related to innocence issues.)

The immediate steps detailed below recognize that it is essential to communicate with victims' family members and other stakeholders in order to conduct a thorough review of every case in which this office previously made a decision to seek the death penalty and those cases in which this office previously obtained death judgments. Victims' family members deserve the utmost care and consideration, and it is critical for this office to provide information and services to them and to ensure that their voices are heard. (See policy memo on Victims' Services for additional steps that will be taken related to the needs of victims.)

THE USE OF THE DEATH PENALTY AT TRIAL

In any case charged from this day forward, the District Attorney's Office will not seek the death penalty. In any case currently charged with special circumstances that does not fall into the categories listed below, the case shall now proceed as a non-death penalty case. The Special Circumstance Committee is hereby permanently disbanded.

The following specific policies apply to all filed cases where a letter of intent to seek the death penalty has been filed or verbally noticed in court, or a jury has returned a verdict of death.

1. All Deputy District Attorneys are to request a continuance of at least 30 days to enable the District Attorney or his designee, to review the case. If a deadline cannot be continued, the Deputy District Attorney shall immediately notify the District Attorney or his designee No new briefs or documents will be filed in these cases without direct approval from the District Attorney or his designee.

2. Further instructions will be provided on a case-by-case basis.

CASES WITH A JUDGEMENT OF DEATH ARISING OUT OF LOS ANGELES COUNTY

The District Attorney's Office will not seek an execution date for any person sentenced to death.

The District Attorney's Office will not defend existing death sentences and will engage in a thorough review of every existing death penalty judgment from Los Angeles County with the goal of removing the sentence of death. The Office will continue to defend validly obtained convictions in all cases where the evidence supports the conviction beyond a reasonable doubt, consistent with the policies established for conviction integrity review.

Consistent with this policy, in any post-conviction case in which the District Attorney is counsel for the People of the State of California in record correction proceedings or counsel or co-counsel for the Secretary of the Department of Corrections and Rehabilitation in post-conviction proceedings, the following specific policies apply:

1. All Deputy District Attorneys are to request a continuance of at least 30 days to enable the District Attorney or his designee to review the case. If a deadline cannot be continued, the Deputy District Attorney shall immediately notify the District Attorney. No new briefs or documents will be filed, nor any evidentiary hearing dates set, in any case without direct approval of the District Attorney or his designee.

2. For cases arising from death judgments in Los Angeles County in which the District Attorney is not currently counsel or co-counsel for any party to the litigation, the office will consult with the Attorney General and seek his assistance with implementing the goals of this Office. This Office authorizes and encourages the Attorney General to adopt positions and negotiate resolutions in state and federal post-conviction proceedings consistent with this policy in any capital case arising out of Los Angeles County.

The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.

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SPECIAL DIRECTIVE 20-10

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: HABEAS CORPUS LITIGATION UNIT

DATE: DECEMBER 7, 2020

This Special Directive addresses issues of Bureau of Prosecution Support Operations, Habeas Corpus Litigation Team in Chapter 1.07.03 of the Legal Policies Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of Chapter 1.07.03 of the Legal Policies Manual.

INTRODUCTION

Irrefutable evidence shows that wrongful convictions occur with unacceptable frequency, including convictions that are obtained in proceedings where due process violations and other fundamental constitutional errors denied a defendant their right to a fair trial. The mission of the Habeas Corpus Litigation (HABLIT) Unit is to ensure that justice is done in every case filed in that unit and that every potentially meritorious claim raised in a petition for a writ of habeas corpus is carefully reviewed and investigated.

In every case, HABLIT shall undertake a good-faith case review designed to ensure the integrity of the challenged conviction. In every case, where any injustice is uncovered, including racial injustice, whether or not it is of a constitutional magnitude, HABLIT shall examine and recommend appropriate remedies capable of redressing the harm uncovered, within the bounds of the law. For example, HABLIT is directed to ascertain whether, based on its review and investigation into claims raised in a petition, the outcome in the case comports with the office's current views what would constitute a fair and just conviction and sentence today and, if not, HABLIT shall take steps to find a remedial solution to bring the conviction and sentence into line with today's standards, such as recommending that a petitioner be considered for resentencing to a lesser term pursuant to Penal Code § 1170(d).

HABLIT shall not, as a policy, defend every conviction or raise every conceivable procedural challenge with equal fervor and without regard to the potential merits of the claims presented. Before relying on procedural challenges to defeat any claims raised in a petition, HABLIT shall make a fulsome initial assessment as to whether a petitioner's claims have potential merit, i.e., whether the facts alleged, if true, state a prima facie case for relief. Where a claim appears potentially meritorious on its face, HABLIT shall immediately commence investigating the claim, and seek the earliest possible resolution where it is determined that the claim is meritorious. If the petitioner has failed to state a prima facie case and/or the petitioner is abusing

the writ process by filing successive petitions without additional new evidence supporting the claims presented, HABLIT shall defend the conviction.

GUIDING PRINCIPLES

"The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants."

-American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2(b)

"When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor's jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit...When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction."

-American Bar Association, Model Rules of Professional Conduct, Standard 3.8(g)-(h); California Rules of Professional Conduct (F)-(G)

POLICIES GOVERNING HABLIT UNIT CASE REVIEW OF NON-CAPITAL CASES

A. Habeas Corpus Litigation

Post-conviction litigation differs significantly from the primary work of our office at the trial level. Postconviction litigation at its core is an attempt to balance the People's interest in finality—that a jury's verdict is presumed reliable and brings closure to a case—with an individual's interest in fundamental Constitutional rights and statutory due process rights, and society's interest in preventing wrongful convictions. When tasked with responding to a petition for writ of habeas corpus, HABLIT must weigh these competing interests and find the appropriate balance in each individual case.

Where a petitioner's claims are patently meritless or plainly refuted by the record, the balance tips strongly in favor of finality and HABLIT shall defend that conviction. But where a petitioner presents allegations that are supported by reasonably available evidence, the balance tips against finality and HABLIT shall not simply oppose the petitioner's claim, for the sake of protecting a conviction. Rather, HABLIT shall assess each claim on the merits and if it could potentially expose fundamental constitutional error and/or a statutory right to due process HABLIT's response to the court should so indicate.

In weighing whether a conviction should be defended and protected, or whether a different outcome or resolution is in the interests of justice, HABLIT shall investigate and take into account the following considerations:

- Whether there is a reasonable probability that the applicant is actually innocent, despite the petitioner's ability or inability to articulate a legally sound claim[1];
- Whether material evidence relied upon to obtain the conviction is no longer deemed credible;
- Whether there is evidence the prosecution or conviction was tainted by racial discrimination, whether or not a court previously agreed with the applicant's assertion of racial discrimination;
- Whether the prosecution failed to disclose material evidence in the possession of any law enforcement agency that was favorable to the defense, whether exculpatory, impeaching, or mitigating;
- Whether the fact-finding process was so corrupted as to deny the applicant a fair adjudication of his or her guilt or innocence at trial;
- Whether a manifest injustice rendered the trial fundamentally unfair; and/or,
- Whether, had the office known at the time of trial what it now knows about the evidence, the office would not have chosen to prosecute the case.

The above list is intended to be illustrative; it is not exhaustive.

HABLIT's *de novo* weighing of these interests, prior to a decision to defend a conviction, will ensure greater confidence in this Office's convictions, promote transparency, and strengthen the public's confidence in our criminal justice system, which is capable of addressing errors when they are exposed.

HABLIT's approach to case review and case resolution shall be guided by this office's policy of avoiding unnecessary litigation and resolving cases at the earliest possible juncture, where it is in the interests of justice to do so. HABLIT shall consider what steps, if any, can and should be taken to remedy any injustice it uncovers, whether or not the error or errors are of a constitutional magnitude.

Where HABLIT determines, for example, that based on its review and investigation into claims raised in a petition, the outcome in the case does not comport with the office's current views and policies of what constitutes a fair and just conviction and sentence today, HABLIT shall take steps to find a remedial solution to bring the conviction and sentence into line with today's standards, including seeking dismissal of the case pursuant to P.C. 1385, moving for a reduction of sentence pursuant to P.C. 1170(d), advocating before the BPH for release on parole, supporting a petition for the restoration of rights, seeking expungement of the case, and/or supporting a request for clemency or pardon, where such remedies are in the interest of justice.

B. Screening and Litigation Prior to the Issuance of an Order to Show Cause

[1] *See*, Rule 3.8 Special Responsibilities of a Prosecutor (Rule Approved by the Supreme Court, Effective June 1, 2020)

Upon the filing of a petition, the reviewing court may either summarily dismiss the petition, ask our office for informal briefing, or issue an order to show cause (OSC). The issuance of an OSC is analogous to issuing the writ of habeas corpus, *i.e*., requiring the body of the petitioner to be brought to court to initiate a cause of action as to whether the petitioner's confinement is constitutional. The writ—an OSC—must issue if a petitioner's allegations state a prima facie case on a claim that is not procedurally barred. *People v. Romero*, 8 Cal. 4th at 738; Pen. Code § 1476.

1. Informal Briefing

HABLIT's involvement in the foregoing process is triggered when a reviewing court requests an informal response. The purpose of an informal response to assist the court in deciding whether to summarily deny a petition or issue an OSC. *See* Cal. Rules of Ct. R. 8.385(b).

If HABLIT is tasked with informal briefing, an independent review of the petitioner's allegations must be done with the balancing between finality and individual rights discussed above as the paramount consideration. If a determination is made that the petitioner's allegations—accepted as true and resolving inferences in favor of the petitioner as the law requires—set forth a prima facie claim for relief, HABLIT's informal response to the court should be to advise it that an OSC is necessary. This does not mean that HABLIT is conceding the conviction should be overturned at this stage. It means that HABLIT acknowledges a case should be initiated, and that the court may exercise its "full power and authority" to hold a hearing, allow discovery, "and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case." Pen. Code. § 1484.

In the preparation of an informal response, HABLIT shall be cognizant of the expedited manner in which the California Legislature and Courts intend for habeas corpus petitions to be litigated. California Rules of Court 4.551; *Maas v. Superior Court* (2016) 1 Cal.5th 962, 981. The informal reply need only address the petition's sufficiency as a pleading – that is, whether it states a prima facie claim for relief, and whether there are any applicable procedural bars. *People v. Romero* (1994) 8 Cal.4th 728, 737. The informal response shall not present evidence or otherwise address the merits of the claims presented, except to state whether or not a prima facie case has been made and an OSC should issue, or that, instead, the petition fails to state a prima facie case and/or is procedurally barred.

2. Procedural Bars

Procedural bars to post-conviction relief were erected for the express purpose of preventing abuse of the writ. When this office urges the court to dismiss a potentially meritorious claim on the basis of a procedural bar alone, it undermines confidence in our ability to fairly administer justice and, ultimately, in the People's faith in our convictions and the integrity of our system.

Because HABLIT's decision to argue that a procedural bar prevents a court from considering the merits of a petitioner's claims, such decisions shall be based on whether the petition, in fact, constitutes an abuse of the writ. Procedural bars of otherwise meritorious claims should not be argued, ***absent compelling good cause that has been approved by a supervisor***. ***In no circumstance shall HABLIT assert a procedural bar when there is a credible claim of factual innocence.***

While HABLIT's post-conviction investigation into a petitioner's claims will often be underway while informal briefing is being prepared, that ongoing investigation should not form

the basis of any requested extension of time in which to file the informal response.

3. Post-Conviction Investigation

The goal of a post-conviction investigation is to uncover the truth and determine whether a petitioner's claims have merit, not to defend a conviction that is unsound. These investigations shall not be undertaken as a means of "protecting" a conviction, nor shall they be adversarial in nature. Threatening a witness, recanting or otherwise, with prosecution for perjury, either directly or indirectly, is witness intimidation and prosecutorial misconduct under California law. *People v. Bryant* (1984) 157 Cal.App.3d 582.

The HABLIT Unit Head Deputy shall work with the training division and management to ensure deputies and investigators are trained in best practices for conducting post-conviction investigations and deputies shall consult with relevant experts when investigating potentially meritorious claims raised in a petition. HABLIT investigations often require looking into convictions that are decades old, where witnesses' memories have faded, and/or that involve reluctant or recanting witnesses, and therefore often require specialized knowledge and training on issues such as memory science, as eyewitness identifications, and police practices used at the time that are no longer considered best practices.

These investigations shall not be undertaken as a means of "protecting" a conviction, nor shall they be adversarial in nature. Thus, for example, investigators should not engage in tactics designed to dissuade a recanting witness by threatening to charge that witness with perjury; rather the paramount goal of a HABLIT investigation shall be to determine the reliability and truthfulness of the recantation. Using a high-pressure, coercive, or intimidating approach in these investigations wastes time and resources and sends a mixed message to office staff about the HABLIT's mission and undermines the office's credibility with the public.

HABLIT deputies and investigators shall also make all reasonable efforts to avoid *un*intentional witness intimidation. These efforts will include, but are not limited to, conducting interviews outside of a police station in a non-threatening or neural location, if possible, and the concealing of the investigator's gun, if one is carried, except where specifically required to do so by law, or if approved by the elected District Attorney.

HABLIT deputies and investigators shall audio record and/or video record all witness interviews conducted in the course of post-conviction investigations. HABLIT shall provide copies of those recordings to the petitioner or petitioner's counsel, once an OSC has issued, and shall continue providing all discovery to which the petitioner has a right, as soon as it is discovered. All discovery provided by this office shall be documented by signed discovery receipts.

HABLIT deputies and investigators shall understand what confirmation bias is—also referred to as tunnel vision—and how to avoid it. Studies have shown that confirmation bias is pervasive in reinvestigations in wrongful conviction cases, where prosecutors tasked with checking their own work and the work of their colleagues fail to see error because they are looking to confirm that no mistakes were made in the original investigation and trial. When original police reports are viewed deferentially and/or treated as unassailable accounts of the truth of what transpired in the case, for example, confirmation bias is likely driving the investigation. Research shows that police reports are often incomplete and contain inaccuracies, due to the fast-pace at which criminal investigations unfold, following serious felony offenses, and therefore should be reviewed critically, not deferentially. HABLIT deputies and investigators shall test and probe

information in police reports, witness accounts, and other new evidence presented by an applicant, in a manner designed to uncover the truth, rather than protect the conviction.

4. Facilitating Informal Discovery and Limited Factfinding

Prior to the issuance of an OSC, the court's power to compel discovery is limited. However, Penal Code § 1054.9 and ongoing *Brady* requirements obligate our office to provide discovery where conditions are met. HABLIT should interpret these bases in good faith and in accordance with this office's policies governing discovery.

Recognizing that certain categories of otherwise privileged information and work product prepared by this office may contain exculpatory or impeachment information relevant to a petitioner's claims, and the benefit to the truth-seeking process of having both parties review this material, HABLIT shall err on the side of disclosing the complete LACDA trial file to the petitioner's counsel for independent review, subject only to reasonable and necessary disclosure agreements. Any redactions shall be limited to those deemed strictly necessary to protect victim or witness privacy.

Moreover, absent clearly abusive or frivolous attempts to obtain information, HABLIT shall facilitate a petitioner's ability (or petitioner's counsel's ability) to speak with law enforcement agents and prosecution experts to obtain information and/or materials the petitioner needs to further support the claims raised in the petition, where such communications can be facilitated.

In the event the petitioner's case file(s) have been lost in whole or part, HABLIT shall immediately inform the petitioner, or their counsel, that the file(s) is lost or incomplete. HABLIT shall work with the Post-conviction Discovery Unit to reconstruct the case file by complete files from law enforcement agencies responsible for investigating the case, including:

- The LACDA's internal files;
- The LAPD, LASD, LAFD, and/or any other law enforcement agency or emergency services provider involved in the case;
- Crime labs;
- The coroner's office, in homicide cases;
- The original trial deputy's personal file;
- The superior court file;
- The courthouse exhibit room;
- The court of appeal; and
- Any other source reasonably likely to have relevant materials, records, and/or evidence, such as medical records, where appropriate releases are provided, 911 dispatch call recordings, etc.
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5. Red Flags

Documented wrongful conviction cases show that convictions obtained by the presentation of certain types of evidence are at a higher risk of producing an unreliable or unconstitutional outcome. HABLIT shall pay special attention to claims involving any of the following high-risk

factors, most of which are considered to be the most common causes of wrongful convictions:

- the petitioner was convicted based, in whole or in part, on eyewitness identification evidence or testimony, particularly where it was a stranger identification or cross-racial identification, or both[2];
- the petitioner was convicted based, in whole or in part, on a confession and there are allegations that this confession was false or coerced [3];
- the petitioner was convicted based, in whole or in part, on testimony that has since been recanted as false or coerced;
- the petitioner's conviction is alleged to have been borne from official misconduct, including witness tampering, misconduct in interrogations, fabricated evidence and confessions, the concealment of exculpatory evidence, and misconduct at trial[4];
- law enforcement personnel involved in the investigation or arrest of the petitioner were subsequently discharged or relieved of their duties for misconduct;
- the petitioner was convicted based on forensic evidence grounded in methodologies that have since been largely or wholly discredited as unreliable, including but not limited to bloodstain pattern analysis, comparative bullet lead analysis, forensic odontology (bitemarks), hair microscopy for the purpose of determining whether known/unknown hairs share a common source, Shaken Baby Syndrome (SBS). HABLIT shall review the forensic methods used to analyze the evidence and ensure that forensic evidence used to obtain a conviction has standardized scientific principles and/or otherwise remains foundationally valid and valid as applied[5];

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[2] HABLIT shall verify that eyewitness identifications supporting a conviction comport with standards and research accepted by the scientific community and do not run afoul of the best practice and recommendations in the 2019 Third Circuit Eyewitness Identification Report. The CIU shall assess the reliability of eyewitness identification evidence in light of the non-exhaustive lists of system and estimator variables set forth in *State v. Henderson* (N.J. 2011) 27 A.3d 872, and continually examine and apply emerging research related to eyewitness identifications, including but not limited to the American Psychological Association white papers Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence (2020) and Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads (1998).

[3] HABLIT shall consult the 2010 American Psychological Association white paper on police interrogation and confessions, and any emerging literature or research regarding false confession and recanting witnesses, to inform its review of convictions supported by testimony that has since been recanted.

[4] HABLIT shall consult the National Registry of Exonerations report *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement* (2020), and any emerging literature or research regarding official misconduct, to inform its review of convictions alleged to have resulted in whole or in part from official misconduct.

[5] The use of unreliable and misleading forensic evidence, which we know is a common cause of wrongful convictions imperils the integrity of the criminal legal system. The CIU shall critically and continually examine emerging scientific literature, which may also call into question older forensic methods, and train staff about these changes, so that case review criteria can be updated as needed. The CIU shall ensure that forensic evidence supporting a conviction complies with the findings, recommendations, and best practices set forth in specific reviews of the relevant sciences, including but not limited to:

- the petitioner was convicted based on forensic evidence that the LACDA has generally accepted as reliable, but the particular conclusions or opinions presented to the jury in support of the prosecution's case exceeded the bounds of what is now recognized to be valid science – for example, through testimony purporting to "identify" a petitioner as the unique source of an item of biological evidence through a method other than DNA analysis, or through expert testimony implying or stating a statistical basis for the likelihood of a particular conclusion that is not verifiable or otherwise valid;
- the conviction was based on evidence, the reliability of which has since been called into question, and was corroborated only with jailhouse informant testimony or testimony by an informant that has been used by law enforcement or this office on more than one occasion;
- a gang allegation was found true by a jury where the only evidence of gang membership was presented by a gang expert, and that evidence would now be deemed inadmissible hearsay under *People v. Sanchez* (2016) 63 Cal. 4th 665, and the evidence of gang membership served as the only evidence of motive used to obtain the conviction;
- evidence based on analysis by crime labs that were not accredited when the analysis was conducted, and/or have been implicated in scandals related to their handling and testing of evidence;
- evidence supporting the conviction was corroborated by one or more of the above types of unreliable evidence;
- defense counsel was disbarred or otherwise disciplined after the challenged conviction was obtained, or was found by a court to have provided ineffective assistance of counsel in one or more other cases.

6. Forensic Evidence

Where a petitioner challenges the reliability of forensic evidence the prosecution presented at trial to obtain the conviction, HABLIT shall examine the reliability of the forensic testing obtained at the time of trial. Where the reliability of that evidence is in question, HABLIT shall consult with experts and determine whether re-testing the evidence in question would be probative, in that it may tend to help identify the identity of the perpetrator of the crime, or may otherwise exculpate the petitioner. HABLIT shall request that forensic test results be expressed in reports

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- American Association for the Advancement of Science (AAAS) reports on Fire Investigation (2017) and Latent Fingerprint Examinations (2017)
- American Statistical Association (ASA) Position on Statistical Statements for Forensic Evidence (2019)
- National Academy of Sciences (NAS) report *Strengthening Forensic Science in the United States: A Path Forward* (2009)
- National Institute of Standards and Technology (NIST) report on Latent Print Examination and Human Factors (2012), Working Group on Human Factors in Handwriting Examination (2020), and Scientific Foundation Studies on DNA mixture interpretation, bitemark analysis, firearms examination, and digital evidence (forthcoming)
- President's Council of Advisors on Science and Technology (PCAST) report *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016).

and testimony using clear and comprehensible language, to inform the HABLITS's decision making.

Where a petitioner seeks DNA testing of evidence as part of new evidence sought in support of a claim raised in a petition and has facially satisfied the requirements of P.C. 1405, HABLIT shall not raise procedural challenges or defenses to oppose, nor shall it oppose, requests DNA testing, where the testing may lead to evidence identifying the perpetrator of a crime. Where a petitioner requests DNA testing and needs assistance in ascertaining the status of the evidence to be tested, HABLIT shall assist the petitioner in ascertaining the status of physical evidence by facilitating contacts between petitioners seeking DNA testing, or their attorneys, and the crime lab, the coroner's office, law enforcement, or other entities, who can assist in searching the locations where the evidence may be stored in an effort to locate the evidence in question.

HABLIT shall carefully scrutinize cases in which experts or others opined or testified using terms like "reasonable degree of scientific certainty," which have no accepted scientific meaning, yet convey an unsupported measure of reliability or conclusiveness to the factfinder. HABLIT shall request that all information concerning the limitations of forensic techniques should be disclosed alongside the results of any analyses. All forensic methods have limitations, and none are error free. Where error rates for a method are not known or have not been adequately measured, reports shall state that fact. HABLIT shall carefully scrutinize any conviction based in whole or in part upon testimony that states or implies a "zero error rate" or which purports to provide an error rate that has not been independently validated. HABLIT shall similarly make those limitations clear in communications with the applicant and/or their counsel and the court. HABLIT shall also request that all methods of forensic analyses be documented in the first instance to permit HABLIT's review and disclosure of all steps followed and the methodology used to arrive at the conclusions reached.

HABLIT shall ensure that the petitioner and/or their counsel receive certificates or reports of forensic analyses, as well as complete documentation of the methods used and the results reached. HABLIT shall disclose to the petitioner or petitioner's counsel all inconclusive and exculpatory forensic results. If a petitioner alleges that evidence was improperly analyzed and/or mishandled by the crime lab or coroner's office, or other governmental entity, HABLIT shall seek and provide the petitioner with any information discovered concerning "corrective actions" taken in a laboratory relating to problematic methods and personnel, and proficiency testing of individual analysts, if any, where relevant.

Once HABLIT learns that a petitioner is seeking to test forensic evidence, HABLIT shall make a request to preserve any forensic evidence in the case.

7. Cumulative Error Claims

Where a petitioner alleges a claim of cumulative error, the allegation is that there are at least two separately cognizable trial errors which, while viewed independently may be harmless error, but when the prejudice from the two or more errors is viewed cumulatively it rises to the level of prejudicial error. *People v. Hill* (1998) 17 Cal.4th 800, 844.

HABLIT shall be cognizant that errors can be and are made, both during the investigation and prosecution of felony cases. HABLIT shall, where a cumulative error claim is raised, affirmatively and fairly assess the combined prejudice to a petitioner, where the petition states a

prima case for relief as to one or more claims in the petition. HABLIT shall consider, in assessing whether the petitioner was denied the right to a fair trial, whether the court, during the direct appeal or a prior habeas proceeding, ruled that another error, or other trial errors, did occur (in addition to the errors alleged in the petition), but denied relief as to the earlier-identified error(s) on the ground that they were harmless. Any prejudice flowing from the error or errors earlier ruled to be harmless, must be considered along with the prejudice arising from the additional error identified in the petition, in determining whether the errors, combined, can together sustain a cumulative error claim. *In re Reno* (2012) 55 Cal.4th 428, 483. As with other claims, if a petitioner's cumulative error claim sets forth a prima facie claim for relief, HABLIT shall so advise the court in its informal response and indicate that an OSC as to the cumulative error should issue.

8. C.C.P. §170.6 Challenges

The superior court generally assigns habeas corpus petitions to the same department that presided over the trial and/or sentencing proceedings. On occasion, the matter will be reassigned to another judge, such as when a judge retires or where there may be a conflict of interest.

Conflicts are not infrequent because the vast majority of criminal court judges are former prosecutors, and petitions often allege government or prosecutorial misconduct that implicates former LACDA colleagues of the judge assigned to hear the post-conviction case.

When such reassignments occur, HABLIT shall not challenge, pursuant to Civil Procedure §170.6, any judge who is not a former prosecutor unless there is a non-pretextual and articulable justification for the filing of a §170.6 challenge, approved by a supervisor. When HABLIT files a C.C.P. §170.6 challenge to an assigned judge who is not a former prosecutor, it creates the appearance that this office believes it will receive more favorable treatment from a judge who was a former prosecutor than one who was not. While the law does not require that any specific reason be articulated in the public filing, HABLIT shall avoid even the appearance of judge-shopping and shall not file §170.6 challenges for that purpose.

C. Post-OSC Litigation

When the court issues an OSC, formal briefing begins. During this formal briefing and up to and including an evidentiary hearing, HABLIT's role shall not be merely adversarial to the petitioner but—again—one of seeking justice and balancing the interest of finality with potentially meritorious claims indicating a wrongful conviction.

1. Post-OSC Discovery

Once the court issues an OSC, the petitioner is entitled to discovery and has subpoena power to seek materials from sources outside this office. To the extent HABLIT did not already provide discovery to the petitioner informally as set forth in B.4., *infra,* once the OSC issues, HABLIT shall do so and shall continue providing the petitioner with additional new materials that are discovered, as they become available. As noted above, HABLIT deputies and investigators shall audio record or video record all witness interviews conducted in the course of post-conviction investigations and shall provide copies of those recordings to the petitioner. All discovery shall be documented through the use of signed discovery receipts.

2. The Return

Upon issuance of the OSC, HABLIT shall file a timely Return that admits or denies the material factual allegations in the petition. Denials shall be supported by citations to evidence; general denials may be deemed "admissions," and shall be avoided. The Return is the People's opportunity provide the court with the factual bases for any denial, and allege new facts in support of petitioner's conviction. HABLIT shall provide, in the Return, an articulable reason or justification for any allegation being denied, supported by a factual basis and evidence. HABLIT shall admit factual allegations where there is no basis for denying them. The purpose of the admission and denial of facts in the Return is to assist the court in determining whether the merits of the petition can be reached, without the need for an evidentiary hearing, and to limit the scope of any required evidentiary hearing only to those facts actually in dispute.

3. Communications with Petitioner's Trial Counsel

This Office respects the sanctity of the attorney-client privilege between a defendant and defense counsel. A petitioner who alleges Ineffective Assistance of Counsel may have impliedly waived some portion of the attorney-client privilege as to communications with petitioner's trial counsel. This waiver is not absolute, however, and is extremely limited.

HABLIT shall err on the side of caution and notify a petitioner before seeking to contact defense counsel and provide petitioner with a chance to object or modify a claim to avoid an inadvertent or implied waiver of the attorney-client privilege. HABLIT will not seek disclosure of anything beyond that which is strictly necessary and legally allowable under California and Federal law, including information that exceeds the limited scope of a pending ineffective-assistance-of-counsel claim.

HABLIT shall not encourage any attorney to violate their ethical duties of confidentiality and loyalty to former clients, as articulated in the California Rules of Professional Conduct; rather, HABLIT attorneys or investigators speaking to defense counsel must remind defense counsel of the attorney-client privilege prior to the start of a substantive interview.

D. Case Resolution

Where the court, or HABLIT, determines that a petitioner's conviction and sentence must be vacated for any reason, HABLIT shall ascertain (i) if determined by the court, whether the court's decision should be appealed; (ii) whether there still exists constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt; and/or (iii) whether there are identifiable avenues for obtaining constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt.

If there are grounds for appealing a court's ruling, and it is in the interests of justice to do so, HABLIT shall ensure that a notice of appeal is timely filed. If a decision is made to appeal the grant of a habeas corpus petition, a memorandum shall be submitted to a supervisor for approval, justifying the decision to appeal before a notice of appeal is filed. If an appeal is taken, there shall be a strong presumption that a petitioner who has secured a grant of habeas relief in the superior court should be released OR, or granted bail, pending that appeal.

If, in HABLIT's assessment, there exists constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt and/or there are identifiable avenues for

obtaining constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt, and it is in the interests of justice to do so, HABLIT shall articulate what the remaining evidence is and, if approved by the District Attorney, shall announce that the LACDA intends to retry the petitioner.

If there are no grounds for appealing the court's ruling, and where there no longer exists constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt and there are no identifiable avenues for obtaining constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt, HABLIT shall announce that the LACDA does not intend to appeal, nor does it intend to retry, the petitioner.

1. Re-Sentencing Cases

Where HABLIT determines that the fair and just resolution in a case involves, among other relief, seeking a reduction in the petitioner's sentence pursuant to P.C. 1170(d), and the decision is approved by the District Attorney, HABLIT shall inform the petitioner or petitioner's counsel of the decision at the earliest possible opportunity. With the petitioner's agreement, HABLIT shall coordinate with deputies tasked with resentencing so that a motion for resentencing can be filed by the LACDA at the earliest opportunity.

HABLIT's decision to seek a sentence reduction shall not be dependent upon the petitioner's agreement to withdraw any claims made in a pending petition. For example, a petitioner who maintains that they are actually innocent of the crimes of conviction shall not be forced to choose between dropping the claim of innocence and receiving the support of the LACDA for a P.C. 1170(d) reduction in sentence.

2. Reentry Assistance & Compensation Assistance

HABLIT shall not delay the release of any person whose entitlement to post-conviction relief and release from custody has been established, for any reason; it is the duty of the HABLIT to immediately arrange for conditional release of those individuals pending the formalization of the conviction being vacated, including facilitating the release process by coordinating with the CDCR, providing the CDCR with court orders and any other documentation required to secure the petitioner's release from custody.

Where HABLIT determines that a conviction should be overturned and a case dismissed based on actual innocence, HABLIT shall assist the petitioner in securing necessary support and documentation, such as a finding of actual innocence, that facilitate successful reentry into the community and will support the enactment of systems of compensation for those wrongfully convicted.

3. Findings of Factual Innocence

This office recognizes that monetary compensation is essential to a wrongfully convicted person's ability to rebuild their life. Under California law, wrongfully convicted persons who are innocent of the crimes for which they were convicted may file a claim for compensation with the California Victim Compensation and Government Claims Board (CVCGC Board), under California Penal Code section 4900.

Under current law, the CVCGC Board determines whether to approve a claim by either: (i) holding a hearing at which the claimant presents evidence supporting their claim of innocence, and reaching a determination as to whether the claimant has met the standard; or, (ii) receiving a "finding of factual innocence" made by the superior court, which is binding on the CVCGC Board.

Under current law, a wrongfully convicted person must demonstrate that they are innocent by a preponderance of the evidence. The burden is on the wrongfully convicted person to prove their innocence. Because that standard is antithetical to the bedrock principle of our criminal justice system–which presumes a person is innocent until they are proven guilty beyond a reasonable doubt[6]–absent extenuating circumstances and supervisor approval, it shall be the policy of this office to move jointly for and/or concede in the superior court that "a finding of factual innocence" should be made, where the conviction has been overturned, the charges have been dismissed, the LACDA does not intend to appeal the court's ruling overturning the conviction, and there no longer exists constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt.

In such cases, the LACDA shall proactively assist the petitioner in seeking the statutory compensation to which they are entitled, including filing in the superior court, jointly with the petitioner, if requested, a motion "for a finding of factual innocence by a preponderance of the evidence that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her." Cal. Pen. Code 1485.55 (b). Because the court's "finding of factual innocence," is binding on the CVCGC Board, this office's joint request for that finding will expedite and facilitate the compensation process. HABLIT shall also assist the petitioner, in the above-described circumstance, by supporting their claim before the CVCGC Board, when filed, if requested.

4. Victim Outreach & Advocacy

HABLIT shall comply with all statutes and rules governing victims' rights and may engage a victim representative at any stage in the investigation when doing so may be in the best service of the investigation and/or the victim. HABLIT will be respectful of victims and institute a culture of keeping victims abreast of investigation outcomes, when the outcome affects or changes the nature of the conviction and/or sentence. Upon the District Attorney's decision to seek relief in a case, HABLIT shall engage a victim representative to liaise with the victim or victims.

5. "Learning Organization"

[6] "Absent conviction of a crime, one is presumed innocent." *Nelson v. Colorado.* (2017) 137 U.S. 1249, 1255 (explaining that once a criminal conviction is erased, the presumption of innocence is restored and holding that the state "may not presume a person, adjudged guilty of no crime, nonetheless guilty *enough* for monetary exactions"), citing *Johnson* v. *Mississippi* (1988) 486 U. S. 578, 585 (1988) (holding that after a "conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge"); *Coffin* v. *United States* (1895) 156 U. S. 432, 453 ["axiomatic and elementary," the presumption of innocence "lies at the foundation of our criminal law."

The outcomes of HABLIT investigations are intended to provide a critical opportunity to identify systemic gaps that go beyond just one individual's error and can reinforce the idea that the District Attorney's office is a "learning organization." HABLIT will have a clear avenue for recommending policy and procedural changes, as well as enhanced training, to address any deficiencies that are uncovered.

The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.

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SPECIAL DIRECTIVE 20-09

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: YOUTH JUSTICE

DATE: DECEMBER 7, 2020

This Special Directive addresses current policies in the previously named Juvenile Delinquency Practice Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of the Juvenile Delinquency Practice Manual.

INTRODUCTION

In upholding the laws as they presently stand, this office will support efforts that recognize children as a separate class in line with decisions[1] from the Supreme Court of the United States and state-wide legislation[2]. This office will do its part to find alternatives to detention and make diversion the default. The following changes to existing practices seek to bring this office in step with the trend to seek "care over cages" and address "need over deed." This will also include the creation of a juvenile division that allows for specialization and promotability, and that receives specialized training.

All prosecutorial practices in youth justice will account for the established science demonstrating young people's unique vulnerabilities (including their impulsivity, susceptibility to peer influences, risk-taking and lesser ability to fully appreciate long-term consequences, and their lack of control over their home/family/life circumstances), their malleability and capacity for growth and maturation, and thus their diminished culpability and potential for rehabilitation.

Specifically, we will be guided by the following principles:

- Our prosecutorial approach should be biased towards keeping youth out of the juvenile justice system and when they must become involved, our system must employ the "lightest

[1] *Roper v. Simmons* 543 U.S. 51 (2005), *Graham v. Florida* 560 U.S. 48 (2010), *Miller v. Alabama* 567 U.S. 460 (2012), *Montgomery v. Louisiana* 577 U.S. __ (2016).

[2] Proposition 57 (Eliminated prosecutors' direct file authority and established new court procedures for transferring a youth's case to adult court), SB 1391 (Repealed prosecutors' authority to motion to transfer a case of youth age 14 or 15 to adult court), SB 439 (Set minimum age of juvenile court jurisdiction at 12, excluding murder and violent rape offenses), SB 395 & 203 (Require youth under age 18 to consult with legal counsel prior to custodial interrogation or waiving constitutional rights), SB 823 (Plans closure of DJJ and transferring the responsibility for youth to the counties).

touch" necessary in order to provide public safety;

- A juvenile justice system must be family and child centered, holistic and collaborative with other systems and communities in order to heal trauma, foster positive youth development, and promote true public safety;
- A juvenile justice system must incorporate research and data in order to create effective responses to crime and youth need;
- We must invest in community-based services, schools, health and mental health programs and other resources that allow all children to thrive, no matter their zip code, race or gender;
- Any court involvement in a young person's life should be proportionate, for the shortest duration possible and result in a pathway towards a better future for youth; and
- Youth justice approaches should reflect what science and data clearly demonstrate-that youth are malleable and continue to mature until their early-to mid-20s, affording the juvenile justice system a unique opportunity to support youth in achieving well-being.

The following policies shall be implemented **immediately**:

I. FILING DECISIONS

1. **Youth accused of misdemeanors will not be prosecuted. If deemed necessary and appropriate, youth accused of misdemeanor offenses and low-level felonies will be referred to pre-filing, community-based diversion programs.**

2. **Crimes involving property damage or minor altercations with group home (STRTP) staff, foster parents, and/or other youth shall not be charged** when the youth's behaviors can reasonably be related to the child's mental health or trauma history. Involvement in the justice system can exacerbate, rather than improve, mental health issues or trauma and seeking resolution or supports through alternatives like restorative justice and health systems can better address the root causes of such behaviors,

3. **We will decline charges for property damage or minor altercations with members of the youth's household** when the family can be better served by DCFS, or by way of an appropriate plan by a parent or legal guardian, and the behaviors can reasonably be related to the child's mental health, trauma history, or alleged child abuse or neglect.

4. **We will continue to work with the Youth Justice Workgroup to develop collaborative decision-making teams** that facilitate information sharing, collaboration and input into filing decisions by other key partners, including schools, health systems, families and youth themselves.

5. **We will support and work with the Youth Justice Workgroup and Office of Youth Development to eliminate provision of diversion programs by probation and law enforcement, such as** Probation's Juvenile Citation Diversion Program (in which youth are cited for infractions to appear in juvenile traffic court), and instead dismiss or refer such cases where appropriate to YDD's expanding

diversion infrastructure.

6. **EFFECTIVE JANUARY 1, 2021: The Abolish Chronic Truancy (ACT) unit and other truancy interventions by the District Attorney is disbanded**.

II. PETITIONS

1. **Filings will consist of the lowest potential code section that corresponds to the alleged conduct and mandate one count per incident. (a)**The only exception to misdemeanor filings will be in the case of "wobbler" offenses that warrant intervention (such as assault (Penal Code § 245)). Absent a documented history of violence, such cases will be filed as misdemeanors and require approval from the Deputy in Charge (DIC) to bypass diversion. (b) Filing Wobbler offenses as felonies will require a documented history of violence for the charged youth and/or serious injury to the alleged victim. In such cases, appropriate charging, including the decision to file a felony, must receive Head Deputy approval. Request for permission to file a felony shall include the basis for the request on a written memorandum. *This memorandum shall be forwarded from the Head Deputy to the appropriate Bureau Director.*

2. **Filing deputies are instructed to NOT file any potential strike offense if the offender is 16 or 17 years of age at the time of the offense. The only exception to this policy shall be charges involving forcible rape and murder.**
    a. For example, all robberies will be filed, at most, as a grand theft person and/or assault by means likely to cause great bodily injury. For all open cases, a strike offense shall be withdrawn or refiled/amended as a non-strike offense, or vacated and replaced with a finding of a non-strike offense, or dismissed.

3. **Enhancements shall not be filed** on youth petitions consistent with the office wide directives on ending enhancement filings.

4. **The office will immediately END the practice of sending youth to the adult court system.**
    a. **All pending motions to transfer youth to adult court jurisdiction shall be withdrawn** at the soonest available court date, including agreeing to defense counsel's request to advance.
    b. Cases will proceed to adjudication or disposition within the existing boundaries of juvenile jurisdiction.

5. **The following guidelines shall be followed in sexual offense cases:**
    a. **We will avoid labeling normative adolescent behavior as a sex offense** and instead collaborate with appropriate partners to provide effective interventions that reduce recidivism and support a youth's education and development around healthy sexual behavior.
        i. Example: Child pornography statutes shall not be used to charge

youth who consensually own or send sexually explicit photographs.

b. **We will strive to structure charges, filing and prosecution wherever possible to avoid the requirement of sex offense registration.**
c. **We will withhold objections to removal from sex offense registries** for individuals who were youth when they committed their offenses.

III. TRANSPARENCY

1. **Provide timely, complete and "open discovery"**, including Brady and other information calling into question the integrity of law enforcement action involved at the earliest opportunity-- including with the initial discovery packet when available.
    a. Consistent with the ABA rules and best prosecutorial practices, our office will approach discovery in a manner that maximizes transparency and accountability.

IV. DETENTION

1. **The office Presumption shall be against detention[3].**
    a. In the vast majority of cases, youth should be released to their families and/or caregivers, or to the least restrictive environment possible consistent with WIC § 636.
    b. In line with the spirit of WIC § 202(a), detention will only be sought where a child poses an immediate danger to others, and only *for as long* as the child represents a danger to others.
    c. Detention will not be sought on the grounds that a child has no other place to go, or that a child has serious mental health problems. If detention is sought in an exceptional case, the request should be for a minimal period and should only be after failed attempts at community detention (CDP).

2. **Deputies shall not seek detention for a probation violation** unless the violation constitutes an independent, serious crime that poses an imminent risk of harm to others.

3. **Deputies shall not seek detention for leaving placement.**
    a. Engaging a Child Family Team (CFT) meeting shall be the first remedial measure taken to assist in stabilizing the youth.
    b. If immediate replacement is not available, the youth should be sent to DCFS Transitional Shelter Care (TSC) to await Probation identifying placement.

4. **House arrest (CDP) shall not be sought in excess of 15 days** and deputies shall stipulate to house arrest credits toward maximum confinement.

V. DISPOSITION AND RESOLUTION OF CASES

[3] http://www.pjdc.org/wp-content/uploads/Californias-County-Juvenile-Lockups-November-2020-Final.pdf

1. **Deputies shall not oppose dismissal on competency grounds** when presented with evidence of incompetence.

2. **Deputies shall seek to avoid immigration consequences.**
    a. Deputies are instructed to offer dispositions in accordance with Penal Code § 1016.3(b):
        i. "The prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."[4]

3. **Deputies shall only seek probation supervision in serious felony cases and request terms that are individually tailored to a youth's needs.**
    a. Probation conditions will not include automatic search conditions, gang conditions, and other conditions that are overboard.

4. **Deputies shall not object to sealing records** pursuant to WIC § 786 and 781, or dismissing strike offenses pursuant to WIC § 782.

VI. DUAL STATUS (CROSS-OVER) YOUTH

5. **Deputies shall make every effort to prevent a dependent youth from crossing over into the delinquency system.**
    a. If the court determines dual status is appropriate, deputies will encourage a dependency lead for children involved in the dependency system. When available, diverting cases to other systems will be the default position.

6. **No delinquency filing if the circumstances that give rise to the potential petition also give rise to the dependency petition.**
    a. Examples: Parent and youth are delivering drugs; both are arrested and charged with drug trafficking; dependency petition is filed; teen will not be charged.
    b. In a physical fight where the parent is hitting teen and the teen responds by hitting back, resulting in a dependency petition, the teen will not be charged.

7. **For any child awaiting placement, the District Attorney will support the release of youth to a temporary, non-secure setting** so that youth do not face prolonged detention simply because no safe placement has been identified.

8. **The presumption for youth in congregate care and housing based on mental health needs** will be that the alleged conduct was within the scope of behaviors to be managed or treated by the foster home or facility.

[4] 1016.2 codifies Padilla v. Kentucky 559 U.S. 356 (2010)

a. Formal filing in these situations will require DIC approval and conform to all other policies enumerated herein regarding misdemeanors and charging the lowest possible offense.

The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.

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SPECIAL DIRECTIVE 20-08

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: SENTENCING ENHANCEMENTS/ALLEGATIONS

DATE: DECEMBER 7, 2020

This Special Directive addresses the following chapters in the Legal Policies Manual:

Chapter 2	Crime Charging - Generally
Chapter 3	Crime Charging - Special Policies
Chapter 7	Special Circumstances
Chapter 12	Felony Case Settlement Policy
Chapter 13	Probation and Sentencing Hearings

Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of the abovementioned chapters of the Legal Policies Manual. Additionally, the following sections of the Legal Policies Manual are removed in their entirety. Chapter 2.10 - Charging Special Allegations, Chapter 3.02 - Three Strikes, Chapter 7 - Special Circumstances, Chapter 12.05 - Three Strikes, Chapter 12.06 - Controlled Substances.

INTRODUCTION

Sentencing enhancements are a legacy of California's "tough on crime" era. (See Appendix.) It shall be the policy of the Los Angeles County District Attorney's Office that the current statutory ranges for criminal offenses alone, without enhancements, are sufficient to both hold people accountable and also to protect public safety. While initial incarceration prevents crime through incapacitation, studies show that each additional sentence year causes a 4 to 7 percent increase in recidivism that eventually outweighs the incapacitation benefit.[1] Therefore, sentence enhancements or other sentencing allegations, including under the Three Strikes law, shall not be filed in any cases and shall be withdrawn in pending matters.

This policy does not affect the decision to charge crimes where a prior conviction is an element of the offense [i.e., felon in possession of a firearm (Penal Code § 29800(a)(1)), driving under the influence with a prior (Vehicle Code § 23152), domestic violence with a prior (Penal Code §

[1] Mueller-Smith, Michael (2015) "The Criminal and Labor Market Impacts of Incarceration.", *available at* https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf.

273.5(f)(1)), etc.], nor does it affect Evidence Code provisions allowing for the introduction of prior conduct (i.e., Evidence Code §1101, 1108, and 1109).

The specified allegations/enhancements identified in this policy directive are not an exhaustive list of all allegations/enhancements that will no longer be pursued by this office; however, these are the most commonly used allegations/enhancements.

POLICY

- Any prior-strike enhancements (Penal Code § 667(d), 667(e); 1170.12(a) and 1170.12 (c)) will not be used for sentencing and shall be dismissed or withdrawn from the charging document. This includes second strikes and any strikes arising from a juvenile adjudication;
- Any Prop 8 or "5 year prior" enhancements (Penal Code §667(a)(1)) and "3 year prior" enhancements (Penal Code §667.5(a)) will not be used for sentencing and shall be dismissed or withdrawn from the charging document;
- STEP Act enhancements ("gang enhancements") (Penal Code § 186.22 et. seq.) will not be used for sentencing and shall be dismissed or withdrawn from the charging document;
- Special Circumstances allegations resulting in an LWOP sentence shall not be filed, will not be used for sentencing, and shall be dismissed or withdrawn from the charging document;
- Violations of bail or O.R. release (PC § 12022.1) shall not be filed as part of any new offense;
- If the charged offense is probation-eligible, probation shall be the presumptive offer absent extraordinary circumstances warranting a state prison commitment. If the charged offense is not probation eligible, the presumptive sentence will be the low term. Extraordinary circumstances must be approved by the appropriate bureau director.

II. PENDING CASES

At the first court hearing after this policy takes effect, DDAs are instructed to orally amend the charging document to dismiss or withdraw any enhancement or allegation outlined in this document.

III. SENTENCED CASES

Pursuant to PC § 1170(d)(1), if a defendant was sentenced within 120 days of December 8, 2020 they shall be eligible for resentencing under these provisions. DDAs are instructed to not oppose defense counsel's request for resentencing in accordance with these guidelines.

APPENDIX

California has enacted over 100 sentencing enhancements, many of which are outdated, incoherent, and applied unfairly. There is no compelling evidence that their enforcement improves public safety. In fact, the opposite may be true. State law gives District Attorneys broad authority over when and whether to charge enhancements. The overriding concern is interests of justice and public safety.

The Stanford Computational Policy Lab studied San Francisco's use of sentencing enhancements from 2005 to 2017. They released their report, *Sentencing Enhancements and Incarceration: San Francisco, 2005-2017* in October of 2019. The following policy is informed by the results of the Stanford study.

As noted in the study:

> "During the 1980s and 90s, enhancements became more numerous and severe. Dozens of new enhancement laws were passed in a way that critics alleged was haphazard—in "reaction to the 'crime of the month.'"

California's massive rates of incarceration can be tied directly to the extreme sentencing laws passed by voters in the 1990's, including the 1994 Three Strikes Law. In 1980, California had a prison population of 23,264. In 1990, it was 94,122. In 1999, five years after the passage of Three Strikes, California had increased its population to a remarkable 160,000. By 2006, the prison population had ballooned to 174,000 prisoners. California now has 130,000 people in state prison and 70,000 people in local jails.

The Stanford study found that the use of sentencing enhancements in San Francisco accounted for about **1 out of 4 years** served in jail and prison. This study found that the use of sentencing enhancements -- mostly Prop. 8 priors and Three Strikes enhancements -- accounted for half of the time served for enhancements. The study concluded that we could substantially reduce incarceration by ceasing to use enhancements. These enhancements also exacerbate racial disparities in the justice system: **45% of people serving life sentences in CDCR under the Three Strikes law are black**.

Gang enhancements have been widely criticized as unfairly targeting young men of color. Recent analyses by the LA Times suggest that the CALGANG database is outdated, inaccurate and rife with abuse. According to California Department of Corrections and Rehabilitation data from 2019, more than 90 percent of adults with a gang enhancement in state prison were either black or Latinx.

According to Fordham Law Prof. John Pfaff, "There is strong empirical support for declining to charge these status enhancements. Long sentences imposed by strike laws and gang enhancements provide little additional deterrence, often incapacitate long past what is required by public safety, impose serious and avoidable financial and public health costs in the process, and may even lead to greater rates of reoffending in the long run."

According to Pfaff, a growing body of evidence-based studies have suggested that policing deters; long sentences do little. What deters most effectively is the risk of detection and apprehension in the first place. Other studies increasingly indicate that spending more time in prison can *cause* the

risk of later reoffending; as the harms and traumas experienced in prison grow, the ability to reintegrate after release falls.

That prison may actually increase the risk of reoffending while imposing serious costs on communities starkly illuminates the need to invest in alternatives. Such options do exist. One striking example: by expanding access to (non-criminal justice based) drug treatment, the expansion of Medicaid yielded billions in reduced crime in states that participated in the expansion.

By avoiding harsh sentencing and investing in rehabilitation programs for the incarcerated, we can reduce crime *and* help people improve their lives.

The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.

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SPECIAL DIRECTIVE 20-07

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: MISDEMEANOR CASE MANAGEMENT

DATE: DECEMBER 7, 2020

This Special Directive addresses issues of Misdemeanor Case Management in Chapter 9 of the Legal Policies Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of Chapter 9 of the Legal Policies Manual.

INTRODUCTION

The public's interaction with the criminal justice system is mainly through misdemeanor prosecutions, yet the power and influence of the misdemeanor system in Los Angeles County has gone largely unnoticed. The goal of this new policy is to reimagine public safety and best serve the interests of justice and community well-being. As such, the prosecution of low-level offenses will now be governed by this data-driven Misdemeanor Reform policy directive.

Los Angeles County courts should not be revolving doors for those in need of treatment and services. Currently, over 47% of those incarcerated pre-trial on misdemeanor cases suffer from mental illness. Likewise, nearly 60% of those released each day have a significant substance use disorder. Meanwhile, individuals experiencing homelessness account for almost 20% of arrests in Los Angeles despite comprising only 1.7% of the population. The status quo has exacerbated social ills and encouraged recidivism at great public expense.

Moreover, the consequences of a misdemeanor conviction are life-long and grave, even for those who avoid incarceration. Misdemeanor convictions create difficulties with employment, housing, education, government benefits, and immigration for non-citizens and citizens alike. Deportation, denial of citizenship, and inadmissibility affect not only individuals, but also children, families, and immigrant communities. And no matter one's immigration status, the resultant costs and fees of misdemeanor convictions force many to choose between necessities such as rent, transportation, and medical care versus financial obligations to the justice system.

Despite the immense social costs, studies show that prosecution of the offenses driving the bulk of misdemeanor cases have minimal, or even negative, long-term impacts on public safety. Agencies equipped with the social-service tools necessary to address the underlying causes of offenses such as unlicensed driving, sex work, drug possession, drinking in public, and trespassing

are best positioned to prevent recidivism and will thus be empowered to provide help to those in need.

The goal of the Los Angeles County District Attorney's Office is to protect public safety. To do so as effectively as possible, we will direct those in need of services to treatment providers, divert those undeserving of criminal records to appropriate fora, and reorient our focus towards combating violent and serious criminal offenses.

I. DECLINATION POLICY DIRECTIVE

The misdemeanor charges specified below shall be declined or dismissed before arraignment and without conditions unless "exceptions" or "factors for consideration" exist.

These charges do not constitute an exhaustive list. Each deputy district attorney is encouraged to exercise his or her discretion in identifying a charge falling within the spirit of this policy directive and proceed in accordance with its mandate.

In addition, each deputy district attorney retains discretion to seek a deviation from this policy when a person poses an identifiable, continuing threat to another individual or there exists another circumstance of similar gravity. In such a situation, the deputy district attorney must consult with their supervisor, place their justification for seeking a deviation in writing, and record their supervisor's determination in the case file. Such a deviation should be the exception, not the rule. In all circumstances, the person's ability to pay shall be considered.

Trespass – Penal Code § 602(a)-(y)

a. Exceptions or Factors For Consideration
    i. Repeat trespass offenses on the same public or private property over the preceding 24 months
    ii. Verifiable, imminent safety risk
    iii. No indicia of substance use disorder and/or mental illness, or homelessness

Disturbing The Peace – Penal Code § 415(1)-(3)

a. Exceptions or Factors For Consideration
    i. Repeat offenses over the preceding 24 months involving substantially similar behavior to that charged

    ii. No indicia of substance use disorder and/or mental illness

Driving Without A Valid License – Vehicle Code § 12500(a)-(e)

a. Exceptions or Factors For Consideration
    i. Repeat driving offenses over the preceding 24 months involving substantially similar behavior to that charged

Driving On A Suspended License – Vehicle Code § 14601.1(a)

a. Exceptions or Factors For Consideration
    i. Repeat driving offenses over the preceding 24 months involving substantially similar behavior to that charged

Criminal Threats – Penal Code § 422

a. Exceptions or Factors For Consideration
    i. Offense related to domestic violence or hate crime
    ii. Repeat threat offenses over the preceding 24 months
    iii. Documented history of threats towards victim
    iv. Possession of a weapon capable of causing bodily injury or death during commission of offense
    v. No indicia of substance use disorder and/or mental illness

Drug & Paraphernalia Possession – Health & Safety Code §§ 11350, 11357, 11364, & 11377

a. Exceptions or Factors For Consideration
    i. None identified

Minor in Possession of Alcohol – Business & Professions § 25662(a)

b. Exceptions or Factors For Consideration
    i. None identified

Drinking in Public – Los Angeles County Municipal Code §13.18.010

c. Exceptions or Factors For Consideration
    i. None identified

Under the Influence of Controlled Substance – Health & Safety Code § 11550

a. Exceptions or Factors For Consideration
    i. None identified

Public Intoxication – Penal Code § 647(f)

a. Exceptions or Factors For Consideration

    i. None identified

Loitering – Penal Code § 647(b),(c), (d), (e)

a. Exceptions or Factors For Consideration
    i. Repeat offenses over the preceding 24 months involving substantially similar behavior to that charged

Loitering To Commit Prostitution – Penal Code § 653.22(a)(1)

a. Exceptions or Factors For Consideration
    i. None identified

Resisting Arrest – Penal Code § 148(a)

a. Exceptions or Factors For Consideration
    i. Repeat offenses over the preceding 24 months involving substantially similar behavior to that charged
    ii. The actual use of physical force against a peace officer
    iii. The charge is filed in connection with another offense not enumerated above

If the charge is not declined, follow these sequential steps until dismissal:

A. **Pre-Arraignment Diversion via Administrative Hearing.** Upon compliance with condition(s) imposed in the administrative hearing, the charge shall be formally declined;
B. **Post-Arraignment, Pre-Plea Diversion.** Upon compliance with condition(s) imposed at arraignment or pretrial, the charge shall be dismissed without the entry of a plea of nolo contendere or guilty;
C. **Post-Arraignment, Post-Plea Diversion.** Upon compliance with condition(s) imposed at pre-trial, the charge shall be dismissed following the withdrawal of a plea of nolo contendere or guilty.

The conditions of such diversion shall be the same as those statutorily required upon conviction, absent monetary fines and fees and status registration. In no circumstance may the offer of diversion be conditioned upon (1) waiver of a person's constitutional or statutory rights or (2) a temporal or procedural deadline other than commencement of trial.

II. DIVERSION POLICY DIRECTIVE

The purpose of the Diversion Policy Directive is to utilize remediation to protect public safety, promote individual rehabilitation, and encourage prosecutorial discretion. For all misdemeanor offenses not listed below under the Declination Policy Directive, pre-plea diversion shall be presumptively granted. This diversion policy shall not apply to (1)offenses excluded under Penal Code §1001.95 and (2) any driving under the influence offense.

The Diversion Policy Directive is also intended to complement statutory diversion schemes such as those codified under Penal Code §§ 1001.36, 1001.80, 1001.83, and 1001.95. The Deputy District Attorney shall utilize their discretion, in accordance with the spirit of this policy, when determining which diversionary scheme is best suited to serve the interests of justice.

The conditions of such diversion shall be the same as those statutorily required upon conviction, absent monetary fines and fees and status registration. In no circumstance may the offer of diversion be conditioned upon waiver of a person's constitutional or statutory right, except for a waiver of time under Penal Code § 1382. The duration of such diversion shall presumptively be 6 months, but in no circumstance shall it exceed 18 months. Upon compliance with the

condition(s) imposed, the charge(s) shall be dismissed without the entry of a plea of nolo contendere or guilty.

The presumption of pre-plea diversion may be rebutted upon reasoned consideration of the following factors:

- Convictions for offenses of equal or greater severity than that charged over the preceding 24 months;
- Documented history of threats or violence towards a victim;
- Clear evidence of an identifiable, continuing threat to another individual or other circumstance of similar gravity.

In such a situation, the Deputy District Attorney must consult with their supervisor, place their justification for seeking a deviation in writing, and record their supervisor's determination in the case file.

III. NON-DIVERSIONARY PLEA OFFERS

If a misdemeanor case is not subject to declination or resolved via the Diversion Policy Directive, the deputy district attorney shall adhere to the following guidelines when making plea offers:

- No offer shall require that a defendant complete combined jail time and community labor as a term of a sentence;
- No offer shall require that a defendant complete in excess of 15 days of community labor as a term of a sentence;
- No offer shall require status registration for a defendant unless mandated by statute;
- Once conveyed to the defendant, no offer shall be increased in response to the defendant exercising their right to pursue a jury trial or pretrial motion.

In seeking a deviation from any of the aforementioned guidelines, the deputy district attorney must consult with their supervisor, place their justification for seeking a deviation in writing, and record their supervisor's determination in the case file.

IV. FINES AND FEES

Fines and fees place burdens on individuals in the criminal system and their families and pose significant and sometimes insurmountable obstacles to reentry. Deputy district attorneys shall:

- Presume that an individual is indigent and unable to pay fines and fees under the following circumstances: the individual is represented by the Public Defender, the Alternate Public Defender, Bar Panel, or a free legal services organization, the defendant is receiving any type of means-tested government benefits, the defendant is experiencing homelessness or the defendant can make a showing of indigence by clear and convincing evidence;
- Actively support and in no case object to requests to waive fines and fees for indigent individuals;
- Refrain from arguing that a failure to pay a fine, fee, or court ordered program represents a violation of summary probation if the defendant is indigent as defined above, or that

summary probation should be extended based upon an alleged failure to pay, or that an individual should be incarcerated or suffer an additional sanction due to failure to pay.

The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.

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SPECIAL DIRECTIVE 20-08.2

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: AMENDMENT TO SPECIAL DIRECTIVE 20-08

DATE: DECEMBER 18, 2020

This Office is committed to eliminating mass incarceration and fostering rehabilitation for those charged with crimes. As such, this Office will not pursue prior strike enhancements, gang enhancements, special circumstances enhancements, out on bail/O.R. enhancements, or Penal Code section 12022.53 enhancements. After listening to the community, victims, and my deputy district attorneys, I have reevaluated Special Directive 20-08 and hereby amend it to allow enhanced sentences in cases involving the most vulnerable victims and in specified extraordinary circumstances. These exceptions shall be narrowly construed.

Effective immediately, Special Directive 20-08 is amended as follows:

The following sentence enhancements and allegations shall not be pursued in any case and shall be withdrawn in pending matters:

- Any prior-strike enhancements (Penal Code section 667(d), 667(e), 1170.12(a) and 1170.12(c)) will not be used for sentencing and shall be dismissed or withdrawn from the charging document. This includes second strikes and any strikes arising from a juvenile adjudication;
- Any Prop 8 or "5-year prior" enhancements (Penal Code section 667(a)(1)) and "three-year prior" enhancements (Penal Code section 667.5(a)) will not be used for sentencing and shall be dismissed or withdrawn from the charging document;
- STEP Act enhancements ("gang enhancements") (Penal Code section 186.22 et. seq.) will not be used for sentencing and shall be dismissed or withdrawn from the charging document;
- Special circumstances allegations resulting in an LWOP sentence shall not be filed, will not be used for sentencing, and shall be dismissed or withdrawn from the charging document;
- Violations of bail or O.R. release (Penal Code section 12022.1) shall not be filed as part of any new offense;
- Firearm allegations pursuant to Penal Code section 12022.53 shall not be filed, will not be used for sentencing, and will be dismissed or withdrawn from the charging document.

However, where appropriate, the following allegations, enhancements and alternative sentencing schemes may be pursued:

- Hate Crime allegations, enhancements or alternative sentencing schemes pursuant to Penal Code sections 422.7 and 422.75;
- Elder and Dependent Adult Abuse allegations, enhancements, or alternative sentencing schemes pursuant to Penal Code sections 667.9, 368(b)(2)/12022.7(c);
- Child Physical Abuse allegations, enhancements or alternative sentencing schemes pursuant to Penal Code sections 12022.7(d), 12022.9, and 12022.95;
- Child and Adult Sexual Abuse allegations, enhancements or alternative sentencing schemes pursuant to Penal Code sections 667.61, 667.8(b), 667.9, 667.10 ,667.15, 674, 675, 12022.7(d), 12022.8(b), and 12022.85(b)(2);
- Human Sex Trafficking allegations, enhancements or alternative sentencing schemes pursuant to Penal Code sections 236.4(b) and 236.4(c);
- Financial crime allegations, enhancements or alternative sentencing schemes where the amount of financial loss or impact to the victim is significant, the conduct impacts a vulnerable victim population or to effectuate Penal Code section 186.11;
- Other than the enhancement or allegation prohibitions previously listed, enhancements or allegations may be filed in cases involving the following extraordinary circumstances with written Bureau Director approval upon written recommendation by the Head Deputy:

    - Where the physical injury personally inflicted upon the victim is extensive; or
    - Where the type of weapon or manner in which a deadly or dangerous weapon including firearms is used exhibited an extreme and immediate threat to human life;

  Facts or circumstances that are sufficient to meet the legal definition of great bodily injury or use of a deadly or dangerous weapon alone are insufficient to warrant extraordinary circumstances. The written request and approval must be placed in the case file.

CASE SETTLEMENT

The following directives cover case settlement.

1. If the charged offense(s) is probation-eligible, probation shall be the presumptive offer.

    a. Appropriate deviations from this presumption are as follows:
        i. If the charged offense(s) is probation-eligible, and extraordinary circumstances exist, the Deputy District Attorney may file the basis and recommendation for a deviation in writing to their Head Deputy and the appropriate Bureau Director. Upon written approval from the Bureau Director, the Deputy District Attorney may offer a state prison sentence in accordance with this policy. The written basis for the deviation, recommendation, and approval shall be kept in the case file.
        ii. If, but for the terms of this directive, the People could have reasonably alleged an enhancement, and defendant's conduct would have therefore been ineligible for probation, Deputy District Attorneys may file a

recommendation for a deviation in writing to their Head Deputy. Upon written approval from the Head Deputy, the Deputy District Attorney may offer a state prison sentence pursuant to the sentencing triad of the substantive offense(s). The written basis for the deviation, recommendation, and approval shall be kept in the case file.

2. If the charged offense(s) is not probation eligible, the presumptive sentence shall be the low term.

    a. When deviating from the low term the deputy shall document the supporting reasons in the case file.

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SPECIAL DIRECTIVE 20-08.1

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN
District Attorney

SUBJECT: FURTHER CLARIFICATION OF SPECIAL DIRECTIVE 20-08

DATE: DECEMBER 15, 2020

This Special Directive is intended to further supplement the language provided in SD 20-08, Section II concerning Pending Cases, issued on December 7, 2020. The introduction of that Special Directive states, "...sentence enhancements or other sentencing allegations, including under the Three Strikes law, shall not be filed in any cases and shall be withdrawn in pending matters." The language is clear that this policy is intended to put an end to the practice of alleging strike priors and all other special allegations in accordance with the constitutional authority granted solely to prosecutors across the state of California.

If a pending matter has strike priors alleged or enhancements/allegations (pursuant to SD 20-08) deputies shall make the following record:

"The People move to dismiss and withdraw any strike prior (or other enhancement) in this case. We submit that punishment provided within the sentencing triad of the substantive charge(s) in this case are sufficient to protect public safety and serve justice. Penal Code section 1385 authorizes the People to seek dismissal of all strike prior(s) (or other enhancements) when in the interests of justice. Supreme Court authority directs this Court to determine those interests by balancing the rights of the defendant and those of society 'as represented by the People.' The California Constitution and State Supreme Court precedent further vest the District Attorney with sole authority to determine whom to charge, what charges to file and pursue, and what punishment to seek. That power cannot be stripped from the District Attorney by the Legislature, Judiciary, or voter initiative without amending the California Constitution. It is the position of this office that Penal Code section 1170.12(d)(2) and Penal Code 667(f)(1) are unconstitutional and infringe on this authority. Additional punishment provided by sentencing enhancements or special allegations provide no deterrent effect or public safety benefit of incapacitation--in fact, the opposite may be true, wasting critical financial state and local resources."

Legal authority: *People v. Superior Court (Romero)* (1996) 13 Cal. 4th 497, 530 ("[T]he language of [section 1385], 'furtherance of justice,' requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People,* in determining whether there should be a dismissal." (emphasis in original); *Dix v. Superior Court* (1991) 53 Cal. 3d at 451.

Furthermore, if a court refuses to dismiss the prior strike allegations or other enhancements/allegations based on the People's oral request, the DDA shall seek leave of the court to file an amended charging document pursuant to Penal Code section 1009.

If a court further refuses to accept an amended charging document pursuant to Penal Code section 1009, the DDA shall provide the following information to their head deputy: Case number, date of hearing, name of the bench officer and the court's justification for denying the motion (if any). The DDA shall stipulate to any stay of proceedings if requested by the defense.

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