



Office of the District Attorney Alameda County

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INTERIM FINAL SPECIAL DIRECTIVE 23-01

RESPONSIBLE CASE DISPOSITION GUIDELINES

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: PAMELA Y. PRICE
District Attorney

DATE: MARCH 1, 2023

INTERIM FINAL SPECIAL DIRECTIVE: This interim final special directive is effective March 6, 2023. Staff is encouraged to provide feedback on how we can refine and best operationalize these changes. Comments on this interim final directive can be submitted anonymously here: <https://forms.office.com/g/LtcS2p5yKY>. Comments received by March 31, 2023 will be considered before issuing the final directive.

This directive reduces reliance on sentencing enhancements and allegations as an effort to bring balance back to sentencing and reduce recidivism. Generally, prosecutors shall not file or require defendants plead to sentence enhancements or other sentencing allegations. Exceptions may be allowed on a case-by-case basis in cases involving the most vulnerable victims and in specified extraordinary circumstances. All policies are presumptive, not mandatory requirements. Where extraordinary circumstances suggest that an exception is appropriate, specific supervisory approval must be obtained.

Attorneys are expected to follow this directive.

The policies of this Special Directive supersede any contradictory language of the Pride and Professionalism Handbook.

I. INTRODUCTION

This directive is informed by the views and opinions of the community, victims, criminal law experts, and court opinion. As result of this informed process, the following directive is enacted, effective immediately. We will continually monitor and review data collected on the implementation of this directive, and we will regularly review this and other directives and policies with our prosecutors and members of the community to ensure that they are effective and successful. This new directive captures the District Attorney's Office's vision of justice for Alameda County.

The specified allegations/enhancements identified in this 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.

This directive 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 § 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).

II. DIRECTIVE

Generally, prosecutors shall not file or require defendants plead to sentence enhancements or other sentencing allegations. Exceptions may be allowed on a case-by-case basis in cases involving the most vulnerable victims and in specified extraordinary circumstances. All policies are presumptive, not mandatory requirements. Where extraordinary circumstances suggest that an exception is appropriate, specific supervisory approval must be obtained. Wherever the term “supervisory approval” is used, it means that:

- (1) Prosecutors must obtain signed approval of their unit’s supervisor, and
- (2) If approving, the unit supervisor must then obtain signed approval from the supervising Chief Assistant District Attorney, who if approving, must then obtain signed approval from the District Attorney.
- (3) Approvals and disapprovals must be noted in the case management charging or case notes, including the rationale for and the date of approval, and identity of the requesting prosecutor, supervisor, and Chief who obtained approval or disapproval from the District Attorney.**

The following subsections provide more specific direction.

A. ENHANCEMENTS AND ALLEGATIONS

1. Special Circumstance Allegations

1.1. Prosecutors are prohibited from filing special circumstance allegations absent extraordinary circumstance and supervisory approval.

1.2. If a special circumstance has already been found true or admitted, prosecutors are not required to move to dismiss the enhancement.

1.3. Pending cases with alleged special circumstance allegations may not proceed without review. After initial review, prosecutors may move to dismiss or withdraw the enhancement pursuant to Penal Code section 1385 without supervisory approval, otherwise the prosecutor shall immediately request permission to proceed and the decision whether to dismiss or withdraw the enhancement shall be conducted by an executive committee led by the supervising Chief Assistant District Attorney.

1.3.1. Decisions on whether to proceed or to dismiss or withdraw will be based on individual case review, including but not limited to the extent of the defendant's participation in the murder, the defendant's prior violent record, and any other factor bearing on the defendant's mental state. Decisions will be made in writing and placed in the case management charging or case notes.

1.3.2. Prosecutors shall cooperate in this review by timely providing the Chief Assistant District Attorney with any and all requested case materials to review.

1.4. Prosecutors shall not move to reinstate special circumstance allegations that were previously dismissed by a court.

2. Strike Priors

2.1. Prosecutors shall plead strike priors pursuant to Penal Code sections 667, subdivision (f)(1) and 1170.12, subdivision (d)(1) where there is sufficient evidence to prove the prior beyond a reasonable doubt.

2.2. Absent supervisory approval, prosecutors shall move to dismiss or strike all alleged strike priors pursuant to Penal Code section 1385 in the interest of justice, arguing factors for judicial consideration set forth by California Committee on Revision of the Penal Code (hereinafter "The Committee"), outlined in section II.A.4. Supervisory approval is not required to dismiss or withdraw alleged strike priors, however prosecutors shall document in the case management case notes both the rational for dismissal or withdraw and that they have discussed the rational with their unit supervisor.

2.3. Prosecutors shall not move to reinstate strike priors that were previously dismissed by a court and shall not use those strike priors in case negotiations.

3. Other Conduct and Status Enhancements

3.1. These policies apply to pending and future cases for all other conduct and status enhancements.

3.2. Prosecutors are prohibited from filing conduct and status enhancements, unless supervisory approval is obtained.

3.3. Where appropriate in cases involving the most vulnerable victims, in specified extraordinary circumstances, and with supervisory approval, 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 supervisory approval:
 - 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;

3.4. The following sentence enhancements and allegations shall not be pursued in any case absent extraordinary circumstance and supervisory approval:

- Any Prop 8 or “five-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;
- 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.

3.5. In any pending case, prosecutors shall not move to reinstate any allegations or conduct enhancements that were previously dismissed by a court.

3.6. In any pending case, prosecutors shall make motions to dismiss or withdraw pursuant to Penal Code section 1385 any enhancements and special circumstances allegations, unless supervisory approval is obtained. Dismissal or withdrawal should be based on individual case review pursuant to the considerations set forth by The Committee as defined in section II.A.4. The presumption will be in favor of dismissal or withdrawal when any one of the factors apply. Supervisory approval is not required to dismiss or withdraw, however prosecutors shall document in case management case notes both the rationale for dismissal or withdraw and that they have discussed the rationale with their unit supervisor.

4. Criteria for Dismissing Enhancements

With respect to motions to dismiss or withdraw allegations, prosecutors shall be guided by the best available research and science on the topic. Guidance can be found within recommendations for evaluating requests to dismiss enhancements in the interest of justice promulgated by the California Committee on Revision of the Penal Code (hereinafter “The Committee”). The California Legislature and Governor Gavin Newsom established the Committee as a first concerted effort in decades to thoroughly examine our state’s criminal laws. The Legislature gave the Committee special data-gathering powers, directing it to study all aspects of criminal law and procedure and to make recommendations to “simplify and rationalize” the state’s Penal Code.

The Committee’s inaugural report¹ contains ten recommendations for judicial evaluation of requests to dismiss enhancements. Following the Committee’s guidance, we hereby incorporate Recommendation 5, which establishes proposed guidelines for judges when evaluating a request to dismiss enhancements in the “interests of justice” pursuant to Penal Code section 1385. The presumption will be in favor of dismissal or withdrawal when any **one** of the factors apply.

Factors to consider when seeking dismissal or withdrawal are when:

- The current offense is nonviolent.
- The current offense is connected to mental health issues.
- The enhancement is based on a prior conviction that is over five years old.
- The current offense is connected to prior victimization or childhood trauma.
 - The defendant was a juvenile when he/she committed the current offense or prior offenses.
 - Multiple enhancements are alleged in a single case or the total sentence is over 20 years.
- A gun was used but it was inoperable or unloaded.
- Application of the enhancement would result in disparate racial impact.

This list is not exhaustive as there may be factors beyond those listed above where it would be in the interest of justice to dismiss or withdraw an enhancement.

¹ The full report can be accessed at http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf.

Prosecutors shall consider the “interests of justice” broadly in determining whether an enhancement is appropriate in their case. In determining whether there is sufficient evidence of the existence of a factor to consider, prosecutors should rely on all available credible evidence. If the existence of a factor is in dispute, the prosecutor shall consult with their supervisor to determine whether there is sufficient credible evidence to consider the factor.

The presumption can be overcome if there is clear and convincing evidence that dismissal of the enhancement would endanger public safety. If a prosecutor wishes to pursue an enhancement in a case where dismissal or withdrawal is presumed pursuant to The Committee’s recommendations, the prosecutor must seek supervisory approval for final individualized determination on whether it is appropriate to pursue the enhancement.

B. CASE SETTLEMENT

The following directives cover case settlement.

1. Pleas Involving Strikes: Prosecutors shall not require admission to strike priors in plea bargains absent supervisory approval.
2. Probation Eligibility: If the charged offense(s) is probation-eligible, probation shall be the presumptive offer.

2.1. If the charged offense(s) is probation-eligible, and extraordinary circumstances exist, prosecutors may seek supervisory approval for a deviation.

2.2. If the charged offense(s) is not probation eligible, the presumptive plea offer shall be the low term.

2.2.1. When deviating from offering the low term, prosecutors shall obtain supervisory approval.

C. SENTENCED CASES

Absent supervisory approval and pursuant to PC § 1172.1(a), if a defendant was sentenced prior to the effective date of this directive and is within 120 days of their sentencing, prosecutors are instructed to stipulate to recall and resentencing upon defense counsel’s request in accordance with this directive.