

OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF SACRAMENTO



**LEGAL & CASE PROSECUTION
POLICY MANUAL**

ANNE MARIE SCHUBERT
DISTRICT ATTORNEY

December 10, 2019

Table of Contents

INTRODUCTION	4
ETHICS, PROFESSIONALISM, AND DISCOVERY	4
BRADY POLICY: LAW ENFORCEMENT PROFESSIONALS	5
1. REQUIRED SUBMISSIONS.....	5
2. BRADY COMMITTEE ACTION AND DATABASE.....	6
3. CONFIDENTIALITY.....	6
4. PRISON CRIMES UNIT.....	7
BRADY POLICY: INFORMANTS AND INDIVIDUALS WHO HAVE RECEIVED MATERIAL BENEFITS	7
USE OF INFORMANTS AND COOPERATING WITNESSES	9
1. AGREEMENTS FOR INVESTIGATIVE COOPERATION.....	9
2. USE OF IN-CUSTODY INFORMANTS AND “PERKINS OPERATIONS”.....	10
3. PROFFER AGREEMENTS.....	10
4. AGREEMENTS TO TESTIFY.....	11
5. STATUTORY IMMUNITY.....	11
JAIL COMMUNICATIONS	12
ACCUSATIONS OF MISCONDUCT	12
REPORTING OF JUDICIAL OR ATTORNEY MISCONDUCT	13
ASSISTANCE TO LAW ENFORCEMENT AGENCIES	14
1. SEARCH WARRANTS/RAMEY WARRANTS.....	14
2. LINEUPS.....	14
3. REQUESTS FOR DISTRICT ATTORNEY LEGAL OPINIONS.....	14
BASIC CRIMINAL CASE PROCESSING	15
1. FILING.....	15
2. COURT APPEARANCES AND CASE FILES.....	15
3. RESOLUTION AND DISPOSITION.....	15
4. DISQUALIFICATION OF A JUDGE.....	16
GUIDELINES FOR DRIVING UNDER THE INFLUENCE CHARGES	16
1. FILING GUIDELINES.....	16
2. PRIOR CONVICTIONS FOR DUI.....	17

3. DISPOSITION GUIDELINES	18
4. DRIVING UNDER THE INFLUENCE TREATMENT COURT	19
JUVENILE CASES	20
1. JUVENILE COURT FILING OF PETITIONS.....	20
2. JUVENILE CASES FILED IN ADULT COURT.....	20
THREE STRIKES LAW POLICIES	22
1. INTAKE.....	22
a. Filing Decision.....	22
b. Filing Policies on Priors for Other Purposes	22
c. Wobblers.....	23
d. Prior Juvenile Adjudications	23
2. DISPOSITIONS.....	23
a. Striking Priors.....	23
b. Persons Authorized to Dismiss Strike Priors.....	24
c. Proceeding to Trial in Three Strike Life Cases.....	25
CHARGES AND ALLEGATIONS REQUIRING APPROVAL.....	25
COLLATERAL CONSEQUENCES	26
DECISION WHETHER TO SEEK THE DEATH PENALTY	27
1. PROCEDURE FOR MAKING PENALTY DETERMINATION	28
2. PROCEDURE FOLLOWING INITIAL PENALTY PHASE MEMO.....	29
3. POLICY IMPLEMENTATION	30
RIGHTS OF CRIME VICTIMS	30
PRE-CONVICTION BODY FLUID TESTING POLICY	31
VICTIM RESTITUTION	31
1. FELONY CASES	31
a. Defendant is Sentenced Immediately (No Presentence Report is Written).....	31
b. Defendant's Case is Referred to the Probation Department for a Probation Report.....	32
2. MISDEMEANOR CASES	32
GRAND JURY GUIDELINES	33
POST-CONVICTION CLAIMS OF FACTUAL INNOCENCE AND REQUESTS FOR REVIEW	33

INTRODUCTION

This “Legal & Case Prosecution Policy Manual” is comprised of policy directives adopted and considered currently effective for this office. Part of the trust we all hold as public servants is to adopt prosecution policies that are in the best interest of the public we serve. Also, as an office with over 170 attorneys, serving as administrators of justice for a population of over one million, we need certain basic standards to ensure the fair administration of justice. To these ends, this manual will serve as a reference and aid to all.

Throughout these policies, the term “prosecutor” refers to any individual who is representing this office in an attorney role, including deputy district attorneys, legal research attorneys, and interns.

This edition of the “Legal & Case Prosecution Policy Manual” supersedes all previous versions.

ETHICS, PROFESSIONALISM, AND DISCOVERY

The mission of the Sacramento County District Attorney’s Office is to “Seek Justice, Serve Justice, Do Justice.” Our interest is not that we shall win a case, but that justice shall be done. (*Berger v. United States* (1935) 295 U.S. 78, 88.) The primary function of a 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 not to 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.

We must maintain the highest standards of ethics, civility, and professionalism. Prosecutors shall be guided by the principles set forth in the most current edition of the California District Attorneys Association’s publication *Professionalism: A Sourcebook of Ethics and Civil Liability Principles for Prosecutors*.

Any prosecutor who believes that they are ethically prohibited from proceeding with a case or has other ethical concerns about the performance of their duties shall discuss the issue with their supervisor. If the prosecutor is unable to resolve the matter with the supervisor, the prosecutor may go to the next highest person in the supervisory chain. (See Rules 1.13, 3.8 of the California Rules of Professional Conduct).

It is the policy of the Sacramento County District Attorney’s Office to promptly provide all discoverable materials in criminal cases in accordance with the law. Prosecutors shall follow all constitutional, statutory, and ethical discovery obligations.

Prosecutors must provide all materials subject to California’s criminal discovery statutes (see Penal Code section 1054 *et seq.*). Further, pursuant to *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny, material evidence favorable to the accused must be disclosed.

In addition, as required by Rule 3.8(d) of the California Rules of Professional Conduct, prosecutors must make timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused, mitigate the offense, or mitigate the sentence, except when relieved of this responsibility by a protective order from the court. Cases where such an order might be sought include those where disclosure of discoverable materials would endanger the safety of a victim or witness, threaten the loss or destruction of evidence, or compromise other law enforcement investigations. Note that this discovery obligation is not dependent on a finding of materiality.

Any questions concerning discovery of materials should be resolved in favor of disclosure.

BRADY POLICY: LAW ENFORCEMENT PROFESSIONALS

Pursuant to the District Attorney’s responsibility to follow all legal and ethical discovery obligations, including the duties under Penal Code section 1054.1 and *Brady v. Maryland* (1963) 373 U.S. 83 to disclose favorable evidence to a defendant (collectively referred to as *Brady* material), this protocol is established to address material with respect to law enforcement professionals that is exculpatory or impeaching.

The District Attorney’s *Brady* Committee consists of the Chief Deputy District Attorney, the Assistant District Attorney, and those prosecutors assigned to the committee by the District Attorney. This committee serves as evaluator of all potential *Brady* material as it relates to law enforcement personnel. The committee collects any potential *Brady* information, evaluates it, and decides if it requires inclusion in the *Brady* database.

1. REQUIRED SUBMISSIONS

It is the responsibility of every prosecutor and investigator to immediately alert any member of the *Brady* Committee when they become aware of potential *Brady* material that relates to any member of the law enforcement community within Sacramento County, or to any member of law enforcement who potentially has contact with any Sacramento County criminal prosecution. Information of this type includes, but is not limited to, information that would tend to establish that the law enforcement professional

- has made false reports in the past

- has pending criminal charges or is the target of a current criminal investigation
- is being investigated by his or her own department for improper conduct, or has been found by that department to have engaged in such conduct
- has exhibited a character for untruthfulness
- has a bias in one or more potential criminal cases
- has an inappropriate relationship with a key witness or a defendant or his or her attorney
- is on probation or parole
- is suspected of hiding or altering evidence or committing perjury in a criminal investigation
- may not be truthful or totally forthcoming in any criminal investigation in which they are involved

Such information should be given to a *Brady* Committee member immediately.

2. BRADY COMMITTEE ACTION AND DATABASE

The *Brady* Committee will evaluate the evidence submitted and, if appropriate, request additional information from any appropriate source. Ultimately, the *Brady* Committee will decide whether the information provided triggers inclusion in the *Brady* database and a need for any notification to the defense.

Eligibility for the database will be determined by the *Brady* Committee based on a standard of substantial evidence, keeping in mind the prosecutor's discovery responsibilities. Every prosecutor will be responsible for ensuring that the database is checked as to every law enforcement professional who is a potential witness.

3. CONFIDENTIALITY

The actual information supporting the inclusion of the law enforcement professional in the database will not be available for access online. The information behind the database will be maintained by a member of the *Brady* Committee. A check of the *Brady* database application will indicate whether a particular officer should be the subject of further inquiry by the prosecutor. When the check of the database indicates that the prosecutor should make further inquiry as to a particular officer, the database will also indicate who the prosecutor should consult for access to the underlying information. The decision whether disclosure is necessary in

a particular case will be made by the inquiring prosecutor in consultation with the *Brady* Committee.

If a decision is made by the *Brady* Committee to include a law enforcement professional in the *Brady* database, that person and his or her department will be notified and have an opportunity to provide additional information. Inclusion in the *Brady* database is subject to constant review by the *Brady* Committee, and a name may be withdrawn from the database upon further consideration of current or new information.

The database may only be examined by the *Brady* Committee or a prosecutor whose subpoena or inquiry has triggered a response. Database information may not be released unless the *Brady* Committee has determined that notification is consistent with our discovery responsibilities.

4. PRISON CRIMES UNIT

A separate system will be used for cases in the Prison Crimes Unit (PCU) for law enforcement professionals employed by the Department of Corrections and Rehabilitation. It may use a computer database, or a paper filing and index system, in the discretion of the Assistant Chief Deputy District Attorney with authority over the PCU. The PCU *Brady* system will be administered jointly by the supervisor of the PCU and the Assistant Chief Deputy with authority over that unit. They shall use the same procedure and standards for inclusion of information as the *Brady* Committee and the general office *Brady* database, and prosecutors in the PCU shall have the same responsibilities with respect to consulting the PCU *Brady* system. Prosecutors not assigned to the PCU shall be responsible to check with the PCU *Brady* system when a law enforcement professional employed by the Department of Corrections and Rehabilitation is a victim, material witness, or defendant in a case outside the PCU.

BRADY POLICY: INFORMANTS AND INDIVIDUALS WHO HAVE RECEIVED MATERIAL BENEFITS

When an informant or any other individual has received material benefits from law enforcement and/or the prosecution, the promise or tender of such benefits may constitute exculpatory or impeachment evidence (i.e., *Brady* material), which shall be disclosed as required by law to the defense. In order to ensure that an attorney prosecuting a case will be notified that an informant or other individual has received material benefits, the procedures outlined below will be followed.

An informant or individual who has received material benefits regarding a narcotics investigation will have those benefits documented in a material benefits file system maintained in the Major

Narcotics Unit. The Major Narcotics Unit will be responsible for including the names and appropriate identifying information of all such persons in the material benefits index.

Material benefits provided to an informant or individual other than in a narcotics investigation will be documented in the material benefits file system maintained by the confidential secretary for the Chief Deputy District Attorney and Assistant District Attorney. When any prosecutor or investigator provides or promises material benefits to an informant or any other individual or becomes aware that such benefits have been provided or promised by any law enforcement agency, the prosecutor or investigator shall notify that secretary. Notifications shall be made by use of a receipt of material benefits form (available from the Justice, Training, and Integrity Unit) or by other similar means that includes the same information.

The full nature of the benefits provided to an informant or other individual will be maintained in these material benefits file systems. In addition, the name and such identifying information as may be appropriate will be entered into a confidential portion of the District Attorney's case management system. Thereafter, when any subpoena is prepared in that system for the identified person, a notice will be sent to the secretary responsible for maintaining the material benefits file system, the Chief Deputy, the Assistant District Attorney, and any other persons determined necessary by the Chief Deputy or Assistant District Attorney. One of those persons notified shall alert both the prosecutor who issued the subpoena and that prosecutor's supervisor of the status of the witness as an informant or other individual who has received a material benefit. The decision on what disclosure to make and what action to take in a particular case shall be made by the prosecutor assigned to the case and that prosecutor's supervisor in consultation with the Chief Deputy or the Assistant District Attorney.

As used in this policy, "material benefit" shall include (but may not be limited to) any of the following when the benefit has been promised or provided to the informant or other individual, or to another person on account of the cooperation of the informant or other individual:

- Financial benefit – includes payments of any kind, including but not limited to room, board, use of an automobile, moving and relocation expenses (including payment for relocation expenses for which our office seeks reimbursement from the California Department of Justice), but does not include standard or statutory witness fees or claims paid to the person by the California Victim Compensation and Government Claims Board.
- Custody benefit – includes leniency in arrest, booking, or bail.
- Charging benefit – includes any consideration in the charges filed.
- Timing benefit – either delay or acceleration of a court appearance that provides a material benefit.
- Case disposition benefit – includes reduction or dismissal of some or all charges, agreement as to period of incarceration, agreement as to fine or restitution obligation, or favorable input to the sentencing court by the District Attorney's Office or by law enforcement.

- Immunity – includes whether given by formal court order, written guarantee, or less formal means. Determining if immunity is considered a material benefit shall take into account whether the informant or other individual had central involvement in criminal activity, only minimal or tangential involvement, or involvement that only amounted to being a witness.
- Intervention benefit – includes action by the District Attorney’s Office or law enforcement to obtain favorable action or treatment by some other governmental agency (e.g., IRS, CPS, immigration authorities, or civil courts) or with some private entity or agency (e.g., an employer).

USE OF INFORMANTS AND COOPERATING WITNESSES

Caution should always be exercised in dealing with informants and the use of witnesses who seek leniency in return for testimony. It is the policy of this office to carefully evaluate and strictly control the use of informants and cooperating witnesses (I/CW) as witnesses. The following policies and procedures apply unless an exception has been approved by the Chief Deputy District Attorney or Assistant District Attorney.

1. AGREEMENTS FOR INVESTIGATIVE COOPERATION

- a. Any agreement by which a criminal defendant or any I/CW seeks consideration on pending or potential charges in exchange for cooperation in a law enforcement investigation shall be memorialized in a written contract, a form for which is available from the Justice, Training, and Integrity (JTI) Unit.
- b. All contracts with persons seeking consideration on pending or potential criminal charges in exchange for cooperation against narcotics traffickers shall be reviewed and approved by the supervisor of the Major Narcotics Unit. All other requests to use an I/CW must be approved in writing by an Assistant Chief Deputy District Attorney. No commitments regarding the terms of such agreements shall be made prior to such approval. All contracts shall be included in the material benefits files. (See, *supra*, *Brady* Policy: Informants and Individuals Who Have Received Material Benefits.)
- c. An I/CW shall not be called to testify without the written approval of the Chief Deputy or the Assistant District Attorney.

2. USE OF IN-CUSTODY INFORMANTS AND “PERKINS OPERATIONS”

- a. An in-custody informant is a person other than a co-defendant, percipient witness, accomplice, or co-conspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution. (Penal Code section 1127a(a).) The use of an in-custody informant is generally discouraged by this office and can only be approved in writing by either the Chief Deputy or Assistant District Attorney.
- b. A law enforcement agency may seek to insert an officer posing as an inmate into a correctional facility and secretly record conversations with an in-custody suspect. These investigative procedures are typically referred to as “*Perkins Operations*” (*Illinois v. Perkins* (1990) 496 U.S. 292, 294). Although the law permits these types of operations, such operations are prohibited by our office absent extraordinary circumstances and advanced written approval by the Chief Deputy or Assistant District Attorney.

3. PROFFER AGREEMENTS

When an individual facing criminal charges expresses a desire to become an informant, the District Attorney’s Office may wish to conduct an interview to evaluate the information the individual has to offer. This individual may be a charged defendant who seeks to provide information against a co-defendant, or this individual may be someone charged with their own criminal case who seeks to provide information about another person who has allegedly committed an unrelated crime.

When dealing with an informant in a criminal case, special care and caution must be used to identify and comply with our obligations under both *Brady v. Maryland* (1963) 373 U.S. 83 and Penal Code section 1054.1. A statement that is not material or exculpatory under *Brady* may still need to be discovered under Penal Code section 1054.1. Therefore, in an abundance of caution, absent extraordinary circumstances and advanced written approval by the Chief Deputy or Assistant District Attorney, it is the policy of this office that, even if no agreement is reached to become a testifying witness, as part of our interview agreement with potential informants we must notify them that their interview will be discovered. A form designed to memorialize the terms of the agreement for the interview must be obtained from the JTI Unit and shall be used by prosecutors to draft the interview agreement.

The interview with the potential informant shall be recorded. A detective or investigator from the submitting law enforcement agency who is familiar with the case, or a District Attorney criminal investigator, must be present at the interview. If the informant is represented by counsel, that attorney must also be present.

Informant interview agreements must be approved by an Assistant Chief Deputy. A copy of the agreement shall be provided to the Assistant Chief Deputy in charge of the Major Crimes Bureau. An informant shall not be called to testify without the written approval of the Chief Deputy District Attorney or the Assistant District Attorney.

A copy of the proffer agreement shall be included in the material benefits file.

4. AGREEMENTS TO TESTIFY

Upon written approval by the Chief Deputy District Attorney or the Assistant District Attorney for an I/CW to testify, a letter of agreement to testify shall be prepared by the prosecutor and provided to the I/CW and his or her counsel for signature. A form designed to memorialize the terms of the agreement must be obtained from the JTI Unit and shall be used by prosecutors for drafting the letter of agreement.

A copy of the informant's signed letter of agreement shall be forwarded through the chain of command to the Chief Deputy or Assistant District Attorney who approved the agreement and a copy shall be included in the material benefits file.

5. STATUTORY IMMUNITY

Just prior to or during testimony, a witness may need the Fifth Amendment protection against self-incrimination. The following procedures must be followed regarding requesting immunity when this occurs.

Any utilization of Penal Code section 1324 or section 1324.1 requesting that the court grant immunity must be approved in writing by an Assistant Chief Deputy. The petition for immunity must state whether the immunity is: (1) transactional, or (2) use.¹

After approval has been obtained, the following shall be prepared for submission to the Superior Court after obtaining these required forms from the JTI Unit:

- Petition for Order Requiring Witness to Answer Questions and Produce Evidence Under Penal Code Section 1324 [felony cases] or Petition for Immunity Under Penal Code Section 1324.1 [misdemeanor cases]

¹ Transactional immunity is rarely used by this office. Immunity grants in misdemeanor cases are transactional pursuant to Penal Code section 1324.1. Unlike Penal Code section 1324 use immunity, which can be forced upon a witness, section 1324.1 immunity can only be used with the witness' consent.

- Order Requiring Witness to Answer Questions Pursuant to Penal Code Section 1324 [felony cases], or Order of Immunity Pursuant to Penal Code Section 1324.1 [misdemeanor cases]

A copy of the Petition and Order shall be included in the material benefits file (see, *supra*, *Brady* Policy: Informants and Individuals Who Have Received Material Benefits).

JAIL COMMUNICATIONS

Communications with inmates incarcerated in Sacramento County, generally consisting of phone calls and social visits, are recorded by the Sacramento County Sheriff's Department for institutional security. Statements made by a defendant or an incarcerated witness obtained, retrieved, or downloaded from the Sheriff's Department jail recording system by District Attorney employees or provided by the investigating agency will be discovered to the defense, without the need for the defense to make a discovery request for those items. This applies regardless of whether any District Attorney employee has actually reviewed or listened to those particular recordings.

The defense may request additional jail recordings, such as recordings of the defendant, a co-defendant, or an incarcerated witness, that have not yet been retrieved from the jail system. If such recordings are discoverable pursuant to Penal Code section 1054.1, *Brady v. Maryland* (1963) 373 U.S. 83, or any other discovery obligation, the recordings will be provided to the defense, subject to the cost of preparation and production. Discovery of such recordings may only be delayed or withheld in accordance with the procedure established in Penal Code section 1054.7 if it would result in possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.

If a prosecutor believes that legally confidential or privileged communications were inadvertently obtained, the prosecutor shall immediately cease reviewing or listening to the communication and contact the Justice, Training, and Integrity Unit for direction on what further action needs to be taken.

ACCUSATIONS OF MISCONDUCT

Accusations of prosecutorial misconduct are serious matters and should be handled accordingly. It is important to contest accusations that are without merit and to acknowledge when mistakes have been made. Any prosecutor accused of misconduct shall respond promptly and appropriately. The prosecutor must also report the accusations to their supervisor and the Justice, Training, and Integrity (JTI) Unit at the earliest possible time.

Allegations of misconduct shall not be left unanswered on the record. For accusations made orally in open court and not immediately overruled by the judge, the prosecutor shall ask that the court require opposing counsel to state with specificity the allegation of misconduct, facts supporting it, and the remedy sought.

If the accusation is without merit, the prosecutor should respond and request a finding that no misconduct occurred. If the matter can be immediately addressed, the prosecutor may do so at that time. If the matter is more complex, the prosecutor should request a reasonable time to respond and to confer with their supervisor and a member of the JTI Unit before proceeding further.

The JTI Unit, along with the prosecutor's supervisor, shall consult with the prosecutor's divisional Assistant Chief Deputy District Attorney to decide the course of action. The JTI Unit shall represent any prosecutor accused of misconduct if the matter is set for a hearing.

For accusations made outside of court by way of letter or written motion, a formal written response may be required and when appropriate shall be filed with the court. Any attorney accused of misconduct in writing shall prepare a written memorandum of the facts and allegations and assist the JTI Unit representative in preparing an opposition on their behalf. In other respects, the course of action outlined for accusations made in open court should be followed.

All findings of prosecutorial misconduct and inquiries from the State Bar must be immediately reported to the prosecutor's supervisor, who will then consult with the JTI Unit and the prosecutor's divisional Assistant Chief Deputy on all necessary courses of action.

REPORTING OF JUDICIAL OR ATTORNEY MISCONDUCT

Any prosecutor, in their professional capacity, wishing to complain to the State Bar about an attorney's conduct or to the presiding judge or Commission on Judicial Performance about a judicial officer's conduct should discuss the matter with their supervisor and prepare a memorandum for their Assistant Chief Deputy District Attorney to review, which will then be forwarded to the Chief Deputy District Attorney. Any complaint to the State Bar against an attorney or to the presiding judge or the Commission on Judicial Performance against a judicial officer shall be approved in writing by the District Attorney or Chief Deputy.

ASSISTANCE TO LAW ENFORCEMENT AGENCIES

1. SEARCH WARRANTS/RAMEY WARRANTS

The District Attorney's Office is available at all times to assist law enforcement agencies in obtaining search warrants or *Ramey* warrants. *Ramey* warrants shall only be issued with approval of the appropriate unit supervisor.

- a. During Office Hours: The supervisor of the unit responsible for the type of case involved shall assign an available prosecutor to handle an agency's request for assistance during office hours.
- b. After Office Hours: The prosecutor assigned to after-hours on-call search warrant/*Ramey* warrant duty shall handle an agency's request for assistance after office hours.

Any search warrant involving the use of a special master must have the approval of an Assistant Chief Deputy District Attorney, the Assistant District Attorney, or the Chief Deputy District Attorney.

2. LINEUPS

The District Attorney's Office is available when a law enforcement agency requests that a prosecutor attend a live lineup. Our involvement at the lineup is to observe and assist the agency in an advisory role only. The supervisor of the unit responsible for the type of case involved shall assign a prosecutor in the unit to accommodate the agency's request. Notice must be given to the attorney of record. If there is no attorney of record or the attorney of record is not available, the Public Defender's Office shall be notified.

3. REQUESTS FOR DISTRICT ATTORNEY LEGAL OPINIONS

The County Counsel or the agency's city attorney is usually the appropriate attorney to provide legal advice to law enforcement agencies. A prosecutor shall not give legal advice to a law enforcement agency or officer except on issues directly related to a pending criminal investigation or case.

BASIC CRIMINAL CASE PROCESSING

1. FILING

- a. Intake Decisions: For non-vertical units, all criminal intake filing decisions will be made by the Consolidated Intake Division. For vertical units, filing decisions will be made by the supervisor of that specific unit, or the supervisor's designee. Any variation from this policy requires the approval of an Assistant Chief Deputy District Attorney.
- b. Employee Cases: In cases where the victim, a witness, or the suspect is either an employee or an immediate family member of an employee of the District Attorney's Office, no filing decision will be made without first consulting the Assistant Chief Deputy who has authority over the unit where the case would be assigned if filed. The Assistant Chief Deputy will determine whether recusal is necessary.

2. COURT APPEARANCES AND CASE FILES

- a. Court Appearances. The assigned prosecutor has the responsibility to make court appearances. If the assigned prosecutor cannot make the appearance, then that assigned prosecutor must secure another prosecutor to make the appearance.
- b. Case File Documentation. Case files should be legibly documented for each court appearance. The date of each appearance should include the month/day/year. The final disposition should be noted in the appropriate section on the outside of the case file.

3. RESOLUTION AND DISPOSITION

All resolutions and dispositions shall be based on the individual merits of the case, to include consideration of the following factors: the defendant's background, the facts and circumstances of the crime, input from the victim, collateral consequences appropriate for consideration, and all applicable sentencing laws.

4. DISQUALIFICATION OF A JUDGE

The decision to disqualify a judge is discouraged and should be confined to unusual situations.

- a. Code of Civil Procedure Section 170.6: A prosecutor may challenge a judge when they believe that the judge is prejudiced against a party or attorney such that the attorney cannot obtain a fair and impartial trial or hearing. Within two working days of the exercise of a Code of Civil Procedure section 170.6 challenge, a brief written memo must be forwarded to the District Attorney, the Chief Deputy District Attorney, the Assistant District Attorney, the divisional Assistant Chief Deputy, and the prosecutor's supervisor explaining the decision to exercise a challenge.
- b. Code of Civil Procedure Section 170.1: A prosecutor shall not challenge a judge for cause without the approval of the Chief Deputy or Assistant District Attorney.

GUIDELINES FOR DRIVING UNDER THE INFLUENCE CHARGES

Driving under the influence (DUI) is the crime of driving a vehicle while under the influence of alcohol and/or drugs, including recreational drugs, over the counter medication, and medications prescribed by a physician. DUIs continue to be the leading cause of fatal traffic collisions. The District Attorney's Office is committed to prosecuting these crimes in the interest of public safety and with the goal of the prevention of future offenses.

The following sets forth our filing and disposition guidelines in DUI cases. They are provided to promote consistency and uniformity in our handling of DUI cases. They cannot prevail in every situation, as each case must turn on the sufficiency of the evidence. However, deviation from these guidelines requires approval of a supervisor or lead attorney.

1. FILING GUIDELINES

Absent serious problems of proof, a DUI will be charged in any of the following scenarios:

- a. The blood alcohol level is .09% or higher.
- b. The blood alcohol level is .08%, when there is also a PAS of .09% or higher.
- c. The driver refused all chemical tests and there is additional evidence of impairment.

- d. The blood alcohol level is zero, or below .08%, when there is also proof that the defendant is under the influence of drugs. Each case must turn on the sufficiency of the particular evidence, including the opinion of the DRE officer and the Crime Lab.
- e. If the criteria in any of the guidelines set forth in (a)-(d) above are met, and any person other than the defendant sustains an injury, a violation of Vehicle Code section 23153 will be charged. Depending on the nature and extent of the injuries, a felony Vehicle Code section 23153 may be charged.

The following allegations and enhancements will be charged, if applicable:

- a refusal to submit to a chemical test at the request of a peace officer pursuant to Vehicle Code sections 23577 and 23538(b)(2)
- high blood alcohol allegation pursuant to Vehicle Code sections 23578, 23538(b)(2), or 23556
- multiple victims of a Vehicle Code section 23153 offense pursuant to Vehicle Code section 23558
- excessive speed enhancement pursuant to Vehicle Code section 23582
- minor passengers present in the vehicle enhancement pursuant to Vehicle Code section 23572

2. PRIOR CONVICTIONS FOR DUI

When charging DUI cases, violation dates and prior violations must be accurate. Each prior DUI conviction increases the offer on the present DUI. A DUI conviction is considered a prior conviction if the violation date is within 10 years of the current violation date (Vehicle Code section 23540).

A DUI can be filed as a felony when the following priors exist:

- A person is convicted of a DUI and the offense occurred within 10 years of 3 or more separate DUI convictions (Vehicle Code section 23550).
- A person is convicted of a DUI within 10 years of a prior felony DUI conviction (Vehicle Code section 23550.5).
- A person is convicted of Vehicle Code section 23153 with 2 or more priors (Vehicle Code section 23566). Vehicle Code section 23153 can be filed as a stand-alone felony without any priors.

3. DISPOSITION GUIDELINES

- a. A Vehicle Code section 23152 offense with a blood alcohol level of .10% or more will be resolved as a violation of Vehicle Code section 23152.
- b. A Vehicle Code section 23152 offense with a blood alcohol level of .08% or .09% which does not fall within either of the criteria noted in paragraph (c), below, may be resolved as a "wet reckless."
- c. A Vehicle Code section 23152 offense with a blood alcohol level of .08% or more will remain a Vehicle Code section 23152 offense if (a) the defendant's driving contributed to a collision or (b) the defendant has one or more provable separate DUI or "wet reckless" conviction(s) within the previous ten years.
- d. A Vehicle Code section 23153 offense, filed as either a felony or a misdemeanor, must remain a Vehicle Code section 23153 offense absent proof problems. No reduction to Vehicle Code section 23152 shall occur unless injury did not occur, or there is insufficient proof of an unlawful or negligent act proximately causing the injury. Where possible, the victim should be contacted prior to arraignment to confirm the extent of the injuries. Prior to conveying an offer on the case, the prosecutor must contact the victim to ascertain the extent of the injuries.
- e. Valid separate prior DUI convictions shall be pled and shall not be stricken except for failure of proof. A defendant must admit all alleged prior convictions upon entry of a plea.
- f. Multiple Vehicle Code section 23152 charges shall not be discounted or dismissed to induce a plea unless defects in proof so require.
- g. Vehicle Code sections 14601.2 and 14601.5 shall not be dismissed as part of a plea bargain except for reasons of proof. In felony cases, 10 to 30 additional days of incarceration should be sought. With one or more prior conviction(s), a minimum of an additional 30 to 60 days should be sought.
- h. Refusal allegations must be pled and proven/admitted. Refusal allegations shall not be stricken in a plea bargain except where there is a failure of proof. Additional consecutive punishment for a refusal shall be sought pursuant to Vehicle Code section 23577 and Vehicle Code section 23538(b)(2).
- i. In any case where the defendant's blood alcohol level is .15% or more, the enhancement pursuant to Vehicle Code section 23578 shall be pled and proven/admitted. In any case where a defendant's blood alcohol level is .20% or more, the enhancement pursuant to Vehicle Code sections 23538(b)(2) or 23556 shall be pled and proven/admitted.

- j. In any case where there are multiple victims of a Vehicle Code section 23153 offense, the enhancement pursuant to Vehicle Code section 23558 shall be pled and proven/admitted.
- k. In any case where the defendant is driving 30 or more miles per hour over the posted speed limit on a freeway, or 20 or more miles per hour over the posted speed limit on any other street or highway, the enhancement pursuant to Vehicle Code section 23582 shall be pled and proven/admitted.
- l. Pursuant to Vehicle Code section 23572, in any Vehicle Code section 23152 case where a minor under the age of 14 years of age was a passenger in the vehicle at the time of the offense, that fact shall be pled and shall not be stricken except for failure of proof. Additional consecutive punishment shall be sought pursuant to Vehicle Code section 23572 as indicated, except where the defendant is also convicted of Penal Code section 273a arising out of the same facts and incident.

4. DRIVING UNDER THE INFLUENCE TREATMENT COURT

The DUI Treatment Court, implemented in October of 2017, is the result of a collaborative effort between the District Attorney's Office, the Sacramento Superior Court, the Sacramento Probation Department, the Public Defender's Office, and other agencies.

The Sacramento County DUI Treatment Court is a court-supervised, comprehensive treatment program for repeat DUI offenders who have two or three prior DUI convictions within a ten-year period and who have a problem with substance abuse. The goals of the program are to keep communities safe and to reduce recidivism amongst DUI repeat offenders that will lead to a decrease in alcohol and drug-related collisions, injuries, and fatalities. Successful completion of DUI Treatment Court does not result in the reduction or dismissal of any DUI charges, allegations, or enhancements.

This is a voluntary program that includes regular court appearances before a designated DUI Treatment Court Judge. Anyone that meets the basic criteria for acceptance must be assessed for suitability and the appropriate level of treatment. The program components consist of treatment (individual and group counseling), regular attendance at self-help meetings (such as Alcoholics Anonymous or Narcotics Anonymous), random drug testing, case management services, and probation supervision. The program also assists with obtaining education and skills assessments and will provide referrals for vocational training, education, and/or job placement services. The program's length, determined by each participant's progress, will be up to 18 months. Pursuant to the current agreement of the parties, to successfully complete the DUI Treatment Court, a defendant must

- serve any mandatory in-custody time in the county jail

- serve a portion of custody time in an alternative program as approved by the court (i.e., Home Detention, Adult Work Project, and Community Service)
- successfully complete treatment
- maintain sobriety (to include no positive alcohol/drug tests, including missed and/or tampered tests, for a minimum of 120 consecutive days)
- successfully complete the SB38 Multiple Offender DUI Program
- pay any restitution in full and pay any imposed fines and fees (that are not reduced by any custody time served)
- comply with any probation conditions and court orders

JUVENILE CASES

1. JUVENILE COURT FILING OF PETITIONS

Our office shall file Juvenile Justice Court petitions when less restrictive measures are insufficient to provide for the protection and safety of the community and the minor.² Our office shall work to preserve and strengthen the minor's family ties whenever possible, collaborating with juvenile justice partners to reform the minor's behavior.

The Juvenile Division of our office shall implement Crossover Youth practices, prevention programs, diversion strategies, trauma-responsive practices, restorative justice opportunities and collaborative court efforts to the extent they are feasible and effective. Juvenile Justice Court dispositions shall include consideration of the minor's family and social history, childhood trauma, child welfare system involvement, mental health concerns, and input from the victim.

The goal of all Juvenile Justice Court filings and dispositions shall include the care, treatment, and guidance of the minor consistent with his/her best interest, the safety and protection of the community, and redressing harm to crime victims.

2. JUVENILE CASES FILED IN ADULT COURT

The following is a comprehensive policy for this office regarding the decision to seek adult prosecution against a juvenile and the case process after that decision is made.

In all cases where the law permits, and where the minor faces an offense per Welfare and Institutions Code section 707(b), the supervisor and intake prosecutor assigned to the Juvenile

² Less restrictive measures include parental remedies, school remedies, and community-based youth intervention programs.

Division will send a written communication detailing facts known about the offense, factors reviewed by the Juvenile Court in determining transfer suitability, and the likely outcome of a transfer hearing to the following group: the Assistant Chief Deputy District Attorney overseeing the Juvenile Division, the Assistant District Attorney, and the Chief Deputy District Attorney. In cases of homicide, a communication will also include the Assistant Chief Deputy overseeing the Major Crimes Bureau.

A recommendation on filing a Welfare and Institutions Code section 707(a) transfer motion will be made by the Assistant Chief Deputy overseeing the Juvenile Division. The Assistant District Attorney and Chief Deputy will make the final decision after considering the recommendations of the supervisor of the Juvenile Division and the Assistant Chief Deputy.

Each decision will be made on a case-by-case basis considering the following factors:

- circumstances and gravity of the offense committed by the minor
- whether the minor was an active participant, or an aider and abettor
- degree of criminal sophistication exhibited by the minor
- community safety
- whether a weapon was used
- nature and extent of injuries intended and/or caused
- the minor's previous delinquent history
- the minor's history of trauma
- the minor's history within the child welfare/dependency system
- whether the minor can be rehabilitated prior to expiration of juvenile court jurisdiction
- success of previous attempts by the juvenile court to rehabilitate the minor
- whether the interests of justice are best served with the case proceeding in Juvenile Justice Court

At any time during the transfer process, including after the case has been filed in adult court, the case is subject to re-evaluation based on new or additional information. All subsequent reviews will be conducted by the Assistant Chief Deputies in charge of the unit prosecuting the case and the Juvenile Division. If the Assistant Chief Deputies recommend that the case should be in juvenile court, the Assistant District Attorney and Chief Deputy will make the final decision.

The primary concern in all Welfare and Institutions Code section 707(a) transfer decisions shall be whether the public interest is served by a juvenile court disposition.

THREE STRIKES LAW POLICIES

The purpose of this directive is to set forth the policies that will govern this office's application of the "Three Strikes Law," Penal Code sections 667(b) - (i) and 1170.12.

1. INTAKE

a. Filing Decision

While the Three Strikes Law authorizes the dismissal of prior strike convictions by the court and the prosecutor for insufficient evidence or in the furtherance of justice,³ it does not allow for discretion in charging known prior strike convictions at the outset.⁴ Therefore, if the case qualifies for treatment as a two strikes case (one qualifying prior conviction) or a three strikes case (two prior qualifying convictions), all known strike priors will be filed at intake. Priors must be alleged separately. If a prior is not filed at intake but the assigned prosecutor becomes aware of the prior after the case is filed, the complaint should be amended to include the prior before any disposition of the case.

A decision whether a prior exists and should therefore be alleged may be based upon a rap sheet entry showing the conviction. In cases where the rap sheet entry is ambiguous (i.e., the conviction is for Penal Code section 245 but does not show if a weapon was used, or is for Penal Code section 459, but does not show if the burglary was residential), the prior will not be alleged except on further investigation to determine if the prior has the necessary elements.

b. Filing Policies on Priors for Other Purposes

In an ongoing effort to resolve appropriate cases at an early stage, Penal Code section 667(a) 5-year priors will generally not be filed at the outset absent unusual circumstances and in the interest of justice. Prosecutors shall consult with their supervisors for guidance.

³ Penal Code section 667(f)(2).

⁴ "Notwithstanding any other law, subdivisions (b) to (i), inclusive, shall be applied in every case in which a defendant has one or more prior serious or violent felony convictions as defined in subdivision (d). The prosecuting attorney shall plead and prove each prior serious or violent felony conviction except as provided in paragraph (2)." (Penal Code section 667(f)(1).)

c. Wobblers

If the new crime is a wobbler, the decision whether to file the case as a misdemeanor or a felony should be made at the outset. The criteria to be used in this decision may take into account the criminal history of the defendant but shall not be based solely on his or her status as a potential strike offender. Cases that would have been filed as misdemeanors absent the Three Strikes Law should continue to be filed as misdemeanors.

d. Prior Juvenile Adjudications

When the background material from the submitting law enforcement agency indicates the defendant may have a prior juvenile strike, juvenile records should be evaluated. For Sacramento County juvenile priors, this can be done by calling the District Attorney's Juvenile Division or the Juvenile Probation Intake Supervisor. If a prior qualifying under Welfare and Institutions Code section 707(b), Penal Code section 1192.7(c), or Penal Code section 667.5(c) is found, it will be treated as a prior conviction and filed. Dismissal of juvenile strike priors will be conducted in accordance with the process and factors set out below with emphasis on, and consideration of, those factors particularly associated with youthful offenders.

Unlike adult court records, Juvenile Court records are confidential, complicating the procedure for obtaining a "certified prior package." Prosecutors should follow the process outlined at <https://saccourt.ca.gov/juvenile/records.aspx> to obtain copies of local juvenile court records and /or local juvenile probation records. Standing Order SSC-JV-99-021 provides the necessary Welfare and Institutions Code section 827 declaration (form) to initiate this process.

2. DISPOSITIONS

a. Striking Priors

The Three Strikes Law authorizes the court to strike a prior for insufficient evidence, or in the furtherance of justice on the District Attorney's motion. While the statute forbids the use of priors in plea bargaining, the statute authorizes dismissing the allegation of a strike prior in furtherance of justice when the disposition would otherwise result in a punishment that is disproportionate and therefore unjust based on the circumstances of the offense and the background of the defendant. In this situation, the prior will be stricken without regard to whether or not the defendant is induced thereby to enter a guilty plea. Authorization to strike a prior for this purpose will be based upon consideration of a number of factors. These factors should assist us in determining whether the interests of justice are served by a life sentence or a

sentence of twice the ordinary prison term in the particular case. While none of these alone is controlling, each may be regarded as mitigating:

- whether the current offense is de minimis in nature, or if a wobbler, serious enough to be a felony, but not sufficiently serious to warrant a two or three strikes sentence
- whether the strike priors are remote in time
- whether the strike priors arose from a single period of aberrant behavior
- whether the underlying facts of the strike priors undermine the seriousness ordinarily associated with the charges
- whether the prior offenses include actual violence or threat of great violence
- whether the defendant has a history of weapons possession or use
- whether the defendant's age and circumstance reduce the likelihood of future threat
- whether, after viewing all of the facts and circumstances and background of the defendant, the case falls within the spirit of the Three Strikes Law

Whenever a strike prior is alleged, the case must go through a strike review process. The assigned prosecutor will notate in the file, along with a summary of the facts of the case and the defendant's background, the prosecutor's recommendation whether the case should proceed as a strikes case or whether the strike prior should be dismissed. The prosecutor will provide the file to their supervisor. The supervisor will then notate their recommendation on whether to proceed with or dismiss the prior and provide the file to the person designated by the District Attorney with authority to dismiss a strike prior (see below). That person will then indicate approval or disapproval of dismissing the prior. A copy of the sheet will be kept in the case file. A prosecutor may only move to dismiss a strike prior with the approval of the person(s) designated by the District Attorney (see below).

Where appropriate and in the furtherance of justice, a prior may be dismissed for strike purposes but may still be alleged for enhancement purposes under Penal Code section 667(a).

b. Persons Authorized to Dismiss Strike Priors

In order to maintain fairness and consistency throughout the office, the District Attorney will appoint the Assistant Chief Deputy District Attorneys who shall have authority to approve the evaluation and dismissal of prior strike convictions. In the event the appointed Assistant Chief

Deputies are unavailable, the Assistant District Attorney or Chief Deputy District Attorney will review and approve requests to dismiss a strike prior.

c. Proceeding to Trial in Three Strike Life Cases

Facts and evidence sometimes continue to develop as cases progress through prosecution which can alter the evaluation of charging and disposition decisions previously rendered. Therefore, before going to trial seeking a sentence that contemplates an enhanced penalty pursuant to the Three Strikes Law, prosecutors shall review three strikes cases with their supervisor and with the Assistant Chief Deputy designated by the District Attorney.

CHARGES AND ALLEGATIONS REQUIRING APPROVAL

The following class of cases and allegations require mandatory approval from the supervising authority as designated below before the indicated action can be taken. In addition, it is the general policy of the District Attorney's Office that the dismissal of any charge or enhancing allegation should be discussed with the prosecutor's immediate supervisor.

- 1) Homicide cases: Homicide case dispositions, including vehicular homicides, shall be approved by the Assistant Chief Deputy District Attorney of the Major Crimes Bureau.
- 2) Special circumstance allegations: An allegation of a special circumstance shall not be dismissed without the approval of the Assistant Chief Deputy of the Major Crimes Bureau.
- 3) Firearm use allegations: An allegation of a personal use of a firearm in the commission of a felony shall not be dismissed without the approval of the prosecutor's supervisor.
- 4) Prior strike convictions: The allegation of a prior strike conviction shall not be dismissed without the approval of the Assistant Chief Deputy designated by the District Attorney to authorize dismissal of strike convictions.
- 5) Specified sex offenses punishable by incarceration for life: Any allegation pursuant to Penal Code sections 667.61, 667.7, or 667.71 shall not be filed or dismissed without the approval of the Assistant Chief Deputy of the Sex Crimes and Special Prosecutions Bureau.

- 6) Prior Driving Under the Influence (DUI) convictions: The allegation of a prior DUI conviction shall only be stricken pursuant to the DUI policy contained in this manual (see, *supra*, Guidelines for Driving Under the Influence Charges).
- 7) Life sentences: Facts and evidence sometimes continue to develop as cases progress through prosecution which can alter the evaluation of charging and disposition decisions previously rendered. Therefore, before going to trial in any case in which conviction contemplates a life sentence not listed above, prosecutors shall review the case with their supervisor and divisional Assistant Chief Deputy.

COLLATERAL CONSEQUENCES

Criminal convictions carry collateral consequences, such as impacting a person's right to vote, serve as a juror, possess firearms, and ability to remain in the United States if not a citizen. In unusual cases, the collateral consequences may be so disproportionate to the severity of the crime and to the criminal punishment imposed as to be unjust.

The United States Supreme Court has found that immigration consequences resulting from criminal convictions can be substantial and warrant consideration by both the prosecution and the defense. In *Padilla v. Kentucky* (2010) 559 U.S. 356, the Court held that it was inadequate assistance of counsel for a defense attorney to neglect to advise a criminal defendant of the potential for deportation as the result of a guilty plea. The opinion noted:

... [I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does. (*Id.* at p. 373.)

Penal Code section 1016.3 states that the prosecution shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.

In the case of *In re Hernandez* (2019) 33 Cal.App.5th 530, the 4th Appellate District Court found that a defendant who initialed a plea form acknowledging that her conviction "will have the

consequence of deportation, exclusion from admission to the United States, or denial of naturalization” was nevertheless provided ineffective assistance of counsel, as she was not advised of the mandatory deportation consequence of her plea.

The determination regarding collateral consequences is highly case specific and shall be based upon careful consideration of all relevant factors relating to both the crime and the defendant to arrive at an appropriate disposition. These factors include

- the nature of the charge(s)
- the seriousness of the conduct involved
- the defendant’s criminal background or lack thereof
- the length of the sentence
- the length of probation

Case disposition based upon collateral consequences is rarely in the interest of justice in a case involving a serious or violent felony pursuant to Penal Code sections 667 or 1170, within the meaning of the Three Strikes Law.

A prosecutor should determine an appropriate sentence based upon the standard sentencing factors, and then if a significant downward departure or substitution of charges is appropriate due to a disproportionate collateral consequence, the prosecutor may insist upon a concession to maintain parity with the original sentence. Any alteration of a charge must be justified by the facts, either in the original police report, or from subsequent investigation.

A prosecutor’s decision concerning collateral consequences should be documented in the file and when appropriate, noted on the record.

Unit supervisor approval is required prior to any change in a proposed disposition based on these factors. For cases involving a serious or violent felony, approval must be obtained from the divisional Assistant Chief Deputy District Attorney.

DECISION WHETHER TO SEEK THE DEATH PENALTY

In special circumstance murder cases the law gives the District Attorney discretion whether to seek the death penalty against a defendant. The purpose of this policy is to set forth the procedures for making this critical decision. The decision to seek the death penalty will be made by the Death Penalty Review Committee, which consists of

- the District Attorney
- the Chief Deputy District Attorney
- the Assistant District Attorney
- the Assistant Chief Deputy District Attorney who oversees the Major Crimes Bureau

1. PROCEDURE FOR MAKING PENALTY DETERMINATION

- a. The Major Crimes Assistant Chief Deputy (or the prosecutor substituting for the Assistant Chief Deputy) shall file all special circumstance cases. In every murder case in which special circumstances are alleged, the factors and procedure for determining whether to seek the death penalty are outlined below.
- b. An initial evaluation whether to seek the death penalty or the penalty of life without the possibility of parole (LWOP) will be made by the assigned prosecutor in consultation with the Major Crimes Assistant Chief Deputy. The assigned prosecutor will prepare a memo within 90 days of arraignment. This memo will include
 - an outline and evaluation of the facts of the case
 - circumstances in aggravation and mitigation of punishment
 - any other factors relevant to the penalty decision

If further investigation is required to determine the relevant facts and circumstances, the assigned prosecutor may request an extension beyond the ninety-day period. In every case, the views of the victim's family or next of kin shall be sought and included in the death penalty memo. If efforts to locate the victim's family have failed, that fact shall be documented in the memo.

- c. The decision to seek the death penalty or another punishment shall be based upon an evaluation of the evidence under the standard of whether the convincing force of all the relevant evidence would lead a reasonable fact finder to conclude the aggravating circumstances outweigh the mitigating circumstances. This determination shall be made after careful deliberation, taking into account any matter relevant to aggravation or mitigation of the sentence, including, but not limited to
 - the circumstances under which the crime was committed, and the existence of any special circumstances as enumerated in Penal Code section 190.2
 - the presence or absence of prior criminal activity by the accused which involved the personal use or attempted use of force or violence or the express or implied threat to use force or violence
 - the presence or absence of any valid prior felony conviction
 - whether the offense was committed while the accused was under the influence of extreme mental or emotional disturbance
 - whether the victim was a participant in the accused's homicidal conduct or consented to the homicidal act
 - whether the offense was committed under circumstances which the accused reasonably believed to be a moral justification or extenuation for his or her conduct
 - whether the accused acted under extreme duress or under the substantial domination of another person

- whether at the time of the offense the capacity of the accused to appreciate the criminality of his or her conduct or to conform to the requirements of the law was impaired as a result of mental disease or the effects of intoxication
- the age of the accused at the time of the crime
- whether the accused was an accomplice to the offense and whether his or her participation in the commission of the offense was relatively minor
- any other circumstance that mitigates the gravity of the crime even though it may not be a legal excuse for the crime
- the accused's character, background, history, mental and/or physical condition

2. PROCEDURE FOLLOWING INITIAL PENALTY PHASE MEMO

- a. The assigned prosecutor will forward the death penalty memo to the Major Crimes Assistant Chief Deputy for review. If both the assigned prosecutor and the Major Crimes Assistant Chief Deputy believe the case does not warrant the seeking of the death penalty, the memo and any comments from the Major Crimes Assistant Chief Deputy shall be forwarded to the remaining members of the Death Penalty Review Committee. If all members are in agreement, the assigned prosecutor will notify the victim's family or next of kin. Absent unusual circumstances, within 90 days of arraignment the assigned prosecutor will notify the court and counsel in writing of the decision not to seek the death penalty. That writing shall be a numbered page of discovery in the case file.
- b. If any member of the Death Penalty Review Committee believes the case warrants the seeking of the death penalty regardless of the recommendation in the death penalty memo, the assigned prosecutor will be notified by the Major Crimes Assistant Chief Deputy. The assigned prosecutor will promptly notify both the court and counsel that the case is being presented to the Death Penalty Review Committee for further review. The assigned prosecutor will also notify counsel that they may timely submit written materials they believe are relevant to the determination as outlined in Section 1, subsection (c), above. Within 120 days of arraignment, or upon written notification of a request for further time by the assigned prosecutor or defense counsel, at a reasonable time thereafter, the assigned prosecutor will make a detailed presentation to the Death Penalty Review Committee. Thereafter, the Death Penalty Review Committee will make a recommendation on whether to seek the death penalty. The District Attorney shall make the final decision.
- c. Once notified of the above decision, the assigned prosecutor will notify the victim's family or next of kin and then notify both the court and counsel in writing. That notification shall be a numbered page of discovery. The District Attorney, in consultation with the Death Penalty Review Committee, will strive to make the final decision as to whether to seek the death penalty within 120 days of arraignment.

- d. If, after the initial evaluation, newly discovered evidence or other circumstances create a reason to re-evaluate the original penalty determination, the assigned prosecutor or the Major Crimes Assistant Chief Deputy shall draft and submit a supplemental memo. The Major Crimes Assistant Chief Deputy will forward the memo to the Death Penalty Review Committee and the procedures set forth in Section 1, subsections (b) and (c), as outlined above, shall be followed. If the District Attorney decides to change the penalty to be sought, the assigned prosecutor shall immediately notify the victim's family or next of kin and then notify the court and counsel.

3. POLICY IMPLEMENTATION

The death penalty memo, any notes thereof, and any supplemental memo and notes thereof seeking reconsideration are confidential attorney work-product documents. They are not subject to discovery. Copies should be retained in the case file and separately by the Major Crimes Assistant Chief Deputy. This policy is formulated by the District Attorney to responsibly exercise discretion under the law. It is not intended to create substantive enforceable rights.

RIGHTS OF CRIME VICTIMS

The Sacramento County District Attorney's Office is dedicated to providing advocacy and support services to crime victims. All employees of the District Attorney's Office shall promote the rights of crime victims, including section 28 of article 1 of the California Constitution (Proposition 9, Victim's Bill of Rights Act of 2008, Marsy's Law) and Penal Code section 679.02. All employees of the District Attorney's Office shall uphold and seek appropriate court orders to implement the subdivisions of article 1, section 28 of the California Constitution and any applicable statutes.

The District Attorney Victim/Witness Unit has been designated as the primary provider of comprehensive services to victims and witnesses in Sacramento County. The Victim/Witness Unit seeks to reduce trauma to victims of crime in the criminal justice system and to provide services as described in Penal Code section 13835.2 and in Marsy's Law (California Constitution, article 1, section 28). These services may include resource and referral assistance, emergency assistance, assistance with Victims of Crime compensation claims, orientation to the criminal justice system, court tours, court support, providing victims with case status and case disposition information, assistance with obtaining a criminal protective order, the coordination of victim impact statements, and property return.

The assigned prosecutor is responsible for providing case status updates and other pertinent information to the victim. In the event a victim advocate is assigned to a case, the assigned

prosecutor shall consult with the victim advocate to ensure that the rights of crime victims are protected.

PRE-CONVICTION BODY FLUID TESTING POLICY

In felony and misdemeanor cases, especially in assault-related crimes, the defendant may have transferred a body fluid such as blood, saliva, or semen to a victim or arresting officer. In situations where it is appropriate to seek a pre-conviction order that the defendant submit to testing for a communicable disease, such as HIV or hepatitis C, prosecutors shall utilize forms and procedures available from the supervisor of the Adult Sexual Assault Prosecution Unit.

VICTIM RESTITUTION

In accordance with section 28 of article 1 of the California Constitution (Proposition 9, Victim's Bill of Rights Act of 2008, Marsy's Law), all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons convicted of the crimes causing the losses they suffer.

The prosecutor assigned to a case involving a victim(s) shall make every attempt to contact the victim(s) and ascertain what losses have been incurred as a result of the actions of the person committing the crime(s). This information should be documented in the file and should be readily accessible at the time of a plea or sentencing.

1. FELONY CASES

The following protocol is to be followed in all cases filed and resolved as felonies:

a. Defendant is Sentenced Immediately (No Presentence Report is Written)

If the prosecutor has the restitution information at the time of sentencing, then the prosecutor shall request that restitution be ordered to the victim(s) in the amount specified. The court clerk forwards the restitution order to the Department of Revenue Recovery.

If the prosecutor does not have the restitution information at the time of sentencing, the prosecutor shall request restitution be ordered to the victim(s) in an amount "to be determined." If the defendant is sentenced to state prison, the Probation Department will make the

determination in conjunction with the Penal Code section 1203c report. The Probation Department will also seek a modification of the court's minute order to reflect the amount of restitution owed by the defendant. In addition, the Probation Department will send the victim's address and phone number to the Department of Revenue Recovery. The court will need to forward a new abstract of judgment to the California Department of Corrections and Rehabilitation.

If the prosecutor does not have the restitution information and the defendant is granted some form of probation, the prosecutor shall request restitution be ordered to the victim(s) in an amount "to be determined." The Probation Department will make the determination as to the proper restitution amount and seek a modification of the court's minute order to reflect the restitution amount owed and send the victim's address and phone number to the Department of Revenue Recovery.

b. Defendant's Case is Referred to the Probation Department for a Probation Report

The Probation Department will make the determination as to the restitution amount. However, the assigned prosecutor should forward any information regarding the amount of restitution claimed by the victim that has already been ascertained to the Probation Department to aid in this process.

The Probation Department includes the amount of restitution sought in the probation report and the court typically adopts this recommendation and makes it part of the probation conditions for that defendant. The court clerk forwards the restitution information to the Department of Revenue Recovery. The Probation Department forwards the victim's address and phone number to the Department of Revenue Recovery.

2. MISDEMEANOR CASES

The following protocol is to be followed in all cases filed as misdemeanors or in felony cases that have been reduced to or pled as a misdemeanor:

- a. The assigned prosecutor shall contact the victim(s) and ascertain what losses have been incurred as a result of the actions of the person committing the crime(s). This information should be documented in the file and should be readily accessible at the time of a plea or sentencing.
- b. At the time a plea is taken or sentencing is pronounced, the prosecutor shall complete the triplicate "Restitution Order" form, available in the Misdemeanor Unit, and provide the white copy to the court clerk. The form must include the victim's name and the amount

of restitution ordered. If the amount of restitution is unknown, the prosecutor shall request that the court order restitution to the victim in an amount “to be determined.”

- c. The white copy is stamped as “filed” with the court and should be placed in the court file. This document becomes an addendum to the minute order and part of the record.
- d. The pink copy of the form is provided to the defense attorney or Public Defender.
- e. The yellow copy of the form is retained in the District Attorney’s file. After restitution is ordered, the assigned prosecutor shall add the victim’s confidential contact information to the yellow copy of the form. If the victim is a business or other entity, include the identity of the contact person and a claim number if available. Provide the complete address for all civilian victims.
- f. The closed file along with the completed yellow form shall be routed to the Misdemeanor Unit restitution clerk. The clerical staff will notify the victim of the restitution order and send a copy of the restitution form to the Department of Revenue Recovery.

There should be a restitution order in all cases to fully reimburse the victim's losses (Penal Code section 1203.4). If a victim fails to respond to requests for information regarding restitution, it should be documented in the file by the prosecutor who attempted to make contact with the victim.

GRAND JURY GUIDELINES

The Chief Deputy District Attorney and any prosecutor as designated by the District Attorney are the office liaisons and advisers to the grand jury. They will maintain a written record of cases presented to the grand jury.

The use of the grand jury for investigative purposes or to seek an indictment must be approved in writing by the supervisor of the prosecutor seeking to use the grand jury, the divisional Assistant Chief Deputy District Attorney, and the Chief Deputy.

POST-CONVICTION CLAIMS OF FACTUAL INNOCENCE AND REQUESTS FOR REVIEW

No person or system is infallible, and exonerating the innocent is as important as convicting the guilty. After conviction, a prosecutor is ethically bound to inform the appropriate authority of information that casts doubt upon the correctness of the conviction. (*Imbler v. Pachtman* (1976))

424 U.S. 409, 427, fn. 25.) If the District Attorney's Office learns of new evidence indicating an innocent person was convicted, we must act appropriately.

Claims of factual innocence made after conviction shall be referred to the Assistant Chief Deputy District Attorney in charge of the Justice, Training, and Integrity (JTI) Unit. The request must raise a meaningful claim of factual innocence and not be merely a request for resentencing or reweighing conflicting evidence. The JTI Unit shall make an initial inquiry, in consultation with the case prosecutor and supervisor, to determine what further review or investigation is appropriate. Factors to be considered include, but are not limited to

- the evidence of guilt
- the plausibility of the claims
- whether the claims were known or reasonably should have been known to defendant prior to conviction
- whether the claims were previously investigated or litigated
- whether the defendant has consistently asserted innocence
- whether additional testing or investigation would help resolve the issues

The fact that the claims have been previously rejected by a trial or appellate court shall be considered but will not necessarily preclude further inquiry.

When a prosecutor knows of clear and convincing evidence establishing that a defendant was convicted in Sacramento County of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction as required in Rule 3.8(g) of the California Rules of Professional Conduct. 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 follow the procedures set forth in Rule 3.8(f) of the California Rules of Professional Conduct, including disclosing the evidence as required and undertaking any necessary further investigation. Victims shall be notified of any post-conviction release decisions and proceedings in accordance with article I, section 28 of the California Constitution. Assistance of a victim advocate should generally be obtained when notifying the victim.

Other requests for post-conviction review, such as requests for resentencing under Penal Code section 1170(d), shall be referred to the supervisor of the JTI Unit.