Source: Criminal Law/California Criminal Law Forms Manual/Contents

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Antonio R. Sarabia II

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Preface to the Second Edition

California Criminal Law Forms Manual was conceived as a companion to CEB's popular criminal law treatise, California Criminal Law Procedure and Practice (Cal CEB Annual) (Crim Law). Since its inception, the Forms Manual has mirrored Crim Law's organizational structure. The chapter numbers in the Forms Manual are the same as the chapter numbers in Crim Law. Therefore, forms that relate to the subject matter of a particular chapter in Crim Law can be found in the chapter of the same number in the Forms Manual. In 2005, CEB changed the organizational structure of Crim Law. This restructuring made it appropriate to reorganize the Forms Manual, so that it would continue to mirror the structure of Crim Law.

We took this opportunity to make a number of other changes, including adopting a convenient compact format, consolidating instructions for drafting and filing motions in Chapter 1, and updating authorities and comments when appropriate. As in the first edition, the forms are cross-referenced to the appropriate chapters or sections of Crim Law.

The book and disk have identical forms, with the exception of Judicial Council forms, which are found only in the book. See the discussion of Judicial Council forms in Chapter 1. Instructions for using the forms disk are enclosed with the disk.

Sara Ruddy, CEB Publications Attorney, served as project manager for the second edition. CEB attorneys Nancy Yuenger and Cathy Daly provided legal editing and research. Christopher Forshay handled copy editing and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

September 2010 Update

CEB would like to acknowledge two contributing authors for the September 2010 update: Michael Begovich, update author of chapter 29, and Antonio R. Sarabia II, update author of chapter 40.

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Acknowledgments

The following judges and attorneys contributed, reviewed, or both, forms for the first edition of this Forms Manual. CEB wishes to express its gratitude to them for their original work in creating the forms, and for their valuable suggestions concerning expanding the forms to include additional issues, information, and practical advice.

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Selected Developments

September 2010 Update

Filing of papers. Unless otherwise ordered or specifically provided by law, all pretrial motions, accompanied by a supporting memorandum, must be served and filed at least 10 *court* days before the time appointed for hearing and all opposition papers must be filed at least 5 *court* days before the time appointed for hearing. Cal Rules of Ct 4.111(a). See chap 1.

Fee agreements. Revised State Bar sample fee agreements. See chap 3.

Speedy trial. In *People v Mirenda* (2009) 174 CA4th 1313, 95 CR3d 702, the court ruled that an unjustified 25-year delay supported dismissal of prosecution before trial when prejudice to the defendant arose from the death of important witnesses, the irreparable fading of memories, and the complete inability to mount a defense. See chap 19.

Restitution. New memorandum in support of prompt restitution. See chap 40.

Jury selection. New jury questionnaire for capital cases. See chap 29.

Juvenile delinquency. Revised Judicial Council form of proof of service in juvenile court and revised Judicial Council form notice of appeal. See chap 56.

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Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of June 23, 2010, and monitored developments through July 14, 2010.

CEB Citation

Cite this publication as: California Criminal Law Forms Manual (2d ed Cal CEB 2005).

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§1.1 I. OVERVIEW

Preparing and filing motions and other papers in court is a major part of any litigation practice. Criminal law is no exception. The bulk of this manual consists of examples of motions and other papers that may be necessary or appropriate during the course of a case, accompanied when appropriate by sample memorandums in support of or in opposition to the motion or suggested arguments that can be adapted to particular fact situations. Each form in the manual is accompanied by a comment and a cross-reference to California Criminal Law Procedure and Practice (Cal CEB Annual) (Crim Law). This forms manual uses the same chapter titles and organizational structure as Crim Law. Thus, for example, because Crim Law, chap 11 is about discovery, forms related to discovery are in chap 11 of this forms manual.

Part II of this chapter, "Preparing, Filing, and Serving Motions and Other Papers," covers the form and formatting of court papers (§§1.2-1.12), the use of Judicial Council forms (§1.13), local rules and forms (§§1.14-1.15), citation format (§1.16), service and filing requirements (§1.17), and general instructions for preparing effective motions (§§1.18-1.27). Part III, "Criminal Law Practice Management Forms" (§§1.28-1.31), contains forms that pertain to Crim Law, chap 1.

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II. PREPARING, FILING, AND SERVING MOTIONS AND OTHER PAPERS

§1.2 A. Form and Format Requirements

The form and format of papers filed in the trial court are governed by Cal Rules of Ct 1.2, 2.3, 2.100-2.119. "Papers" includes all documents offered for filing in any case, with the following exceptions (Cal Rules of Ct 2.3(2)):

- Exhibits or copies of documents;
- Judicial Council forms;
- Local court forms;
- The record on appeal in a limited civil case; and
- Briefs filed in appellate divisions.

The Rules of Court prescribe the form and format of papers filed in the trial court in minute detail. Compliance with their requirements is important because the clerk is not permitted to accept noncomplying papers without a court order. Cal Rules of Ct 2.118. But see Cal Rules of Ct 2.118(a) (clerk may not reject papers solely because they are handwritten or printed or because handwritten or printed papers are not in black or blue-black ink); Cal Rules of Ct 2.118(b) (clerk may not reject paper solely because it does not contain attorney's or party's fax number or e-mail address on first page).

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§1.3 1. Paper and Printing Requirements

All original papers filed in the trial court must be on recycled paper. Cal Rules of Ct 2.101.

NOTE: The definition of recycled paper is found in Pub Res C §42202. Cal Rules of Ct 1.6(22).

The use of recycled paper is also required for copies of papers, documents, exhibits filed in the court or served on the parties, and originals and copies of documents served on parties or filed in the appellate division. Cal Rules of Ct 1.22 (use of recycled paper in all courts), 2.101 (use of recycled paper in trial court). The paper must be 8½ × 11 inches in size, of standard quality, and at least 20-pound weight. Cal Rules of Ct 2.103. It must be white or unbleached with an opaque, unglazed finish. Cal Rules of Ct 2.103.

All papers must be typewritten, printed, or prepared by a duplication process that produces clear, legible, and permanent copies. Cal Rules of Ct 2.104. Papers must be in a typeface that is "essentially equivalent" to Courier, Times New Roman, or Arial. Cal Rules of Ct 2.105. The font size must be at least 12 points and the ink color must be blue-black or black. Cal Rules of Ct 2.104, 2.106. Only one side of the page may be used. Cal Rules of Ct 2.102.

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§1.4 2. Margins; Line Spacing; Line Numbering

The left margin must be at least one inch from the left edge of the paper and the right margin at least 1/2 inch from the right edge of the paper. Cal Rules of Ct 2.107.

The lines on each page must be one and one-half spaced or double spaced and numbered consecutively. Cal Rules of Ct 2.108(1). Line numbers must be placed at the left margin and separated from the text of the paper by a vertical column of space at least 1/5 inch wide or a single or double vertical line. Each line number must be aligned with a line of type or the line numbers must be evenly spaced vertically on the page. Line numbers must be consecutively numbered beginning with the number 1 on each page. There must be at least three line numbers for every vertical inch on the page. Cal Rules of Ct 2.108(4).

Footnotes, quotations, and printed forms of corporate surety bonds and undertakings may be single spaced and have unnumbered lines if they also comply generally with the space requirements of Rule 2.111. See Cal Rules of Ct 2.108(3), 2.111.

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.5 3. Pages in General

§1.5 3. Pages in General

The pages of a paper submitted to the court must be consecutively numbered, with the numbers at the bottom of the page, unless a rule provides otherwise for a particular type of document. Cal Rules of Ct 2.109.

All papers must be firmly bound at the top. Cal Rules of Ct 2.113.

NOTE: It is common to staple papers in the top-left corner.

Each page must have two prepunched holes at the top. The holes must be centered, 2½ inches apart, and 5/8 of an inch from the top of the page. Cal Rules of Ct 2.115.

Exhibits may be attached to the papers, but they should be the same size as the rest of the papers. An exhibit that is larger or smaller than a standard 8½ × 11 inch sheet of paper can be stapled to a blank sheet of letter-size paper. If the exhibit is a copy, it must be equal to typewritten material in legibility and permanency. Cal Rules of Ct 2.114.

NOTE: A standard two-hole punch makes properly spaced holes.

Except for exhibits, each paper must have a footer at the bottom of each page, containing the title of the paper, or some clear and concise abbreviation, in at least 10-point type. The footer should be below the page number and divided from the rest of the page by a printed line. Cal Rules of Ct 2.110.

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.6 4. First-Page Format: Caption

§1.6 4. First-Page Format: Caption

The first page of each paper must contain a caption consisting of the following (Cal Rules of Ct 2.111):

- The name, address, telephone number, fax number and e-mail address (if available), and State Bar number of the attorney for the party on whose behalf the paper is being filed;
- The title of the court;
- The title and number of the case;
- The nature of the paper being filed; and
- The name of the judge and department to which the case is assigned.

A sample first page, including caption, is reproduced in §1.12.

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.7 a. Attorney Identifying Information

§1.7 a. Attorney Identifying Information

The attorney's name, address, telephone number, fax number and e-mail address (if available), and State Bar number must appear on the first page of any court paper. This information must begin on line 1, in the space commencing one inch from the top of the page, on the left-hand side of the page. Cal Rules of Ct 2.111(1).

The space on lines 1-7 to the right of the attorney's identifying information should be left blank. Cal Rules of Ct 2.111(2).

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§1.8 b. Name of Court

The name or title of the court goes on line 8, and must be at least 3-1/3 inches from the top of the paper. Cal Rules of Ct 2.111(3). The court's name is customarily centered and written in capital letters. There is no standard "proper" way to designate the name of the court. For example, in San Francisco, many attorneys refer to the court as the "Superior Court for the City and County of San Francisco," while others simply call it the "San Francisco County Superior Court." Both are proper.

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§1.9 c. Title of Case; Description of Paper

The title of the case must be placed on the left side of the page below the title of the court. The initial pleading must list the name of every party to the case, each on a separate line. Subsequent papers may list just the name of the first party on each side "with appropriate indication of other parties," *e.g.,* "et al." Cal Rules of Ct 2.111(4).

The case number should be placed to the right of and opposite the title of the case. Cal Rules of Ct 2.111(5). A description of the paper, *e.g.,* "Notice of Motion and Motion for Pretrial Discovery Compliance Order (Pen. Code, §1054.5)," goes below the case number. Cal Rules of Ct 2.111(6). A petition should identify the character of the action, *e.g.,* "Petition for Writ of Prohibition." See sample caption in §1.12.

Court papers often have several distinct parts. A motion, for example, may include a notice of motion, the motion itself (which is often merged with the notice of motion), a supporting memorandum, one or more declarations in support of the motion, one or more exhibits, and a proposed order. When all the motion papers are being filed together, there is no requirement for each part to be captioned separately. Many attorneys do, however, include a separate caption for each part. If each part of a motion will not have a separate caption, it is a good idea to list all the parts in the caption on the first page, *e.g.,* "Notice of Motion and Motion to Suppress Evidence (Pen. Code, §1538.5), Declaration of Counsel, Supporting Memorandum, Proposed Order."

A responsive paper should identify what is being responded to, and if there are multiple parties, should identify the party that filed the document that it is responding to, *e.g.,* "People's Opposition to Defendant John Smith's Motion to Suppress Evidence."

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.10 d. Name of Judge and Department

§1.10 d. Name of Judge and Department

The name of the judge and department to which the case is assigned must appear below the nature of the paper or the character of the action or proceeding. Cal Rules of Ct 2.111(7).

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.11 e. Other Information

§1.11 e. Other Information

When filing motion papers, it is common practice to put the date, time, and location (if known) of the hearing on the motion; the trial date, if one has been set; and whether the defendant is in custody below the title of the motion. Check local rules for requirements with regard to additional information that must be included on the first page of the notice of motion, such as the length of time required to hear the motion, whether the defendant is in or out of custody, and the department, hearing date, and hearing time.

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.12 f. Sample Pleading: First Page

§1.12 f. Sample Pleading: First Page



__[Name]__
District Attorney, _____ County
__[Name]__, Deputy District Attorney
SBN 150,000
1234 Main Street, Suite 101
_____, California
Tel: (123) 444-4444
Fax: (123) 444-4445
Email: deputyda@county.gov

Name of court must be on line 8

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF _____

Fax number and email address optional

People of the State of California, Plaintiff, vs. John Smith, Defendant	No. _____ Notice of Motion and Motion to Increase Bail, Memorandum of Points and Authorities, Declaration of Counsel Department __ Judge: Hon. __[Name]__

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that, on __[*date*]__, at __[*time*]__, in Department 10 of the above-entitled court, or as soon thereafter as the matter may be heard, the People will move the Court for an order increasing the bail from the present amount of $100,000.

It is common practice to include additional infornation here, such as date, time, and location of the hearing on a motion; the trial date, if one has been set; and whether the defendant is in custody

This motion will be based on the attached memorandum of points and authorities, the attached declaration of counsel for the People, the attached police report, dated _____, __[*list any other attached documents*]__ all court documents in this case, and evidence and argument presented at the hearing on this motion.

Each page must have a footer, consisting of the name of the paper or a clear and concise abbreviation

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§1.13 B. Judicial Council Forms

The California Judicial Council has drafted preprinted forms for many commonly used court papers. Some are mandatory; others are optional. See Cal Rules of Ct 1.31, 1.35. Each form has an annotation in the lower left margin indicating whether its use is mandatory or optional and showing its effective date. Judicial Council forms must be accepted for filing by all the courts. Cal Rules of Ct 1.31(a), (c), 1.35(a), (c).

Judicial Council forms are available on the Judicial Council's website at http://www.courtinfo.ca.gov/forms. All can be downloaded and many can be filled in on line. The fill-in forms cannot, however, be saved. Judicial Council forms are also available from most court clerk offices.

Multiple-page forms may be either one-sided or two-sided; if both sides of the paper are used, the back of each page should be inverted so that it can be easily read in a file with the pages fastened together at the top. See Cal Rules of Ct 2.134(b).

It is acceptable to file computer-generated duplicates of Judicial Council forms. A printer with a resolution of at least 300 dots per inch must be used to print such forms. Cal Rules of Ct 1.44.

Duplicates must be printed on recycled paper. Cal Rules of Ct 2.131.

Forms presented for filing must be firmly bound at the top and must have two pre-punched normal-sized holes, centered 2½ inches apart and 5/8 of an inch from the top of the form. Cal Rules of Ct 2.133, 2.134(c).

Judicial Council Forms usually include a proof of service. This is, however, intended solely for the convenience of the parties. Use of the proof of service included with the form is optional; any proper proof of service is acceptable. Cal Rules of Ct 1.41.

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C. Local Rules and Forms

§1.14 1. Local Rules

It is important to be aware of any local rules and to follow them, unless (as occasionally occurs) the local rule conflicts with a statute or with a California Rule of Court. In that event, the local rule is of no effect. See Govt C §68070; *Cox v Superior Court* (1993) 19 CA4th 1046, 23 CR2d 751. Note, though, that if the local rule merely implements or reasonably extends the statute or rule of court, the local rule must be followed. See 2 Witkin, California Procedure, *Court* §§181, 199-200, 203, 205, 207 (5th ed 2008).

Each superior court must maintain a complete and up-to-date copy of its local rules in the office of the court's executive officer, in a county law library, or on the Internet. It must provide the Judicial Council with the street address and room number of the place where the rules are kept. Cal Rules of Ct 10.613(e). In addition, each court is required to make its local rules available for inspection and copying at each location in which the court accepts filings, and to provide information about how to obtain a complete copy of the rules. Cal Rules of Ct 10.613(b). A substantial majority of California's 58 counties post their local rules on their websites, which can be accessed on the Judicial Council website at http://www.courtinfo.ca.gov/rules/localrules.htm. The rules are often in PDF format for convenient downloading. In addition, proposed local rules can often be viewed online.

Amendments to local rules must be filed with the Judicial Council in electronic form at least 45 days before their effective date. Cal Rules of Ct 10.613(d). Ordinarily, new and amended rules have an effective date of January 1 or July 1. See Govt C §68071. But see Cal Rules of Ct 10.613(i) (providing procedure for adopting rule with different effective date).

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.15 2. Local Forms

§1.15 2. Local Forms

Some counties have local forms that must be used in criminal cases. Check with the local clerk's office or local practitioners. Courts often post local forms on their websites. Superior court websites are listed on the Judicial Council website at http://www.courtinfo.ca.gov/courts/trial/courtlist.htm.

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§1.16 D. Citation Format

The Reporter of Decisions for the California Supreme Court writes the California Style Manual, which gives specific rules for citation of cases and statutes, and other grammatical issues. See Jessen, California Style Manual (4th ed 2000).

Lawyers in state courts usually follow some variation of the California Style Manual citation style for cases and statutes. Some local court rules require lawyers to follow some version of these style rules. Many lawyers, however, do not follow the complete style for citation of cases and statutes from the Style Manual. For example, the Style Manual requires three citations to be given for each case: the official citation found in the California Reports, the California Reporter citation, and the Pacific Reporter citation. It is common, however, for lawyers to give only the California Reports citation, or the California Reports and California Reporter citations.

The most commonly used citation forms for California cases from the California Style Manual follow:

- Cal., Cal.2d, Cal.3d, and Cal.4th (California Supreme Court cases).
- Cal.App., Cal.App.2d, Cal.App.3d, and Cal.App.4th (California Courts of Appeal cases).
- Cal.App.Supp, Cal.App.Supp 2d, Cal.App.Supp 3d, Cal.App.Supp 4th (California Superior Court Appellate Department cases).

Examples of complete cites using modified California Style Manual style follow:

- *People* v. *Jackson* (1993) 15 Cal.App.4th 1197.
- *Curry* v. *Superior Court* (1977) 75 Cal.App.3d 221.
- *In re Littlefield* (1993) 5 Cal.4th 122.

California Style Manual style abbreviates code names for parenthetical citations to statutes, but does not use abbreviations for code names (or the section symbol) for textual references to statutory material. The word "subdivision" is written out in textual references and abbreviated "subd." in parenthetical citations. Many superior court judges have a relaxed attitude toward the use of abbreviations in the text itself. Practice is more formal in the court of appeal and the supreme court. The most common California statutes cited in criminal cases are abbreviated in the California Style Manual as:

- Civ. Code
- Code Civ. Proc.
- Gov. Code
- Health & Saf. Code
- Pen. Code
- Veh. Code
- Welf. & Inst. Code

Samples of parenthetical code citations using California Style Manual style follow:

- Pen. Code, §484, subd. (a)
- Veh. Code, §10851

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.17 E. Service and Filing Requirements for Pretrial Motions

§1.17 E. Service and Filing Requirements for Pretrial Motions

Unless otherwise ordered or specifically provided by law, all pretrial motions, accompanied by a supporting memorandum, must be served and filed at least 10 court days before the time appointed for hearing. Cal Rules of Ct 4.111(a). All papers opposing a pretrial motion must be served and filed at least 5 court days before the time appointed for hearing. Reply papers must be served and filed at least 2 court days before the time appointed for hearing. When serving by mail, it is customary to attach the proof of service to the motion papers. In any event, proof of service of the moving papers must be filed no later than 5 court days before the time appointed for hearing. Cal Rules of Ct 4.111(a).

Pretrial motions may be filed with the criminal court clerk, or with the clerk of the court where the motion will be heard, depending on local practice. Whether filing the papers with the court in person or by mail, counsel should include a copy to be conformed by the clerk and returned to counsel. A return stamped envelope should be enclosed if papers are mailed. The conformed copy is counsel's proof of the fact and date of filing of the motion.

NOTE: When serving a prosecutor or public defender in a large office by mail, put the deputy's name on the envelope to assist in its timely delivery.

Service should be made on each attorney of record and any unrepresented party. Service may be accomplished by:

- Mailing a copy of the motion under CCP §§1012-1013a;
- Serving the papers personally; or
- Substituted service under CCP §1011.

For further discussion of serving papers, see California Civil Procedure Before Trial, chap 18 (4th ed Cal CEB 2004).

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F. Drafting Motions and Briefs

§1.18 1. Short Is Better Than Long

Trial and appellate judges must read many legal papers every day. Most judges like short motions and briefs that make their points in simple declarative sentences followed by citations of authority. Your important points may be lost in an unnecessarily long supporting or opposing memorandum, or the judge's eyes may have glazed over by the time he or she gets to your most important argument. On the other hand, it is often important to provide enough detail to persuade the judge that the facts of your case really do warrant granting the relief you are requesting.

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§1.19 2. Simple Language Is Best

Short sentences written in clear language are easiest to read quickly. Try to avoid jargon and pretentious language. Use the active, rather than the passive, voice. Eliminate unnecessary words. Avoid string cites and unnecessarily long quotes.

There are a number of good books and articles on legal writing. See, *e.g.,* Weihofen, Legal Writing Style (2d ed 1980); Wydick, Plain English for Lawyers (5th ed 2005).

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§1.20 3. Be Clear

Make sure what you have written will be clear to the judge. When you complete a memorandum or a brief, reread it as if you were the judge. Start by reading the headings. Do they follow each other naturally? Do they make every point you want to make? Are any necessary steps missing? Then read the argument under each heading. Does it support the heading it is under, or should it go elsewhere? Do you need further support for the heading? Have you cited legal authority for each position?

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.21 4. Be Persuasive

§1.21 4. Be Persuasive

Your most important tool in persuading the judge to your position is to have found a statute or case that fits the facts of your case. Once located, give the rule of law, apply it to the facts of your case, and draw a conclusion from that application. Be sure you Shepardize cases and statutes so that you do not use an overruled or depublished case, or a statute that has been amended or repealed.

Consider adding an introductory paragraph to the memorandum or brief that summarizes your main arguments. It helps to have an introductory paragraph that orients the judge right away to the main issues. This section could be called "Issues," "Summary of Argument," or some other suitable title. For example, in a Pen C §995 motion, this section might read: "John Doe is alleged to have killed the victim. The issue is whether he used a gun."

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§1.22 5. Tell the Judge What Relief You Want

"A motion is an application made to the court for an order." *People v Carson* (1970) 4 CA3d 782, 785, 84 CR 699. Decide what order you want the judge to make and ask for it. For example, in a severance motion, which count or counts do you want severed? In a Pen C §1538.5 motion, what evidence do you want suppressed? Keep in mind that the request and order may end up being reviewed by an appellate court; appellate judges must be able to tell from the record what relief was requested and either granted or denied in the trial court. See *People v Superior Court (Pierson)* (1969) 274 CA2d 228, 232, 78 CR 830. ("A slipshod motion begot a slipshod ruling.... Maybe everybody knew what everybody was talking about but we do not.")

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.23 6. Prepare Proposed Order

§1.23 6. Prepare Proposed Order

If you want the judge to issue a written order granting the motion, you will need to prepare a proposed order to accompany the motion. Although written orders are less common in criminal cases than in civil practice, you will need a written order if the order you want is a direction to someone not in court when the judge makes the order. In addition, you might want to prepare a proposed order if it is important to have the record reflect the exact nature of the relief requested or granted. Preparing a proposed order to go with the motion is a good way of focusing your attention on the need to decide what relief is desired, and allows the judge to give you exactly the relief you want.

Even if you do not include separate captions for other parts of the motion, a proposed order should always include a caption. A signed order is not part of the motion but a separate document. The court in which the case is being tried may have local rules or customs that relate to proposed orders. In Los Angeles, for example, a proposed order is always considered a separate document. It is not filed with the motion papers but "lodged" with the clerk until signed by the judge. See Los Angeles Ct R 6.5(b).

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§1.24 7. Give the Judge Sufficient Information About the Case to Rule on Your Motion

Many lawyers assume that the judge knows everything about the case that they do. That is not true. Penal Code §1204.5 requires judges generally to refrain from looking at police and witness reports, the defendant's arrest and conviction records, and any affidavits or representations concerning the case, whether written or oral, unless in support of a motion. Be sure to give the judge the information he or she needs to rule on your motion.

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§1.25 8. Attach Declarations and Exhibits

Be sure to attach any record or declaration that is necessary to support your motion. Papers attached to a motion, *e.g.,* police reports or transcripts, must be labeled as exhibits. Typically, the defense labels its exhibits with capital letters and the prosecution uses numbers. When no local court rule or local practice dictates how exhibits are to be labeled, it is common either to center the title and number or letter at the very top or very bottom of the first page of the exhibit, *e.g.,* "EXHIBIT A" or "EXHIBIT 1." The pages of the exhibit are usually numbered at the bottom separately from the page numbers of the rest of the motion. Exhibits are commonly stapled together at the end of the motion, immediately in front of the proof of service.

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.26 9. Find Out Where and When Particular Motions Are Heard Before Setting or Requesting a Date

§1.26 9. Find Out Where and When Particular Motions Are Heard Before Setting or Requesting a Date

It is common in many counties for particular motions, *e.g.,* Pen C §1538.5 motions, to be heard by one judge on a certain day of the week at a certain time. Find out this information so that you can calendar your motions for the right time and place.

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§1.27 10. Serve Opposing Counsel and Attach Proof of Service

Trial judges will deny relief if your opponent was not served, except in the unusual situation in which you are allowed to bring an ex parte motion. The only way the judge knows if opposing counsel was served is by seeing a proof of service attached to your motion. Appellate clerks will probably refuse to accept your papers for filing if no proof of service is attached.

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III. CRIMINAL LAW PRACTICE MANAGEMENT FORMS

§1.28 A. Client Information Letter

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

[*Attorney's letterhead*]

Date: _ _ _ _ _ _

To: _ _[*Name of client*]_ _

_ _[*Address*]_ _

Re: [*Describe reason for letter, e.g., next court appearance; include case number if desired*]

Dear _ _[*name of client*]_ _**:**

Your next court appearance is for _ _[*tell purpose, e.g., the preliminary hearing*]_ _ **on** _ _[*day of week*]_ _**,** _ _[*date*]_ _**, at** _ _[*time*]_ _**, in Department** _ _[*number*]_ _ **of** _ _[*name of court*]_ _**, located at** _ _[*address*]_ _**. It is important that you be there on time.** _ _[*A map is enclosed.*]_ _ _ _[*Please meet me outside the courtroom at* _ _[*time*]_ _**.**]_ _

[*You may want to tell the client what to wear to court, as well as what not to wear, as in the following example.*]

Please wear a suit, pants with a shirt and jacket, or pants with a shirt to court. Please do not wear sunglasses, a baseball cap, shorts, or a tank top.

_ _[*If the client failed to appear at the last court date, and it is possible the court will order the client into custody when he or she reappears, inform the client of that possibility so that he or she can make any necessary arrangements.*]_ _

It is important that I have complete information about the witnesses in your case. Please call my office right away and give the office staff the names, phone numbers, addresses, or other identifying information concerning your witnesses, _ _[*identify witnesses*]_ _**.**

_ _[*Remind the client if he or she is supposed to be having tests done, e.g., physical or psychological evaluations. Ask the client to call your office and leave the names, addresses, and phone numbers of experts if you do not have that information. If you need the results of these tests by a certain date, include that date in the letter.*]_ _

Enclosed is a copy of the _ _[*name of motion*]_ _ **that has been filed with the court. If it is successful,** _ _[*explain the result, e.g., one count will be dismissed, the case will be dismissed*]_ _**.** _ _[*If the client will have to testify at the hearing, tell the client that, and set up a meeting in advance of the hearing at which you can discuss the client's testimony with him or her.*]_ _ **The court will hold a hearing on this motion at your next court appearance.**

Remember that you are not to discuss your case with anyone except me, my office staff, and those people I have directed to speak with you. If you have any questions concerning this, please call _ _[*me/my office*]_ _**.**

If you have any questions about your case _ _[*tell the client how you want to be contacted, e.g., to call and talk with a particular staff member who is familiar with the case, to ask you those questions when you meet at court, or to call your office and set up a phone conference time for you to return the client's call*]_ _**.**

Very truly yours,

_ _[*Signature of attorney*]_ _
_ _[*Typed name*]_ _

Comment: It is important to keep in contact with clients. Not doing so is a frequent cause for complaints to the State Bar. You can keep clients satisfied and informed and get the information you need from them without having to talk to them each time if you set up office procedures that allow your staff to handle most calls.

It is a good idea to send a reminder letter before each court date. Writing the letter provides you with the opportunity to review the case file and ask the client for any information that is needed.

Cross-Reference: For discussion of the need to keep clients informed concerning their case, see California Criminal Law Procedure and Practice §1.19 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.29 B. General Authorization

§1.29 B. General Authorization

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To download **WordPerfect** version, right click and choose *Save Target As*

AUTHORIZATION FOR RELEASE OF INFORMATION

I, _ _[*name of defendant*]_ _, give my permission to my attorney, _ _[*name*]_ _, and _ _[*his/her*]_ _ agent to obtain any record of any nature that concerns me. This authorization extends from the date of this authorization to one year from that same date.

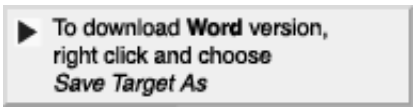
Date: _ _ _ _ _ _

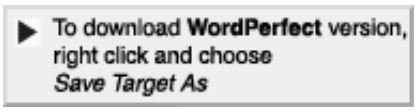
_ _[*Signature of defendant*]_ _
_ _[*Typed name*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Date of birth*]_ _
_ _[*Social Security number*]_ _

Cross-Reference: For discussion of public records, see California Criminal Law Procedure and Practice, chap 12 (Cal CEB Annual).

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§1.30 C. Release of Medical Records





RELEASE OF MEDICAL RECORDS

I hereby authorize and request _ _[*doctor's or hospital's name*]_ _ **to disclose to my attorney,** _ _[*name of attorney*]_ _**, or** [*his/her*] **representative, any and all information that you have concerning me. This includes, but is not limited to,** _ _[*describe the records you want, e.g., all records concerning my medical examination, diagnosis, and treatment by you and anyone at your direction*]_ _**. I also authorize and consent to the copying of any records whatever concerning the above. This information is necessary** _ _[*tell why, e.g., to assist me in defending myself in a criminal case*]_ _**. Its use will be limited to** _ _[*tell uses, e.g., the criminal case against me*]_ _**.**

This authorization expires on _ _[*date*]_ _**.**

A photostatic copy or facsimile copy of this authorization shall be deemed to be valid as the original.

I have read and understand this authorization, and know that I have the right to receive a copy of the authorization.

Date: _ _ _ _ _ _

_ _[*Signature of client*]_ __
_ _[*Typed name*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
_ _[*Date of birth*]_ _

Comment: Release of medical information is covered by CC §§56-56.37. The release must be in at least 14-point type, signed and dated by the patient. CC §56.11.

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Source: Criminal Law/California Criminal Law Forms Manual/1 Preparing and Filing Motions and Other Papers; Criminal Law Practice Management/§1.31 D. Contract for Services of Consultant/Expert

§1.31 D. Contract for Services of Consultant/Expert

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[*Attorney's letterhead*]

Date: _ _ _ _ _ _

To: _ _[*Name of consultant*]_ _

_ _[*Address*]_ _

RE: _ _[*name of case/description of services*]_ _

CONFIDENTIAL—PRIVILEGED COMMUNICATION
(Evid. Code §952; Code Civ. Proc. §§2018.010-2018.080; Pen. Code §1054.6)

Dear _ _[*name*]_ _**:**

Thank you for agreeing to be a consultant on this case. This contract sets forth your and _ _[*my/Law Firm's*]_ _ **obligations.**

You have agreed to _ _[*e.g., review specified material and consult with me following that review*]_ _**.** _ _[*I/Law Firm will*]_ _ **pay you $**_ _ **per hour for your services** _ _[*up to a maximum of $*_ _ _ _ _]_ _**.** _ _[*A check in the amount of $*_ _ _ _ _ *is enclosed as a* _ _[*deposit/retainer*]_ _.]_ _ **You have also agreed to** _ _[*e.g., testify/write a report*]_ _ **if** _ _[*I request/Law Firm requests*]_ _ **you to** _ _[*testify/write a report*]_ _ **based on the review and consultation described above.**

_ _[*My/Law Firm's*]_ _ **obligation to you is to pay your fees, give you direction, and provide you with the information you need to provide your expert advice. Your duties include providing your expert advice to me in confidence.**

The California Courts advise attorneys to inform their experts in writing about the nature of the confidentiality requirements of our relationship. What follows describes the fiduciary relationship established by this contract.

1. All information about this case, including any information we discussed before you agreed to consult on the case, is completely confidential. Unless you become a witness, all work you perform under this agreement comes within the attorney-client privilege and the attorney work product privilege. These privileges are statutory mandates under California Evidence Code section 952, Code of Civil Procedure sections 2018.010-2018.080, and Penal Code section 1054.6, which state that your work for _ _[*me/us*]_ _ **is private and confidential, and that it cannot be discovered by anyone. These privileges cover all oral discussions and written communications between us.**

2. If counsel or investigators from the other side of this lawsuit contact you for help with the case, you cannot do so. This would put you in a conflict of interest and would breach our contract and privileged relationship. Should the opponent contact you about this case, your only response is, "Sorry, I cannot help you." You cannot state that the reason you are not helping is because you are working for us, because that is revealing a confidence.

3. If any individual associated with the opposing party (*e.g.,* an attorney, an investigator, or an expert or consultant) contacts you with the express purpose of finding out if you are working, or have worked, on this case, you shall let us know who contacted you, when, and what was asked.

If you are contacted by opposition attorneys (or their investigators or experts), it can be a basis for their disqualification from the case and other sanctions, because it is serious misconduct for a legal adversary to exploit privileged communications of the other side.

If you are contacted about the case and you are not certain whether it is permissible for you to talk, call _ _[*me/us*]_ _ before you say anything. You can always call the person back after we resolve the ambiguity.

4. Your obligation of confidentiality is not time-limited. It does not conclude on the resolution of the case in court. Thus, unless _ _[*I/we*]_ _ expressly authorize you to disclose information about the case (*e.g.,* by designating you as a witness), you cannot disclose any information about the case to anyone.

5. Sometimes, a case is very interesting and you might wish to discuss it at conferences or professional gatherings with your colleagues. Do not do it. Even discussing the facts without names could give away the identity of the case to a lawyer or expert working for the opposition.

6. You have the responsibility to ensure that employees and other staff members in your office are aware that the confidentiality obligations stated in this contract apply to them as well.

7. All written communications between us should be labeled at the top of the document: CONFIDENTIAL—PRIVILEGED COMMUNICATION.

Please sign this contract and return it to _ _[*me/us*]_ _. _ _[*I/We*]_ _ have enclosed a copy for your files.

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

I have read this contract and agree to be bound by its terms.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Comment: It is very important to make sure that any consultant you engage has a clear understanding of the extent of the client's right to confidentiality in the lawyer-client relationship. The best way to do this is to put it in writing. Including this information in an engagement agreement is an excellent way to ensure that each consultant you hire understands his or her obligation not to disclose information about the case.

Cross-Reference: On discovery of work product and privileged information, see California Criminal Law Procedure and Practice §11.14 (Cal CEB Annual).

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Professional Responsibility

This manual is a companion volume to California Criminal Law Procedure and Practice (Cal CEB Annual). This chapter is reserved.

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3

Right to Counsel; The Attorney-Client Relationship

A. Legal Fee Agreement §3.1
B. State Bar Sample Fee Agreements §3.2
C. Letter Notifying Defense Counsel of Substitution of Counsel, and for Release of Information §3.3
D. Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210) §3.4
E. Motion to Remove Defense Counsel §3.5
F. Defense Motion to Be Relieved as Counsel §3.6

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Source: Criminal Law/California Criminal Law Forms Manual/3 Right to Counsel; The Attorney-Client Relationship/§3.1 A. Legal Fee Agreement

§3.1 A. Legal Fee Agreement

To download **Word** version, right click and choose *Save Target As*

To download **WordPerfect** version, right click and choose *Save Target As*

NOTICE: FEES IN THIS CONTRACT ARE NEGOTIABLE;
ATTORNEY FEES ARE NOT SET BY LAW

1. IDENTIFICATION OF PARTIES. This agreement, executed in duplicate with each party receiving an executed original, is made between _ _[*name of attorney*]_ _, hereafter referred to as "Attorney," and _ _[*name of client*]_ _, hereafter referred to as "Client."

This agreement is required by Business and Professions Code section 6148 and is intended to fulfill the requirements of that section.

[*Option 1: One Fee for Case Through Sentencing*]

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: Representation in Case No. _ _[*number*]_ _, _ _[*court, e.g., San Bernardino County Superior Court*]_ _, now set for arraignment on _ _[*date*]_ _, through disposition, whether by trial, sentencing, or otherwise. No promises or representations have been made, express or implied, regarding the results in this case.

3. LEGAL SERVICES SPECIFICALLY EXCLUDED. Legal services that are not to be provided by Attorney under this agreement specifically include, but are not limited to, the following: _ _[*List services excluded, e.g., representation following a mistrial or granting of a motion for a new trial, appellate work, work on any petition for an extraordinary writ, and representation on any other case (including cases related to this case, such as any later probation or parole revocation).*]_ _

If Client wishes Attorney to provide any legal services not included under this agreement, a separate written agreement between Attorney and Client will be required.

4. ATTORNEY FEES. Client will pay to Attorney the fixed sum of _ _[*dollar amount*]_ _ for attorney fees for the legal services to be provided under this agreement, payable in full on or before _ _[*date*]_ _. This payment is nonrefundable even if Client pleads guilty or the case is dismissed.

[*Option 2: Fee Structure for Case Up to Trial*]

2. LEGAL SERVICES TO BE PROVIDED. The legal services to be provided by Attorney to Client are as follows: making court appearances concerning client's release from custody, plea negotiations, and setting a trial date; preparation of case for trial; and work on plea negotiations, including discussions with prosecution. No promises or representations have been made, express or implied, regarding the results in this case.

3. LEGAL SERVICES SPECIFICALLY EXCLUDED. This contract does not cover payment for attorney services for the following:

Appeals to _ _[*the superior court appellate department/the court of appeal/the California Supreme Court/any federal court*]_ _.

Writs or similar proceedings to any court.

Representation in any administrative hearing, even if related to this case.

Representation in any _ _[*probation/parole*]_ _ violation arising out of any case, even if the revocation is triggered by this case.

_ _[*Representation at the preliminary hearing in this case.*]_ _

Representation at the trial in this case.

Representation at evidentiary hearings in this case.

Representation at the sentencing hearing in this case.

Representation at a retrial of this case.

Representation if this case is dismissed and then recharged.

As the case progresses, Attorney will notify Client of any proceedings not covered by this contract that require a new contract and the payment of additional fees.

4. ATTORNEY FEES. Client will pay to Attorney the sum of _ _[*dollar amount*]_ _ for attorney fees for the legal services to be provided under this agreement, payable in full on or before _ _[*date*]_ _. This payment is nonrefundable even if Client pleads guilty or the case is dismissed on the first day Attorney makes a court appearance.

[*Continue*]

5. RESPONSIBILITIES OF ATTORNEY AND CLIENT. Attorney will perform the legal services called for under this agreement, keep Client informed of progress and developments, and respond promptly to Client's inquiries. Client will be truthful and cooperative with Attorney; keep Attorney reasonably informed of developments and of Client's address, telephone number, and whereabouts; and timely make any payments required by this agreement. Communications between the client and counsel, his or her staff, and a third party whose services are necessary to enable the lawyer to carry out the provisions of the representation are all privileged.

6. COSTS. Client will pay all "costs" in connection with Attorney's representation of Client under this agreement. Costs are separate from attorney fees. Costs include, but are not limited to, expert fees and expenses, investigation costs, long-distance telephone charges, messenger service fees, photocopying expenses, and process server fees. Costs will be advanced by Attorney and then billed to Client, unless the costs can be met out of client deposits that are intended to cover costs.

7. DEPOSIT. Client will pay to Attorney an initial deposit of _ _[*dollar amount*]_ _ to be received by Attorney on or before _ _[*date*]_ _, and to be applied against costs incurred by Client. This amount will be deposited by Attorney in an interest-bearing trust account. Client authorizes Attorney to withdraw the principal from the trust account to pay costs as they are incurred by client. Any interest earned will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. If, at the termination of services under this agreement, the total amount incurred by Client for costs is less than the amount of the initial deposit, the difference will be refunded to Client.

Attorney will notify Client whenever the full amount of any deposit has been applied to costs incurred by Client. Within 15 days after each notification is mailed, Client will pay to Attorney an additional deposit in the same amount, and to be applied in the same manner, as the initial one. Deposit of such additional amounts and payment of any interest earned will be made in the same manner as for the initial deposit. Client authorizes Attorney to withdraw the principal from the trust account to pay costs as they are incurred by Client. If, at the termination of services under this agreement, the total amount incurred by Client for costs is less than the total amount of all deposits, the difference will be refunded to Client.

8. STATEMENTS AND PAYMENTS. Attorney will send Client a monthly statement indicating costs incurred and their basis, any amounts applied from deposits, and any current balance owed. If no costs are incurred for a particular month or if they are minimal, the statement will be held and combined with that for the following month unless a statement is requested by Client. Any balance will be paid in full within 30 days after the statement is mailed.

9. EFFECTIVE DATE OF AGREEMENT. The effective date of this agreement will be the date when, having been executed by Client, one copy of the agreement is received by Attorney and Attorney receives the payment required by Paragraph 4 of this agreement and the initial deposit required by Paragraph 7, provided that the copy, payment, and deposit are received on or before _ _[*date*]_ _, or Attorney accepts late receipt.

The foregoing is agreed to by:

Date: _ _ _ _ _ _ __[*Signature of client*]__
_ _[*Typed name*]_ _
Client

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney

Comment: When there is potential federal interest in a case, counsel should place in the agreement a *cautionary statement* stating that Bus & P C §6149 makes the fee agreement a "privileged document." Nonetheless, federal courts have routinely ignored this limitation and have ordered fee agreements produced in spite of the California statute. See California Criminal Law Procedure and Practice §§3.14, 9.16, 51.5, 57.33 (Cal CEB Annual).

The State Bar has sample written fee agreement forms and clauses. They are reproduced in §3.2, and they can be obtained from the California State Bar's website at http://calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf. Three sample legal fee agreements are available: Two are for hourly employment (litigation and nonlitigation); the other is for contingent fee agreements. In addition, there are 11 additional sample clauses.

Cross-Reference: For a general discussion of fee agreements, see Fee Agreement Forms Manual, chap 1 (2d ed Cal CEB 2007); Crim Law §3.14.

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§3.2 B. State Bar Sample Fee Agreements

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THE STATE BAR OF CALIFORNIA
Sample Written Fee Agreement Forms

(Prepared by the State Bar Committee on Mandatory Fee Arbitration.
Approved by the Board of Governors June 20, 1987; amended effective
November 22, 1996; May 15, 2001; June 23, 2005; March 8, 2010)

INSTRUCTIONS AND COMMENTS

I. INTRODUCTION

Attached are three sample attorney-client fee agreements prepared by the Committee on Mandatory Fee Arbitration of the State Bar of California and approved by the Board of Governors. They are advisory only. They are not binding upon the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility, or any member of the State Bar.

The first two agreement forms are designed for use in non-contingent fee arrangements. They cover (1) litigation on an hourly basis, and (2) non-litigation on an hourly basis. The third form is for a contingency fee matter. Finally, there are "Other Clauses of Interest in Fee Agreements" which list optional clauses for specific circumstances.

II. OVERVIEW

A. INTENDED PURPOSE AND LIMITATIONS

The accompanying forms are samples. These "Instructions and Comments" and the forms are intended for use only by attorneys admitted to practice in California, who are expected to utilize their own independent legal and business judgment when evaluating the forms and these comments.

The agreements are in the format of a relatively formal agreement while attempting to eliminate unnecessary "legalese." For those attorneys who prefer a more colloquial style, such as a letter-agreement, the language can be adapted to that format. Attorneys are encouraged to mold the samples to fit their needs.

B. SUMMARY OF THE STATUTES

1. Non-Contingent Fee Agreements

In non-contingent matters, Section 6148 of the Business and Professions Code requires California attorneys to have written fee agreements with their clients whenever the client's total

expense, including fees, will foreseeably exceed $1,000 and to provide a duplicate copy of the fully executed agreement to the client.

The fee agreement must state:

(a) Any basis for compensation including, but not limited to, hourly rates, statutory or flat fees, and other standard rates, fees and charges;

(b) The general nature of the legal services to be provided to the client;

(c) The responsibilities of attorney and client under the agreement.

If an attorney fails to comply with the statute, the fee agreement becomes voidable at the client's option, whereupon the attorney is entitled to a "reasonable" fee.

A written fee agreement is not required when services are rendered in an emergency to avoid prejudice to the client or where a writing is otherwise impractical; when the client is a corporation; when the client, after full disclosure, makes a written waiver of the benefits of section 6148; or when the fee agreement is implied in fact by prior services of the same general kind having been rendered to and paid for by the client. The attorney is urged to use caution in relying upon these "exceptions." There can be very few circumstances where a written fee agreement is not advisable.

Section 6148(b) requires attorneys to provide their clients with written billing statements. A client may request such statements at minimum intervals of 30 days. The attorney must provide a statement within 10 days after demand. All statements, whether requested by the client or not, must state "...the amount, rate and basis for calculation or other method of determination of the attorneys fees and costs." (subd.(b)).

2. Contingency Fee Agreements.

In contingency fee agreements, Section 6147 of the Business and Professions Code contains the same requirements as non-contingency fee agreements (discussed above) for a written fee agreement and a duplicate copy of the executed agreement being provided to the client.

There are additional requirements for contingency fee agreements. The agreement must include:

(a) A statement of the contingency fee percentage amount.

(b) A statement as to how disbursements and costs will affect the contingency fee and the client's recovery.

(c) A statement as to what extent, if any, the client could be required to pay any compensation to the attorney for related matters that arise out of their relationship not covered by their contingency fee agreement. This may

include any amounts collected for the client by the attorney.

(d) Unless the claim is subject to the provisions of Business and Professions Code Section 6146 (Claim Against Health Care Provider), a statement that the fee is not set by law but is negotiable between attorney and client.

(e) If the claim is subject to Section 6146, a statement that the rates set forth in that section are the maximum limits for the contingency fee and that the attorney and client may negotiate a lower rate. If the matter involves a claim for injury or damage against a health care provider based upon negligence, the attorney should carefully review Business and Professions Code Section 6146.1.

If any contingency fee agreement does not comply with the statutory provisions, the agreement is voidable at the option of the client, and the attorney is then entitled to a "reasonable" fee.

C. SUMMARY OF RULE OF PROFESSIONAL CONDUCT 3-410

California Rule of Professional Conduct 3-410 requires that California attorneys who know or should know that they do not have professional liability insurance must inform a client in writing, at the time the client engages the attorney, that the attorney does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of legal representation in the client's matter will exceed four hours.

An attorney who must give a client the written disclosure has the option of doing so in the fee agreement. Rule 3-410 suggests the following language for inclusion in the fee agreement or in a separate writing:

> *"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."*

Rule 3-410 provides limited exemptions to the disclosure requirement. The written disclosure is not required of attorneys when they are government lawyers or in-house counsel and representing a client in that capacity; when they provide legal services in an emergency to avoid prejudice to the rights or interests of a client; or when they have already advised the client in a fee agreement or separate writing that the attorney does not have professional liability insurance. Attorneys are urged to use caution in relying on the exemptions. Attorneys also should be aware that Rule 3-410 contains a separate written disclosure requirement if the attorney does not provide written notice to the client at the time of the client's engagement of the attorney.

Attorneys are urged to review Rule 3-410 in its entirety.

III. GUIDELINES FOR COMPLIANCE WITH THE STATUTES

Compliance with the statutes requires the judgment of the individual attorney. Forms

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alone cannot tell an attorney how to comply. Rather, compliance will result from the attorney's understanding of the statutory provisions and the issues those provisions raise.

A. STANDARD FOR DISCLOSURE

Due to the consumer orientation of the statutes and the fiduciary nature of the attorney-client relationship, the statutes must be examined in the light most favorable to the client. Disclosures required by statute should be accompanied by all additional information necessary to make the disclosure complete, accurate, and not misleading. The statutory requirements should be considered minimum standards.

B. AGREEMENT IN WRITING

To meet the statutory requirement of an agreement in writing, the fee agreement must be signed by both the attorney and the client. An attorney must be firm in requesting that the client sign the agreement before work commences.

C. DISCLOSURE OF STANDARD RATES, FEES AND CHARGES

An attorney should err on the side of inclusion when enumerating standard rates, fees and charges. In an hourly case, fixed or minimum charges for specific functions should be clearly set forth in the agreement to avoid misleading the client. For example, most firms have a minimum billing unit; some charge a minimum time for a telephone call, letter, or court appearance; others charge flat fees for the use of standardized documents developed over the years, or for specific tasks.

Costs and expenses that are passed through should be enumerated in enough detail to avoid misunderstanding. Charges passed through other than "at cost" should be detailed to avoid omitting a "standard rate, fee or charge." Caution should be exercised in "marking up" or "surcharging" costs, as some authorities consider such practices unethical. Caution should also be exercised in charging for items that would be considered general office overhead.

D. NATURE OF SERVICES/DUTIES OF PARTIES

When the statute requires disclosure of the nature of the services to be rendered and the respective duties of the attorney and the client, it simply enumerates two of the indispensable terms of an agreement. When the fee is on an hourly basis, these items can be covered in simple, short generalities. In flat or "premium" fee agreements, however, the scope of the attorney's responsibilities should be defined carefully. In contingency fee agreements, the scope of the services and costs covered and excluded under the percentage fee is especially important.

E. BILLS: AMOUNT, RATE AND BASIS

All bills must state the amount, rate and basis for calculation (or other method of determination) of the attorney's fees and costs. A bill that simply states "for services rendered" is not sufficient. In an hourly case, the bill should describe the services, identify the attorneys who performed services, the time each expended, their hourly rates and the resulting fee for each

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attorney's time. In other types of cases, such as flat or premium fees, the bill should refer to the "basis of calculation" which should be set forth in the fee agreement. Bills for costs and expenses must clearly identify the costs and expenses and provide the amount of the costs and expenses incurred. It is recommended that costs be individually itemized.

F. EXEMPTIONS

Except for the provision exempting corporate clients from the required disclosures, the exemptions in the statute are narrow. Attorneys should rely on these exemptions with caution.

G. BREVITY AND CLARITY v. COMPLETE DISCLOSURE

The statute embraces two potentially inconsistent goals: detailed disclosure on one hand, and information in an understandable format on the other. Each attorney should strive to strike a balance between these goals when drafting fee agreements. In addition to a proper agreement, it is suggested that the attorney take the time and effort to explain the terms of the agreement and to determine that the client fully understands its terms.

IV. INSTRUCTIONS

A. FORM NO. 1: HOURLY LITIGATION

1. Conditions (Par. 1) and Effective Date (Par. 14)

At the threshold, the attorney must determine at what point the agreement comes to life. Until it does, there is no written agreement that complies with the statute. Once it does, the attorney is obligated to render services, even if the client has not paid. If services are performed before the written agreement takes effect, the attorney will be limited to a "reasonable" fee. This form and the other samples embody one solution to these intertwined issues. It is not the only solution, nor will it always be the best solution.

Par. 1 (Conditions) interacts closely with Par. 14 (Effective Date). Working together, the two clauses are designed to delay the attorney's obligation to perform services until the client signs the agreement and pays the deposit; however, the clauses also are drafted to bring within the agreement any services performed before signing and payment. The delay in the attorney's obligation to perform services is based on a cautious reading of the statute's written agreement requirement. We assume that no written agreement exists until both parties sign and perform the conditions precedent. At the same time, however, we recognize that attorneys frequently will (or must) perform services before signing and payment; they will often do so under circumstances that will not fall within the statute's exemptions for emergencies or impracticality. For that reason, "premature" services are brought under the agreement's protection; upon signing and payment the agreement will take effect, but retroactively to the date the attorney first performed services. Without the retroactivity provision compensation for "premature" services would be limited to a reasonable fee, because the services were performed without a written agreement.

Of course, if the agreement never takes effect, then the statutory penalty limits the

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attorney to the reasonable value of any services performed.

If the attorney expects to perform services before the agreement is signed and the deposit paid, then the attorney should document the facts in a writing, preferably one signed by the client.

Likewise, document reliance on any statutory exemptions, such as emergency or impracticality.

2. Scope and Duties (Par. 2 and Par. 3)

Fill in a brief description of the subject of the representation (Par. 2). This is a statutory requirement. Enumeration of the client's and attorney's duties likewise is required by the statute (Par. 3).

The scope of services provided excludes appeal from the judgment and execution proceedings. The attorney may exclude more, less or nothing. Any exclusion from the scope of services should be carefully drawn, and consistent with the duty of care owed by the attorney regarding the specific matter that is the subject of the representation.

3. Deposit (Par. 4)

This is an optional clause. Fill in the amount of any deposit and the date by which it must be paid. An attorney cannot withdraw funds from the trust account without the client's express authorization. We have provided for that authorization. If a more cautious approach to the authorization question is preferred, the attorney might provide that sums will be withdrawn from the trust account only after they are invoiced to client and "x" days pass without client's protest of any of the charges.

The attorney need not require a deposit of any kind. This paragraph sets forth one way to handle the deposit if the attorney opts for one. This clause places a ceiling on further deposits. Without a ceiling, the right to require further deposits is so open-ended that it might be unenforceable for uncertainty. In addition, provision is made for advance payment of all fees and costs to be incurred in preparing for and conducting trial or arbitration. Because it is calculated based on objective facts, no ceiling has been placed on the pre-trial deposit.

The "Replenishing Deposit" clause provided in the "Additional Provisions" forms may be used as an alternative.

4. Legal Fees (Par. 5)

The attorney must inform the client in the fee agreement whether and under what conditions rates are subject to change.

Also, the attorney should add any standard or minimum time or dollar charges for specific functions-for example, ".x" hours for a telephone call or letter. Failure to disclose such practices probably misleads the client when the agreement states that fees are charged by the

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actual time by the hour and some fraction of an hour.

Some firms either do not charge for travel time or charge at reduced rates. The attorney should discuss this with the client.

5. Costs and Expenses (Par. 6)

This is not an inclusive list. The attorney may include more or less. The attorney should disclose the rate or charge for any items not passed through strictly at cost; if not done, the attorney may violate the statute's requirement that standard rates, fees and charges be disclosed.

A Rate Schedule should be included for charges that are not usually passed through strictly at cost. All such charges should be enumerated to comply with the statute's requirement that attorneys disclose their standard rates, fees and charges.

The attorney should specifically address how air travel other than economy, hotel accommodations and meals will be charged.

The sample paragraph allows the attorney to incur costs and retain consultants, etc., without client consent. Optional clauses, to be initialed by the client, would require client approval before costs in excess of a specific dollar amount or of a certain nature, (e.g., experts) were incurred.

Language is included notifying the client that in certain cases, it may be the client's responsibility to pay other parties' costs.

6. Billing Statements (Par. 7)

Attorneys' statements shall describe the services rendered, and must state the "basis" of the charges, including the amount, rate, and basis for calculation or other method of determination of fees and costs.

7. Lien (Par. 8)

This is an optional clause, but is recommended for the attorney's protection. The California Supreme Court has determined that a lien in an hourly fee case gives the attorney an interest adverse to the client, and therefore the attorney must comply with Rule 3-300 of the Rules of Professional Conduct by fully disclosing the acquisition and terms of the lien and transmitting that information to the client in writing in a manner which should reasonably be understood by the client, advising the client in writing that the client may seek the advice of an independent lawyer of the client's choice, and giving the client a reasonable opportunity to seek that advice before the client gives written consent to the lien. The Supreme Court left open whether the same requirements must be met for a valid lien in a contingent fee case, but caution dictates that the same procedure be followed.

8. Discharge and Withdrawal (Par. 9)

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This clause is declaratory of applicable law and the Rules of Professional Conduct.

9. Disclaimer of Guarantee (Par. 10)

This is an optional clause.

10. Construction Clauses (Pars. 11 - 13)

These are optional clauses found in many formal agreements.

B. FORM NO. 2: HOURLY NON-LITIGATION

With the exceptions and additions recited below, the comments on the Hourly-Litigation Form apply equally to the Hourly Non-Litigation Form.

1. Scope and Duties (Par. 2)

An exclusion for litigation has been added.

2. Client's Duties (Par. 3)

References to appearances at legal proceedings are deleted.

3. Deposit (Par. 4)

References to trial and arbitration dates and related fees are deleted.

4. Costs and Expenses (Par. 6)

Reference to litigation-related costs is deleted.

5. Lien

The attorney's lien has been deleted because it may be inappropriate in a non-litigation context.

C. FORM NO. 3: CONTINGENCY FEE

With the exceptions and additions recited below, the comments on the Hourly Litigation Form 1 apply equally to the Contingency Form 3.

1. Conditions (Par. 1) and Effective Date (Par. 19)

The instructions for these paragraphs are the same as those for the Hourly Litigation Form, Paragraphs 1 and 14.

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2. Scope of Services (Par. 2), Responsibility of the Parties (Par. 3), and Limitation of Representation (Par. 10)

Fill in the defendant's name, the nature of the event giving rise to the claim and the date (Par. 2). This paragraph and Paragraph 10 (Limitation of Representation), describe the scope and limitations of the representation. A description of the subject of the representation is a statutory requirement. Enumeration of the client's and attorney's responsibilities likewise is required by the statute (Par. 3).

The point at which the covered services ends should be carefully defined to avoid any question of the obligation to provide additional services without additional fees. The scope of services in the sample excludes appeal from the judgment and execution proceedings. The attorney may exclude more, less or nothing. Any exclusion from the scope of services should be carefully drawn, and should be consistent with the duty of care owed by the attorney regarding the specific matter that is the subject of the representation.

The scope of representation is also limited to the specific matter defined in Paragraph 2. Business and Professions Code Section 6147 requires a statement as to what extent, if any, the client could be required to pay any compensation to the attorney that arises out of their relationship but is not covered by the contingency fee agreement. The sample (Par. 10) provides that representation as to related matters will require a separate agreement. As to the related matter of defending the client on cross-complaints, the option of a separate agreement or engaging separate counsel is given. Here again, the attorney may broaden the scope of the services to include those related matters which are excluded in the sample.

3. Legal Fees (Par. 4)

As required by statute, this paragraph explains the contingency on which fees become due, the method of calculation of fees at various points in the litigation, and deduction of costs. An optional clause includes non-monetary proceeds as part of the net recovery on which the fees are based. If this clause is used, consideration should be given to whether or not to enumerate the potential non-monetary items, e.g., the value of continued insurance coverage.

Neither the particular stages in litigation at which the percentage of the fee changes, nor the specific basis for computation of a reasonable fee in the event of discharge, should be viewed as being endorsed by the State Bar. It should be noted that no specific contingency fee amounts are recommended in these forms. These provisions are illustrative only. Other provisions may be more appropriate in particular cases.

Business and Professions Code Section 6147 provides that a reasonable fee is owed in the event of failure to comply with the statute, and existing case law provides for payment of a reasonable fee in the event of discharge of the attorney by the client prior to occurrence of the contingency on which fees become due. Accordingly, this paragraph states that the reasonable fee in such a case is payable on the occurrence of the contingency and provides assistance in the determination of the amount of a fee which may be considered reasonable.

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4. Negotiability of Fees (Par. 5)

This statement is required by statute.

5. Billing Statements (Par. 8)

This optional paragraph is intended for use in the event the client is to pay costs as the litigation progresses, rather than deducting all costs from the recovery.

6. Approval Necessary for Settlement (Par. 9)

This provision is optional.

7. Discharge and Withdrawal (Par. 11)

This is declaratory of applicable law and rules. Together with Paragraphs 4 (Legal Fees), 12 (Conclusion of Services) and 13 (Lien), this paragraph notifies the client of payment obligations if the attorney is discharged or withdraws.

8. Conclusion of Services (Par. 12)

Returning the file and other property is required under existing law and the Rules of Professional Conduct.

9. Receipt of Proceeds (Par. 14)

This is an optional clause.

10. Disclaimer of Guarantee (Par. 15)

This is an optional clause.

11. Construction Clauses (Pars. 16 - 18)

These are optional clauses found in many formal agreements.

V. ADDITIONAL PROVISIONS

There are innumerable additional provisions that an attorney may include in a fee agreement. The following are several which the attorney may wish to consider. All of these clauses are optional.

1. Arbitration Clause

An attorney should consult the firm's malpractice insurance carrier regarding its position on arbitration and particular arbitration provisions, including any award of attorney's fees.

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§3.2 B. State Bar Sample Fee Agreements (Part 2)



The suggested clause is appropriate for binding arbitration of all claims other than fee disputes which are subject to non-binding arbitration under Business and Professions Code Sections 6200, *et seq.* Such clauses may only be enforceable with full disclosure to the client of the ramifications of those choices and the comparative advantages and disadvantages of other alternatives. This clause advises the client of the right to have an independent attorney review it, and requires initialing to approve it.

2. Mediation Clause

This is an optional clause. Under Business and Professions Code Section 6200, a mediation option may be offered to the parties after the attorney or client files a request for fee arbitration with some local bar association or the State Bar fee arbitration programs.

The attorney may want to consider this in determining whether to include a pre-filing mediation clause such as the suggested clause.

3. Interest Clause

It is legally and ethically proper to charge interest on fees. If the attorney elects to do so, this clause provides appropriate language. Please keep in mind that interest, if charged, must be reasonable so as not to violate either the prohibition against unconscionable fees nor the usury provisions of the California Constitution. It must be simple interest, made a part of the agreement, and separately stated as an increment on the monthly or other periodic billing. Generally, interest should begin running only after a certain specified period, i.e., thirty, sixty or ninety days after the billing invoice is rendered, if not paid within that time.

If the Agreement uses the terms "finance charges," "late fees," "penalty payment" or anything other than simple interest, this may create problems with the Federal Truth In Lending Law and the California Unruh Act.

4. Replenishing Deposit

This is an alternative to Par. 4 in Forms 1 and 2, and provides for an automatically replenishing deposit.

5. Attorneys' Fees Clause

An attorneys' fees clause is permitted, except that attorneys' fees are not recoverable in fee arbitrations under Business and Professions Code Sections 6200, *et seq.* Further, an attorney may not usually recover fees for representing him or herself. If this clause and an arbitration clause are both used, the attorneys' fee provisions should be the same. Inclusion of this clause should be cleared with the attorney's malpractice insurance carrier.

6. Other Payor Clauses

These clauses may be appropriate where someone other than the client is responsible for

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paying the attorney's fees, and may be used only in compliance with Rule 3-310(F) of the Rules of Professional Conduct.

7. Fixed Fee Clause

This clause is a suggested alternative to Paragraph 5 (Legal Fees and Billing Practices) where the work is being performed on a fixed fee basis.

8. Other Attorney Clauses

See California Rules of Professional Conduct Rule 2-200(A). These clauses may be appropriate where the attorney contemplates working with another attorney who is not a partner, associate or shareholder of the attorney. Charging associate counsel fees as a cost in an hourly fee case is appropriate, but is a suspect practice in contingency fee litigation. Separate sample clauses are therefore offered for hourly and contingency fee cases.

9. Professional Liability Insurance Clause.

See California Rules of Professional Conduct Rule 3-410. An attorney who knows or should know that he or she does not have professional liability insurance at the time of the client's engagement of the attorney must make a written disclosure to the client, subject to limited exemptions listed in the rule. Rule 3-410 suggests the language of this clause for inclusion in the fee agreement or in a separate writing.

VII. CONCLUSION

These forms are disseminated in the hope that they will be useful to attorneys in their practices. Attorneys are urged to make alterations to these forms so that they conform to the attorney's practice and the needs and requirements of the attorney and clients, subject always to satisfying the statutory requirements for fee agreements and the Rules of Professional Conduct.

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Form No. 1

Sample Written Fee Agreement

Hourly Litigation

CRANE, GARCIA & MOORE
441 Bauchet Street
Los Angeles, CA 90012
(213) 680-9600

(Date)

ATTORNEY-CLIENT FEE AGREEMENT

CRANE, GARCIA & MOORE ("Attorney") and **STELLA KING** ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below.

1. **CONDITIONS.** This Agreement will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit called for under Paragraph 4.

2. **SCOPE OF SERVICES.** Client hires Attorney to provide legal services in the following matter:_____ [describe matter]. Attorney will provide those legal services reasonably required to represent Client. Attorney will take reasonable steps to keep Client informed of progress and to respond to Client's inquiries. If a court action is filed, Attorney will represent Client through trial and post-trial motions. This Agreement does not cover representation on appeal or in execution proceedings after judgment. Separate arrangements must be agreed to for those services. Services in any matter not described above will require a separate written agreement.

3. **CLIENT'S DUTIES**. Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information or developments which may come to Client's attention, to abide by this Agreement, to pay Attorney's bills on time, and to keep Attorney advised of Client's address, telephone number and whereabouts. Client will assist Attorney in providing necessary information and documents and will appear when necessary at legal proceedings.

4. **DEPOSIT.** Client agrees to pay Attorney an initial deposit of $_____ by _____. The hourly charges will be charged against the deposit. The initial deposit,

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This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code section 6148 but may not address varying contractual obligations which may be present in a particular case. The State Bar makes no representation of any kind, express or implied, concerning the use of these forms.

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as well as any future deposit, will be held in a trust account. Client authorizes Attorney to use that fund to pay the fees and other charges as they are incurred. Payments from the fund will be made upon remittance to client of a billing statement. Client acknowledges that the deposit is not an estimate of total fees and costs, but merely an advance for security.

Whenever the deposit is exhausted, Attorney reserves the right to demand further deposits, each up to a maximum of $_____ before a trial or arbitration date is set. Once a trial or arbitration date is set, Client shall pay all sums then owing and deposit the attorneys' fees estimated to be incurred in preparing for and completing the trial or arbitration, as well as the jury fees or arbitration fees, expert witness fees and other costs likely to be assessed. Those sums may exceed the maximum deposit.

Client agrees to pay all deposits after the initial deposit within _____ days of Attorney's demand. Unless otherwise agreed in writing, any unused deposit at the conclusion of Attorney's services will be refunded.

5. LEGAL FEES AND BILLING PRACTICES. Client agrees to pay by the hour at Attorney's prevailing rates for all time spent on Client's matter by Attorney's legal personnel. Current hourly rates for legal personnel are as follows:

Senior partners----------/hour
Partners----------/hour
Associates----------/hour
Paralegals----------/hour
Law clerks----------/hour

The rates on this schedule are subject to change on 30 days' written notice to Client. If Client declines to pay increased rates, Attorney will have the right to withdraw as attorney for Client.

The time charged will include the time Attorney spends on telephone calls relating to Client's matter, including calls with Client, witnesses, opposing counsel or court personnel. The legal personnel assigned to Client's matter may confer among themselves about the matter, as required and appropriate. When they do confer, each person will charge for the time expended, as long as the work done is reasonably necessary and not duplicative. Likewise, if more than one of the legal personnel attends a meeting, court hearing or other proceeding, each will charge for the time spent. Attorney will charge for waiting time in court and elsewhere and for travel time, both local and out of town.

Time is charged in minimum units of one-tenth (. 1) of an hour. The following have higher minimum charges:

Telephone calls:
Letters:
Other:

6. COSTS AND OTHER CHARGES.

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(a) Attorney will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses in addition to the hourly fees. The costs and expenses commonly include, service of process charges, filing fees, court and deposition reporters' fees, jury fees, notary fees, deposition costs, long distance telephone charges, messenger and other delivery fees, postage, photocopying and other reproduction costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses, consultants' fees, expert witness, professional, mediator, arbitrator and/or special master fees and other similar items. Except for the items listed below, all costs and expenses will be charged at Attorney's cost.

In-office photocopying	/page
Facsimile charges	/page
Mileage	/mile
Other:	

(b) Out of town travel. Client agrees to pay transportation, meals, lodging and all other costs of any necessary out-of-town travel by Attorney's personnel. Client will also be charged the hourly rates for the time legal personnel spend traveling.

(c) Experts, Consultants and Investigators. To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants or investigators. Client agrees to pay such fees and charges. Attorney will select any expert witnesses, consultants or investigators to be hired, and Client will be informed of persons chosen and their charges.

Additionally, Client understands that if the matter proceeds to court action or arbitration, Client may be required to pay fees and/or costs to other parties in the action. Any such payment will be entirely the responsibility of Client.

7. BILLING STATEMENTS. Attorney will send Client periodic statements for fees and costs incurred. Each statement will be payable within _____ days of its mailing date. Client may request a statement at intervals of no less than 30 days. If Client so requests, Attorney will provide one within 10 days. The statements shall include the amount, rate, basis of calculation or other method of determination of the fees and costs, which costs will be clearly identified by item and amount.

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8. LIEN. Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of the representation under this Agreement. The lien will be for any sums owing to Attorney at the conclusion of services performed. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Attorney may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Attorney has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's choice before agreeing to such a lien. By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and—whether or not Client has chosen to consult such an independent lawyer—Client agrees that Attorney will have a lien as specified above.

_____(Client Initial Here) _____(Attorney Initial Here)

9. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Agreement, refusal to cooperate or to follow Attorney's advice on a material matter or any fact or circumstance that would render Attorney's continuing representation unlawful or unethical. When Attorney's services conclude, all unpaid charges will immediately become due and payable. After services conclude, Attorney will, upon Client's request, deliver Client's file, and property in Attorney's possession unless subject to the lien provided in Paragraph 8 above, whether or not Client has paid for all services.

10. DISCLAIMER OF GUARANTEE AND ESTIMATES. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Attorney makes no such promises or guarantees. Attorney's comments about the outcome of the matter are expressions of opinion only. Any estimate of fees given by Attorney shall not be a guarantee. Actual fees may vary from estimates given.

11. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

12. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

13. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them, or an oral agreement only to the extent that the parties carry it out.

14. EFFECTIVE DATE. This Agreement will govern all legal services performed by Attorney on behalf of Client commencing with the date Attorney first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

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THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM AS OF THE DATE ATTORNEY FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE, JOINTLY AND SEVERALLY, FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: _____

_____
STELLA KING
Address: _____
_____
Telephone: _____

DATED: _____

CRANE, GARCIA & MOORE

By: _____
Linda H. Garcia, Partner

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Form No. 2

Sample Written Fee Agreement

Hourly Non-Litigation

CRANE, GARCIA & MOORE
441 Bauchet Street
Los Angeles, CA 90012
(213) 680-9600

(Date)

CRANE, GARCIA & MOORE ("Attorney") and **STELLA KING** ("Client") hereby agree that Attorney will provide legal services to Client on the terms set forth below.

1. CONDITIONS. This Agreement will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit called for under Paragraph 4.

2. SCOPE OF SERVICES. Client hires Attorney to provide legal services in the following matter: _____ [describe matter]. Attorney will provide those legal services reasonably required to represent Client. Attorney will take reasonable steps to keep Client informed of progress and to respond to Client's inquiries. This Agreement does not cover litigation services of any kind, whether in court, arbitration, administrative hearings, or government agency hearings. Separate arrangements must be agreed to for those services. Services in any matter not described above will require a separate written agreement.

3. CLIENT'S DUTIES. Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information or developments which may come to Client's attention, to abide by this Agreement, to pay Attorney's bills on time and to keep Attorney advised of Client's address, telephone number and whereabouts. Client will assist Attorney in providing information and documents necessary for the representation in the described matter.

4. DEPOSIT. Client agrees to pay Attorney an initial deposit of $_____ by _____.

This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code section 6148 but may not address varying contractual obligations which may be present in a particular case. The State Bar makes no representation of any kind, express or implied, concerning the use of these forms.

The hourly charges will be charged against the deposit. The initial deposit, as well as any future deposit, will be held in a trust account. Client authorizes Attorney to use that fund to pay

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the fees and other charges as they are incurred. Payments from the fund will be made upon remittance to Client of a billing statement. Client acknowledges that the deposit is not an estimate of total fees and costs, but merely an advance for security.

Whenever the deposit is exhausted, Attorney reserves the right to demand further deposits, each up to a maximum of $_____.

Client agrees to pay all deposits after the initial deposit within ____ days of Attorney's demand. Unless otherwise agreed in writing, any unused deposit at the conclusion of Attorney's services will be refunded.

5. LEGAL FEES AND BILLING PRACTICES. Client agrees to pay by the hour at Attorney's prevailing rates for all time spent on Client's matter by Attorney's legal personnel. Current hourly rates for legal personnel are as follows:

Senior partners----------/hour
Partners----------/hour
Associates----------/hour
Paralegals----------/hour
Law clerks----------/hour

The rates on this schedule are subject to change on 30 days' written notice to client. If Client declines to pay any increased rates, Attorney will have the right to withdraw as Attorney for Client.

The time charged will include the time Attorney spends on telephone calls relating to Client's matter, including calls with Client and other parties and attorneys. The legal personnel assigned to Client's matter may confer among themselves about the matter, as required and appropriate. When they do confer, each person will charge for the time expended, as long as the work done is reasonably necessary and not duplicative. Likewise, if more than one of the legal personnel attends a meeting or other proceeding, each will charge for the time spent. Attorney will charge for waiting time and for travel time, both local and out of town.

Time is charged in minimum units of one tenth (. 1) of an hour. The following have higher minimum charges:

Telephone calls:
Letters:
Other:

6. COSTS AND OTHER CHARGES.

(a) In general, Attorney will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses in addition to the hourly fees. The costs and expenses commonly include fees fixed by law or assessed by public agencies, long distance telephone charges, messenger and other delivery fees, postage, photocopying and other reproduction costs, travel costs including parking, mileage,

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transportation, meals and hotel costs, investigation expenses and consultants' fees and other similar items. Except for the items listed below, all costs and expenses will be charged at Attorney's cost.

In-office photocopying	/page
Facsimile charges	/page
Mileage	/mile
Other:	

(b) Out of town travel. Client agrees to pay transportation, meals, lodging and all other costs of any necessary out-of-town travel by Attorneys personnel. Client will also be charged the hourly rates for the time legal personnel spend travelling.

(c) Consultants and Investigators. To aid in the representation in Client's matter, it may become necessary to hire consultants or investigators. Client agrees to pay such fees and charges. Attorney will select any consultants or investigators to be hired, and Client will be informed of persons chosen and their charges.

7. BILLING STATEMENTS. Attorney will send Client periodic statements for fees and costs incurred. Each statement will be payable within _____ days of its mailing date. Client may request a statement at intervals of no less than 30 days. If Clients requests, Attorney will provide one within 10 days. The statements shall include the amount, rate, basis of calculation or other method of determination of the fees and costs, which costs will be clearly identified by item and amount.

8. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Agreement, refusal to cooperate or to follow Attorney's advice on a material matter or any fact or circumstance that would render Attorney's continuing representation unlawful or unethical. When Attorney's services conclude, all unpaid charges will immediately become due and payable. After services conclude, Attorney will, upon Client's request, deliver Client's file, and property in Attorney's possession, whether or not Client has paid for all services.

9. DISCLAIMER OF GUARANTEE AND ESTIMATES. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of the matter. Attorney makes no such promises or guarantees. Attorney's comments about the outcome of the matter are expressions of opinion only. Any estimate of fees given by Attorney shall not be a guarantee. Actual fees may vary from estimates given.

10. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties. No other agreement, statement, or promise made on or before the effective date of this Agreement will be binding on the parties.

11. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

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§3.2 B. State Bar Sample Fee Agreements (Part 3)

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12. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement only to the extent that the parties carry it out.

13. EFFECTIVE DATE. This Agreement will govern all legal services performed by Attorney on behalf of Client commencing with the date Attorney first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM AS OF THE DATE ATTORNEY FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE, JOINTLY AND SEVERALLY, FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. THE CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: _____

_____
STELLA KING
Address: _____
_____
Telephone: _____

DATED: _____

CRANE, GARCIA & MOORE

By: _____
Linda H. Garcia, Partner

Print

Form No. 3

Contingency Fee Agreement

CRANE, GARCIA & MOORE
441 Bauchet Street
Los Angeles, CA 90012
(213) 680-9600

(Date)

ATTORNEY-CLIENT CONTINGENCY FEE AGREEMENT

CRANE, GARCIA & MOORE ("Attorney"), and **STELLA KING** ("Client") hereby agree that Attorney will provide legal services to "Client" on the terms set forth below.

1. **CONDITIONS**. This Agreement will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Agreement and pays the initial deposit, if any, called for under Paragraph 7.

2. **SCOPE OF SERVICES**. Client is hiring Attorney to represent Client in the matter of Client's claims against _____ [and possibly others as future investigation may indicate], arising out of _____which occurred on or about _____.

If a court action is filed, Attorney will represent Client until a settlement or judgment, by way of arbitration or trial, is reached. Attorney will oppose any motion for a new trial or any other post-trial motions filed by an opposing party, or win make any appropriate post-trial motions on Client's behalf. After judgment, Attorney will not represent Client on any appeal, or in any proceeding to execute on the judgment, unless Client and Attorney agree that Attorney will provide such services and also agree upon additional fees, if any, to be paid to Attorney for such services. Services in any matter not described above will require a separate written agreement.

3. **RESPONSIBILITIES OF THE PARTIES**. Attorney will provide those legal services reasonably required to represent Client in prosecuting the claims described in Paragraph 2 and will take reasonable steps to keep Client informed of progress and developments, and to respond promptly to inquiries and communications. Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of any information and developments which may come to Client's attention, to abide by this Agreement, to pay Attorney's bills for costs on time, and to

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This sample written fee agreement form is intended to satisfy the basic requirements of Business & Professions Code Section 6147 but may not address varying contractual obligations which may be present in a particular case. The State Bar makes no representation of any kind, express or implied, concerning the use of these forms.

keep Attorney advised of Client's address, telephone number and whereabouts. Client agrees to

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appear at all legal proceedings when Attorney deems it necessary, and generally to cooperate fully with Attorney in all matters related to the preparation and presentation of Client's claims.

4. LEGAL FEES. Attorney will only be compensated for legal services rendered if a recovery is obtained for Client. If no recovery is obtained, Client will be obligated to pay only for costs, disbursements and expenses, as described in Paragraph 6.

The fee to be paid to Attorney will be a percentage of the "net recovery," depending on the stage at which the settlement or judgment is reached. The term "net recovery" means: (1) the total of all amounts received by settlement, arbitration award or judgment, including any award of attorneys fees, (2) minus all costs and disbursements set forth in Paragraph 6. [Net recovery shall also include the reasonable value of any non-monetary proceeds.]

Attorney's fee shall be calculated as follows:

(i) If the matter is resolved before filing a lawsuit or formal initiation of proceedings, then Attorney's fee will be _____ percent (____%) of the net recovery;

(ii) If the matter is resolved prior to ____ days before the date initially set for the trial or arbitration of the matter then Attorney's fee will be _____ percent (____%) of the net recovery; and

(iii) If the matter is resolved after the times set forth in (i) and (ii), above, then Attorney's fee will be _____ percent (____%) of the net recovery.

In the event of Attorney's discharge or withdrawal as provided in Paragraph 11, Client agrees that, upon payment of the settlement, arbitration award or judgment in Client's favor in this matter, Attorney shall be entitled to be paid by Client a reasonable fee for the legal services provided. Such fee shall be determined by considering the following factors:

(1) The actual number of hours expended by Attorney in performing legal services for Client;
(2) Attorney's hourly rates;
(3) The extent to which Attorney's services have contributed to the result obtained;
(4) The amount of the fee in proportion to the value of the services performed;
(5) the amount of recovery obtained;
(6) Time limitations imposed on Attorney by Client or by the circumstances; and
(7) The experience, reputation and ability of personnel performing the services.

5. NEGOTIABILITY OF FEES. The rates set forth above are not set by law, but are negotiable between an attorney and client.

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6. COSTS AND LITIGATION EXPENSES. Attorney will incur various costs and expenses in performing legal services under this Agreement. Client agrees to pay for all costs, disbursements and expenses paid or owed by Client in connection with this matter, or which have been advanced by Attorney on Client's behalf and which have not been previously paid or reimbursed to Attorney. Costs, disbursements and litigation expenses commonly include court fees, jury fees, service of process charges, court and deposition reporters' fees, photocopying and reproduction costs, notary fees, long distance telephone charges, messenger and other delivery fees, postage, deposition costs, travel costs including parking, mileage, transportation, meals and hotel costs, investigation expenses, consultant, expert witness, professional mediator, arbitrator and/or special master fees and other similar items. Except for the items listed below, costs and expenses will be charged at Attorney's cost.

In-office photocopying	/page
Facsimile charges	/page
Mileage	/mile
Other:	

Client understands that, as set forth in Paragraph 7 below, a deposit for costs may be required before the expenditure is made by Attorney.

To aid in the preparation or presentation of Client's case, it may become necessary to hire expert witnesses, consultants or investigators. Attorney will select any expert witnesses, consultants or investigators to be hired, and Client will be informed of persons chosen and their charges.

Client authorizes Attorney to incur all reasonable costs and to hire any investigators, consultants or expert witnesses reasonably necessary in Attorney's judgment unless one or both of the clauses below are initialed by Attorney.

Attorney shall obtain Client's consent before incurring any costs in excess of $_____.

Attorney shall obtain Client's consent before retaining outside investigators, consultants, or expert witnesses.

If an award of fees and/or costs is sought on Client's behalf in this action, Client understands that the amount which the court may order as fees and/or costs is the amount the court believes the party is entitled to recover, and does not determine what fees and/or costs Attorney is entitled to charge Client or that only the fees and/or costs which were allowed were reasonable. Client agrees that, whether or not attorneys' fees or costs are awarded by the court in Client's case, Client will remain responsible for the payment, in full, of all attorneys' fees and costs in accordance with this Agreement.

Additionally, Client understands that if Client's case proceeds to court action or arbitration, Client may be required to pay fees and/or costs to other parties in the action. Any such award will be entirely the responsibility of Client.

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7. DEPOSIT. Client agrees to pay Attorney an initial deposit for costs of $_____, to be returned with this signed Agreement. Attorney will hold this initial deposit in a trust account. Client hereby authorizes Attorney to use that deposit to pay the costs, disbursements and other expenses incurred under this Agreement.

When Client's deposit is exhausted, Attorney reserves the right to demand further deposits, each up to a maximum of $_____.

Once a trial or arbitration date is set, Attorney will require Client to pay all sums then owing, and to deposit the costs Attorney estimates will be incurred in preparing for and completing the trial or arbitration, as well as the jury fees or arbitration fees likely to be assessed. Those sums may exceed the maximum deposit.

Client agrees to pay all deposits required under this Agreement within 10 days of Attorney's demand. Any deposit that is unused at the conclusion of Attorney's services will be refunded.

8. MONTHLY BILLING STATEMENTS. Attorney will send Client monthly billing statements for costs, disbursements and expenses incurred in connection with this matter. Each statement is to be paid in full within 15 days after the date of such statement.

9. APPROVAL NECESSARY FOR SETTLEMENT. Attorney will not make any settlement or compromise of any nature of any of Client's claims without Client's prior approval. Client retains the absolute right to accept or reject any settlement. Client agrees to consider seriously any settlement offer Attorney recommends before making a decision to accept or reject such offer. Client agrees not to make any settlement or compromise of any nature of any of Client's claims without prior notice to Attorney.

10. LIMITATION OF REPRESENTATION. Attorney is representing Client only on the matter described in Paragraph 2. Attorney's representation does not include independent or related matters that may arise, including, among other things, claims for property damage, workers' compensation, disputes with a health care provider about the amount owed for their services, or claims for reimbursement (subrogation) by any insurance company for benefits paid under an insurance policy.

This Agreement also does not include defending Client against, or representing Client in any claims that may be asserted against Client as a cross-claim or counter-claim in Client's case. This Agreement does not apply to any other legal matters. If any such matters arise later, Attorney and Client will either negotiate a separate agreement if Client and Attorney agree that Attorney will perform such additional legal work or Client will engage separate counsel with respect to the cross-claim or counter-claim or additional legal work.

11. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time, upon written notice to Attorney. Attorney may withdraw from representation of Client (a) with Client's consent, (b) upon court approval, or (c) if no court action has been filed, for

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good cause and upon reasonable notice to Client. Good cause includes Client's breach of this contract, Client's refusal to cooperate with Attorney or to follow Attorney's advice on a material matter, or any other fact or circumstance that would render Attorney's continuing representation unlawful or unethical.

Notwithstanding Attorney's withdrawal or Client's notice of discharge, and without regard to the reasons for the withdrawal or discharge, Client will remain obligated to pay Attorney for all costs incurred prior to the termination and, in the event that there is any net recovery obtained by Client after conclusion of Attorney's services, Client remains obligated to pay Attorney for the reasonable value of all services rendered from the effective date of this Agreement to the date of discharge.

12. CONCLUSION OF SERVICES. When Attorney's services conclude, all unpaid charges will immediately become due and payable. Attorney is authorized to use any funds held in Attorney's trust account as a deposit against costs to apply to such unpaid charges. After Attorney's services conclude, upon request, Client's file and property will be delivered to Client, or Client's other attorney, whether or not Client has paid any fees and/or costs owed to Attorney.

13. LIEN. Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums owing to Attorney for any unpaid costs, or attorneys' fees, at the conclusion of Attorney's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise. The effect of such a lien is that Attorney may be able to compel payment of fees and costs from any such funds recovered on behalf of Client even if Attorney has been discharged before the end of the case. Because a lien may affect Client's property rights, Client may seek the advice of an independent lawyer of Client's own choice before agreeing to such a lien. By initialing this paragraph, Client represents and agrees that Client has had a reasonable opportunity to consult such an independent lawyer and—whether or not Client has chosen to consult such an independent lawyer—Client agrees that Attorney will have a lien as specified above.

_____(Client initials here) _____(Attorney initials here)

14. RECEIPT OF PROCEEDS. All proceeds of Client's case shall be deposited into Attorney's trust account for disbursement in accordance with the provisions of this Agreement.

15. DISCLAIMER OF GUARANTEE. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of this matter. Attorney makes no such promises or guarantees. There can be no assurance that Client will recover any sum or sums in this matter. Attorney's comments about the outcome of this matter are expressions of opinion only. Client acknowledges that Attorney has made no promise or guarantees about the outcome.

16. ENTIRE AGREEMENT. This Agreement contains the entire agreement of the parties. No other agreement, statement or promise made on or before the effective date of this Agreement will be binding on the parties.

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17. SEVERABILITY IN EVENT OF PARTIAL INVALIDITY. If any provision of this Agreement is held in whole or in part to be unenforceable for any reason, the remainder of that provision and of the entire Agreement will be severable and remain in effect.

18. MODIFICATION BY SUBSEQUENT AGREEMENT. This Agreement may be modified by subsequent agreement of the parties only by an instrument in writing signed by both of them or an oral agreement only to the extent that the parties carry it out.

19. EFFECTIVE DATE. This Agreement will govern all legal services performed by Attorney on behalf of Client commencing with the date Attorney first performed services. The date at the beginning of the Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

THE PARTIES HAVE READ AND UNDERSTOOD THE FOREGOING TERMS AND AGREE TO THEM, AS OF THE DATE ATTORNEY FIRST PROVIDED SERVICES. IF MORE THAN ONE CLIENT SIGNS BELOW, EACH AGREES TO BE LIABLE JOINTLY AND SEVERALLY FOR ALL OBLIGATIONS UNDER THIS AGREEMENT. THE CLIENT SHALL RECEIVE A FULLY EXECUTED DUPLICATE OF THIS AGREEMENT.

DATED: _____

_____
STELLA KING
Address: _____
_____
Telephone: _____

DATED: _____

CRANE, GARCIA & MOORE

By: _____
Linda H. Garcia, Partner

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Other Clauses of Interest in Fee Agreements

1. ARBITRATION OF ALL DISPUTES INCLUDING CLAIMS OF MALPRACTICE

Any controversy between the parties regarding the construction, application or performance of any services under this Agreement, and any claim arising out of or relating to this Agreement or its breach, shall be submitted to binding arbitration upon the written request of one party after the service of that request on the other party. The parties shall appoint one person [Option: or agree upon a 3-person panel] to hear and determine the dispute. [Option: name the arbitration provider such as AAA, JAMS, ADR, etc., and provide that the arbitration shall be conducted pursuant to the provider's rules]. If the parties cannot agree, then the Superior Court of [fill in the name of county] County shall choose an impartial arbitrator whose decision shall be final and conclusive on all parties. Attorney and Client shall each have the right of discovery in connection with any arbitration proceeding in accordance with Code of Civil Procedure Section 1283.05. [Optional provision: The cost of the arbitration, excluding legal fees and costs, shall be borne by the losing party or in such proportion as the arbitrator shall decide.] The parties shall bear their own legal fees and costs for [all claims, or contract claims, or tort claims]. The sole and exclusive venue for the arbitration and or any legal dispute, shall be [fill in name of county] County, California.

2. STATE BAR FEE ARBITRATION

Notwithstanding subparagraph A above, in any dispute subject to the jurisdiction of the State of California over attorney's fees, charges, costs or expenses, Client has the right to elect arbitration pursuant to the fee arbitration procedures of the State Bar of California, as set forth in California Business and Professions Code Section 6200, *et seq.* Those procedures permit a trial after arbitration, unless the parties agree in writing, after the dispute has arisen, to be bound by the arbitration award. If, after receiving a notice of client's right to arbitrate, Client does not elect to proceed under the State Bar fee arbitration procedures, and file a request for fee arbitration within 30 days, any dispute over fees, charges, costs or expenses, will be resolved by binding arbitration as provided in the previous subparagraph A.

Because each party is giving up a right, Client is encouraged to have an independent lawyer of Client's choice review these arbitration provisions before agreeing to them.

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By initialing below, Client and Attorney confirm that they have read and understand subparagraphs A and B above, and voluntarily agree to binding arbitration. In doing so, Client and Attorney voluntarily give up important constitutional rights to trial by judge or jury, as well as rights to appeal. Client is advised that Client has the right to have an independent lawyer of Client's choice review these arbitration provisions, and this entire agreement, prior to initialing this provision or signing this Agreement.

_____(Client initial here) _____(Attorney initial here)

3. MEDIATION CLAUSE

If a dispute arises out of or relating to any aspect of this Agreement between Client and Attorney, or the breach thereof, and if the dispute cannot be settled through negotiation, Attorney and Client agree to discuss in good faith the use of mediation before resorting to arbitration, litigation, or any other dispute resolution procedure.

4. INTEREST CHARGES

If a billing statement is not paid when due, interest will be charged on the principal balance (fees, costs, and disbursements) shown on the statement. Interest will be calculated by multiplying the unpaid balance by the periodic rate of .833% per month (TEN PERCENT [10%] ANNUAL PERCENTAGE RATE). The unpaid balance will bear interest until paid.

[Interest may not be compounded without compliance with the California Civil Code, Appendix I, dealing with usury.]

5. REPLENISHING DEPOSIT

To commence the representation, Client has provided [must provide] Attorney with a $_____ deposit. Attorney will hold the deposit in Attorney's trust account and apply it to each statement when rendered by Attorney. Client will pay any additional balance due upon receipt of Attorney's statements each month and also will replenish the deposit each month in the amount of all payments made to Attorney from the deposit. At the conclusion of the matter, the deposit will be applied to the final statement, in which event Client will be responsible for any amount due over and above the deposit or be entitled to a refund of any amount remaining after the final statement is satisfied in full.

6. SECURITY DEPOSIT

Attorney's obligation to render services to Client will be subject to Attorney's receipt of a refundable security deposit of $_____.

Attorney will apply $_____ of that deposit to the first fees and costs billed to Client pursuant to this Agreement, and will retain the remainder of the deposit in Attorney's trust account as security for Client's obligations to make timely payment of fees and costs pursuant to this Agreement. Attorney will thereafter apply the remaining deposit against what appears to be

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the last billing for the services rendered to Client pursuant to this Agreement. Client agrees to provide an additional security deposit of $_____ at least 120 days prior to the first scheduled trial date of the matter.

7. ATTORNEYS' FEES CLAUSE

The prevailing party in any action or proceeding arising out of or to enforce any provision of this Agreement, with the exception of a fee arbitration or mediation under Business and Professions Code Sections 6200-6206, will be awarded reasonable attorneys' fees and costs incurred in that action or proceeding, or in the enforcement of any judgment or award rendered.

8. OTHER PAYOR CLAUSE – INSURANCE

Client has informed Attorney that Client may have insurance coverage which may pay for some or all of Attorney's fees which may become due under this Agreement. Attorney will make a claim with the insurer for compensation. It is understood, however, that if the insurance provider refuses or fails to pay Attorney for any reason, Client shall remain responsible for paying all Attorney's statements as they are rendered upon the billing and payment terms set forth in this Agreement. Should the insurance provider pay only a portion of the fees and costs, Client shall be responsible for the balance.

9. OTHER PAYOR CLAUSE – PERSONAL

Client has informed Attorney that Client has arranged for [employer/relative-name and relationship] to be responsible for some or all of Attorney's fees which may become due under this Agreement. It is understood that should [name] fail for any reason to pay Attorney's statements as they become due, Client shall remain responsible for paying all Attorney's statements as they are rendered upon the billing and payment terms set forth in this Agreement.

It is understood that the attorney/client relationship will only exist between Attorney and Client, and that [employer/relative name] will have no right to information regarding the representation of Client by Attorney, and have no right to control or direct the Attorney in providing the services under this Agreement, unless specifically approved by Client.

[Note: Provide signature line for employer/relative in Agreement.]

10. FIXED FEE CLAUSE

Client agrees to pay a fixed fee of $_____ for Attorney's services under this Agreement. The fixed fee is due by _____. Attorney shall have no obligation to provide services to Client until the fixed fee is paid in full. Unless Attorney withdraws before the completion of the services or otherwise fails to perform services contemplated under this Agreement, the fixed fee will be earned in full and no portion of it will be refunded once any material services have been performed.

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11. "OTHER ATTORNEY" CLAUSE – CONTINGENCY

It is agreed that Attorney will associate with another attorney, [name], who will assist Attorney regarding the representation. [Name] will be compensated out of the fees which Attorney otherwise will earn under this Agreement based upon the effort and time he/she puts into the case. Attorney will divide the total fees received from the representation with [name], and the terms of the division will be [specify the terms of fee division]. This division of fees will not increase the fee due from Client should Attorney obtain a recovery on behalf of Client.

12. "OTHER ATTORNEY" CLAUSE – HOURLY

It is agreed that Attorney will associate with another attorney, [name], who will assist Attorney regarding the representation. [Name] will be compensated by Attorney on an hourly basis at a rate of $_____ per hour. These charges will be billed by Attorney to Client as a cost as defined in this Agreement. [Option: or "billed directly to Client by the other attorney."].

[Note: not suitable for use in contingency fee cases.]

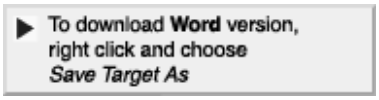
13. PROFESSIONAL LIABILITY INSURANCE DISCLOSURE

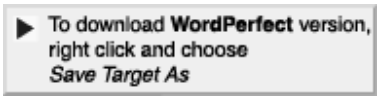
Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance.

Comment: These sample fee agreement forms are available from the California State Bar. Each set of forms contains an hourly fee agreement for litigation matters, an hourly fee agreement for nonlitigation matters, a sample agreement for contingency cases, and 11 additional sample clauses. A set may be downloaded from the California State Bar's website at http://calbar.ca.gov/calbar/pdfs/MFA/Sample-Fee-Agreement-Forms.pdf.

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§3.3 C. Letter Notifying Defense Counsel of Substitution of Counsel, and for Release of Information





SUBSTITUTION OF COUNSEL

TO: My former attorney, _ _[*name*]_ _

FROM: _ _[*Name of client*]_ _

This RELEASE relates solely to Court Docket No(s). _ _ _ _ _ _

My NEW ATTORNEY is: _ _[*name*]_ _

I authorize and instruct you to turn over to my NEW ATTORNEY, named above, all discovery and pleadings in the _ _[*case/cases*]_ _ identified above _ _[*including the police and other official reports, together with any transcripts, and other court documents therein*]_ _.

I also authorize and instruct you to permit my NEW ATTORNEY to inspect and copy all reports, transcripts or recordings of any witnesses interviewed by employees of _ _[*name of former attorney*]_ _ *in the* _ _[*case/cases*]_ _ identified above.

To the extent necessary to accomplish these instructions, I release you from the attorney/ client privilege.

I have read the above release and have signed my authorization below at the date and place indicated.

Date: _ _ _ _ _ _ __ _[*Signature of client*]_ __
Location: _ _ _ _ _ _ _ _[*Typed name*]_ _

Witnessed by: _ _[*Signature of witness*]_ _
_ _[*Typed name*]_ _

Comment: A criminal defendant has the right to discharge *retained* counsel and substitute a new attorney with or without cause, if the substitution is timely and it does not result in significant prejudice to the defendant. See *People v Ortiz* (1990) 51 C3d 975, 983, 275 CR 191. To discharge appointed counsel and substitute another appointed attorney, an indigent defendant must show either that counsel is providing inadequate representation or that there is an irreconcilable conflict between attorney and client. See *People v Marsden* (1970) 2 C3d 118, 84 CR 156.

Under Cal Rules of Prof Cond 3-700(D)(1) and Proposed Cal Rules of Prof Cond 1.16(e)(1), an attorney whose employment has terminated must release all client papers and property to the client, at the client's request.

Cross-Reference: See California Criminal Law Procedure and Practice §§3.24-3.29 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/3 Right to Counsel; The Attorney-Client Relationship/§3.4 D. Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210)

§3.4 D. Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210)



SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	FOR COURT USE ONLY
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
DEFENDANT'S FINANCIAL STATEMENT AND NOTICE TO DEFENDANT *(check all that apply)* ☐ ELIGIBILITY FOR APPOINTMENT OF COUNSEL ☐ REIMBURSEMENT FOR COST OF COURT-APPOINTED COUNSEL ☐ ELIGIBILITY FOR RECORD ON APPEAL AT PUBLIC EXPENSE	CASE NUMBER:

1. a. Defendant's name: _____ d. Date of birth: _____
   b. Other names used: _____ e. Telephone number: _____
   f. Driver's license number: _____
   c. Address: _____
2. Defendant's present employment:
   a. Occupation:
   b. Name of employer:
   c. Address:
   d. Gross pay per month: $ week: $ day: $
   e. Take-home pay per month: $ week: $ day: $
   f. Name of union: _____
   g. Name of credit union: _____
3. *If defendant is not now working, state the name and address of defendant's last employer and the last date defendant was employed.*
   a. Name: _____
   b. Address: _____
   c. Last date of employment: _____
4. Defendant ☐ is ☐ is not married.
5. a. Spouse's name: _____ d. Date of birth: _____
   b. Other names used: _____ e. Telephone number: _____
   f. Driver's license number: _____
   c. Address: _____
6. Spouse's present employment
   a. Occupation:
   b. Name of employer:
   c. Address:
   d. Gross pay per month: $ week: $ day: $
   e. Take-home pay per month: $ week: $ day: $
   f. Name of union: _____
   g. Name of credit union: _____
7. *If spouse is not now working, state the name and address of spouse's last employer and the last date spouse was employed.*
   a. Name: _____
   b. Address: _____
   c. Last date of employment: _____
8. Dependents

Name	Address	Relationship	Age

Form Approved for Optional Use
Judicial Council of California
MC-210 [Rev. January 1, 2009]

DEFENDANT'S FINANCIAL STATEMENT ON ELIGIBILITY FOR APPOINTMENT OF COUNSEL AND REIMBURSEMENT AND RECORD ON APPEAL AT PUBLIC EXPENSE

CEB
Pen. Code, § 987. 8
www.courtinfo.ca.gov

Print

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

9. OTHER MONTHLY INCOME

Defendant		Spouse	
a. Unemployment and disability	$	a. Unemployment and disability	$
b. Social Security	$	b. Social Security	$
c. Welfare, TANF	$	c. Welfare, TANF	$
d. Veteran's benefits	$	d. Veteran's benefits	$
e. Worker's compensation	$	e. Worker's compensation	$
f. Child support payments	$	f. Child support payments	$
g. Spousal support payments	$	g. Spousal support payments	$
h. All other income not elsewhere listed	$	h. All other income not elsewhere listed	$
Total:	$	**Total:**	$

10. EXPENSES

Monthly expenses being paid by defendant alone or by defendant and spouse

a. Rent or house payments	$	f. Clothing and laundry	$
b. Car payments	$	g. Food	$
c. Transportation payments	$	h. Support payments	$
d. Medical and dental payments	$	i. Insurance payments	$
e. Loan payments	$	j. Other payments (union, taxes, utilities)	$
		Total (a-j):	$

11. Installment payments other than those listed in item 10.

Name of Creditor		Monthly Payment		Balance Owed
a.	$		$	
b.	$		$	
c.	$		$	
d.	$		$	
e.	$		$	
Total:	$		**Total:** $	

ASSETS

12. What do you own? *(State value):*

a. Cash	$	
b. House equity	$	
c. Cars, other vehicles and boat equity *(List make, year, and license number of each)*	$	
d. Checking, savings, and credit union accounts *(List name and account number of each)*	$	
e. Other real estate equity	$	
f. Income tax refunds due	$	
g. Life insurance policies (ordinary life, face value)	$	Length of ownership _____
h. Other personal property (jewelry, furniture, furs, stocks and bonds, etc.)	$	
Total:	$	

13. **ELIGIBILITY FOR APPOINTMENT OF COUNSEL AND NOTICE TO DEFENDANT:** If an attorney is appointed to represent you, the court will, at the conclusion of the criminal proceedings, after a hearing, make a determination of your ability to pay all or a portion of the cost of the attorney. If the court determines that you are at that time able to pay, the court will order you to pay all or part of such cost. Such an order will have the same force and effect as a judgment in a civil action and will be subject to execution.

Declaration of Defendant

I declare under penalty of perjury that the foregoing is true and correct, and that I understand the notice contained in item 13, under the laws of the state of California.

Date:

_____
(Signature of Defendant)

Comment: An indigent defendant charged with an offense that can result in a loss of liberty is entitled to appointment of counsel. *Tracy v Municipal Court* (1978) 22 C3d 760, 766, 150 CR 785; *Mills v Municipal Court* (1973) 10 C3d 288, 301, 110 CR 329.

A defendant requesting appointed counsel must disclose his or her assets and liabilities under penalty of perjury. Although use of this form is not mandatory, a defendant requesting appointment of counsel should provide all the information requested by the form.

Cross-Reference: For further discussion of the right of indigent defendants to appointment of counsel, see California Criminal Law Procedure and Practice §§3.3-3.6 (Cal CEB Annual).

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§3.5 E. Motion to Remove Defense Counsel

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO _ _[*NAME*]_ _, DEFENDANT IN THE ABOVE-ENTITLED ACTION; BY AND THROUGH _ _[*HIS/HER*]_ _ ATTORNEY, _ _[*NAME*]_ _:

PLEASE TAKE NOTICE that, on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _ of the above-entitled Court, or as soon thereafter as the matter can be heard, the People of the State of California will move the Court to remove attorney, _ _[*name*]_ _, as attorney for defendant, _ _[*name*]_ _, due to a conflict of interest.

This motion will be based on the attached declaration, supporting memorandum, and oral argument presented at the time of the motion.

Date:_ _ _ _ _ _

Respectfully submitted,
_ _[*Name of District Attorney*]_ _
District Attorney
__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

[*Integrate facts of case that support removing defense counsel with law, as in the following example based on defense counsel having represented the codefendant at the preliminary hearing.*]

I.

Once defense attorney, _ _[*name*]_ _, decided to represent defendant, _ _[*name*]_ _, after previously representing codefendant, _ _[*name*]_ _, _ _[*he/she*]_ _ placed himself in a position of obvious conflict with, and undue advantage over, codefendant due to their previous confidential attorney-client relationship and information obtained therein, possibly detrimental to codefendant, which counsel might use to argue against the interest of _ _[*his/her*]_ _ former client at trial, plea negotiations, or sentencing. (*Leversen v Superior Court* (1983) 34 C3d 530, 194 CR 448; *Dill v Superior Court* (1984) 158 CA3d 301, 205 CR 671.) In *Dill*, a civil litigant sought an order disqualifying the law firm representing his adversary, Cook, on the basis that Dill's former attorney had joined the law firm representing Cook. The trial court denied the motion, but the Court of Appeal reversed and compelled the disqualification. The Court of Appeal ruled that, when an attorney had "former personal involvement" in the "identical action," such attorney was disqualified from representing any interest adverse to his former client, pursuant to (former) Rule 4-101 of the Rules of Professional Conduct. (*Dill v Superior Court, supra,* 158 CA3d at 306.) The Court also ruled that proof of the attorney's reception of confidential information was not required "when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney…." (*Dill v Superior Court, supra*, 158 CA3d at 304, quoting *Global Van Lines, Inc. v Superior Court* (1983) 144 CA3d 483, 489, 192 CR 609.)

II.

Therefore, counsel in defense attorney's position has an ethical and legal obligation to withdraw from this case. If he fails to do so, he may be removed from the case even at the expense of depriving defendant of his choice of counsel in order to assure codefendant a fair trial. (*Leversen v Superior Court, supra*; *Dill v Superior Court, supra*; *Yorn v Superior Court* (1979) 90 CA3d 669, 153 CR 295.) In *Yorn*, a codefendant in a criminal case filed a pretrial motion to disqualify the other codefendant's privately retained counsel on grounds of a prior attorney-client relationship between the attorney and Mr. Yorn and for conflict of interest. The attorney had represented Mr. Yorn earlier in the case, and confidential information had been communicated. Mr. Yorn's

motion was granted and the court's decision was affirmed on appeal.

CONCLUSION

For the foregoing reasons, the People respectfully request the above Court to remove _ _[*name*]_ _ as attorney for defendant, based on the ground of conflict of interest, and appoint substitute counsel pursuant to Penal Code section 987.2, or allow defendant a reasonable time to obtain new retained counsel if he is otherwise able to so do.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF _ _[*NAME*]_ _

I, _ _[*name*]_ _, declare:

1. That I am a Deputy District Attorney licensed to practice law in the State of California.

2. That I represent the People of the State of California, Plaintiff, in the above-entitled action.

3. _ _[*State facts that support removing defense counsel, e.g., that defense counsel represented the codefendant at the preliminary hearing in the same matter.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: The court may remove an appointed attorney because of a conflict even if the defendant consents to the conflict. See *People v Noriega* (2010) 48 C4th 517, 520, 108 CR3d 74; *People v Jones* (2004) 33 C4th 234, 240, 14 CR3d 579. Another possible ground for removal of counsel would be counsel's inability to proceed in a timely fashion. *People v Avila* (2009) 46 C4th 680, 690, 94 CR3d 699; *People v McKenzie* (1983) 34 C3d 616, 630, 194 CR 462.

Cross-Reference: See Crim Law §3.28. See also Crim Law §§2.8-2.15.

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Source: Criminal Law/California Criminal Law Forms Manual/3 Right to Counsel; The Attorney-Client Relationship/§3.6 F. Defense Motion to Be Relieved as Counsel

§3.6 F. Defense Motion to Be Relieved as Counsel

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To download **WordPerfect** version, right click and choose *Save Target As*

[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111.*]

TO THE ABOVE-ENTITLED COURT AND TO _ _[*NAME OF DEFENDANT*]_ _:

PLEASE TAKE NOTICE that _ _[*name of withdrawing attorney*]_ _ moves the Court under Code of Civil Procedure section 284(2) for an order permitting _ _[*him/her*]_ _ to be relieved as attorney for defendant, _ _[*name*]_ _, in this action. The grounds for issuance of this order are _ _[*specify grounds*]_ _.

The Court is located at _ _[*address*]_ _.

This motion is based on the attached documents and exhibits including _ _[*specify by title (or nature) and date, e.g., the declaration of _ _[name]_ _ **on _ _[date]_ _]_ _, _ _[and]_ _ on all papers filed in this action _ _[and on any evidence received at the hearing*]_ _.**

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

MEMORANDUM IN SUPPORT OF MOTION TO BE RELIEVED AS DEFENSE COUNSEL

[*Use if you are retained and the defendant has not paid your fee.*]

Defense attorneys may be relieved from representing a criminal defendant when the defendant has failed to pay the agreed-on fee. (*People v Castillo* (1991) 233 CA3d 36, 55, 284 CR 382.) _ _[*Add facts from your case concerning nonpayment of fee and further case law.*]_ _

[*Use if there is a conflict.*]

There is a conflict in the present case. See the attached declaration of defense counsel. Because it is essential that the attorney-client privilege be protected, defense counsel's good faith assertion of a conflict of interest _ _[*with a third person*]_ _ is sufficient basis for a motion to be relieved, without requiring details. (*Leversen v Superior Court* (1983) 34 C3d 530, 194 CR 448; *Aceves v Superior Court* (1996) 51 CA4th 584, 592, 59 CR2d 280; *Uhl v Municipal Court* (1974) 37 CA3d 526, 112 CR 478.) _ _[*Add additional information and case law if desired.*]_ _

[*Use if you are the public defender and are requesting to be relieved because of financial ineligibility.*]

The Public Defender of _ _ _ _ _ _ County is authorized to represent individuals who are _ _[*use language of authorization, e.g., "not financially able to employ counsel" under section 27 of the Alameda County Charter*]_ _.

Defendant, _ _[*name*]_ _, was in custody when the Public Defender began representing _ _[*him/her*]_ _, but is now out of custody and is financially able to employ counsel because _ _[*state why, e.g., he or she has full-time employment, an automobile, and a savings account*]_ _.

[*Use if defendant wants to represent himself or herself.*]

**A criminal defendant has the right to waive counsel and represent himself or herself. (*Faretta v California* (1975) 422 US 806, 835, 45 L Ed 2d 562, 581, 95 S Ct 2525; *Martinez v Court of Appeal of California* (2000) 528 US 152, 154, 145 L Ed 2d 597, 602, 120 S Ct 684; *People v Taylor* (2009) 47 C4th 850, 878, 102 CR3d 852 (right to self-representation does not extend to direct appeal of criminal conviction.) _ _[*Add relevant facts and*

additional case law.]_ _

[*Use if you want to join in a defendant's Marsden motion.*]

When a defendant's right to counsel would be substantially impaired by continuing with the present attorney, the trial court may discharge the attorney and substitute new counsel. (*People v Marsden* (1970) 2 C3d 118, 123, 84 CR 156.) The substantial impairment in this case is _ _[*specify*]_ _. _ _[*Add relevant facts and additional case law.*]_ _

[*Continue*]

Therefore, _ _[*the Office of the Public Defender/defense counsel*]_ _ must move to be relieved as attorney of record.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF _ _[*NAME OF ATTORNEY*]_ _ SUPPORTING _ _[*HIS/HER*]_ _ MOTION TO BE RELIEVED AS ATTORNEY FOR DEFENDANT, _ _[*NAME*]_ _

I, _ _[*name*]_ _, declare:

1. I am the attorney for _ _[*name of defendant*]_ _ in this action.

2. _ _[*State reason for request to be relieved; see Comment, below.*]_ _

3. _ _[*State reason for making motion to be relieved instead of filing a substitution of attorneys; see Comment, below.*]_ _

4. No injury to defendant will result from my being relieved as counsel because _ _[*give reason*]_ _.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept. _ _[*number*]_ _**
Plaintiff,	**No. _ _[*case number*]_ _**
vs.	**[PROPOSED] ORDER GRANTING ATTORNEY'S MOTION TO BE RELIEVED AS COUNSEL FOR DEFENDANT, _ _[*NAME*]_ _**
_ _[*Name(s)*]_ _,	
Defendant(s)	
_____/	

The motion of _ _[*name of outgoing attorney*]_ _, attorney for defendant, _ _[*name*]_ _, to be relieved was regularly heard at the above date and time. Appearing as attorneys were: _ _[*List names of defense attorney, prosecutor, and any co-counsel*]_ _.

IT IS ORDERED that:

1. _ _[*Name of outgoing attorney*]_ _ be relieved as attorney for defendant.

2. _ _[*State any additional orders, e.g., allowing defendant to proceed in pro per, or appointing new defense counsel*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: An attorney seeking to withdraw as counsel for a defendant may not do so without permission of the court. Defense counsel seeking to withdraw from a case must take reasonable steps to avoid prejudicing the defendant's rights, including giving notice to the client, allowing time for the employment of other counsel, and delivering papers and property to the client or the new attorney. Cal Rules of Prof Cond 3-700(A)(2), (D). See Proposed Cal Rules of Prof Cond 1.16(d), (e)(1).

A motion to be relieved as counsel must be served on the defendant (see CCP §284(2)), the prosecutor, and co-counsel. Withdrawal is effective only when written notice is given to the "adverse party." CCP §285; *People v Bouchard* (1957) 49 C2d 438, 441, 317 P2d 971.

This motion includes a proposed order. If the court grants the motion, written copies of the court's order must be served on the former client and other parties in the action. CCP §§284-285; Cal Rules of Ct 3.1362(d)-(e).

If the reason for the request to be relieved is a conflict of interest, and the nature of the conflict is not apparent from the circumstances, counsel should consider including some general information about the nature of the conflict in the declaration accompanying the motion. See *Manfredi & Levine v Superior Court* (1998) 66 CA4th 1128, 78 CR2d 494 (trial court's denial of counsel's motion to be relieved not abuse of discretion when counsel refused to answer any questions about nature of conflict and trial court had reason to doubt counsel's good faith). If the trial court wants further information about the nature of the conflict, counsel should request a hearing in chambers. See 66 CA4th at 1136. Counsel should exercise care to avoid disclosing any privileged information.

Judicial Council forms. When this motion is brought by retained counsel, the procedures for discharge, withdrawal, and substitution of counsel are the same in criminal proceedings as in civil proceedings. *People v Bouchard, supra.* See CCP §§284-285 (civil and criminal); Cal Rules of Ct 3.1362 (civil). In civil cases, the use of forms Notice of Motion and Motion to Be Relieved as Counsel—Civil (Judicial Council Form MC-051) and Declaration in Support of Attorney's Motion to Be Relieved as Counsel—Civil (Judicial Council Form MC-052) is mandatory. Cal Rules of Ct 3.1362(a), (c). A supporting memorandum is not required. Cal Rules of Ct 3.1362(b). An attorney unfamiliar with the practices in the court in which the motion to be relieved is filed should check the local rules and check with the court clerk about whether the court expects counsel to use the Judicial Council forms in criminal matters.

The declaration must state in general terms, without compromising the confidentiality of the attorney-client relationship, why the declarant is making a motion to be relieved instead of filing a substitution of attorneys. See Cal Rules of Ct 3.1362(c). If the notice of motion will be served on the client by mail, the declaration must include additional statements concerning the client's current or last known address. See Cal Rules of Ct 3.1362(d).

Effect on speedy trial rights. The prosecution must consider the effect of defense counsel's withdrawal on the defendant's and the prosecution's speedy trial rights and may want to oppose the motion if the trial date has already been set, particularly if no conflict is involved. See *People v Murphy* (1973) 35 CA3d 905, 921, 111 CR 295. The prosecution will probably want to have defense counsel or the court obtain a time waiver from the defendant.

Cross-Reference: See Crim Law §§3.24 (retained counsel), 3.25-3.28 (appointed counsel; Marsden motions), 3.7-3.11 (defendant's right to self-representation).

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4

Arrest and Bench Warrants; Summons; Subpoenas

A. Order to Attend Court or Provide Documents: Subpoena/Subpoena Duces Tecum (Criminal and Juvenile) (Judicial Council Form CR-125/JV-525) §4.1
B. Motion to Quash Subpoena (Duces Tecum) §4.2

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Source: Criminal Law/California Criminal Law Forms Manual/4 Arrest and Bench Warrants; Summons; Subpoenas/§4.1 A. Order to Attend Court or Provide Documents: Subpoena/Subpoena Duces Tecum (Criminal and Juvenile) (Judicial Council Form CR-125/JV-525)

§4.1 A. Order to Attend Court or Provide Documents: Subpoena/Subpoena Duces Tecum (Criminal and Juvenile) (Judicial Council Form CR-125/JV-525)



ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
TELEPHONE NO.: FAX NO. (Optional):	
E-MAIL ADDRESS (Optional):	
ATTORNEY FOR (Name):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
STREET ADDRESS:	
MAILING ADDRESS:	
CITY AND ZIP CODE:	
BRANCH NAME:	
CASE NAME:	
ORDER TO ATTEND COURT OR PROVIDE DOCUMENTS: **Subpoena/Subpoena Duces Tecum**	CASE NUMBER:

You must attend court or provide to the court the documents listed below. Follow the orders checked in item 2 below. If you do not, the judge can fine you, send you to jail, or issue a warrant for your arrest.

1. To: (*name or business*) _____

2. You must follow the court order(s) checked below.
   - a. ☐ Attend the hearing.
   - b. ☐ Attend the hearing *and* bring all items checked in c. below.
   - c. ☐ Provide a copy of these items to the court (Do not use this form to obtain Juvenile Court records):
     (1) _____
     (2) _____
     (3) _____
     ☐ *If this box is checked, provide all items listed on the attached sheet labeled "Provide These Items."*
   - d. ☐ If someone else is responsible for maintaining the items checked in c. above, that person (the Custodian of Records) must also attend the hearing.
   - e. ☐ If this box is checked and you deliver all items listed above to the court **within 5 days of service of this order**, you do not have to attend court if you follow the instructions in item 5.

3. **Court Hearing Date:**
   Date: _____ Time: _____
   Dept.: _____ Rm.: _____
   The court hearing will be at *(name and address of court)*:
   _____
   _____
   Call the person listed in item 4 below to make sure the hearing date has not changed. If you cannot go to court on this date, you must get permission from the person in item 4. You may be entitled to witness fees, mileage, or both, in the discretion of the court. Ask the person in item 4 after your appearance.

4. The person who has required you to attend court or provide documents is:
   Name: _____ Phone No.: _____
   Address: _____
   Number, Street, Apt. No.
   _____
   City State Zip

   FOR COURT USE ONLY

   Date: _____ Signature ▶ _____
   Name and Title

Print

CR-125/JV-525

CASE NAME:	CASE NUMBER:

5 a. Put all items checked in item 2c and your completed *Declaration of Custodian of Records* form in an envelope. (You can ask the person in item 4 where to get this form.) Attach a copy of page 1 of this order to the envelope.

b. Put the envelope inside another envelope. Then, attach a copy of page 1 of this form to the outer envelope or write this information on the outer envelope:

(1) Case name
(2) Case number
(3) Your name
(4) Hearing date, time, and department

c. Seal and mail the envelope to the Court Clerk at the address listed in ☐ item 3 or ☐ The court address in the caption on page 1 . You must mail these documents to the court within five days of service of this order.

d. If you are the Custodian of Records, you must also mail the person in item 4 a copy of your completed *Declaration of Custodian of Records. Do not include a copy of the documents.*

The server fills out the section below.

Proof of Service of CR-125/JV-525

1. I personally served a copy of this subpoena on:
   Date: _____ Time: _____ ☐ a.m. ☐ p.m.
   Name of the person served: _____
   At this address: _____
   After I served this person, I mailed or delivered a copy of this Proof of Service to the person in item 4 on *(date):* _____
   Mailed from *(city):* _____
2. I received this order for service on *(date):* _____ and was not able to serve *(name of person)* _____ after *(number of attempts)* _____ attempts because:
   a. ☐ The person is not known at this address.
   b. ☐ The person moved and the forwarding address is not known.
   c. ☐ There is no such address.
   d. ☐ The address is in a different county.
   e. ☐ I was not able to serve by the hearing date.
   f. ☐ Other *(explain):* _____
3. Server's name: _____ Phone no. _____
4. The server *(check one)*
   a. ☐ is a registered process server.
   b. ☐ is not a registered process server.
   c. ☐ is a sheriff, marshal, or constable.
   d. ☐ works for a registered process server.
   e. ☐ is exempt from registration under Business and Professional Code section 22350(b).
5. Server's address: _____
   If server is a registered process server:
   County of registration: _____ Registration no.: _____

I declare under penalty of perjury under the laws of the State of California that I am at least 18 years old and not involved in this case and the information above is true and correct.

Date: _____

▶ _____ ▶ _____

TYPE OR PRINT NAME OF SERVER *SIGNATURE OF SERVER*

Comment: Use of this Judicial Council form is mandatory. Cal Rules of Ct 1.31. It may be used as either a

subpoena for a witness or as a subpoena duces tecum for production of documents. When used as a subpoena duces tecum, check the appropriate box under item 2, list the items requested, and if necessary, attach an affidavit describing the records to be produced.

Personal service of a subpoena is not required. The subpoena may also be sent by mail or messenger, but in this case, service is not complete until the witness acknowledges receipt. See Pen C §1328d. A subpoena should be served in time to permit the witness a reasonable time for preparation and travel. CCP §1987(a).

A subpoena may not be filed unless it is relevant to a legal or factual issue in the case, or the judge orders it filed for good cause. Cal Rules of Ct 3.250(a). Counsel should keep copies of the subpoena and the return of service as part of the record in the case.

Cross-Reference: On subpoenas in criminal cases, see Pen C §§1326-1332. For discussion of subpoenas, see California Criminal Law Procedure and Practice §§4.29-4.36 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/4 Arrest and Bench Warrants; Summons; Subpoenas/§4.2 B. Motion to Quash Subpoena (Duces Tecum)

§4.2 B. Motion to Quash Subpoena (Duces Tecum)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. For discussion, see §§1.4-1.10. See sample first page in §1.12.*]

TO THE ABOVE-ENTITLED COURT, AND TO _ _[*THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA/THE DEFENDANT, AND DEFENSE COUNSEL*]**_ _:**

PLEASE TAKE NOTICE that on _ _[*date*]**_ _, in Department _ _**[*number*]**_ _ at _ _**[*time*]**_ _, or as soon thereafter as the matter may be heard, _ _**[*name of party who is being subpoenaed, or whose records are being subpoenaed*]**_ _ will move the Court for an order**

(a) Quashing the subpoena _ _[*duces tecum*]**_ _ served on _ _**[*name*]**_ _ on _ _**[*give date of service*]**_ _; and**

(b) Awarding reasonable attorney fees and expenses incurred in making this motion.

The motion to quash is made under Code of Civil Procedure section 1987.1 on the ground that the subpoena _ _[*duces tecum*]**_ _ is invalid and defective in that _ _**[*state basis for motion to quash, e.g., service not timely, insufficient description, privilege, discovery should be pursued under Pen C §§1054-1054.7*]**_ _.**

The motion for reasonable attorney fees and expenses is made under Code of Civil Procedure section 1987.2(a) on the ground that the motion to quash was opposed in bad faith or without substantial justification or that one or more of the subpoena's requirements was oppressive.

This motion will be based on the attached supporting memorandum, all papers filed and records in this action, _ _[*the attached declaration(s),*]**_ _ _ _**[*the attached exhibit(s),*]**_ _ evidence taken at the hearing on this motion, and argument at that hearing.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]**_ _**

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

THIS COURT HAS AUTHORITY TO QUASH THIS SUBPOENA DUCES TECUM

The trial court may make an order quashing a subpoena duces tecum on a showing of good cause for nonproduction. (Code of Civil Procedure section 1987.1.) _ _[*Make such arguments as apply to your case, e.g., subpoena not served within required timeframe, materials to be brought not specified, privilege. Give each argument its own heading.*]**_ _**

THIS COURT HAS AUTHORITY TO AWARD REASONABLE ATTORNEY FEES AND EXPENSES

The trial court in its discretion may award the amount of reasonable expenses, including attorney fees, incurred in making or opposing the motion to quash if the motion was made or opposed in bad faith or without substantial justification or one or more of the subpoena's requirements was oppressive. (Code of Civil

Procedure section 1987.2(a).) _ _[*Make applicable arguments.*]_ _

CONCLUSION

For these reasons, the Court should quash the subpoena duces tecum issued on _ _[*date*]_ _ **to** _ _[*name*]_ _ **by the** _ _[*prosecution/defense*]_ _**.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF _ _[*NAME*]_ _ **IN SUPPORT OF MOTION TO QUASH**

I, _ _[*name*]_ _**, declare:**

1. I am _ _[*e.g., the attorney for the defendant*]_ _ **in this action.**

2. On _ _[*date*]_ _**,** _ _[*name*]_ _ **caused a subpoena** _ _[*duces tecum*]_ _ **to be served on** _ _[*name of witness served*]_ _**, requiring** _ _[*him/her*]_ _ **to appear at the trial of this matter in Department** _ _[*number*]_ _ **located at** _ _[*address*]_ _**, at** _ _[*time*]_ _**, on** _ _[*date*]_ _**, and to produce the documents and things described therein. A copy of the subpoena** _ _[*duces tecum*]_ _ **is attached to this declaration as Exhibit** _ _[*number or letter; see §1.25*]_ _**, and incorporated herein by reference.**

3. _ _[*Give facts showing grounds for motion to quash, e.g., service not timely, insufficient description, privilege, discovery should be sought instead under Pen C §§1054-1054.7*]_ _**.**

4. _ _[*If attorney fees are being claimed, give facts showing that opposition to motion will be in bad faith or without substantial justification, or that one or more of the subpoena's requirements was oppressive*]_ _**.**

5. For these reasons, I ask that the Court issue its order quashing the subpoena _ _[*duces tecum*]_ _ _ _[*and awarding reasonable attorney fees incurred in making this motion*]_ _**.**

6. I have incurred the following expenses in making this motion: _ _[*List expenses*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: A motion to quash a subpoena is usually made by the witness on whom the subpoena was served or, in the case of a subpoena duces tecum, by the subject of the records sought.

Cross-Reference: For discussion of moving to quash a subpoena, see Crim Law §§4.33-4.36.

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5

Release Procedures

A. Motion to Increase Bail §5.1
B. Motion to Reduce Bail §5.2
C. Motion to Examine Source of Bail §5.3

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Source: Criminal Law/California Criminal Law Forms Manual/5 Release Procedures/§5.1 A. Motion to Increase Bail

§5.1 A. Motion to Increase Bail

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that, on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _ of the above-entitled court, or as soon thereafter as the matter may be heard, the People will move the Court for an order increasing the bail from the present amount of _ _[*dollar amount*]_ _ to the increased amount of _ _[*dollar amount*]_ _.

This motion will be based on the attached supporting memorandum and declaration, _ _[*list any other attached documents, e.g., a police report or pages from the preliminary hearing transcript,*]_ _ all court documents in this case, and evidence and argument presented at the hearing on this motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

Public safety is the primary factor for the court to consider in setting bail. (Cal Const art I, §12; Pen C §1275; *Gray v Superior Court* (2005) 125 CA4th 629, 642, 23 CR3d 50.) Other factors to consider include the following (Cal Const art I, §12; Pen C §1275):

1. The protection of the public;

2. The seriousness of the offense charged;

3. The previous criminal record of the defendant; and

4. The probability of defendant appearing.

These factors are not exclusive. *In re Alberto* (2002) 102 CA4th 421, 430, 125 CR2d 526.

_ _[*Integrate facts of case and your bail request into above and other relevant law.*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _

Deputy District Attorney

[*Each declaration should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION IN SUPPORT OF MOTION TO INCREASE BAIL IN CASE NO. _ _ _ _ _ _

1. I, _ _[*name*]_ _, am a deputy district attorney for the County of _ _ _ _ _ _ and am presently assigned to the case of People v _ _[*name of defendant*]_ _, Case No. _ _ _ _ _ _.

2. I declare on information and belief that the following facts are true. Each statement of fact is based on _ _[*state what, e.g., the preliminary hearing transcript, the pleadings, interviews with the investigating officer, interviews with civilian witnesses in the case and the police reports in this case*]_ _**.**

3. _ _[*Set forth in this and subsequent numbered paragraphs the facts relevant to the motion*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: Each county is required to have a bail schedule listing bailable felony offenses and the amount of bail the judges have determined to be applicable to each listed offense. Pen C §1269b. The trial court has discretion to set a different bail, but a departure from the bail schedule must be supported by a finding of "unusual circumstances" and the judge must identify those circumstances on the record. *In re Alberto* (2002) 102 CA4th 421, 425 n3, 125 CR2d 526; *In re Christie* (2001) 92 CA4th 1105, 112 CR2d 495.

In a typical felony case, bail is set or denied at the arraignment. This motion is ordinarily filed after bail has been set. Because it requests the court to redecide an issue it has already decided, it should be supported by new facts or evidence that was unavailable at the arraignment. *Alberto,* 102 CA4th at 430.

Cross-Reference: See Crim Law §§5.20-5.23.

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§5.2 B. Motion to Reduce Bail

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that, on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _ of the above-entitled court, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move the Court for an order reducing the bail from the present amount of _ _[*dollar amount*]_ _ to the reduced amount of _ _[*dollar amount*]_ _.

This motion will be based on the attached supporting memorandum _ _[*and declaration(s)*]_ _, the attached declaration of the defendant, all court documents in this case, and evidence and argument presented at the hearing on this motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Signature of attorney*]_ _
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

California Constitution article I, section 12 enumerates the standards governing the setting of bail. When bail is available, article I, section 12 provides that, in fixing the amount of bail, the court may not require bail that is "excessive." The primary consideration in setting bail is public safety. (Pen. Code §1275, subd. (a).) In addition, the court must take into consideration the seriousness of the offense charged, the defendant's previous criminal record, and the probability of the defendant's appearing at the trial or hearing of the case. (Pen. Code §1275, subd. (a).)

[*Add if applicable*]

Although the defendant's bail is now set at the amount listed in the bail schedule maintained pursuant to Penal Code section 1275, subdivision (c), the trial court has discretion to reduce the defendant's bail under unusual circumstances. (Pen. Code §1275, subd. (c); *In re Alberto* (2002) 102 CA4th 421, 430, 125 CR2d 526.) Such circumstances exist in this case. _ _[*Explain the unusual circumstances that authorize the court to reduce defendant's bail below the amount listed in the bail schedule.*]_ _

[*Continue*]

_ _[*Specify why the current bail is excessive and why the requested reduced amount is appropriate under the considerations mandated by the applicable law cited above, with reference to supporting declaration(s) (e.g., by attorney and defendant) if applicable.*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION IN SUPPORT OF MOTION TO REDUCE BAIL IN CASE NO. _ _ _ _ _ _

1. I, _ _[*name*]_ _, am the defendant in the case of People v _ _[*name of defendant*]_ _, Case No. _ _ _ _ _ _.

2. I declare that the following facts are true.

3. _ _[*Set forth in this and subsequent numbered paragraphs the facts relevant to the motion, e.g., length of residence in community, stable family situation, steady employment, lack of prior record*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature*]__
_ _[*Typed name*]_ _
Defendant

Comment: It is essential to present facts that were unavailable when bail was originally set. *In re Alberto* (2002) 102 CA4th 421, 430, 125 CR2d 526.

Cross-Reference: On the factors relevant to the amount of bail, see Crim Law §§5.21-5.23.

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Source: Criminal Law/California Criminal Law Forms Manual/5 Release Procedures/§5.3 C. Motion to Examine Source of Bail

§5.3 C. Motion to Examine Source of Bail

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

The People allege and assert that all or some portion of any consideration, pledge, security, deposit, or indemnification that has been or will be paid, given, made, or promised to obtain bail for the above-named defendant and prisoner has been feloniously obtained and therefore, pursuant to Penal Code section 1275.1, cannot be used for the purpose of bail.

This motion is based on the accompanying declaration(s) of probable cause, all court documents in this case, any testimony taken pursuant hereto, and any other document(s) attached to this motion.

WHEREFORE, the People request an order prohibiting the acceptance of any bail proffered on behalf of this defendant and prisoner and prohibiting _ _[*his/her*]_ _ release on bail unless and until a full hearing is conducted pursuant to Penal Code section 1275.1 and at such hearing the defendant establishes by a preponderance of the evidence that no part of the moneys and goods proffered to obtain bail was feloniously obtained.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

Penal Code section 1275.1, in relevant part, reads as follows:

> **Bail… shall not be accepted unless a judge or magistrate finds that no portion of the consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained.**

***U.S. v Nebbia* (2d Cir 1966) 357 F2d 303, 324, holds:**

> **[T]he mere deposit of cash bail is not sufficient to deprive the court of the right to inquire into other factors which might bear on the question of the adequacy of the bail.**

***U.S. v Melville* (SD NY 1970) 309 F Supp 824, 826, holds:**

> **[T]he function of bail is not to purchase freedom for the defendant but to provide assurance of his reappearance after release on bail; a guarantee of the obligation of the defendant to appear.... For this purpose it becomes appropriate to identify the sources of bail and ascertain their purpose and satisfy the Court that there is a moral assurance for reappearance to be gained by acceptance of the funds emanating from such sources.**

See also *U.S. v Ellis Demarchena* (SD Cal 1971) 330 F Supp 1223, 1271, and *U.S. v Perrone* (SD Fla 1976) 413

F Supp 861, both of which hold that it is the right and duty of a court to inquire into sources of bail and premiums and collateral for bail to see that the money is coming from a legitimate source and will actually serve to ensure the defendant's reappearance, not merely to purchase his or her freedom.

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF PROBABLE CAUSE IN SUPPORT OF MOTION TO EXAMINE SOURCE OF BAIL IN CASE NO. _ _ _ _ _

I, _ _[*name*]_ _, declare as follows:

1. That I am a _ _[*police officer/deputy district attorney*]_ _.

2. That I am assigned to this matter.

3. That _ _[*state facts justifying belief that all or some portion of any money or consideration proffered for bail has been feloniously obtained*]_ _.

WHEREFORE, it is my belief that all or some portion of any consideration, pledge, security, deposit, or indemnification that has been or will be paid, given, made, or promised to obtain bail for this prisoner has been feloniously obtained and, pursuant to Penal Code section 1275.1, cannot be accepted for bail purposes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Job title of declarant*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff,	**No.** _ _[*case number*]_ _
vs.	**[PROPOSED] ORDER PROHIBITING ACCEPTANCE OF PROFFERED BAIL**
_ _[*Name(s)*]_ _,	
Defendant(s)	
_____/	

TO _ _[*NAME OF LAW ENFORCEMENT OFFICER*]_ _, OR ANY OTHER LAW ENFORCEMENT AGENCY HAVING CUSTODY OF DEFENDANT-PRISONER, _ _[*NAME*]__, BOOKING # _ _[*NUMBER*]_ _:

GOOD CAUSE HAVING BEEN SHOWN, IT IS ORDERED that, in the event bail is proffered for the above-described defendant-prisoner, such bail shall not be accepted for this defendant-prisoner nor shall this defendant-prisoner be released from custody unless and until this Court or any other competent court has conducted a hearing pursuant to Penal Code section 1275.1 and has issued an order requiring the acceptance of bail and the release of the defendant-prisoner.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: The trial court cannot accept a bail bond if any portion of it was feloniously obtained. Pen C §1275.1. See, *e.g., People v Pollard* (2001) 90 CA4th 483, 109 CR2d 207. If there is reason to believe that the funds the defendant will use to post bail come from an illicit source, the prosecutor may move to examine the source of bail. This motion could be combined with a motion to increase bail.

Cross-Reference: See Crim Law §5.24.

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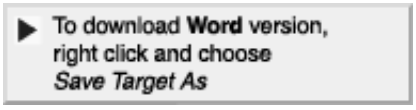
Arraignment

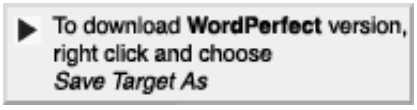
A. Waiver of Defendant's Personal Appearance (Felonies) §6.1
B. Waiver of Personal Appearance (Sentencing) §6.2
C. Guilty Verdict in Absentia §6.3

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Source: Criminal Law/California Criminal Law Forms Manual/6 Arraignment/§6.1 A. Waiver of Defendant's Personal Appearance (Felonies)

§6.1 A. Waiver of Defendant's Personal Appearance (Felonies)





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT:

The defendant, _ _[*name*]_ _, having been advised of _ _[*his/her*]_ _ right to be present at all stages of the proceedings, including, but not limited to, presentation of and arguments on questions of fact and law, and to be confronted by and to cross-examine all witnesses, hereby waives the right to be present at the hearing of any motion or other proceeding in this cause. Examples of hearings concerning which the defendant waives the right to be present include when the case is set for trial, when a continuance is ordered, when a motion to set aside the indictment or information pursuant to the provisions of Penal Code section 995 and following is heard, when a motion for reduction of bail or for a personal recognizance release is heard, and when a motion to reduce sentence is heard.

The undersigned defendant hereby requests the Court to proceed during every absence of the defendant that the Court may permit pursuant to this waiver, and hereby agrees that _ _[*his/her*]_ _ interest is represented at all times by the presence of _ _[*his/her*]_ _ attorney the same as if the defendant were personally present in court, and further agrees that notice to defendant's attorney that defendant's presence in court on a particular day at a particular time is required is notice to the defendant of the requirement of defendant's appearance at that time and place.

Date: _ _ _ _ _ _ __[*Signature of defendant*]__
_ _[*Typed name*]_ _
_ _[*Address*]_ _

Approved:

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _

Comment: This form contains the recommended language of Pen C §977(b), with the addition of examples of specific hearings covered by the 977(b) waiver. The court must give the defendant permission to take advantage of Pen C §977. The form must be signed by the defendant in open court and approved by defense counsel, and it must be filed with the court. Pen C §977(b).

Misdemeanor defendants ordinarily may appear through counsel and do not need to sign a waiver.

Cross-Reference: For further discussion of §977(b) waivers, see California Criminal Law Procedure and Practice §§5.35, 6.5, 35.12-35.14 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/6 Arraignment/§6.2 B. Waiver of Personal Appearance (Sentencing)

§6.2 B. Waiver of Personal Appearance (Sentencing)

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DEFENDANT'S WAIVER OF _ _[*HIS/HER*]_ _ PERSONAL PRESENCE IN COURT

The undersigned defendant, knowing that it is _ _[*his/her*]_ _ right to be personally present at every stage of the proceedings against _ _[*him/her*]_ _, hereby gives up the right to be personally present in court or chambers at the hearing on sentencing in _ _[*his/her*]_ _ case, or when a motion to reduce sentence may be heard, or when questions of law are presented to be argued or considered by the court. The undersigned defendant requests the court to proceed in _ _[*his/her*]_ _ absence as the court may decide pursuant to this waiver, and defendant agrees that _ _[*his/her*]_ _ interests will be represented at all times by the presence of _ _[*his/her*]_ _ attorney as if the defendant were personally present in court. This waiver is made pursuant to section 1193(a) of the Penal Code, which provides, in relevant part:

> **If the conviction is for a felony, the defendant shall be personally present when judgment is pronounced against him or her, unless the defendant, in open court and on the record, or in a notarized writing, requests that judgment be pronounced against him or her in his or her absence, and that he or she be represented by an attorney when judgment is pronounced, and the court approves his or her absence during the pronouncement of judgment, or unless, after the exercise of reasonable diligence to procure the presence of the defendant, the court shall find that it will be in the interest of justice that judgment be pronounced in his or her absence….**

Date: _ _ _ _ _ _ __[*Signature of defendant*]__
_ _[*Typed name*]_ _
_ _[*Address*]_ _

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of defendant*]_ _

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
Witness

Comment: This form contains the exact language of Pen C §1193(a). The defendant should not waive his or her presence at sentencing and pronouncement of judgment unless there is a good reason for the waiver. For example, a defendant facing separate charges in another county or jurisdiction and anticipating that those charges will result in a prison sentence might prefer to postpone pronouncement of judgment and sentencing in the case at hand until after the other proceeding if there is an agreement for a concurrent sentence when the case returns. In this situation, the defendant might prefer not to be returned from prison for the sentencing hearing. The defendant should not waive his or her presence at sentencing if there are sentencing issues to be litigated.

Because the pronouncement of judgment is a critical phase of the prosecution, a separate waiver should be used.

Cross-Reference: See California Criminal Law Procedure and Practice §§6.5, 35.13 (Cal CEB Annual).

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§6.3 C. Guilty Verdict in Absentia

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GUILTY PLEA IN ABSENTIA

I, _ _[*name of defendant*]_ _, the defendant in this case, declare:

1. I know that I am charged with driving in violation of _ _[*e.g., section 14601.1 of the Vehicle Code*]_ _;

2. By signing this affidavit, I am pleading guilty to a lesser charge of a violation of _ _[*e.g., section 12500 of the Vehicle Code*]_ _;

3. I personally initialed and signed the attached waiver of rights;

4. I enter this plea freely and voluntarily without either threat or coercion or promise of benefit or reward, except that my lawyer has told me that my sentence will be _ _[*e.g., a fine of $211, plus $35 administrative fee for paying by installments through Central Collections*]_ _.

5. I hereby plead guilty to a violation of _ _[*e.g., section 12500 of the Vehicle Code, driving without having a license in possession*]_ _.

I declare under penalty of perjury that the above facts are true.

Date: _ _ _ _ _ _ __[*Signature of defendant*]__
_ _[*Typed name*]_ _
_ _[*Address*]_ _

Comment: This form might be used for an out-of-county (or state) defendant who is pleading guilty to a misdemeanor, if the agreed-on disposition results in no jail time.

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7

Pleadings; Joinder and Severance

A. Demurrer §7.1
B. Opposition to Demurrer §7.2
C. Motion to Sever Counts §7.3
D. Opposition to Motion to Sever Counts §7.4
E. Motion to Sever Codefendants §7.5
F. Opposition to Motion to Sever Codefendants §7.6

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Source: Criminal Law/California Criminal Law Forms Manual/7 Pleadings; Joinder and Severance/§7.1 A. Demurrer

§7.1 A. Demurrer

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TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court dismiss _ _[*specify whether entire charging document or particular named counts and/or enhancements are challenged*]_ _ under Penal Code section 1004 _ _[*specify applicable subdivision*]_ _ on the _ _[*ground/grounds*]_ _ that _ _[*specify applicable ground(s)*]_ _. This demurrer will be based on the attached supporting memorandum, on the charging document in this case, and on such argument as may be made at the hearing on this demurrer.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

[*The following argument is made only if a plea of not guilty has already been entered.*]

THE COURT HAS THE POWER TO RULE ON A DEMURRER EVEN AFTER A PLEA HAS BEEN ENTERED

The Court has the authority to allow the defendant to demur to the charges even though a plea has been entered. (Penal Code section 1003.) _ _[*Give any facts about the case that argue in favor of permitting the plea to be withdrawn and a demurrer made, e.g., that the defendant entered a plea without counsel, or with different counsel*]_ _.

[*The main issues raised by demurrer are set out below; choose the one(s) applicable to your case.*]

THE COURT HAS NO JURISDICTION OVER THE OFFENSE CHARGED IN THAT IT ALLEGES THAT THE OFFENSE WAS COMMITTED ON A DATE BEYOND THE STATUTE OF LIMITATIONS

Ordinarily, a prosecution is barred once the period of time given in the appropriate statute of limitations has run. (Penal Code sections 799-805.) Violation of _ _[*specify statute of crime charged*]_ _ is subject to a _ _[*specify number of years of statute of limitations for that crime*]_ _-year statute of limitations. The charging document in this action alleges that the crime occurred on _ _[*date*]_ _. The date that the prosecution of this case is considered to have begun for purposes of the statute of limitations is _ _[*insert date; see Pen C §804 and discussion in Crim Law §19.14*]_ _. _ _[*Number of years*]_ _ have passed between the date the alleged crime occurred and _ _[*specify event that triggered prosecution for purposes of the statute of limitations*]_ _. The prosecution of the charged offense therefore did not begin within the statute of limitations period.

THE PROSECUTION DID NOT ALLEGE ANY FACTS THAT WOULD EXEMPT THIS CASE FROM THE BAR OF THE STATUTE OF LIMITATIONS

Although the statute of limitations for a particular offense generally starts to run from the date of the commission of the offense, for certain offenses, the period starts to run from "discovery of an offense." (Penal

Code section 803(c).)

The phrase "discovery of an offense" is not defined in section 803(c), nor does the law designate the specific person who qualifies as a discoverer. The statute does not set forth any pleading requirements.

Case law has provided guidance for the courts and for prosecutors in this regard. In *People v Zamora* (1976) 18 C3d 538, 134 CR 784, the California Supreme Court imposed the following requirements on criminal pleadings:

> **We do not believe that technical rules of pleading in criminal cases will be resurrected by requiring that the following *facts* be alleged in an accusatory pleading which seeks to avoid the bar of the statute of limitations by pleading the "discovery" provision of [former] section 800: (1) the date on which the offense was "discovered"; (2) how and by whom the offense was "discovered"; (3) lack of knowledge, both actual and constructive, prior to the date of "discovery"; (4) the reason why the offense was not "discovered" earlier.**

18 C3d at 565 n26. See also *People v Lopez* (1997) 52 CA4th 233, 245, 60 CR2d 511.

These "facts" (not just a statement worded in conclusionary language) are required to be pleaded in felony cases even before the preliminary hearing. As the *Zamora* court stated:

> **[I]n order to hold a defendant over for trial the People carry the burden of producing evidence (either before the grand jury or at the preliminary hearing) which demonstrates that there is probable cause to believe that the prosecution is not barred by the statute of limitations. [Citation omitted.] We believe that the committing magistrate or the trial court will be aided in making the probable cause determination by specific pleading on the limitation issue.**

18 C3d at 565.

In the present case, the accusatory pleading fails to set forth any facts that would exempt this case from the statute of limitations bar; therefore, the defendant's demurrer should be sustained.

THE COURT HAS NO JURISDICTION OVER THE OFFENSE CHARGED IN THAT THE ACCUSATORY PLEADING ALLEGES THAT THE OFFENSE OCCURRED IN _ _ _ _ _ _ COUNTY. THIS COUNTY, THEREFORE, DOES NOT HAVE JURISDICTION

The charging document alleges that the offense occurred in _ _ _ _ _ _ County. With limited exceptions that do not apply in this case (see, *e.g.,* Penal Code section 784.7), a county is without jurisdiction to try an offense not committed within its boundaries. (See *People v Crise* (1990) 224 CA3d Supp 1, 274 CR 242 (conviction reversed because defendant was tried on Health and Safety Code section 11550 in county unrelated to one where conduct occurred).) _ _[*Specify relevant law, and apply it to the facts of the case. See Pen C §1004(1); Crim Law §7.20.*]**_ _**

THE ACCUSATORY PLEADING FAILS TO GIVE THE DEFENDANT ADEQUATE NOTICE OF THE CHARGES AGAINST _ _[*HIM/HER*]**_ _**

Due process under both the federal and state constitutions requires that the defendant receive adequate notice of the charges so that he or she may have a reasonable opportunity to prepare a defense and not be taken by surprise at trial. (See, *e.g., In re Oliver* (1948) 333 US 257, 273, 92 L Ed 682, 694, 68 S Ct 499*; In re Jamil H.* (1984) 158 CA3d 556, 559, 204 CR 816; *Gaylord v Municipal Court* (1987) 196 CA3d 1348, 1351, 242 CR 486; *Lamadrid v Municipal Court* (1981) 118 CA3d 786, 173 CR 599; *Sallas v Municipal Court* (1978) 86 CA3d 737, 150 CR 543 (decision reversed because complaint failed to specify what regulation minor violated by entering school grounds without lawful reason). _ _[*Specify relevant law, and apply it to the facts of the case. Crim Law §7.21.*]**_ _**

THE ACCUSATORY PLEADING IS UNCERTAIN IN THAT IT DOES NOT SUBSTANTIALLY CONFORM TO THE PROVISIONS OF PENAL CODE SECTIONS 950 AND 952

_ _[*Specify relevant law, and apply it to facts. See Pen C §1004(2); People v Hathaway (1972) 27 CA3d 586, 103 CR 638;* ***People v Jordan (1971) 19 CA3d 362, 97 CR 570****. See also Crim Law §7.21.*]_ _

_ _[*SPECIFY STATUTE*]_ _ **IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD**

To provide due process under both the state and federal constitutions, a criminal statute must "'be definite enough to provide (1) a standard of conduct for those whose activities are proscribed and (2) a standard for police enforcement and for ascertainment of guilt.'" *Williams v Garcetti* (1993) 5 C4th 561, 567, 20 CR2d 341, quoting *Walker v Superior Court* (1988) 47 C3d 112, 141, 253 CR 1. Vague laws may trap the innocent by failing to provide fair warning about what conduct is prohibited and invite arbitrary and discriminatory enforcement by failing to provide explicit standards for those who apply them. *Williams v Garcetti, supra.* See also *Grayned v City of Rockford* (1972) 408 US 104, 108, 33 L Ed 2d 222, 227, 92 S Ct 2294. _ _[*Specify relevant law, and apply it to the affected statute.*]_ _

THE OFFENSES OF _ _[*SPECIFY TYPE OF OFFENSE AND COUNT NUMBERS*]_ _ ARE MISJOINED IN THAT THEY WERE NOT CONNECTED TOGETHER IN THEIR COMMISSION AND DO NOT CONTAIN COMMON ELEMENTS OF SUBSTANTIAL IMPORTANCE

_ _[*Specify relevant law, and apply it to the affected statute. Note that it is usually difficult to challenge this type of error by demurrer because it is usually not clear from the face of the charging document. See Pen C §1004(3); Crim Law §7.22. This type of error is usually raised by a severance motion. See Crim Law §§7.27-7.42.*]_ _

THE ALLEGATION OF _ _[*SPECIFY STATUTE OR COUNT*]_ _ DOES NOT STATE A PUBLIC OFFENSE

_ _[*Specify relevant law, and apply it to the allegations in the charging document. See Pen C §1004(4); Crim Law §7.23.*]_ _

THE LANGUAGE CHARGING VIOLATION OF _ _[*SPECIFY CHARGE OR COUNT*]_ _ CONTAINS MATTER THAT, IF TRUE, CONSTITUTES _ _[*LEGAL JUSTIFICATION/EXCUSE*]_ _ OF THE OFFENSE CHARGED

_ _[*Specify relevant law, and apply it to the allegations in the charging document. See Pen C §1004(5); Crim Law §7.24.*]_ _

[*Continue*]

A DEMURRER IS THE APPROPRIATE WAY OF CHALLENGING _ _[*STATE GROUNDS FOR CHALLENGE, E.G., VIOLATION OF STATUTE OF LIMITATIONS*]_ _

_ _[*Specify authority that allows the particular type of challenge to the charging document to be made by demurrer. See discussion in Crim Law §§7.20-7.26.*]_ _

A DEMURRER IS A CHALLENGE TO THE JURISDICTION OF THE COURT OVER THE OFFENSE CHARGED; THE REMEDY FOR LACK OF JURISDICTION IN THIS CASE IS DISMISSAL

When the Court has no jurisdiction over the offense charged, the Court is to sustain the demurrer. (Penal Code section 1007.) If the Court believes that the prosecution may correct the defect through amending the charging document, the Court must permit the prosecution that opportunity. Otherwise, the Court should dismiss the charge(s). (Id.) _ _[*Tell the court why dismissal without giving the prosecution the opportunity to amend is appropriate, if that is the case.*]_ _

CONCLUSION

Defendant respectfully requests that the demurrer be sustained and that _ _[*specify charges*]_ _ be dismissed.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: A demurrer must be in writing and signed by the defendant or defense counsel. Pen C §1005. Unless otherwise ordered or specifically provided by law, all pretrial motions (including demurrers), accompanied by a

supporting memorandum, must be served and filed at least 10 court days before hearing date, all papers opposing the motion must be served and filed at least 5 court days before the hearing date, and all reply papers must be filed at least 2 court days before the hearing date. Proof of service of the moving papers must be filed no later than 5 court days before the time appointed for hearing. Cal Rules of Ct 4.111(a). On service and filing, see §1.17.

Cross-Reference: For discussion of procedures for demurring to a charging document, see Crim Law §§7.20-7.26.

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Source: Criminal Law/California Criminal Law Forms Manual/7 Pleadings; Joinder and Severance/§7.2 B. Opposition to Demurrer

§7.2 B. Opposition to Demurrer

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OPPOSITION MEMORANDUM

[*The main opposition arguments to a demurrer are set out below; choose the one(s) applicable to your case, and add any others needed to oppose the motion.*]

DEFENDANT HAS ALREADY ENTERED A PLEA; _ _[*HIS/HER*]_ _ DEMURRER IS THEREFORE UNTIMELY AND SHOULD BE OVERRULED

Demurrers are to be made before a plea is entered, unless allowed by the court. (Penal Code section 1003.) _ _[*Give specific factual arguments for why the court should not make an exception in this case and consider the demurrer.*]_ _

THE GROUND FOR DEFENDANT'S DEMURRER IS NOT ONE PERMITTED BY LAW

The only objections allowed to be raised by demurrer are those set out in Penal Code section 1004. *People v Saffell* (1946) 74 CA2d Supp 967, 972, 168 P2d 497. The issue raised by defendant is not one of those listed in section 1004 and is therefore not permitted to be raised by demurrer. The Court should deny defendant's demurrer.

SUPPORT FOR DEFENDANT'S DEMURRER IS NOT APPARENT FROM THE FACE OF THE CHARGING DOCUMENT

A demurrer may challenge only those defects that appear on the face of the charging document. (Penal Code section 1004.) _ _[*Describe why the defects alleged by the defense do not appear on the face of the charging document.*]_ _

THE DEFENSE DEMURRER _ _[*WAS NOT IN WRITING/WAS NOT IN WRITING AND DID NOT "DISTINCTLY SPECIFY" THE GROUNDS OF THE OBJECTION*]_ _

A defense demurrer must be in writing, and "distinctly specify" the grounds of objection. (Penal Code section 1005.) Failure to observe either of these requirements requires the court to disregard the demurrer. (Penal Code section 1005.) _ _[*Describe the defects.*]_ _

EVEN IF THE COURT SUSTAINS DEFENDANT'S DEMURRER, THE COURT IS REQUIRED TO ALLOW THE PROSECUTION TO AMEND THE CHARGING DOCUMENT (PENAL CODE SECTION 1007)

_ _[*Explain how the charging document might be amended to meet the defense challenge.*]_ _

CONCLUSION

The People request that this court overrule defendant's demurrer because _ _[*summarize grounds*]_ _**.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__

_ _[*Typed name*]_ _
Deputy District Attorney

Comment: Ordinarily, a demurrer raises only legal issues. In this situation, an opposition memorandum by itself may be an appropriate opposition.

Unless otherwise ordered or specifically provided by law, all papers opposing the demurrer must be served and filed at least 5 court days before the time appointed for hearing. Cal Rules of Ct 4.111(a). On service and filing, see §1.17.

Cross-Reference: For discussion of demurrers, see California Criminal Law Procedure and Practice §§7.20-7.26 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/7 Pleadings; Joinder and Severance/§7.3 C. Motion to Sever Counts

§7.3 C. Motion to Sever Counts

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court sever _ _[*specify count(s)*]_ _ from _ _[*specify count(s)*]_ _. This motion will be based on the attached supporting memorandum, on the court records and pleadings in the court files for this case, _ _[*describe any other attached exhibits, e.g., a declaration by counsel, a portion of the preliminary hearing transcript*]_ _, and on any evidence and argument that may be presented at the hearing on this motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

[*The main issues raised in a motion to sever counts are set out below; choose the one(s) applicable to your case, and any others that support your motion.*]

COUNT _ _[*SPECIFY COUNT*]_ _ **IS SUPPORTED BY MUCH STRONGER EVIDENCE THAN COUNT** _ _[*SPECIFY COUNT*]_ _**, AND IS BEING USED TO BOLSTER COUNT** _ _[*SPECIFY COUNT*]_ _

When one count is supported by stronger evidence, and is being used to bolster another count, particularly one supported with weaker evidence, that is a factor supporting severance. (*Williams v Superior Court* (1984) 36 C3d 441, 452, 204 CR 700; *Coleman v Superior Court* (1981) 116 CA3d 129, 172 CR 86.) Joining these counts violates the defendant's right to a fair trial under the Fifth and Sixth Amendments to the United States Constitution. An accused retains federal due process rights even after passage of Penal Code section 954.1 because federal due process rights cannot be abrogated by the voters of California. (See *Belton v Superior Court* (1993) 19 CA4th 1279, 1285, 24 CR2d 34.) _ _[*Describe the difference between the two counts in your case, and why one is being used to bolster the other.*]_ _

NO EVIDENCE IS CROSS-ADMISSIBLE BETWEEN COUNTS _ _[*NUMBER*]_ _ **AND** _ _[*NUMBER*]_ _

Penal Code section 954.1 states that the cross-admissibility of evidence between counts is not a factor that requires severance of counts. The fact that there is no cross-admissible evidence, however, may still be considered as a factor suggesting prejudice. (*Belton v Superior Court* (1993) 19 CA4th 1279, 24 CR2d 34.) _ _[*Explain why no evidence is cross-admissible.*]_ _

COUNT _ _[*NUMBER*]_ _ **IS HIGHLY INFLAMMATORY; COUNT** _ _[*NUMBER*]_ _ **IS NOT**

Count _ _[*number*]_ _**, charging** _ _[*type of crime*]_ _**, involves inflammatory facts,** _ _[*e.g., the rape of a*

child]_ _. **The other charge,** _ _[*name of crime*]_ _**, does not. A joint trial of a common crime with a shocking one would make it difficult for defendant to obtain a fair trial on the less important charge. (*Coleman v Superior Court, supra*.)**

DEFENDANT WILL BE PREJUDICED IF COUNTS _ _[*NUMBER*]_ _ **AND** _ _[*NUMBER*]_ _ **ARE JOINED FOR TRIAL BECAUSE PREJUDICIAL EVIDENCE IS ADMISSIBLE ON ONLY ONE OF THE TWO COUNTS**

When joinder permits the admissibility of prejudicial evidence, such as a prior felony conviction, that would not otherwise be admissible, defendant can be prejudiced. (*Walker v Superior Court* (1974) 37 CA3d 938, 942, 112 CR 767.) _ _[*Describe the prejudicial evidence in your case.*]_ _

JOINDER IS IMPROPER BECAUSE THE REQUIREMENTS OF PENAL CODE SECTION 954 HAVE NOT BEEN MET

When different offenses are joined, the complaint must show on its face that joinder is proper under at least one of the classifications specified in Penal Code section 954. (*People v Degnen* (1925) 70 CA 567, 234 P 129.) _ _[*Describe the specific violation. Penal Code §954 requires that two different offenses be connected together in their commission, or be different statements of the same offense, or be of the same class of offense. See, e.g., People v Madden (1988) 206 CA3d Supp 14, 254 CR 207.*]_ _

[*Continue*]

DEFENDANT WILL BE PREJUDICED BY THE JOINDER OF COUNTS _ _[*NUMBER*]_ _ **AND** _ _[*NUMBER*]_ _ **BECAUSE** _ _[*DESCRIBE PREJUDICE*]_ _**. THE COURT SHOULD THEREFORE SEVER COUNTS** _ _[*NUMBER*]_ _ **AND** _ _[*NUMBER*]_ _

When a defendant shows proper grounds for severance of counts, and prejudice from joinder, a severance should be ordered. (*People v Johnson* (1988) 47 C3d 576, 253 CR 710.) "[T]he court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in an accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (Penal Code section 954.) _ _[*Summarize why the judge should exercise his or her discretion to sever counts.*]_ _

CONCLUSION

Defendant requests that the court sever count _ _[*number*]_ _ **from count** _ _[*number*]_ _ **for the above reasons.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: When it appears on the face of the information that offenses are joined in violation of Pen C §954, the defendant should demur to the accusatory pleading. Pen C §1004(3). See Pen C §1012 (failure to demur to errors that appear on face of pleading and are mentioned in Pen C §1004(2)-(3), (5), which includes improper joinder, waives right to challenge error).

A severance motion must be in writing, accompanied by a supporting memorandum, and served on all parties. See Cal Rules of Ct 4.111. See §1.17 for the service and filing requirements of Cal Rules of Ct 4.111.

When assessing the propriety of joinder, the court considers (1) whether evidence is cross-admissible in separate trials; (2) whether some of the joined charges are likely to "unusually inflame" jurors against the defendant; (3) whether a weak case has been joined with a strong case or another weak case so that the outcome of some or all of the charges may be altered by the totality of the evidence; and (4) whether one of the charges is a capital offense, or the joinder of the charges makes the case a capital case. *People v Mendoza* (2000) 24 C4th 130, 161, 99 CR2d 485; see also *People v Cook* (2006) 39 C4th 566, 581, 47 CR3d 22, quoting *People v Mendoza, supra*. However, when crimes of the same class are joined together, evidence concerning one offense need not be admissible to prove the other

offense for joinder to be permissible. *People v Cook, supra,* quoting Pen C §954.1.

The burden of demonstrating prejudice is on the moving party. See *People v Cook, supra*. Counsel should therefore submit exhibits or other evidence that supports the argument that joinder would be prejudicial. For example, police reports might be attached when one crime is alleged to be inflammatory, and the defendant's confession to one of the charged crimes might be attached when it is alleged that a strong case is joined with a weak case. *People v Kemp* (1961) 55 C2d 458, 477, 11 CR 361.

To be successful in a motion to sever counts that are properly joined under Pen C §954, the defendant must show that the evidence is not cross-admissible *and* that severance is necessary to afford the defendant a fair trial. See *Williams v Superior Court* (1984) 36 C3d 441, 448, 204 CR 700. See also *Calderon v Superior Court* (2001) 87 CA4th 933, 104 CR2d 903 (joinder improper on facts of case). Whether to sever properly joined counts is a matter of trial court discretion. Pen C §954; *People v Price* (1991) 1 C4th 324, 388, 3 CR2d 106.

Cross-Reference: For discussion, see Crim Law §§7.27, 7.29-7.37.

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§7.4 D. Opposition to Motion to Sever Counts

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OPPOSITION MEMORANDUM

[*The main opposition arguments to a motion to sever counts are set out below; choose the one(s) applicable to your case, and add any others needed to oppose the motion.*]

BOTH OF THE CRIMES CHARGED ARE REPULSIVE AND INFLAMMATORY; THE FACT THAT ONE MAY BE SOMEWHAT MORE INFLAMMATORY THAN THE OTHER IS NOT GOOD GROUNDS FOR SEVERING COUNTS

Crimes are usually upsetting to the average juror. The crimes charged against the defendant are no different. See the police reports from these cases, attached as Exhibits 1 and 2. Defendant tries to distinguish one crime as more inflammatory than the other, but in fact they are both disturbing. They are appropriately joined under Penal Code section 954, and should remain joined.

THE LACK OF CROSS-ADMISSIBLE EVIDENCE DOES NOT REQUIRE SEVERANCE

Penal Code section 954.1 specifically allows crimes to be charged that share no cross-admissible evidence. The counts charged in the instant case are properly charged under Penal Code section 954, and therefore should remain joined.

DEFENDANT WILL NOT BE PREJUDICED IF THE _ _[*DESCRIBE EVIDENCE ALLEGED TO BE PREJUDICIAL, E.G., PRIOR CONVICTION*]_ _ **CONCERNING COUNT** _ _[*NUMBER*]_ _ **IS INTRODUCED IN A TRIAL ALSO INVOLVING COUNT** _ _[*NUMBER*]_ _

_ _[*Describe why the evidence alleged to be prejudicial will not in fact be prejudicial, e.g., because that evidence would probably be introduced even if the cases were separately tried.*]_ _

JOINDER IS IN ACCORD WITH PENAL CODE SECTION 954

When different offenses are joined, the complaint must show on its face that the joinder is proper under at least one of the classifications specified in Penal Code section 954. (*People v Degnen* (1925) 70 CA 567, 234 P 129.) _ _[*Describe how the charged offenses are properly charged. Penal Code §954 requires that two different offenses be connected together in their commission, or be different statements of the same offense, or be of the same class of offense.*]_ _

[*If joined crimes are of the same class, describe them. If crimes are of the same class, "evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together." People v Cook (2006) 39 C4th 566, 581, 47 CR3d 22, quoting Pen C §954.1.*]

CONCLUSION

The People request that this Court deny defendant _ _[*name*]_ _**'s severance motion for the reasons given above.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: Be sure to attach as exhibits whatever documents are necessary to support your opposition. Include references to them in your opposition memorandum.

Cross-Reference: For discussion of severance of counts, see California Criminal Law Procedure and Practice §§7.31-7.36 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/7 Pleadings; Joinder and Severance/§7.5 E. Motion to Sever Codefendants

§7.5 E. Motion to Sever Codefendants

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TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court order defendant's matter severed from that of _ _[*codefendant/codefendants*]_ _, _ _[*name(s)*]_ _. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

[*The main issues raised by a motion to sever codefendants are set out below; choose the one(s) applicable to your case, and any others that support your motion.*]

SEVERANCE MUST BE GRANTED WHEN DEFENDANTS ARE NOT ALL JOINED IN A COMMON COUNT

If a particular defendant is not jointly charged in one count with all other defendants, the trial court is required to order a severance on defense motion. (Penal Code section 954; *People v Ortiz* (1978) 22 C3d 38, 42, 148 CR 588.) It is not sufficient that the joined offenses are of the same class (see *People v Simms* (1970) 10 CA3d 299, 307, 89 CR 1), or that they have common elements (*Dove v Superior Court* (1974) 39 CA3d 960, 963, 114 CR 889.) _ _[*Discuss the law relevant to the facts of your case, and apply it to these facts.*]_ _

THE TRIAL COURT SHOULD EXERCISE ITS DISCRETION TO ORDER SEVERANCE WHEN THE PROSECUTION PLANS TO USE THE EXTRAJUDICIAL STATEMENT OF A CODEFENDANT AND EFFECTIVE EXCISION IS NOT POSSIBLE

The right of confrontation, guaranteed by the Sixth Amendment to the United States Constitution precludes the introduction against a criminal defendant of "testimonial" hearsay, unless (1) the declarant is unavailable *and* (2) the defendant has had an opportunity to cross-examine the declarant. (*Crawford v Washington* (2004) 541 US 36, 158 L Ed 2d 177, 124 S Ct 1354.)

In *Bruton v U.S.* (1968) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620, the United States Supreme Court held that when a nontestifying codefendant's out-of-court statement implicates another codefendant, the statement is inadmissible at a joint trial. (See also *People v Aranda* (1965) 63 C2d 518, 47 CR 353 (same; relying on California Constitution).) The error cannot be cured by a limiting instruction admonishing the jury to consider the statement only as to the declarant. (*Ibid.,* see also *People v Boyd* (1990) 222 CA3d 541, 271 CR 738.)

Only if the trial court can effectively delete all parts of the extrajudicial statement implicating a codefendant, can the statement be used in a joint trial. "By effective deletions, we mean not only direct and indirect identifications of codefendants, but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established." (*People v Aranda* (1965) 63 C2d 518, 528, 47 CR 353; see *People v Fulks* (1980) 110 CA3d 609, 616, 168 CR 203.) A statement that contains a reference to another perpetrator has not been effectively redacted when the jury can immediately infer that the other perpetrator is the defendant. (*Gray v Maryland* (1998) 523 US 185, 140 L Ed 2d 294, 118 S Ct 1151.)

When the incriminating portions of the extrajudicial statements cannot be effectively deleted, the trial court must grant severance or exclude the statements. (*People v Song* (2004) 124 CA4th 973, 980, 22 CR3d 118.)
_ _[*Discuss the facts of your case and why effective excision is not possible.*]**_ _**

ASSUMING, ARGUENDO, THAT THE COURT CAN EFFECTIVELY EDIT THE DEFENDANT'S STATEMENTS, THE DEFENSE HAS A RIGHT TO ADMISSION OF THE REMAINDER OF THE STATEMENTS UNDER EVIDENCE CODE SECTION 356 TO SHOW DEFENDANT'S INTENT AND STATE OF MIND

Evidence Code section 356 allows for the relevant remainder of a statement to come into evidence once the prosecution offers a portion of it.

THE COURT SHOULD GRANT SEVERANCE TO PERMIT THE CODEFENDANT TO TESTIFY FOR DEFENDANT AT DEFENDANT'S TRIAL

The case of *People v Isenor* (1971) 17 CA3d 324, 332, 94 CR 746, holds that if the answers to the following questions are in the affirmative, the court should grant a severance in order to permit the codefendant to testify in favor of the defendant.

The questions are:

1. Does the defendant wish the codefendant to testify in defendant's case?

2. Will the testimony exculpate defendant?

3. Is the testimony significant?

4. Does the testimony appear to be bona fide?

5. Is it likely that the codefendant will actually testify?

6. What is the effect of granting the motion in terms of judicial administration and economy?

In this case, the attached declaration of _ _[*name*]**_ _ clearly establishes an affirmative answer to all the above questions, and the effect on judicial administration would not be excessively deleterious. A denial of the motion would be severely prejudicial, because the defendant would be prevented from introducing important exculpatory evidence, and would therefore be denied a fair trial.**

THE COURT SHOULD GRANT A SEVERANCE BECAUSE THE DEFENDANT WOULD BE SERIOUSLY PREJUDICED BY BEING TRIED TOGETHER WITH THE CODEFENDANT

A severance is proper under the following circumstances:

[*There are a number of accepted factors that favor severing codefendants; choose the relevant ones from the following list, add other relevant law, and apply the law to the facts of your case.*]

Potentially antagonistic defenses (*People v Graham* (1969) 71 C2d 303, 330, 78 CR 217);

Great disparity between the count charged against the defendant and the one against the codefendant (*People v Chambers* (1964) 231 CA2d 23, 27, 41 CR 551);

Disparity in the weight of the evidence against each defendant (*People v Chambers, supra,* 231 CA2d at 29);

Evidence potentially prejudicial to the defendant will be admitted at trial, ostensibly against the codefendant (*People v Biehler* (1961) 198 CA2d 290, 298, 17 CR 862; see also *People v Massie* (1967) 66 C2d 899, 916, 59 CR 733);

The codefendant intends to offer evidence harmful to the defendant (*People v Graham* (1969) 71 C2d 303, 331, 78 CR 217);

Evidence was suppressed as to the defendant but not as to the codefendant (*Brown v U.S.* (1973) 411 US 223, 36 L Ed 2d 208, 93 S Ct 1565);

Joinder can result in a conviction of the defendant because of the association with codefendants of disreputable character (*People v Massie* (1967) 66 C2d 899, 916, 59 CR 733*; People v Chambers* (1964) 231 CA2d 23, 27, 41 CR 551);

The prosecution's motive for the joinder was improper, e.g., to obtain a delay, or for other motives not authorized by the statute (see *People v Graham* (1969) 71 C2d 303, 330, 78 CR 217; *People v Clark* (1965) 62 C2d 870, 883, 44 CR 784);

The jury will be confused by evidence on multiple counts (see *Zafiro v U.S.* (1993) 506 US 534, 122 L Ed 2d 317, 113 S Ct 933; *People v Hardy* (1992) 2 C4th 86, 168, 5 CR2d 796; *People v Chambers* (1964) 231 CA2d 23, 27, 41 CR 551).

[*Point out in a separate heading and argument any practical circumstances that support a severance, e.g., that the case is set for trial to begin very soon but co-counsel is out to trial in a very lengthy case.*]

CONCLUSION

Defendant requests that this severance motion be granted for the above reasons.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

DECLARATION OF COUNSEL

[*This declaration is by defense counsel; the declaration of another person or persons may be required instead to support your motion. If that is the case, adapt this form as required.*]

I, _ _[*name of defense counsel*]_ _**, under penalty of perjury, state as follows:**

1. I am the attorney assigned to represent _ _[*name of defendant*]_ _ **in the above-entitled matter.**

2. _ _[*Describe the charges against defendant and each codefendant. For example: Defendant Bruce Brown and codefendant Eric Brown are charged with two counts of robbery, one against defendant and one against codefendant. Codefendant Eric Brown is also charged with a use clause, as well as sections 12021 and 12020 of the Penal Code).*]_ _

3. _ _[*Include any other information known to counsel and relevant to the severance motion, e.g., that none of the joint charges involve a crime committed by both the defendant and the codefendant.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__

_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: A motion for severance must usually be made before trial. Consult local court rules or practice for the appropriate time to make a severance motion. Additional information or a change of circumstances may make it appropriate to renew a severance motion at trial. See *Griffin v Superior Court* (1972) 26 CA3d 672, 696, 103 CR 379 (common law motions concerning evidence not covered by Pen C §1538.5 may be relitigated during trial). When the basis for severance is a codefendant's statement, the motion is usually made during trial. See *People v Graham* (1969) 71 C2d 303, 330, 78 CR 217.

Severance motions must be in writing and served on all parties. Cal Rules of Ct 4.111. For discussion of service and filing requirements, see §1.17. The motion must be supported by affidavits or declarations and exhibits establishing a ground for relief and showing the likelihood of prejudice from a joint trial. When the motion is based on a statement by the codefendant, a copy of the statement should be attached as an exhibit.

Cross-Reference: For discussion of severance of codefendants, see Crim Law §§7.28, 7.38-7.42.

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§7.6 F. Opposition to Motion to Sever Codefendants

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MEMORANDUM IN OPPOSITION TO DEFENDANT _ _[*NAME*]_ _'S MOTION TO SEVER

TO THE ABOVE-ENTITLED COURT, AND TO THE DEFENDANT AND DEFENSE COUNSEL:

[*The main opposition arguments to a motion to sever codefendants are set out below; choose the one(s) applicable to your case, and add any others needed to oppose the motion.*]

PENAL CODE SECTION 1098 FAVORS JOINT TRIALS

Penal Code section 1098 provides in part that "[*w*]hen two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials." Accordingly, whether or not separate accusatory pleadings are filed, "a joint trial is contemplated, and a separate trial is a privilege and not a matter of right." (*People v Parker* (1954) 122 CA2d 867, 871, 265 P2d 933.)

DEFENSE COUNSEL ARGUES THAT SEPARATE TRIALS SHOULD BE ORDERED BECAUSE SOME EVIDENCE IS NOT CROSS-ADMISSIBLE, BUT THE LAW IS OTHERWISE

Severance is not mandatory simply because the evidence from one case would not be admissible in the other case if separate trials were held (called cross-admissibility). (Penal Code section 954.1; *Belton v Superior Court* (1993) 19 CA4th 1279, 24 CR2d 34.) _ _[*You may also wish to argue that the evidence is not in fact cross-admissible.*]_ _

CONTINUANCE OF THE TRIAL DATE OVER DEFENDANT _ _[*NAME*]_ _'S OBJECTION DOES NOT REQUIRE SEVERANCE BECAUSE CODEFENDANT _ _[*NAME*]_ _'S TRIAL DATE WAS CONTINUED FOR GOOD CAUSE, WHICH CONSTITUTES GOOD CAUSE FOR CONTINUING DEFENDANT _ _[*NAME*]_ _'S TRIAL

When a continuance of arraignment, the preliminary hearing, or trial is granted to one codefendant for good cause, that constitutes good cause to continue the cases of all codefendants on the prosecutor's motion, thus avoiding a severance. (Penal Code section 1050.1.) _ _[*Describe the good cause circumstances, and support with a citation to the court file.*]_ _

ALTHOUGH DEFENDANT AND CODEFENDANT ARE CHARGED WITH SEPARATE CRIMES, JOINDER IS PERMISSIBLE BECAUSE THE OFFENSES WERE PART OF THE SAME TRANSACTION

Although a joint trial is not permissible when two or more defendants are charged in separate counts with separate crimes (*Dove v Superior Court* (1974) 39 CA3d 960, 114 CR 889), an exception exists when codefendants are charged with committing offenses at the same time and place that were part of the same transaction. (*People v Wickliffe* (1986) 183 CA3d 37, 227 CR 780; *People v Hernandez* (1983) 143 CA3d 936, 192 CR 432.) _ _[*Describe the facts of the case, citing to the court file, or to attached documents such as police reports.*]_ _

DEFENDANT SHOULD HAVE ATTACKED THE JOINDER OF CODEFENDANTS BY DEMURRING TO THE ACCUSATORY PLEADING

Failure to demur to errors that appear on the face of the pleading is a waiver of the right to challenge that error. (Penal Code section 1012.) _ _[*Describe why the error alleged by the defense fits in this category.*]_ _

DEFENDANT SEEKS SEVERANCE BASED ON THE EXISTENCE OF CODEFENDANT'S STATEMENT; THIS

MOTION MUST BE MADE AT A TIME WHEN THE COURT KNOWS WHETHER THE CODEFENDANT WILL TESTIFY

It is not error to admit a codefendant's statement that implicates defendant if the codefendant testifies, because the confessing defendant is available for cross-examination, even if _ _[*he/she*]_ _ denies having made the extrajudicial statement. (*Nelson v O'Neil* (1971) 402 US 622, 29 L Ed 2d 222, 91 S Ct 1723; *People v Ainsworth* (1988) 45 C3d 984, 1010, 248 CR 568.) Because the defense is moving to sever before trial, this Court cannot know for sure whether codefendant _ _[*name*]_ _ will testify. The Court should therefore deny this motion as premature.

DEFENDANT ASKS THIS COURT TO TRY TO SANITIZE CODEFENDANT'S STATEMENT, BUT A FINAL RULING ON THAT ISSUE CAN ONLY BE MADE BY THE TRIAL JUDGE

The defendant asks this Court as part of _ _[*his/her*]_ _ motion to sever defendant from codefendant because it would be impossible to remove all parts of the statement that implicate defendant. This Court, however, cannot make a final ruling on how to sanitize a statement. Evidentiary issues must be finally decided by the trial judge. (See *People v Anderson* (1987) 43 C3d 1104, 1120, 240 CR 585; *Griffin v Superior Court* (1972) 26 CA3d 672, 696, 103 CR 379.)

_ _[*If the defense did not comply with a local rule, e.g., on time to file motion, raise that issue as a reason to deny the motion.*]_ _

CONCLUSION

The People request that this Court deny defendant _ _[*name*]_ _'s severance motion for the above reasons.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: Attach as exhibits the documents that are necessary to support your opposition. Include cross-references to them in your opposition memorandum.

Cross-Reference: For discussion of severance of codefendants, see California Criminal Law Procedure and Practice §§7.28, 7.37-7.42 (Cal CEB Annual).

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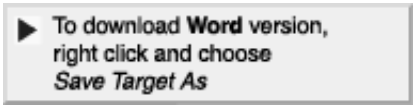
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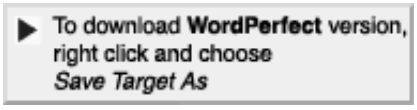
A. Defense Motion to Close Preliminary Hearing, Seal Preliminary Hearing Transcript, and for Protective Order §8.1
B. Prosecution Memorandum in Opposition to Defendant's Motion to Close Preliminary Hearing, Seal Reporter's Transcript of Preliminary Hearing, and Issue Protective Order §8.2

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Source: Criminal Law/California Criminal Law Forms Manual/8 Preliminary Hearings/§8.1 A. Defense Motion to Close Preliminary Hearing, Seal Preliminary Hearing Transcript, and for Protective Order

§8.1 A. Defense Motion to Close Preliminary Hearing, Seal Preliminary Hearing Transcript, and for Protective Order





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court (1) issue a protective order to last until further order of the Court that proscribes extrajudicial statements by any lawyer, party, witness, court official, or law enforcement officer concerning this case, (2) close the preliminary hearing in this case to the press and public; and (3) seal the preliminary hearing transcript in this case until further order of the Court.

This motion is predicated on the following factors:

_ _[*Summarize factors relevant to your case. For example: This case has received regional notoriety, and further comment on the case by either the press or the parties involved would add to the existing publicity surrounding the case and clearly endanger a fair trial because of pretrial publicity.*]_ _

This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in a few sentences.*]_ _

STATEMENT OF FACTS

_ _[*State relevant facts, e.g., the charges, and a summary of publicity on the case. Cross-refer to exhibits attached to the motion, or lodged with the trial court.*]_ _

ARGUMENT

THERE IS A SUBSTANTIAL PROBABILITY THAT AN OPEN PRELIMINARY HEARING WOULD NOT ALLOW THE DEFENDANT TO HAVE A FAIR TRIAL

The test for determining whether to close a criminal proceeding to the public is whether there is a substantial probability that an open hearing would offset the right to a fair trial. (*Press-Enterprise Co. v Superior Court* (1986) 478 US 1, 13, 92 L Ed 2d 1, 13, 106 S Ct 2735 (*Press-Enterprise II)*.)

In this case, _ _[*Describe why your case meets the "substantial probability" test of Press-Enterprise II. Refer to specific publicity and attach copies as exhibits, or lodge them with the trial court.*]**_ _**

NO REMEDY SHORT OF CLOSURE OF THE PRELIMINARY HEARING WILL PROTECT DEFENDANT'S RIGHT TO A FAIR TRIAL

Remedies short of closure must be explored before the trial court may close a criminal proceeding to the public. (*Ortega v Superior Court* (1982) 135 CA3d 244, 185 CR 297.)

In this case, _ _[*Specify other remedies that might be available, e.g., a gag order; sealing police reports and any inadmissible, inflammatory material; or a continuance. Explain why they would not be effective*]**_ _.**

A PROTECTIVE ORDER DIRECTING THOSE INVOLVED WITH THIS CASE NOT TO RELEASE INFORMATION CONCERNING THE CASE IS NECESSARY BECAUSE OTHERWISE THERE IS A REASONABLE LIKELIHOOD THAT INFORMATION CONCERNING THE CASE WOULD MAKE IT DIFFICULT TO IMPANEL AN IMPARTIAL JURY AND WOULD TEND TO PREVENT A FAIR TRIAL

The test for determining the necessity of an order restraining the attorneys in this case from discussing the case with the news media is whether there is a "reasonable likelihood" that information concerning the case would make it difficult to impanel an impartial jury and would tend to prevent a fair trial. (*Younger v Smith* (1973) 30 CA3d 138, 160, 106 CR 225.)

Court orders may also restrain a wide range of persons besides the parties. (*Sheppard v Maxwell* (1966) 384 US 333, 16 L Ed 2d 600, 86 S Ct 1507 (witnesses, court staff, and law enforcement officers coming under court's jurisdiction).)

Defendant in this case asks this Court to ensure _ _[*his/her*]**_ _ right to a fair trial by ordering all attorneys, parties, investigators, witnesses, court officials (including, but not limited to, clerks, reporters, and bailiffs), and law enforcement officials connected with this case, not to discuss any of the following:**

1. Statements concerning the existence or possible existence of any documents, exhibits, or other demonstrative evidence, the admissibility of which may have to be determined by the Court;

2. Any purported extrajudicial statements of the defendant;

3. Statements as to the nature, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter;

4. The release of any documents, exhibits, or any evidence, the admissibility of which may have to be determined by the Court;

5. An opinion or comment for public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence of the defendant;

6. Any statement as to the identity of any prospective witness, or his or her probable testimony, or the effect thereof; or

7. Any opinions or comments as to the nature, source, effect, or admissibility of any testimony, or probable testimony in any pretrial proceeding related to this matter.

_ _[*Explain factually why the above protective order is required, e.g., because the prosecution has released information about otherwise inadmissible evidence to the press. Cite relevant cases.*]_ _

THE COURT SHOULD SEAL THE RECORD OF THE PRELIMINARY HEARING TO PREVENT IRREPARABLE DAMAGE TO THE DEFENDANT'S RIGHT TO A FAIR AND IMPARTIAL TRIAL

The trial court must seal the transcript of the preliminary hearing when the defendant shows that (1) there is a substantial probability of irreparable damage to the defendant's right to a fair and impartial trial, (2) there is a reasonable likelihood of identifiable prejudice to the defense, and (3) no other methods will reasonably ensure a fair trial. (*Cromer v Superior Court* (1980) 109 CA3d 728, 167 CR 671 (sealing portion of preliminary hearing transcript until trial).)

_ _[*Specify why the above tests are met under the facts of your case. Include any other relevant cases.*]_ _

CONCLUSION

For the above-stated reasons, the defendant asks this Court to close the preliminary hearing to the press and public; seal the preliminary hearing transcript; and issue a protective order directed to the parties, their attorneys, court personnel, and others connected with the case.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] PROTECTIVE ORDER**
_ _[*Name(s)*]_ _,	
Defendant(s)	
_____/	

GOOD CAUSE HAVING BEEN SHOWN, IT IS THE ORDER of this Court that no member of the press or public (outside of those persons permitted to attend under Penal Code section 868) will be allowed to be present at any pretrial proceeding in this matter without the express permission of this Court, unless the proceeding is declared by this Court to be an open or public session.

IT IS THE FURTHER ORDER of this Court that this order applies to the following persons: parties to this action; attorneys connected with this case as defense counsel or as prosecutors; other attorneys; judicial officers or employees; witnesses; public officials, including but not limited to the chief of police and the sheriff; and any agent, deputy, or employee of the persons just described.

IT IS THE FURTHER ORDER of this Court that the persons described above not to do the following things:

1. Release or authorize the release for public dissemination of any purported extrajudicial statement of the defendant in this case; release or authorize the release of any documents, exhibits, or any evidence, the admissibility of which may have to be determined by the Court;

2. Make any statement for public dissemination as to the existence or possible existence of any document, exhibit, or any other evidence, the admissibility of which may have to be determined by the Court;

3. Express outside of court an opinion or make any comment for public dissemination on the weight, value, or effect of any evidence as tending to establish guilt or innocence of the defendant;

4. Make any statement outside of court as to the nature, substance, or effect of any testimony that has been given, except as set forth below;

5. Issue any statement concerning the identity of any prospective witness, or his or her probable testimony, or the effect thereof; or

6. Make any out-of-court statement as to the nature, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter; however, a witness may discuss any matter with any attorney of record or agent thereof.

This order does not apply to any of the following items:

1. Factual statements concerning the accused's name, age, residence, occupation, and family status;

2. The following specific circumstances of the arrest: the time and place of the arrest, the identity of the arresting and investigating officers and agencies, and the length of the investigation;

3. The nature, substance, and text of the charge;

4. Quotations from, or any reference without comment to, public records of the court in the case, or to other public records or communications previously disseminated to the public;

5. The scheduling and result of any stage of the judicial proceeding held in open court in an open or public session;

6. A request for assistance in obtaining evidence;

7. Any information about any person not in custody who is sought as a possible suspect or witness;

8. Any statement aimed at warning the public of any possible danger as to such person not in custody; or

9. A request for assistance in obtaining the names of possible witnesses.

This order is not intended to preclude any witnesses from discussing any matter in connection with the case with any of the attorneys representing the defendant or the People, or any representative of such attorneys.

IT IS A FURTHER ORDER OF THIS COURT that the transcript of the preliminary hearing in this matter be sealed.

The above orders are to remain in effect until further order of this Court.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: A party seeking to close a hearing must give adequate notice to the media. *Tribune Newspapers W., Inc. v Superior Court* (1985) 172 CA3d 443, 218 CR 505. In cases of interest to the media, they will usually send their own lawyers to argue against the defense motion. Some of the main areas of attack on a defense motion for a protective order include: the prosecution's right to a public hearing (see Crim Law §13.9); the existence of a reasonable alternative (see *Ortega v Superior Court* (1982) 135 CA3d 244, 185 CR 297); the defendant's failure to meet the particular burden involved because, *e.g.,* the publicity is factual or has subsided (see Crim Law §16.16).

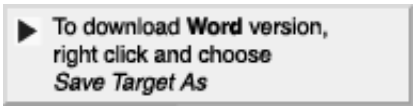
Cross-Reference: For discussion of motions to close the preliminary hearing, seal the transcript, and issue a protective order, see Crim Law §§8.21-8.22, chap 14. See also Crim Law §15.7 for discussion of the nature and extent of news coverage as it relates to arguments for venue change.

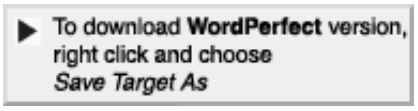
Forms for motions under Pen C §995 to dismiss an information or to quash an indictment can be found in §§13.1-13.2.

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Source: Criminal Law/California Criminal Law Forms Manual/8 Preliminary Hearings/§8.2 B. Prosecution Memorandum in Opposition to Defendant's Motion to Close Preliminary Hearing, Seal Reporter's Transcript of Preliminary Hearing, and Issue Protective Order

§8.2 B. Prosecution Memorandum in Opposition to Defendant's Motion to Close Preliminary Hearing, Seal Reporter's Transcript of Preliminary Hearing, and Issue Protective Order





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

The People oppose the defendant's motion to close the preliminary hearing, seal the preliminary hearing transcript, and for a protective order on the ground that the defense has not produced sufficient evidence to meet any of the legal tests involved.

The defendant, _ _[*name of defendant*]_ _, relies on the extent and nature of publicity to date as the reasons for each of _ _[*his/her*]_ _ requests. The mere fact that there is publicity about a case, however, is not enough to require any of the requested orders. The United States Supreme Court acknowledged in *Nebraska Press Ass'n v Stuart* (1976) 427 US 539, 554, 49 L Ed 2d 683, 96 S Ct 2791, that

> **pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity….**

The People request that the Court review the publicity _ _[*attached to this opposition memorandum/attached to the defense motion/lodged with the court*]_ _. The news coverage of this case has been _ _[*describe factors indicating that the publicity will not affect the defendant's right to a fair trial, e.g., the news coverage is factual, or has diminished over time. Include discussion of cases relevant to the facts of your case*]_ _.

Implicit in the defendant's allegation that pretrial publicity mandates a protective order such as sealing of the transcript is an allegation that the people of _ _ _ _ _ _ County (the jury pool from which all defendants' triers of fact will be drawn) are so gullible as to be influenced by a few column inches of newspaper copy. This unspoken premise is an insult to the intelligence and integrity of the people of this county.

_ _[*If a case was transferred to your county from another county and there is a published case discussing why your county was considered a fair venue, discuss that case. See the chart in California Criminal Law Procedure and Practice §15.39 (Cal CEB Annual) for information on particular change of venue cases. An example of such an argument follows.*]_ _

The character of this county was recognized in *People v Barger* (1974) 40 CA3d 662, 670, 115 CR 298, in which the Court opined that Alameda County is a "populous county with a heterogeneous and cosmopolitan population [which] in itself is a factor which indicates the possibility of securing jurors unaffected by pretrial publicity [citations]."

CONCLUSION

The People submit that an examination of the "extent," "tone," and objectivity of news coverage of this case, given the quality of the people of this county, will reveal that the defendant has failed to present an adequate evidentiary showing to support any of the standards involved in the defendant's requests. Accordingly, the People urge the Court to deny the defendant's motion to close the preliminary hearing, seal the transcript, and for a protective order.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Name of District Attorney*]__
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: See Comment in §22.1.

Cross-Reference: For discussion of motions to close the preliminary hearing, seal the transcript, and issue a protective order, see Crim Law §§8.21-8.22, chap 14. See also Crim Law §15.7 for discussion of the nature and extent of news coverage as it relates to arguments for venue change.

Forms for motions under Pen C §995 to dismiss an information or to quash an indictment can be found in §§13.1-13.2.

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9

Grand Jury

A. Motion to Quash Indictment Based on Error in Grand Jury Composition §9.1
B. Motion to Dismiss Indictment (Pen C §939.71) §9.2
C. Request to Grand Jury and Prosecution to Consider Exculpatory Evidence §9.3

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Source: Criminal Law/California Criminal Law Forms Manual/9 Grand Jury/§9.1 A. Motion to Quash Indictment Based on Error in Grand Jury Composition

§9.1 A. Motion to Quash Indictment Based on Error in Grand Jury Composition

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TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court dismiss the indictment in this case because _ _[*summarize error*]_ _. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two to three sentences.*]_ _

STATEMENT OF FACTS

_ _[*Specify the charges brought against the defendant by the grand jury, and the date they were brought.*]_ _

_ _[*Next, describe the facts concerning the alleged error in the composition of the grand jury. Attach as exhibits declarations or other papers to support each allegation. A very brief example follows; in most cases a demographic expert's testimony would be included, and extensive expert testimony would be taken at the hearing on the motion. See the Comment at the end of this motion.*]_ _

The Franklin County Grand Jury that returned this indictment was composed of 19 members. They were all white males. (See Exhibit One, declaration of _ _[*name of defense counsel*]_ _.) The population of Franklin County is 55 percent females and 45 percent males. The racial breakdown is: 56 percent Caucasian; 24 percent African-American; 15 percent Hispanic; 3 percent Asian; and 2 percent Native American. (See Exhibit Two, 1990 census figures for Franklin County.)

[*Continue*]

ARGUMENT

_ _[*Some of the main arguments concerning error in the composition of the Grand Jury follow. Use any that are relevant.*]_ _

THERE WAS INTENTIONAL DISCRIMINATION IN THE SELECTION OF THE GRAND JURY

_ _[*Give the composition of the Grand Jury, the composition of the county residents, and the basis for claiming intentional discrimination. See U.S. Const amends VI, XIV; People v Newton (1970) 8 CA3d 359, 388, 87 CR 394 (grand jury must be free from "purposeful discrimination"); Vasquez v Hillery (1986) 474 US 254, 88 L Ed 2d 598, 106 S Ct 617 (grand jury must be free from intentional discrimination, which is violation of right to equal protection). See also People v Bell (1989) 49 C3d 502, 524, 262 CR 1 (statistical evidence regarding petit jury not sufficient if selection process neutral; systematic exclusion must be shown).*]_ _

THE GRAND JURY THAT FOUND THE INDICTMENT IN THIS CASE DID NOT REPRESENT A FAIR CROSS-SECTION OF THE COUNTY, WHICH IS A VIOLATION OF THE SIXTH AMENDMENT

_ _[*Give the composition of the Grand Jury, the composition of the county population, and the basis for claiming violation of the fair cross-section requirement. Relevant authorities include US Const amends VI, XIV; Duren v Missouri (1979) 439 US 357, 364, 58 L Ed 2d 579, 587, 99 S Ct 664 (absence of fair cross-section in petit jury due to nonpurposeful exclusion is violation of due process and Sixth Amendment right to trial by impartial jury); People v Corona (1989) 211 CA3d 529, 536, 259 CR 524 (same); People v Superior Court (Dean) (1974) 38 CA3d 966, 971, 113 CR 732 (in formulating panel for grand jury, officials have affirmative duty to develop and pursue procedures aimed at achieving fair cross-section; cited in People v Harris (1984) 36 C3d 36, 59, 201 CR 782). The rules are the same for grand juries as for petit juries (Carter v Jury Comm'n (1970) 396 US 320, 330, 24 L Ed 2d 549, 557, 90 S Ct 518; People v Newton (1970) 8 CA3d 359, 388, 87 CR 394), and the same for the State of California as for the federal courts (Carter v Jury Comm'n, supra).*]_ _

THE DEFENDANT NEED NOT BE A MEMBER OF THE UNDERREPRESENTED GROUP TO CHALLENGE ITS LACK OF REPRESENTATION ON THE GRAND JURY

The defendant is not required to be a member of the group that is underrepresented on the grand jury that found an indictment in _ _[*his/her*]_ _ case in order to challenge that underrepresentation. (*Peters v Kiff* (1972) 407 US 493, 33 L Ed 2d 83, 92 S Ct 2163; *People v Estrada* (1979) 93 CA3d 76, 95 n15, 155 CR 731.)

CONCLUSION

The defendant asks the court to quash the indictment against _ _[*him/her*]_ _ for the above-stated reasons.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: Any relevant declarations, affidavits, or other documents needed to support the motion should be attached as exhibits. See §§18.3-18.4 on declarations and affidavits and §1.25 on exhibits.

A challenge to the composition of the grand jury is made in the superior court through a motion to quash the indictment. *Vasquez v Hillery* (1986) 474 US 254, 88 L Ed 2d 598, 106 S Ct 617 (defendant had made unsuccessful motion to quash indictment in California superior court; U.S. Supreme Court reversed based on systematic exclusion of African Americans from grand jury).

NOTE: The challenge in the trial court is *not* made as a Pen C §995 motion, because extensive evidence must be taken and §995 review is almost always based exclusively on the record of the grand jury proceedings.

At the hearing on the motion, the defense first puts on evidence to prove a prima facie case. See *People v Navarette* (1976) 54 CA3d 1064, 127 CR 55 (discussion of evidence presented in support of motion based on underrepresentation of women). The defense commonly relies on census figures to show the percent of the underrepresented group in the county and on testimony from the jury commissioner (or other county official responsible for grand jury selection procedures) to show what criteria are used and how they are applied. An expert is frequently used to provide a demographic analysis. See discussion in *In re Rhymes* (1985) 170 CA3d 1100, 217 CR 439.

If a prima facie case is shown, the burden shifts to the prosecution to rebut it. *Castaneda v Partida* (1977) 430 US

482, 51 L Ed 2d 498, 97 S Ct 1272.

To prove a prima facie case in the trial court, the following requirements must be met (*Castaneda v Partida, supra*):

- The procedure involved resulted in substantial underrepresentation of an identifiable group over a period of time.
- The underrepresented group is a recognizable, distinct class.
- The group has been singled out for different treatment under laws as written or as applied.
- If the procedure for selecting grand jurors is neutral on its face, the defense must identify some constitutionally impermissible application of the law that is the probable cause of the disparity.

Motions attacking the composition of the grand jury are complicated and voluminous. Defense counsel may obtain information on locating and obtaining copies of such motions through California Attorneys for Criminal Justice (CACJ), 1540 River Park Drive, Suite 224A, Sacramento, CA 95815-4609, (916) 643-1800. Prosecutors can obtain information from the California District Attorneys Association (CDAA), 921 11th Street, Suite 300, Sacramento, CA 95814-2882, (916) 443-2017 or at their website: http://www.cdaa.org.

Cross-Reference: For further discussion of challenges to the composition of the grand jury, see Crim Law §9.5; Ginger, Jury Selection in Civil and Criminal Trials (2d ed 1984-1985); National Jury Project, Jurywork; Systematic Techniques §5.04[6] (2d ed 1983); California Death Penalty Defense Manual (CACJ-CPDA 2008).

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Source: Criminal Law/California Criminal Law Forms Manual/9 Grand Jury/§9.2 B. Motion to Dismiss Indictment (Pen C §939.71)

§9.2 B. Motion to Dismiss Indictment (Pen C §939.71)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court dismiss the indictment in the above-titled case because the prosecution failed to inform the grand jury of exculpatory evidence of which it was aware, as required by Penal Code section 939.71, thereby preventing the grand jury from exercising its duties under Penal Code section 939.7. That failure has resulted in substantial prejudice and is, therefore, grounds, under Penal Code section 939.71, for dismissal of the portion of the indictment related to that evidence. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two to three sentences.*]_ _

STATEMENT OF FACTS

_ _[*Summarize the facts concerning the crime(s) charged as brought out in testimony before the Grand Jury. Follow each summary of particular testimony with a parenthetical citation to the page (and line, if you wish) of the Grand Jury transcript on which that testimony may be found.*]_ _

[*Example*]

On the morning of June 14, 2004, David Jones was notified by the maid that the television was missing from Room 24 of the Villa Motel, of which Mr. Jones is the manager. On entering the room, Mr. Jones found that the window had been forced open and a television was missing. (RT 5: 3-10)

_ _[*List the charges that were found against the defendant by the Grand Jury, and on what date.*]_ _

EXCULPATORY EVIDENCE

_ _[*Describe whatever exculpatory evidence was available to the prosecutor but not presented to the prosecution. Cite to where the exculpatory evidence is memorialized; also attach a copy as an exhibit, and cite to that copy as well.*

Sources of such information might include police reports, declarations from defense investigators who interviewed witnesses who said they gave particular information to the prosecution, and testimony from an earlier hearing in the same case if it has been dismissed before. If you sent information to the prosecution and requested that the Grand Jury be made aware of it, attach a copy as an exhibit.]_ _

ARGUMENT

THE PROSECUTION IS REQUIRED TO INFORM THE GRAND JURY OF EXCULPATORY EVIDENCE OF WHICH IT IS AWARE

The prosecution is required to inform the Grand Jury of any exculpatory evidence of which it is aware. (Penal Code section 939.71.) Although Penal Code section 939.71 does not define "exculpatory evidence," it is expressly intended to codify the holding in *Johnson v Superior Court* (1975) 15 C3d 248, 124 CR 32, which described such evidence as evidence that tends to explain away the charges and as evidence that reasonably tends to negate guilt (*Cummiskey v Superior Court* (1992) 3 C4th 1018, 1033, 13 CR2d 551).

DISMISSAL IS THE REMEDY FOR THE PROSECUTION'S FAILURE TO INFORM THE GRAND JURY OF EXCULPATORY EVIDENCE OF WHICH IT IS AWARE WHEN THAT FAILURE RESULTS IN SUBSTANTIAL PREJUDICE

The prosecution's failure to inform the Grand Jury of exculpatory evidence of which it is aware is grounds for dismissal if that failure results in substantial prejudice. (Penal Code section 939.71.)

THE PROSECUTION WAS AWARE OF EXCULPATORY EVIDENCE THAT WAS NOT DISCLOSED TO THE GRAND JURY

_ _[*Describe what evidence not disclosed to the grand jury was available to the prosecution and why it was exculpatory. Detail how the prosecution was aware of it*]_ _**.**

SUBSTANTIAL PREJUDICE RESULTS WHEN IT IS REASONABLY PROBABLE THAT A RESULT MORE FAVORABLE TO THE DEFENDANT WOULD HAVE BEEN REACHED IF THE GRAND JURY HAD BEEN INFORMED OF THE EXCULPATORY EVIDENCE

The test for assessing substantial prejudice under Penal Code section 939.71 is whether, evaluating the entire record, it is reasonably probable that a result more favorable to the defendant would have been reached if the exculpatory evidence had been disclosed to the grand jury. *Berardi v Superior Court* (2007) 149 CA4th 476, 57 CR3d 170.

THE FAILURE TO DISCLOSE EXCULPATORY EVIDENCE RESULTED IN SUBSTANTIAL PREJUDICE

_ _[*Describe how failure to disclose the exculpatory evidence resulted in substantial prejudice*]_ _**.**

CONCLUSION

The indictment should be dismissed, on the basis of the prosecution's failure to inform the Grand Jury of exculpatory evidence of which it was aware, resulting in substantial prejudice.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: The defendant is entitled to discovery of both testimonial and nontestimonial portions of grand jury proceedings to prepare a motion to dismiss the indictment. *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 92 CR2d 829. The court in *Mouchaourab* construed Pen C §939.71 as one of the "express statutory provisions" that authorizes discovery under Pen C §1054(e). A sample informal discovery motion and a sample motion to compel discovery are in chap 11.

NOTE: This motion is not made as a Pen C §995 motion, because evidence must be taken; rather it is made as a motion to dismiss the indictment under Pen C §939.71. You should check local practice concerning the procedures followed for such motions.

If the defense is aware of the existence of exculpatory evidence that is persuasive enough to "explain away the charges" (see Pen C §939.7), the defense may wish to submit a letter to the grand jury and to the prosecution informing them of the existence of exculpatory evidence. See §9.3.

The opposition arguments that may be made by the prosecution include the following:

- The proposed evidence was not exculpatory; the evidence was not within the reach of the grand jury (Pen C §939.7).
- The grand jury was aware of the evidence but did not ask the prosecution to produce it.
- The prosecution *did* tell the grand jury of the exculpatory evidence.
- The failure to present the proposed evidence did not result in substantial prejudice.

See *People v Thorbourn* (2004) 121 CA4th 1083, 1090, 18 CR3d 77.

Substantial prejudice is demonstrated when, evaluating the entire record, it is reasonably probable that a result more favorable to the defendant would have been reached if the exculpatory evidence had been disclosed to the grand jury. *Berardi v Superior Court* (2007) 149 CA4th 476, 57 CR3d 170.

Any relevant declarations, affidavits, or other documents needed to support the motion should be attached as exhibits. See §§18.3-18.4 on declarations and affidavits and §1.25 on exhibits.

Cross-Reference: On the prosecutor's obligation to present exculpatory evidence to the grand jury, see Crim Law §9.19.

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Source: Criminal Law/California Criminal Law Forms Manual/9 Grand Jury/§9.3 C. Request to Grand Jury and Prosecution to Consider Exculpatory Evidence

§9.3 C. Request to Grand Jury and Prosecution to Consider Exculpatory Evidence

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_ _[*Attorney's letterhead*]_ _

To: _ _[*Name of grand jury foreman or forewoman and of District Attorney*]_ _
_ _[*Address*]_ _
_ _[*Name of District Attorney*]_ _
_ _[*Address*]_ _
Re: _ _[*Name of defendant*]_ _

Dear _ _[*Name of grand jury foreman or forewoman and of District Attorney*]_ _**:**

_ _[*State name of defendant and describe case sufficiently to identify it to the recipients of the letter*]_ _**.**

_ _[*Describe the grand jury's obligations and rights when it receives notice of exculpatory evidence (Pen C §§939.7, 939.71)*]_ _**.**

[*Example*]

Under Penal Code section 939.71, the prosecution has a duty to inform the Grand Jury of any exculpatory evidence of which the prosecution is aware. For purposes of this code section, exculpatory evidence includes evidence that tends to explain away the charges and evidence that reasonably tends to negate guilt. (Penal Code section 939.71(b); *Cummiskey v Superior Court* (1992) 3 C4th 1018, 1033, 13 CR2d 551.) The Grand Jury must weigh all the evidence submitted to it and, when it has reason to believe that other evidence within its reach will explain away the charge, it must order the evidence to be produced. (Penal Code section 939.7.) Copies of these code sections are attached to this letter.

_ _[*Describe in separate paragraphs each piece of evidence that is exculpatory. You might follow a formula for each piece of evidence: First, describe it; second, tell why it is exculpatory; third, state that a copy is attached to the letter, if that is the case (if a copy is not attached, Pen C §939.7 requires that you explain why the evidence is within the reach of the grand jury); fourth, if the prosecution will have to subpoena (duces tecum) a witness or evidence, give sufficient information (such as addresses and phone numbers) for that to easily be accomplished.*]_ _

_ _[*Summarize why no indictment should be found. Offer to provide any further information needed either by the grand jury or the prosecution.*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Signature of attorney*]_ _
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: Both the prosecutor and the grand jury foreperson may be addressed in the same letter, and two originals prepared, signed, and sent (so that each recipient knows that the other has a copy). This is not a court paper and so is not served and filed. Because of the importance of the information and the usual need to act quickly, however, the defense may wish to have these letters delivered by messenger. Because the defense may have to prove at a later time that the letter was delivered to the prosecution and to the grand jury, and possibly prove the date of delivery, the defense should have proof of service. It is common either to have those receiving it sign for receipt, or to send the letter certified mail, return receipt requested.

Defense counsel must weigh several factors before deciding whether to send favorable defense information to the

grand jury and the prosecution. First, if you are not experienced with this particular grand jury, find out from local practitioners whether it is a "rubber stamp" for the prosecution. Consider whether any of the favorable information is privileged or work product or would not otherwise be discovered by the prosecution. Decide whether the information really satisfies the Pen C §939.7 condition that it "will explain away the charge."

Defense counsel who wants to try to reach a disposition that does not involve the filing of an indictment may make an appointment to personally present the exculpatory evidence to the prosecutor before the grand jury has had the opportunity to find an indictment.

The prosecution has no obligation to disclose nonexculpatory evidence to the grand jury. If the grand jury also received a copy of the defense letter, the prosecution may want to ask them if they want to take evidence on the information contained in the defense letter.

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10

Client Interview

Client Interview Form §10.1

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Source: Criminal Law/California Criminal Law Forms Manual/10 Client Interview/§10.1 Client Interview Form

§10.1 Client Interview Form

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CLIENT INTERVIEW FORM

Date _____

Name _____

Address _____ Telephone _____
(Number, street, city, and zip code)

Birthdate _____ Social Security No. _____

E-mail Address

_____

Education

_____

(Highest grade completed) (School names)

Vocational Training _____

(Skill) (School name)

Driver's License No. _____ Issuing State _____

Auto Model/Make _____

Automobile License No. _____

Have you contacted another attorney about this case? Please provide details.

_____

_____

Do you have any outstanding warrants for your arrest? Please provide details.

_____

Is English your native language? _____ If not, what is? _____ Do you need an interpreter? _____

Are you a U.S. citizen? _____ If not, what is your immigration status?

_____

Do you have other cases pending? _____

Are you now on probation or parole? _____

If you are on probation or parole, please list the name and telephone number of your probation or parole officer:

_____

List all prior arrests and whether convicted or not.

Offense	Arresting Agency	Date	Disposition

FAMILY

Name	Address	Telephone	Birthdate	Where Employed
Father				

_____

Mother (Maiden)

_____

Stepfather

_____

Stepmother

_____

Name	Address	Telephone	Birthdate	Where Employed

Brothers/Sisters

_____

_____

_____

_____

Children/Stepchildren

_____

_____

_____

_____

PREVIOUS RECORD

Have you ever been referred to adult or juvenile probation or parole? _____

Agency	Location	Date

_____

_____

_____

_____

Have you ever been in a jail, prison, or mental hospital for juveniles or adults? _____

Name of Institution	Date	Why were you there?

_____

_____

_____

_____

Important: Give complete names and mailing addresses for the next three categories.

MARITAL HISTORY

Married to:	Date Married	Date Sep/Div

_____

_____

_____

(Spouse's current address/telephone)

_____

(Spouse's current employer/telephone)

_____

EMPLOYMENT HISTORY (List present or last employment first)

From/To Name of Employer Type of Business

_____

_____

(Position held/Salary)

_____

(Address)

_____

(Telephone)

From/To Name of Employer Type of Business

_____

_____

(Position held/Salary)

_____

(Address)

_____

(Telephone)

LIST PERSONAL REFERENCES (Persons who know you other than relatives)

Name Address Telephone

_____

_____

_____

_____

DESCRIPTION OF CHARGED OFFENSE:

[This space is left blank for your attorney to fill out.]

THE ARREST: SEARCHES; STATEMENTS TO POLICE: Did anything unusual happen when you were arrested? Were you, anyone with you, or any place searched? Did the police take anything? Did you make a statement to the police? What were the contents of your statements?

_____

_____

PHYSICAL, MENTAL, EMOTIONAL, MARITAL, DRUGS, AND/OR ALCOHOL PROBLEMS: Have you had a problem in any of the above areas? Yes __ No __

If yes, please explain: _____

_____

Are you currently receiving medical treatment or are you seeing a counselor or therapist? Yes __ No __

Name _____

Telephone _____

Address_____

WITNESSES: Please list all the names, addresses, and telephone numbers of people who witnessed the alleged crime or who can give information about it.

Name Address

_____

_____

_____

_____ _____

(Date) (Signature of client)

If someone helped you to complete this questionnaire, please write that person's name, address, and telephone number below.

_____
(Name)

_____
(Address)

_____
(Telephone)

Comment: You can have the client fill out the above form before the interview begins or can use it to organize the interview and elicit the information during the interview. To protect the attorney-client privilege, you or your secretary should caution the client not to share the form with any other person or to bring any other person to the interview unless an interpreter is required.

Cross-Reference: Additional information can be found in California Criminal Law Procedure and Practice, chap 10 (Cal CEB Annual), and in Crim Law §§1.8 (first interview), 1.9 (jail kit), 2.8 (prescreening for conflicts of interest), 3.13 (interviewing the client), 3.14-3.18 (fees and retainer agreements), 3.20-3.22 (accepting employment), and 32.12 (list of possible defenses).

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11

Discovery

A. Informal Defense Discovery Request §11.1
B. Defense Motion to Compel Discovery §11.2
C. Defense Motion for Sanctions §11.3
D. Informal Prosecution Discovery Request §11.4
E. Opposition to Prosecution Discovery Request §11.5
F. Prosecution Motion to Compel Discovery §11.6
G. Prosecution Motion for Sanctions §11.7
H. Motion for In Chambers Appointment of Defense Expert §11.8
I. Defense Motion to Preserve and Copy Tape (*Harvey/Madden* Motion) §11.9
J. Defense Motion for Transfer of Evidence for Retesting §11.10
K. Defense Motion to Dismiss Because of Destruction or Loss of Evidence (*Trombetta/Youngblood* Motion) §11.11
L. Defense Motion for Discovery of Police or Custodial Officer Conduct (*Pitchess* Motion) §11.12
M. Defense Motion for Discovery of Victim's Violent Conduct §11.13
N. Defense Ex Parte Motion for Production of Booking Photo or Latent Fingerprints §11.14
O. Request for Disclosure of Juvenile Case File (Judicial Council Form JV-570) §11.15
P. Acknowledgment of Discovery §11.16
Q. Motion for Conditional Examination §11.17

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.1 A. Informal Defense Discovery Request

§11.1 A. Informal Defense Discovery Request

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[*The informal request may be made by letter, or may be in the form of a court document so that it can be filed. The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO _ _[*NAME*]_ _, DISTRICT ATTORNEY OF _ _ _ _ _ COUNTY:

NOTICE IS HEREBY GIVEN that I presently represent defendant, _ _[*name*]_ _, who is charged with violation of _ _[*state charges*]_ _ in Docket No. _ _[*number*]_ _. Defendant is to next appear in Department _ _[*number*]_ _ of the _ _[*name of court*]_ _ on _ _[*date*]_ _.

Under Penal Code section 1054.5(b), I hereby request that on or before the date of that appearance, _ _[*give an alternative date if that is desired*]_ _, you provide me with copies of the following information, or provide me with the opportunity to review all of the following information:

[*The main items of information to be requested are listed below; select the ones you want, delete the rest, and add any others relevant to your case.*]

The names, current addresses, and telephone numbers of all witnesses to be called to testify against the defendant at trial and of all percipient witnesses and potential witnesses, whether or not the prosecution intends to call the witness to testify against the defendant at trial. (See Penal Code sections 1054.1(a), 1054(e); *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. See also *In re Littlefield* (1993) 5 C4th 122, 19 CR2d 248.)

All statements or utterances by the defendant _ _[*or a codefendant*]_ _, oral or written, however recorded or preserved, whether or not signed or acknowledged by the defendant _ _[*or codefendant*]_ _. (Penal Code section 1054.1(b), (e); *Brady v Maryland, supra*.)

The content of any statements made in the defendant's presence while being interrogated by law enforcement that were intended or might reasonably be expected to have the effect of encouraging the defendant to give a statement about the offense to the police. (*People v Haydel* (1974) 12 C3d 190, 115 CR 394; *Napue v Illinois* (1959) 360 US 264, 3 L Ed 2d 1217, 79 S Ct 1173.)

All notes of observations of the defendant's physical appearance, emotional state, or sobriety by law enforcement personnel or their agents at or near the time of defendant's arrest. (See *People v Haydel, supra*.)

All physical evidence obtained in the investigation of the case against the defendant. (Penal Code section 1054.1(c), (e).)

All photographs, transparencies, slides, diagrams, motion pictures and videotapes of the scene of the alleged offense. (Penal Code section 1054.1(c), (e).)

All photographs, motion pictures, or videotapes of the defendant made at or near the time of defendant's arrest in this case. (Penal Code section 1054.1(c), (e).)

All photographs, videotapes, motion pictures, composites, or likenesses shown to witnesses and prospective witnesses in this case for the purpose of establishing the identity of suspects in the crime charged against the defendant, and all reports concerning the display of such. (Penal Code section 1054.1(c), (e).)

The names and addresses of each witness shown or attending a lineup involving the above-entitled case and the results of any such lineup. (Penal Code section 1054.1(e); *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194.)

A copy of any police radio communication tape concerning the case. (See *People v Madden* (1970) 2 C3d 1017, 88 CR 171.)

Any record of criminal arrests or convictions of the defendant. (Penal Code section 1054.1(d)-(e).)

Any exculpatory evidence, information, documents, and other materials in the possession of, or that have come to the attention of, the District Attorney or of any police department involved in the investigation of the case against the defendant. (Penal Code sections 1054.1(e), 1054(e). See *Giglio v U.S.* (1972) 405 US 150, 31 L Ed 2d 104, 92 S Ct 763; *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194.)

Any record of criminal arrests or convictions (whether for felonies or misdemeanors) of any witness to be called to testify against the defendant. (Penal Code sections 1054.1(e), 1054(e); *People v Lang* (1989) 49 C3d 991, 264 CR 386; *People v Harris* (1989) 47 C3d 1047, 255 CR 352. See *People v Pinholster* (1992) 1 C4th 865, 938, 939, 4 CR2d 765; *People v Pensinger* (1991) 52 C3d 1210, 1271, 278 CR 640; *People v Santos* (1994) 30 CA4th 169, 35 CR2d 719.)

Any promises and/or inducements of any kind made by the prosecution to induce or encourage a witness to assist the prosecution in its investigation of the above-entitled case, or to induce a witness to testify for the prosecution in the above-entitled case. (See Penal Code section 1054.1(e); *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194.)

Any information relevant to impeachment of any witness that the prosecution intends to call at the trial, including any threats, promises, inducements, offers of reward or immunity, affirmative representations made or implied, and any record of convictions, or of pending charges, probation, or parole. (Penal Code sections 1054.1(e), 1054(e). See *People v Pinholster* (1992) 1 C4th 865, 938, 939, 4 CR2d 765; *Davis v Alaska* (1974) 415 US 308, 39 L Ed 2d 347, 94 S Ct 1105.)

All records concerning the arrest of the alleged victim, complaints filed against the victim, or information concerning incidents of specific acts of aggression by the alleged victim, as well as the names, addresses, and phone numbers of witnesses to such acts. There is good cause to request such records because _ _[*e.g., such records will show that alleged victim is prone to violence and victim's claims of self-defense lack corroboration or substance*]_ _. (Penal Code section 1054.1(e). See *Hill v Superior Court* (1974) 10 C3d 812, 817, 112 CR 257 (upon showing of good cause, trial court has discretion to allow defendant to discover "rap sheet" of prosecution witness).)

The identity and whereabouts of any material informants. (Penal Code sections 1054.1(e), 1054(e).)

The names and addresses of all persons detained or arrested as suspects in the above-titled case, and any statement(s) made by such persons. (See Penal Code section 1054.1(e); *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194.)

All written or recorded statements of witnesses who will testify at trial. (Penal Code section 1054.1(e)-(f).)

All written or recorded statements of percipient witnesses, whether or not they will be called to testify. (Penal Code sections 1054.1(e), 1054(e).)

Latent fingerprints lifted in the investigation of this case and photographs of such latent fingerprints, if any. (Penal Code section 1054.1(e); *Brady v Maryland, supra*.)

The known exemplars of fingerprints, if any, used for comparison with latent fingerprints lifted during the investigation of the alleged offense. (Penal Code section 1054.1(e); *Brady v Maryland, supra*.) All photographs, videotapes, audiotapes, and movies concerning this case. (See Penal Code section 1054.1(e).)

All laboratory, technician, and other reports concerning the testing and examination of evidence concerning this case. (Penal Code section 1054.1(e)-(f).)

All reports of experts made in conjunction with this case, involving the results of physical or mental examinations, scientific tests, experiments, or comparisons that the prosecutor intends to offer in evidence at the preliminary hearing or at trial, and all reports of experts who reviewed the work of a prosecution expert

who will testify at the preliminary hearing or at trial. (Penal Code section 1054.1(e)-(f).)

All notes and reports of police officers and investigators concerning the offense charged. This includes reports concerning all aspects of the case, *e.g.,* the crime, the defendant's arrest, law enforcement activities and observations, and conversations with witnesses and potential witnesses. (Penal Code section 1054.1(e)-(f).)

All reports and notes of any law enforcement officer or investigator concerning the defendant and/or the above-entitled case that are maintained separately from the official file, *e.g.,* as "current investigation files," "field identification notes," or "street files."

If Officer _ _[*name*]_ _ has not worked for the _ _[*name of arresting agency for which officer works*]_ _ for at least five years, and worked for another law enforcement agency within five years of the date of the arrest in the instant case, the name and mailing address of Officer _ _[*name*]_ _'s previous employer. (Penal Code section 1054.1(e); *Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897.) All crime reports and arrest reports and other law enforcement reports, and any other information known to the _ _[*name of department*]_ _ Police Department tending to show that the victim, _ _[*name*]_ _, was involved in _ _[*state crime, e.g., drug trafficking*]_ _, in order to support defendant's statement _ _[*tell what defendant's statement was, e.g., that the crime occurred in a dispute over drugs and was not a robbery*]_ _.

Any evidence to be used in rebuttal of the defense case. (*Izazaga v Superior Court* (1991) 54 C3d 356, 285 CR 231; *People v Bunyard* (1988) 45 C3d 1189, 249 CR 71.)

[*Continue*]

Defendant asks that this document be treated as a continuing request through the completion of trial.

Thank you in advance for your cooperation.

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Received by: _ _ _ _ _ _

Date: _ _ _ _ _ _

Comment: An informal discovery request is required before court-ordered discovery may be requested. Pen C §1054.5(b). Counsel should always research the local court rules and standing orders for discovery, as these regional differences often impact practice.

Informal requests should be made early so that counsel can use the requested materials in investigating the case and preparing for trial and to allow ample time for a formal discovery motion if there is any difficulty in obtaining discoverable materials through informal methods. The prosecutor must be given 15 calendar days in which to comply with the informal request before court-ordered discovery may be sought. See Pen C §1054.5(b). When time limits are a problem, counsel should request an order shortening time or whatever other order is necessary. See *Hobbs v Municipal Court* (1991) 233 CA3d 670, 696, 284 CR 655, disapproved on other grounds in *People v Tillis* (1998) 18 C4th 284, 295, 75 CR2d 447. A sample application for an order shortening time is in §18.10. A sample motion to compel discovery is in §11.2. A sample motion for sanctions is in §11.3.

Many courts have a standing order for discovery that requires disclosure of the most commonly requested discovery items. For example, the San Francisco Superior Court Rules provide that "Disclosures required by Penal Code §§1054.1 and 1054.3 shall be made not later than the pre-trial conference." San Francisco Ct R 16.9(A)(1). A standing order simplifies discovery practice, but it is often necessary to supplement it with a specific request for information pertinent to the case. For example, a standing discovery order might require the prosecution to turn over exculpatory material discoverable under *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. See, *e.g.,* San Francisco Ct R 16.9(A)(1). However, a request specifying the specific information sought is necessary when the exculpatory value of the desired information is not readily apparent. See *In re Steele* (2004) 32 C4th 682, 701, 10

CR3d 536.

How informal the informal discovery process is varies from jurisdiction to jurisdiction. It may be common practice in some courts to make informal discovery requests orally; in others, it may be common practice to format the informal request as a court document and filed with the clerk along with proof of service on the opposing party.

Counsel should be aware of the practice in the court in which he or she is appearing regarding what type of request is preferred or required. However, it is important to remember that the informal request is a prerequisite for a motion to compel discovery. For this reason, some experienced attorneys strongly recommend preparing a written informal request that is as specific as possible, and which separately describes each requested item. If court intervention becomes necessary, the attorney can simply attach the informal discovery to his or her noticed request.

CAUTION: Standing discovery orders and lists of standard discovery items, such as the list reproduced in this section, are useful, but it is also crucial for counsel to consider whether the facts of the particular case suggest the need for additional discovery and to add such items to the informal discovery request when appropriate. For example, when the defendant has been charged by indictment, the grand jury transcript, including nontestimonial material, is discoverable under Pen C §1054(e). See *People v Superior Court (Mouchaourab)* (2000) 78 CA4th 403, 92 CR2d 829. See also §9.2.

Some attorneys informally request discovery in a letter, sent by registered or certified mail, return receipt requested. This provides documentation of the fact that the request was made; however, it does not document the contents of the request. San Francisco requires parties to provide written receipts describing contents exchanged during discovery and time received. San Francisco Ct R 16.9(A)(2).

Experienced attorneys recommend serving and filing the request as the safest procedure. The filed document provides evidence of *what* was requested and may avert later questions about whether counsel made an informal request for specific items sought in a motion to compel discovery. The sample form provided here may be formatted as a court document (see Cal Rules of Ct 2.100-2.119; §§1.2-1.12) and filed with an attached proof of service.

Response. Reasons that the prosecution may not give the defense various types of discovery include the following:

- The requested discovery is not required to be given to the defense by Pen C §§1054-1054.7. The prosecution will closely examine the request to see if it comports with statutory requirements, and may oppose any item arguably not covered under the statutory discovery scheme. The prosecution will usually want to narrow the scope of the request as much as possible.
- The requested discovery is work product as defined by CCP §2018.030(a). Pen C §1054.6.
- The requested discovery is privileged. Pen C §1054.6. In some cases, privileged information is not required to be disclosed at the time the witness is "designated" (*e.g.,* pretrial, at the time discovery is usually requested) but may be required to be disclosed later if the witness in fact testifies at trial. See *Andrade v Superior Court* (1996) 46 CA4th 1609, 1613, 54 CR2d 504; *Rodriguez v Superior Court* (1993) 14 CA4th 1260, 18 CR2d 120.
- The requested discovery has to be obtained from third parties not working as part of the investigative or prosecutorial team for the district attorney. See Pen C §§1054(e), 1054.1, 1054.5(a); *People v Superior Court* (2000) 80 CA4th 1305, 1314, 96 CR2d 264. In that case, the defense can obtain the requested evidence directly from the source. *People v Webber* (1991) 228 CA3d 1146, 1167, 279 CR 437.
- Evidence claimed to be favorable to the defense under *Brady* does not fit the *Brady* requirements.
- Other formal proceedings for obtaining the requested evidence that should be followed, *e.g.,* motion to disclose a nontestifying informant, or *Pitchess* motion.

The prosecution should make a record of when and what discovery is given to the defense in response to the informal request. If the district attorney complies with the informal discovery request from the defense, further discovery proceedings are unnecessary. If the district attorney does not comply, or does not completely comply, formal discovery must be pursued. When the district attorney complies with the informal request, counsel should make a memorandum of compliance for the file that describes what was received and when. The district attorney may require defense counsel to reply with a discovery inventory letter that describes each piece of discovery received from the prosecution and the date it was received. As noted above, San Francisco local rules actually require that parties exchange receipts detailing contents exchanged during discovery and date of compliance. San Francisco Ct R 16.9(A)(2).

Special discovery motions. Certain types of discovery should be requested through separate motions, *e.g., Pitchess* motions (see California Criminal Law Procedure and Practice §§11.19-11.24 (Cal CEB Annual)), *Trombetta* motions (see Crim Law §§11.27-11.28), and motions to disclose the identity of a nontestifying informant (see Crim Law, chap 17). See Crim Law §11.2 for a list of the common special discovery motions; see the outline at the beginning of this chapter for a list of the special discovery motions included in this forms manual.

Cross-Reference: For further discussion of discovery, see Crim Law, chap 11.

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.2 B. Defense Motion to Compel Discovery

§11.2 B. Defense Motion to Compel Discovery

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court compel discovery of the items previously requested informally of the prosecution on _ _[*date*]_ _, and not given to the defense. Those items are listed in the attached _ _[*e.g., declaration of counsel*]_ _. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

AN INFORMAL DISCOVERY REQUEST HAS ALREADY BEEN MADE OF THE PROSECUTION, AND _ _[*THERE WAS NO RESPONSE/THE PROSECUTION DID NOT DISCLOSE ALL REQUESTED ITEMS*]_ _

The defense is required to informally seek discovery at least 15 calendar days before asking for court-ordered discovery. (Penal Code section 1054.5(b).) In this case, the defense met that obligation. _ _[*Describe when and how discovery was requested. If the informal discovery request was a court form for standard discovery in criminal cases, state that.*]_ _ **A copy of that informal request is attached as Exhibit A. _ _**[*Describe the prosecution's response, if any, e.g., the prosecution did not comply at all, or turned over some requested items, but not others. If there was partial compliance, tell where in the motion that is detailed, e.g., the items disclosed by the prosecution are set out in Exhibit B, defense counsel's notice of receipt of discovery, and in Exhibit C, the prosecution's compliance letter.*]_ _

THE DEFENSE ASKS THE COURT TO ORDER THE PROSECUTION TO DISCLOSE TO THE DEFENSE THE ITEMS LISTED BELOW. ALL OF THEM WERE REQUESTED INFORMALLY OF THE PROSECUTION, BUT NONE HAVE BEEN GIVEN TO THE DEFENSE

[*Describe what the defense is requesting in general, usually one of the following choices.*]

[*Option 1*]

The defense requests that the court order the prosecution to disclose all items that were requested in the informal discovery request that is attached as Exhibit A, and that are described below.

[*Option 2*]

The prosecution did not disclose every item requested by the defense in its informal discovery motion

(Exhibit A). The defense therefore requests that the court order the prosecution to disclose to the defense those items set out below, which were informally requested but not disclosed.

[*Continue*]

[*Set out all items requested that have not been produced by the prosecution, with accompanying authority that supports their discovery. Be sure to list only the items not produced. A sample informal request is in §11.1. The main items to request follow. Delete any that do not apply, and add any additional ones relevant to your case. They may follow each other, as they do here, or each request may be put on a separate page.*]

DEFENDANT'S STATEMENTS

All statements by the defendant, however recorded or preserved, whether or not signed or acknowledged by the defendant, whether made to police officers or to other people, and the names, addresses, and telephone numbers of any and all witnesses to the making of said statements. If such statements were oral, they shall be reduced to written form and provided to defense counsel. If any such statements were tape-recorded and/or videotaped, the defense shall be permitted to copy such videotape and/or tape-recording and, in addition, any transcript made thereof. Any notes of any such statements, utterances or memoranda shall be preserved, and a copy provided to the defense.

AUTHORITIES: Penal Code section 1054.1(b).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

STATEMENTS USED DURING INTERROGATION OF DEFENDANT

All statements of any person that were shown, read, played, or paraphrased to the defendant during any interrogation conducted by law enforcement. The content of any statements made to the defendant or anyone else in the defendant's presence, which (a) were made in order to encourage the defendant to cooperate with the police and/or (b) might reasonably be expected to have the effect of encouraging the defendant to give a statement about the offense to the police.

AUTHORITIES: Penal Code section 1054.1(e); *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

OBSERVATIONS OF DEFENDANT AT AND NEAR TIME STATEMENT MADE

All memoranda or reports of observations made by police officers, or prosecution investigators and psychotherapists at or near the time of the arrest of the defendant, and at or near the time of the making of any statement, utterance, or memoranda by the defendant, concerning the defendant's physical appearance, emotional state or state of sobriety.

AUTHORITIES: Penal Code section 1054.1(e).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PHOTOS, ETC. OF SCENE OF CRIME

All photographs, transparencies, slides, diagrams, motion pictures, and videotapes of the scene of the alleged offense.

AUTHORITIES: Penal Code section 1054.1(c), (e).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

WITNESSES TO BE CALLED AT TRIAL

The names, current addresses, telephone numbers, and all statements, oral or written, of every prosecution witness whom the prosecution reasonably anticipates it is likely to call to testify at trial, including notes from interviews with these witnesses.

AUTHORITIES: Penal Code section 1054.1(a)

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

CRIMINAL RECORD OF WITNESSES TO BE CALLED AT TRIAL

For each witness who may be called to testify at trial, all records, including police reports, relating to any felony conviction, or any misdemeanor charge, any pending charges, any pending parole or probation, anywhere in California, both at the time of the alleged offense and presently pending. Also any docket numbers or CEN numbers generated by the incident giving rise to the report.

AUTHORITIES: Penal Code section 1054.1(d) ("existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial"); California Constitution article I, section 28(f); *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418; *People v Mickle* (1991) 54 C3d 140, 168, 284 CR 511; Evidence Code sections 452.5, 780, 788. See also *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PERCIPIENT WITNESSES

The names, current addresses, telephone numbers, and all statements, oral or written, of all persons who were percipient witnesses as herein defined, including notes from interviews with these witnesses, whether or not they are to be called to testify against the defendant at trial. The term "percipient" includes any witness to the charged offenses or incidents immediately attendant thereto, as well as a witness who perceived relevant details either before or after the commission of the charged offenses.

AUTHORITIES: Penal Code section 1054.1(a), (e), (f); *Brady v Maryland, supra*.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

REPORTS, RECORDS, AND NOTES ON WITNESSES

All reports, records and notes regarding the witnesses who will be called to testify at trial, or who were percipient witnesses to the charged offense(s), as described above, bearing on any such witness's physical or psychological limitation on their ability to perceive, recollect or communicate concerning the subject matter of his or her testimony; the witness's character for honesty or veracity or their opposites; the existence or nonexistence of any expressed bias, interest, or other motive in testifying; any admission of untruthfulness. Information concerning any hospitalization of the witness that would relate to a witness's mental or physical abilities to observe or recollect, or related to the subject matter of his or her proposed testimony. All notes and reports of observations of police officers and investigators concerning the state of sobriety at the time of the charged offenses of those witnesses.

AUTHORITIES: Penal Code section 1054.1(e); Evidence Code section 780; *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PRIOR VIOLENT ACTS OF VICTIM

Regarding the complaining witness, _ _[*describe the complaining witness, including his or her name and as much other identifying information as possible, e.g., date of birth, physical description, sex, race*]**_ _, based on Penal Code section 1054.1(a), (d)-(f), and *Brady v Maryland, supra,* counsel requests:**

1. All records concerning the arrest or conviction of the complaining witness for specific acts of aggression, together with the names and addresses of witnesses to such acts.

2. All records concerning any felony and misdemeanor convictions suffered by the complaining witness to impeach _ _[*his/her*]**_ _ credibility.**

3. All police reports made within the last five years in which the complaining witness reportedly assaulted or otherwise engaged in violent conduct against the defendant. (*Engstrom v Superior Court* (1971) 20 CA3d 240, 97 CR 484.)

4. All probation reports regarding the complaining witness made within the last five years. (Penal Code section 1203.05.)

5. Any and all criminal charges pending against the complaining witness in any county in the State of California.

6. The probationary status of the complaining witness in any county in the State of California.

7. The police reports for all arrests and convictions for criminal activity on the part of the complaining witness, as well as any docket numbers or CEN numbers generated by the incident giving rise to the report.

AUTHORITIES: California Const article I, section 28(f); *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418; *People v Mickle* (1991) 54 C3d 140, 168, 284 CR 511.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

DOCUMENTS USED TO REFRESH RECOLLECTION

[*Use this section in discovery motion submitted in superior court, after preliminary hearing has been held.*]

All notes made by prospective witnesses relating to matters covered in their testimony at the preliminary examination and all documents used by a prosecution witness to refresh his or her memory at the preliminary examination or before trial.

AUTHORITIES: Penal Code section 1054.1(f).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PROSECUTION OFFERS TO DEFENDANT OR WITNESSES TO OBTAIN INFORMATION OR TESTIMONY

As to defendant and all witnesses who may be called to testify at the trial of the case and any and all persons who were percipient witnesses to the alleged offenses, whether or not they are to be called to testify at the trial of the case: any and all promises, inducements, offers of reward or immunity, plea agreements, or

affirmative representations made or implied to such persons in an effort to obtain information or testimony as to the investigation and/or prosecution of the alleged offenses as charged in the information, and, as to such persons, any and all threats made or implied for a like purpose.

AUTHORITIES: Penal Code section 1054.1(e); Evidence Code section 780.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

LAW ENFORCEMENT REPORTS, ETC.

All reports, notes, documents, diagrams, memoranda, and records, however recorded or preserved, prepared by any police officer or at a police officer's direction in connection with this incident, including, but not limited to, the investigating officers' log, defendant's booking sheet, and defendant's arrest sheet. All notes made by any police officer in connection with this case shall be preserved and a copy provided to defense counsel. "Notes," as used above, include those in the official case file and, additionally, those outside the official file, such as "street files," "criminal investigation files," "field investigation notes," etc.

It is further requested that the prosecution immediately notify all police officers involved in this investigation to preserve any original notes that they may have made during this investigation.

AUTHORITIES: Penal Code section 1054.1(e)-(f); *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. (See discussion in the Comment at the end of this motion.)

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

OPPORTUNITY TO VIEW ALL EVIDENCE

An opportunity to view and examine all physical evidence obtained in the investigation of the charged offense, including a copy of all property record sheets, and copies of all photographs, motion pictures, videotapes, slides, or transparencies taken of any physical evidence and of the scene of the alleged offense, and copies of all photographs taken of the defendant at or near the time of the charged offense, including the booking photograph of the defendant.

AUTHORITIES: Penal Code section 1054.1(c).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

REPORTS AND RECORDS OF EXPERTS CONCERNING CASE

All reports and records of all chemical, biological, medical, criminological, laboratory, or other testing and examination of any physical evidence in this action, including, but not limited to, the victim's body, bodily fluids, and/or clothing, and the defendant's body, bodily fluids, and/or clothing. All reports and records of experts involving mental examinations of the defendant or a witness in the case. Copies of any notes, tape recordings, or any other records or documents used or completed in the course of such testing and examination. The name, address, and telephone number of each person who conducted or performed any such test, examination, or analysis. The name, address, and telephone number of any person who reviewed any such test, examination, analysis, or report for any expert opinion, with a copy of each person's report, evaluation, review and/or analysis. The curriculum vitae of any expert who conducted a test, wrote a report, or reviewed an expert's test or report in this case, who will testify as an expert at the preliminary hearing or at trial.

AUTHORITIES: Penal Code section 1054.1(e)-(f).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

STATEMENTS OF CODEFENDANTS

All statements of codefendant[s], oral or written, however recorded or preserved, whether or not signed or acknowledged by the codefendant.

AUTHORITIES: Penal Code section 1054.1(e); see Penal Code section 1054.1(b).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PHOTOS OF DEFENDANT AND IDENTIFICATION MATERIALS

All photographs, videotapes, motion pictures, composites, or likenesses, of any kind or form whatsoever, shown to any and all witnesses or prospective witnesses in this case for the purpose of establishing the scope of the knowledge of such witnesses or prospective witnesses, or for the purpose of establishing the identity of suspects in the alleged offenses as charged in the information; any and all such photographs and the likenesses shown to such individuals for the purpose of verifying the identification of any defendant; all reports and notes concerning display of any and all such photographs and the like; and the names, addresses, and telephone numbers of all persons shown such photographs and the like and any other persons present during such viewing.

AUTHORITIES: Penal Code section 1054.1(c), (f); *U.S. v Wade* (1967) 388 US 218, 18 L Ed 2d 1149, 87 S Ct 1926.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

DEFENDANT'S CRIMINAL RECORD HISTORY

The defendant's criminal record history, commonly referred to as a "rap sheet."

AUTHORITIES: See Penal Code sections 1054.1(d), 13300(b)(9).

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

PROPERTY SEIZED FROM DEFENDANT

The exact location of any property seized from defendant by warrant or process, including a specific description and inventory of such property; the circumstances of the search and seizure attendant to such taking; the names and official positions of law enforcement personnel, whether federal, state, or local, involved in said search and seizure, as well as the identities of any additional third persons who were present; a specification of items that were seized in addition to those belonging to, or alleged to belong to, defendant, including those alleged to belong to others; the precise time of each search and seizure; the exact beginning and ending time of the search; the exact time of any arrests made during the search and the names, addresses, telephone numbers, and rank of the arresting officers, and the location of such arrest; the manner of entry involved in said search and seizure; any reports of visual surveillance of defendant, codefendants, or third parties by law enforcement officers conducted before any of the aforesaid searches.

AUTHORITIES: Penal Code section 1054.1(c), (e); *U.S. v Nolte* (ND Cal 1965) 39 FRD 359.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

EVIDENCE FAVORABLE TO DEFENDANT (*BRADY* DISCOVERY)

Any evidence that would tend to exonerate the defendant ("*Brady*" discovery), minimize _ _[*his/her*]_ _ probable sentence, or that constitutes information that the defense might use to impeach or contradict prosecution witnesses. *Brady* discovery includes information that relates to the existence of evidence tending to suggest that someone other than the defendant committed _ _[*the crime/any or all of the crimes*]_ _ charged against the defendant. _ _[*Add when applicable*: *Brady discovery also includes any evidence that would tend to support a factor in either aggravation or mitigation as set forth in Penal Code section 190.3.*]_ _

AUTHORITIES: Penal Code sections 1054.1(e), 1054.5(c); *Izazaga v Superior Court* (1991) 54 C3d 356, 378, 285 CR 231 (*Brady* disclosure required even though not included within Pen C §1054.1, because it is mandated by United States Constitution); *Napue v Illinois* (1959) 360 US 264, 3 L Ed 2d 1217, 79 S Ct 1173.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

CONTINUING ORDER; COPIES OF ORDER TO BE GIVEN TO LAW ENFORCEMENT

The defendant requests that each of the above orders be continuing orders through the completion of trial, so that items granted that become available after the date of this order are to be made immediately available to defense counsel. This order is to be given to the prosecutor's investigator and to the police officer in charge of investigating this case, and those persons must immediately give all reports to the prosecutor, who must immediately give them to defense counsel.

AUTHORITIES: See Pen C §1054.7.

ORDER OF THE COURT: Granted ____ Denied ____

Ordered, with the following modification: _____

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION IN SUPPORT OF MOTION FOR DISCOVERY

I, _ _[*declarant's name*; *most such declarations, including this one, are made by defense counsel*]_ _, declare under penalty of perjury that:

1. I _ _[*state if you are in public office, e.g., am a deputy public defender and*]_ _ represent the defendant in the above-entitled action.

2. On information and belief, the records, documents, and information sought by this motion are in the actual and/or constructive possession of the District Attorney of _ _ _ _ _ _ County.

3. The records, documents, and information sought by this motion _ _[*, except those previously provided,*]_ _ are not available to the defendant or _ _[*his/her*]_ _ counsel in the exercise of due diligence. _ _[*Describe why they are unavailable to the defense if that may be an issue*]_ _.

**4. The records and documents sought by this motion are necessary to help prepare the defense in this action. The requested discovery will be helpful to the defense case in the following ways: _ _[*Specify how this*

information will be helpful, e.g., locating witnesses and physical evidence; *preparing for the cross-examination and impeachment of witnesses to be called by the prosecution*; *assessing the credibility of witnesses to be called by the prosecution*; *assessing the credibility of defense witnesses*; *corroborating the testimony of defense witnesses*; *identifying the need for defense expert witnesses*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER COMPELLING DISCOVERY (PEN C §1054.5)**
_ _[*Name*]_ _,	
Defendant.	
_____ /	

It appearing to this Court from the declaration of _ _[*name of declarant*]_ _, _ _[*add title if in public office, e.g., Deputy Public Defender of Los Angeles County,*]_ _**, counsel for the defendant, that there are in your possession or under your control certain items relevant to this action, and good cause appearing therefor,**

IT IS HEREBY ORDERED that you make available to _ _[*name of attorney/the Public Defender of* _ _ _ _ _ _ *County*]_ _ **and/or** _ _[*his/her*]_ _ **lawful representative within** _ _[*number*]_ _ **days of this order each of the items checked off by this Court as granted or modified by this order as indicated on the attached paper(s). Failure to comply with this order may be punishable by contempt of court.**

IT IS FURTHER ORDERED that this Order be deemed a continuing and ongoing order through the completion of trial, so that any items granted by this order, which are actually or constructively obtained by or become known to the District Attorney of _ _ _ _ _ _ **County or any of** _ _[*his/her*]_ _ **deputies, investigators, employees, or agents after initial compliance with this order has been made, shall also be made available immediately to defense counsel.**

IT IS FURTHER ORDERED that copies of this order be given to the prosecutor's investigator, and to the law enforcement officer in charge of investigating this case, and that the prosecutor instruct them that the attached orders are continuing orders, and that law enforcement has a continuing obligation to give items covered by these orders to the prosecutor, who is then to give them to defense counsel.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: If the prosecution has not complied with the informal request for discovery (see §11.1), the defense may move for court-ordered discovery. See Pen C §1054.5(b). This motion includes a proposed order. A copy of the informal request served on the prosecution should be attached to the motion as an exhibit, along with proof of service of the informal request, if any. If there is no proof of service, a declaration by the person who served the informal notice on the prosecution should be attached as an exhibit. See the sample declaration in §18.3. Exhibits are discussed in §18.15.

Prosecution arguments against the motion to compel discovery might include the following:

- No informal request has been made.

- What was requested informally is different from items listed in formal motion.
- Fifteen days have not passed since the defense's informal request.
- The defense failed to follow the pretrial motion requirements of Cal Rules of Ct 4.111 (see Comment, §18.1).
- The informal request did not describe what was desired with enough particularity to enable the prosecution to know what is wanted (see *People v Prince* (2007) 40 C4th 1179, 1232, 57 CR3d 543; *People v Jackson* (1993) 15 CA4th 1197, 19 CR2d 80).
- The material requested is protected by the work product doctrine or by a privilege (Pen C §1054.6).
- The requested item is not within those required to be disclosed by Pen C §1054.1, by statute, or by the U.S. Constitution (Pen C §1054(e)).
- The defense has not complied with the prosecution's discovery request (Pen C §1054.5(b)).

PRACTICE TIP: If the prosecution has already disclosed material that the defense claims it did not disclose, the prosecution must be prepared to prove that disclosure. Common ways of handling discovery given to the defense so that compliance can later be proven are: having the defense sign and date the original of each item given them; and sending a copy of the list of what was sent, along with the date, to defense counsel and filing a copy of that list with the court. Although it is common to write a note in the file that discovery was given to the defense, and this practice may be the best course in many cases, it may cause problems in a case involving significant discovery items.

If the prosecution is concerned that the judge may order the production of information it believes is nondiscoverable, the prosecution should advance the date of the hearing on the defense motion so that it has time to seek a writ of prohibition. See 5 Witkin & Epstein, California Criminal Law, *Criminal Trial* §87 (3d ed 2000). See also *South Tahoe Pub. Util. Dist. v Superior Court* (1979) 90 CA3d 135, 154 CR 1; *Seven Up Bottling Co. v Superior Court* (1951) 107 CA2d 75, 76, 236 P2d 623.

Cross-Reference: For further discussion of discovery, see Crim Law, chap 11.

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§11.3 C. Defense Motion for Sanctions

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To download **WordPerfect** version, right click and choose *Save Target As*

[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court order sanctions against the prosecution under Penal Code section 1054.5 because the prosecution has failed to comply with the Court's _ _[*date*]_ _ discovery order. The defense requests that the following sanctions be imposed on the prosecution:

[*Include the requests below that are relevant.*]

The prosecutor in this case, _ _[*name*]_ _, be held in contempt;

The testimony of all prosecution witnesses related to the prosecution's failure to disclose be prohibited;

The presentation of real evidence related to the prosecution's failure to disclose be prohibited;

The trial of the case be continued;

The jury be advised of the prosecution's refusal to disclose;

The charges be dismissed;

_ _[*Any other order necessary to enforce the provisions of Penal Code sections 1054-1054.7.*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

This Court ordered the prosecution to disclose the items listed in the order attached as Exhibit A on _ _[*date*]_ _. The prosecution has not _ _[*specify what has not been disclosed*]_ _. The defense therefore moves for sanctions.

The appropriate sanctions in this case are _ _[*Specify sanctions and explain why they are appropriate; remember that the testimony of a witness may be prohibited only if all other sanctions have been exhausted, and charges dismissed only if required by the U.S. Constitution (Pen C §1054.5(c)).*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__

_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: A motion for court-ordered discovery (see §11.2) may be combined with a motion for sanctions if the prosecution has failed to comply with informally requested discovery. A copy of the discovery order should be attached to the motion for sanctions.

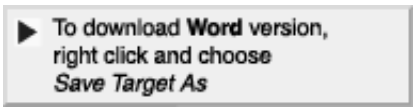
The prosecution may wish to request a review by the judge in chambers of the discovery requests with which it is not complying. See Pen C §1054.7; *Izazaga v Superior Court* (1991) 54 C3d 356, 382, 285 CR 231.

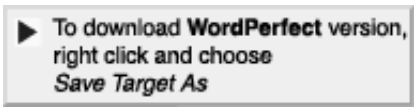
Cross-Reference: For discussion of sanctions, see Crim Law §11.17.

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.4 D. Informal Prosecution Discovery Request

§11.4 D. Informal Prosecution Discovery Request





[*The informal request may be made by letter, or may be in the form of a court document so that it can be filed. The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE DEFENDANT _ _[*AND THE ATTORNEY FOR THE DEFENDANT*]_ _:

The prosecution requests the discovery described below, which is required by Penal Code section 1054.3 to be disclosed to the prosecution by the defense:

1. "The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examination, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial." (Penal Code section 1054.3(a)(1).)

2. The opportunity within the next _ _[*number*]_ _ days to view "[a]ny real evidence which the defendant intends to offer in evidence at the trial." (Penal Code section 1054.3(a)(2).)

This is a continuing request for the above information. If the information becomes available at a future time, the District Attorney by this request asks that it be immediately disclosed to _ _[*him/her*]_ _.

If the defense does not reply to this request within 15 calendar days of being served with it, the People will assume that the defense has refused to comply with the law, and the People will move for an order to compel disclosure and for other sanctions under Penal Code section 1054.5(b). However, the People will not move to compel disclosure if notified that the defense does not intend to call witnesses or offer any real evidence at trial. If the defense will not put on evidence at trial, please notify the assigned deputy district attorney at your earliest opportunity and within 15 calendar days so that a needless hearing can be avoided.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

RECEIVED BY: _ _ _ _ _ _

DATE: _ _ _ _ _ _

Comment: Prosecutors often have standard forms that they use routinely to informally request discovery. It is also common for the prosecution to put a sentence requesting informal discovery at the bottom of the complaint, *e.g.*: "Under Penal Code section 1054.5(b), the People hereby informally request that defendant's counsel provide discovery to the People as required by Penal Code section 1054.3."

Another possible prosecution approach is to format the informal request as a "Request/Motion for Prosecution Discovery" and to include a notice of motion, discovery order, request for sanctions, and order concerning sanctions. The notice asks for discovery within 15 days and sets a court date at which a formal motion will be heard if discovery has not been received. The request/motion and accompanying papers are filed with the court. The court date can be

one already set for another purpose or one specially set.

A formal prosecution motion to compel discovery is in §11.6.

Cross-Reference: For further discussion of discovery generally, see California Criminal Law Procedure and Practice, chap 11 (Cal CEB Annual). On discovery by the prosecution, see Crim Law §§11.9-11.12.

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§11.5 E. Opposition to Prosecution Discovery Request

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT AND TO _ _[*NAME*]_ _, DISTRICT ATTORNEY OF _ _ _ _ COUNTY:

SUMMARY OF ARGUMENT

Defendant opposes the prosecution's motion for discovery on the grounds that:

[*Summarize very briefly your main points; some examples are given below.*]

The prosecution has failed to comply with the statutory discovery requirements.

The discovery sought violates the statutory protection against the disclosure of work product.

The discovery sought violates _ _[*describe any federal constitutional violation*]_ _.

The discovery sought violates the _ _[*type of privilege*]_ _ privilege.

The prosecution, having failed to comply with discovery itself, may not move to compel discovery from the defense.

STATEMENT OF FACTS

Defendant is charged with violating _ _[*list offenses*]_ _. On _ _[*date*]_ _, the prosecution filed a Motion To Compel Discovery, now set for hearing on _ _[*date*]_ _ in Department _ _[*number*]_ _ of this Court. The next court appearance is a _ _[*specify what type of appearance, e.g., pretrial conference*]_ _ set for _ _[*date*]_ _. The trial is set for _ _[*date*]_ _. _ _[*Specify any other relevant facts, e.g., whether you gave any discovery to the District Attorney, and whether any was given to you by him or her.*]_ _

ARGUMENT

[*Some of the main opposition arguments to a prosecution discovery motion are set out below. Choose the one(s) applicable to your case, tailored to the facts of your case, and add any other arguments needed to oppose the motion.*]

DISCOVERY OF DEFENSE INTERVIEWS OF PROSECUTION WITNESSES IS NOT PERMITTED BECAUSE THE DEFENSE DOES NOT PRESENTLY INTEND TO CALL THOSE WITNESSES

Penal Code section 1054.3(a)(1) requires the defense to disclose names, addresses, and statements of persons whom the defense "intends to call as witnesses at trial." This requirement clearly does not apply when the defense interviews a prosecution witness, as long as the defense does not intend to call that witness at trial. Because "no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States" (Penal Code section 1054(e); see also Penal Code section 1054.5(a)), discovery of these interviews should not be allowed.

_ _[*SPECIFY MATERIAL OR INFORMATION*]_ _ **IS PROTECTED WORK PRODUCT**

Penal Code section 1054.6 states that "[n]either the defendant nor the prosecuting attorney is required to disclose any materials or information which are work product as defined in subdivision (a) of Section 2018.030 of the Code of Civil Procedure…."

Code of Civil Procedure section 2018.030(a) provides that "[a]ny writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances."

[*Describe the items you think are protected and explain why.*]

_ _[*General cases: Izazaga v Superior Court (1991) 54 C3d 356, 285 CR 231; Hickman v Taylor (1947) 329 US 495, 91 L Ed 451, 67 S Ct 385 (civil wrongful death action); U.S. v Nobles (1975) 422 US 225, 45 L Ed 2d 141, 95 S Ct 2160 (extended work product doctrine to criminal cases and to product of attorneys' agents); Upjohn v U.S. (1981) 449 US 383, 66 L Ed 2d 584, 101 S Ct 677; Goldberg v U.S. (1976) 425 US 94, 47 L Ed 2d 603, 96 S Ct 1338; Rodriguez v Superior Court (1993) 14 CA4th 1260, 1270, 18 CR2d 120*]_ _**.**

_ _[*Cases finding items absolutely privileged from disclosure as protected work product: summary of strategy session with experts intertwined with thoughts of attorney (Rico v Mitsubishi Motors Corp. (2007) 42 C4th 807, 813, 68 CR3d 758 (paralegal's report at attorney's behest of strategy session between defense attorneys and defense experts, later edited by attorney to show thoughts and opinion of case, absolutely protected)); anticipated testimony of nonexpert witnesses (**Long Beach v Superior Court (1976) 64 CA3d 65, 134 CR 468** (written summary of expected testimony falls within absolute privilege)); information that the attorney or the defendant may have imparted to an expert witness whose name and address is discoverable (Kenney v Superior Court (1967) 255 CA2d 106, 63 CR 84); an expert's report that reflects, in whole or in part, the opinions, impressions, and thoughts of the attorney (National Steel Prods. v Superior Court (1985) 164 CA3d 476, 210 CR 535); investigator's notes containing prior inconsistent statements of a witness when the statements were totally intertwined with the investigator's privileged comments (Rodriguez v McDonnell Douglas Corp. (1978) 87 CA3d 626, 151 CR 399); the notes of a district attorney made concerning his or her impressions of a witness while interviewing the witness (People v Boehm (1969) 270 CA2d 13, 75 CR 590 (statement of witness taken down by attorney, however, was not work product))*]_ _**.**

_ _[*PORTIONS OF*]_ _ **THE EXPERT'S REPORT IN THIS CASE** _ _[*IS/ARE*]_ _ **PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE**

Penal Code section 1054.6 provides that "[n]either the defendant nor the prosecuting attorney is required to disclose any materials or information… which are privileged pursuant to an express statutory provision, or are privileged as provided by the Constitution of the United States."

A number of such provisions exist. Among them is the lawyer-client privilege embodied in Evidence Code section 954:

> **Subject to section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:**
>
> **(a) The holder of the privilege;**
>
> **(b) A person who is authorized to claim the privilege by the holder of the privilege; or**
>
> **(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure.**

The privilege belongs to the client, and the attorney *must,* unless otherwise instructed, assert it for the client. (Business and Professions Code section 6068(e)(1) (attorney's professional responsibility to keep client confidences); *People v Vargas* (1975) 53 CA3d 516, 527, 126 CR 88 (attorney had duty to assert privilege in client's absence); *In re Navarro* (1979) 93 CA3d 325, 330, 155 CR 522 (attorney representing defendant on another matter had duty to assert privilege at preliminary hearing).)

_ _[*Describe why the attorney-client privilege applies in your case*]_ _**.**

[*Include the following paragraph if the communication concerned occurred with an agent of the attorney.*]

The attorney-client privilege protection extends to communications between the client and any *agent* of the attorney, be it psychiatrist, doctor, investigator, secretary, interpreter, or clerk. (*City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 231 P2d 26; Evidence Code section 912(d); *People v Meredith* (1981) 29 C3d 682, 175 CR 612 (privilege extends to observations of evidence by investigator as long as object is not moved).) It does not extend to communications from an independent witness to counsel. (*Greyhound Corp. v*

Superior Court **(1961) 56 C2d 355, 397, 15 CR 90.)**

[*Include the following paragraph if the discovery issue concerns an expert appointed under Evidence Code section 1017.*]

Privileged information in statements and reports does not have to be disclosed when the witness is designated. (*Rodriguez v Superior Court* (1993) 14 CA4th 1260, 1270, 18 CR2d 120.)

Whenever an expert or other witness has been appointed by the court to assist the defense under Evidence Code section 1017, the report of that person is privileged under the express statutory provision for the psychotherapist-patient privilege. If the expert is appointed under Evidence Code section 952 or retained by the attorney, the report is protected by the attorney-client privilege. Moreover, if the order appointing the expert or witness was itself sealed under Evidence Code section 952, the identity of that witness would similarly be exempted from discovery as being privileged under the express, statutory, attorney-client privilege. (See 2 Witkin, Evidence, *Witnesses* §§136, 232 (4th ed 2000).)

[*Include the following paragraph if the expert examined the defendant to assist in evaluating whether an insanity plea should be entered.*]

When an expert examines a defendant to assist the defendant's attorney in deciding whether an insanity plea should be entered or a mental defense tendered, the defendant's communications to the expert are protected. (*Rodriguez v Superior Court* (1993) 14 CA4th 1260, 1266, 18 CR2d 120.)

[*Include the following paragraph if you are arguing that part of the material given to the expert is privileged and will not be relied on by the expert.*]

Even if the defendant intends to call a particular witness, or even actually *calls* the witness to the stand, it does not follow that everything in that witness's case file is discoverable. (See *Sullivan v Superior Court* (1972) 29 CA3d 64, 105 CR 241; but see *Mize v Atchison, Topeka & Santa Fe Ry.* (1975) 46 CA3d 436, 120 CR 787 (waiver through failure to properly object); compare with *Julrik Prods., Inc. v Chester* (1974) 38 CA3d 807, 113 CR 527 (holder of privilege waived it by testifying about part of letter to attorney that was otherwise privileged).)

[*Integrate the following section if there is a question concerning whether a "communication" is involved.*]

The term "communications" includes information transmitted between the parties or advice given. *City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 235, 231 P2d 26 (encompasses almost any act performed by client as part of communication with attorney); *In re Navarro* (1979) 93 CA3d 325, 155 CR 522 (includes attorney's display of public document to client); but see *People v Donovan* (1962) 57 C2d 346, 19 CR 473 (state appraiser's opinion of condemned property's fair market value not within privilege when called by opposing party to testify as to his knowledge, and not as to disclosures he may have made to state's attorney); *People v Gillard* (1997) 57 CA4th 136, 162, 66 CR2d 790 (photographs taken of defendant by defense counsel's investigator are attorney-client communication and privileged); *Suezaki v Superior Court* (1962) 58 C2d 166, 176, 23 CR 368 (film of plaintiff prepared by defendant's investigator is not attorney-client communication).
_ _[*Explain why the information transmitted in your case is a "communication"*]**_ _.**

[*Continue*]

THE PROSECUTION MAY NOT MOVE TO COMPEL DISCOVERY UNTIL ALL DISCOVERY TO WHICH THE DEFENDANT IS ENTITLED HAS BEEN DISCLOSED

The party seeking to compel discovery must be in compliance itself:

> **Upon a showing that a party has not complied with Section 1054.1 and 1054.3 and upon a showing that the moving party *complied* with the informal discovery procedure provided in this subdivision, a court may make any order necessary….**

Penal Code section 1054.5(b) (emphasis added).

See also *Izazaga v Superior Court* (1991) 54 C3d 356, 285 CR 231 (defense obligation to disclose arises "[f]ollowing disclosure of the prosecution's witnesses.").

The defense cannot competently decide what evidence and witnesses are relevant to the case until it has full

discovery.

Therefore, before this Court entertains the prosecution's motion, it should require the district attorney to aver that all discovery to which the defendant is entitled has in fact been disclosed.

CONCLUSION

For the above-stated reasons, defendant respectfully requests that the government's request for discovery and sanctions be denied.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: Any exhibits necessary to support opposition should be attached to the opposition, *e.g.,* a declaration by defense counsel that prosecution discovery was not received and the informal discovery request defense counsel served on the prosecution. The defense has the option of requesting in chambers review of materials. Pen C §1054.7; see *City of Alhambra v Superior Court* (1988) 205 CA3d 1118, 252 CR 789.

Arguments against a prosecution motion to compel discovery include failure to adhere to the requirements of Pen C §§1054-1054.7, *e.g.*:

- No informal request.
- What was requested informally is different from items listed in formal motion.
- Fifteen days have not passed since the informal request.
- Failure to follow the requirements of Cal Rules of Ct 4.111.
- The informal request did not describe what was desired with enough particularity to enable the defense to know what is wanted.
- The material requested is protected by the work product doctrine or by a privilege (Pen C §1054.6).
- The requested item is not required to be disclosed by Pen C §1054.3.
- The prosecution has not complied with the defense discovery request (Pen C §1054.5(b)).
- The defense does not yet know what witnesses or evidence it will use, if any, during its case-in-chief.

If the date set for discovery compliance is immediately before trial, there may not be time to seek a pretrial writ of prohibition if the trial court orders the defense to produce material it believes is not discoverable. The defense may have only the options of not disclosing—and risking exclusion of that witness's testimony at trial—or disclosing. If this problem is foreseeable in advance, defense counsel may be able to obtain an pretrial order protecting the undiscoverable material from disclosure. A motion for such an order should be set for hearing well in advance of trial. The arguments suggested here to oppose the prosecution's motion to compel discovery can be used in support of a motion for a protective order. See 2 Witkin, Evidence, *Discovery* §245 (4th ed 2000); *City of Alhambra v Superior Court* (1988) 205 CA3d 1118, 1135 n18, 252 CR 789; *South Tahoe Pub. Util. Dist. v Superior Court* (1979) 90 CA3d 135, 154 CR 1; see also *Izazaga v Superior Court* (1991) 54 C3d 356, 285 CR 231; *Seven Up Bottling Co. v Superior Court* (1951) 107 CA2d 75, 76, 236 P2d 623.

Cross-Reference: For further discussion of discovery, see California Criminal Law Procedure and Practice, chap 11 (Cal CEB Annual).

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§11.6 F. Prosecution Motion to Compel Discovery

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TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _ of the above-entitled Court, or as soon thereafter as the matter may be heard, the District Attorney will move that the Court compel discovery of the items previously requested informally of the defense on _ _[*date*]_ _, and not given to the prosecution. Those items are listed in the attached declaration and supporting memorandum. This motion will be based on the attached memorandum and informal discovery request, on the court records and pleadings in the court files for this case, on the attached declaration of _ _[*name of declarant, usually the deputy district attorney assigned to the court or case*]_ _, _ _[*describe any other attached exhibits, e.g., a notice of receipt of partial discovery,*]_ _ and on any evidence and argument that may be presented at the hearing on this motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

The District Attorney, in _ _[*his/her*]_ _ informal discovery request, attached to this motion as Exhibit 1, asked the defense only for information permitted by Penal Code section 1054.3. The defense did not _ _[*fully*]_ _ comply. _ _[*If the defense partially complied, describe what was and was not disclosed; that same information should be contained in a declaration of counsel that is attached as Exhibit 2 to the motion.*]_ _

Based on Penal Code section 1054.3, the prosecution asks this court to order the defense to disclose the following information:

_ _[*Set out the information you requested in your informal request that was not disclosed, and the subdivisions of Pen C §§1054-1054.7 that support those requests.*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment,*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER GRANTING PEOPLE'S MOTION FOR DISCOVERY FROM DEFENDANT,**
_ _[*Name*]_ _,	_ _[*NAME*]_ _
Defendant.	
_____ /	

Having read and considered the People's motion for defense discovery, and having heard arguments from both the defense and the prosecution:

IT IS HEREBY ORDERED that the People's motion for defense discovery under Penal Code section 1054.3 is granted. Defendant and _ _[*his/her*]_ _ **counsel shall** _ _[*immediately*]_ _ **provide to the People** _ _[*30 calendar days before trial*]_ _ **or make available for inspection within that time frame:**

1. The names and addresses of the witnesses, other than the defendant, whom the defendant intends to call as witnesses in the defense case-in-chief at trial.

2. All relevant written or recorded statements and/or reports of the witnesses described in paragraph 1, above.

3. All relevant reports and/or statements of experts made in connection with this case, including results of examinations, tests, experiments, or comparisons that the defense intends to offer as evidence at the trial of this matter.

4. All physical evidence that the defense intends to offer in evidence at trial.

IT IS FURTHER ORDERED that this order is a continuing one, through the trial of this matter.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: An informal discovery request (see §11.13) is required before formal court enforcement of discovery can be requested. See Pen C §1054.5(b). This motion includes a proposed order. A copy of the informal request served on the defense, along with proof of service, if any, should be attached to the motion as exhibits. If there is no proof of service, a declaration by the person who served the informal notice on the defense, describing when, where, and on whom service was made should be attached as an exhibit.

Cross-Reference: For further discussion of discovery, see Crim Law, chap 11.

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§11.7 G. Prosecution Motion for Sanctions

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _ of the above-entitled Court, or as soon thereafter as the matter may be heard, the District Attorney will move the Court for sanctions against the defense under Penal Code section 1054.5 because the defense has failed to comply with the Court's _ _[*date*]_ _ discovery order. The People request that the following sanctions be imposed on the defense:

[*Choose the relevant sanctions from the following.*]

Defendant and defense counsel be held in contempt;

The testimony of defense witnesses be prohibited;

The presentation of real evidence be prohibited;

The jury be advised of the defense failure and refusal to disclose;

_ _[*Any other order necessary to enforce the provisions of Penal Code sections 1054-1054.7.*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

This court ordered the defense to disclose the items listed in the order attached as Exhibit 1 on _ _[*date*]_ _. The defense has not disclosed _ _[*specify*]_ _. The prosecution therefore moves for sanctions.

The appropriate sanctions in this case are: _ _[*Specify requested sanctions and why they are appropriate. Remember that the testimony of a witness may be prohibited only if all other sanctions have been exhausted. Pen C §1054.5(c).*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _

Comment: A motion for court-ordered discovery (see §11.6) may be combined with a motion for sanctions. The discovery order should be attached to the motion as an exhibit.

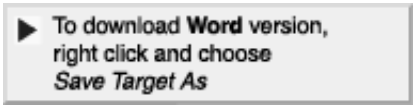
Although the preclusion of defense evidence is one remedy for defense failure to disclose (see *Taylor v Illinois* (1988) 484 US 400, 414, 98 L Ed 2d 798, 813, 108 S Ct 646; *Michigan v Lucas* (1991) 500 US 145, 114 L Ed 2d 205, 111 S Ct 1743), the defense abuse must be shown to be egregious and calculated to obtain a tactical advantage, and other less restrictive sanctions must be shown to be ineffective. *People v Edwards* (1993) 17 CA4th 1248, 1264, 22 CR2d 3.

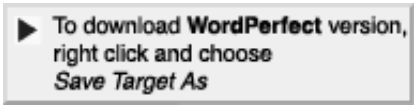
Cross-Reference: For further discussion of sanctions, see Crim Law §11.17.

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§11.8 H. Motion for In Chambers Appointment of Defense Expert





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT:

Defendant, _ _[*name*]_ _, asks the Court to appoint _ _[*specify type of expert, e.g., an investigator or psychotherapist*]_ _ at court expense to aid the defense.

This is a confidential ex parte motion and will be based on the attached declaration and supporting memorandum, on the files in this case, and on any evidence produced at the confidential hearing in chambers on this motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

The right to counsel includes the right to appointed experts when indigency is established (*People v Worthy* (1980) 109 CA3d 514, 167 CR 402) and the need for the expert is shown (*People v Worthy, supra; Mason v Arizona* (9th Cir 1974) 504 F2d 1345; *Puett v Superior Court* (1979) 96 CA3d 936, 158 CR 266). Such a showing may be made ex parte, in chambers, but on the record. (*Torres v Municipal Court* (1975) 50 CA3d 778, 123 CR 553.) Once indigency and need have been shown, appointment of the expert is mandatory. (*People v Worthy, supra*.)

In this case, _ _[*the Public Defender, or name of attorney, if private appointed counsel*]_ _ has been appointed by the Court to represent the defendant after a finding of indigency by the Court. The court may not grant a defendant the services of _ _[*the Public Defender/appointed counsel*]_ _ and then deny him or her the services of necessary experts. To do so violates the right to counsel under the Sixth Amendment to the United States Constitution and the right to equal protection under the Fourteenth Amendment.

Counsel by the attached declaration has also met the second half of the burden, that of showing a reasonable need for the expert. If a further showing is required, counsel is prepared to make such a showing in chambers, ex parte, and on the record. (*Torres v Municipal Court, supra*.)

If appointed, the expert's services are confidential under Evidence Code Section 952 (*City & County of San Francisco v Superior Court* (1951) 37 C2d 227, 231 P2d 26; *Torres v Municipal Court, supra*; 1 Witkin, California Evidence, *Opinion Evidence* §§81, 232). For the same reasons underlying the confidentiality of the expert's reports, and because disclosure of defense witnesses is controlled by Penal Code section 1054.3, the Court should also order that the expert's name be kept confidential until such time as a further order is made as permitted by law.

For the above-stated reasons, defendant respectfully requests that the Court grant the motion for appointment of an expert under Evidence Code sections 730 and 952.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF COUNSEL IN SUPPORT OF MOTION FOR APPOINTMENT OF _ _[*SPECIFY TYPE OF EXPERT*]_ _

I, _ _[*name of declarant*]_ _**, declare:**

I am the _ _[*Deputy Public Defender/attorney*]_ _ **assigned to represent the defendant in this matter following appointment by the court.**

I believe that, in order to adequately represent the defendant, I will require the services of _ _[*specify type of expert, e.g., an investigator*]_ _ **to** _ _[*state what you want expert to do*]_ _**.**

I am prepared to show defendant's need for an expert in more detail at an ex parte, in chambers, reported proceeding if the Court so requires.

The services of this expert must be on a confidential basis, because I or my client may need to transmit privileged information to and discuss tactics with the expert. See Penal Code section 1054.6, which preserves work product and information privileged under the United States Constitution from pretrial discovery.

I am informed and believe that experts are available for the purposes described above, and that their confidential services are available to those defendants who can pay for them.

I believe that the cost of performing the above-described work will not exceed _ _[*dollar amount*]_ _ **for the services of** _ _[*name of expert*]_ _**, exclusive of witness fees.**

I believe that the services of this expert are essential to a vigorous and competent preparation of the defense in this matter; without these services, I believe my client will not receive a constitutionally adequate defense.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER FOR EX PARTE APPOINTMENT OF**
_ _[*Name*]_ _**,**	_ _[*SPECIFY TYPE OF*
Defendant.	*EXPERT*]_ _
_____ /	

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that _ _[*name of expert*]_ _ be appointed under Evidence Code sections 730 and 952 to assist defense counsel in the preparation of the defense in this matter.

The cost of this appointment is not to exceed _ _[*dollar amount*]_ _, excepting witness fees.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER PROHIBITING DISCLOSURE**
_ _[*Name*]_ _,	
Defendant.	
_____ /	

TO THE COUNTY CONTROLLER OF _ _ _ _ _ _ COUNTY, AND TO ALL COURT PERSONNEL:

IT IS HEREBY ORDERED that you shall keep confidential the contents of the application made in this case pursuant to Evidence Code sections 730 and 952, together with any accounting, order, and/or exhibits filed in connection with such application until further order of this Court made after notice to defendant's counsel.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: This motion includes both a proposed order for appointment of the expert and an order prohibiting disclosure of the motion, order, and any related paperwork. Because the motion seeks to keep both the expert's name and report confidential, all parts of it, including the order, should be sealed.

Cross-Reference: For further discussion, see Crim Law §§11.16, 18.10-18.15.

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.9 I. Defense Motion to Preserve and Copy Tape (Harvey/Madden Motion)

§11.9 I. Defense Motion to Preserve and Copy Tape (*Harvey/Madden* Motion)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court order the _ _[*name of police or sheriff's department*]_ _ to retain in its possession and preserve as evidence in this matter all tape-recorded _ _[*radio transmissions, phone calls, or both*]_ _ by the _ _[*name of police or sheriff's department*]_ _ on _ _[*date*]_ _, between the hours of _ _[*specify range of hours*]_ _, concerning the above-named case. _ _[*Specify other identifying information, e.g., names of the law enforcement officers.*]_ _ A copy of the law enforcement report _ _[*prepared by the officers involved in this transmission/concerning these phone calls*]_ _ is attached as Exhibit A.

[*Option 1: Request that tape be made available for copying.*]

The Court is requested to order _ _[*name of police or sheriff's department*]_ _ to make that portion of the tape recording described above available to defendant's attorney or investigator for review and/or copying for a period of 30 days until _ _[*date*]_ _, at which time the tape recording shall be released for regular use by the law enforcement department.

[*Option 2: Request that law enforcement department copy tape.*]

The Court is requested to order the _ _[*name of police or sheriff's department*]_ _ to make copies of the above-described portions of the tape and of the computer printout in this matter, and deliver them to _ _[*name of attorney or public office*]_ _ by _ _[*date*]_ _.

[*Continue*]

This motion will be based on the attached supporting memorandum, all papers filed and records in this action, the attached law enforcement report (Exhibit A), and on any evidence and argument that may be presented at the hearing on this motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

[*This memorandum concerns tape recordings of radio transmissions.*]

The defense is entitled to obtain copies of tape recordings concerning communications by law enforcement officers involved in a defendant's arrest. *People v Madden* (1970) 2 C3d 1017, 88 CR 171; *Ojeda v Superior Court* (1970) 12 CA3d 909, 91 CR 145; *People v Harvey* (1958) 156 CA2d 516, 319 P2d 689.

The defendant asks this Court for an order to preserve and copy the tape involving communications among the law enforcement officers involved in the defendant's arrest. Identifying information is contained in the motion, above, in the attached law enforcement report (Exhibit A), and in the attached order.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER FOR PRESERVATION AND COPYING OF TAPE**
_ _[*Name*]_ _,	
Defendant.	
_____ /	

TO: _ _[*CHIEF OF POLICE OF THE CITY OF* _ _ _ _ _ _*/THE SHERIFF OF* _ _ _ _ _ _ *COUNTY*]_ _, **CALIFORNIA:**

IT IS HEREBY ORDERED that the _ _[*name of police or sheriff's department*]_ _ **shall retain in its possession and preserve as evidence in this matter all tape-recorded** _ _[*radio transmissions and/or phone calls*]_ _ **by the** _ _[*name of police or sheriff's department*]_ _ **on** _ _[*date*]_ _**, between the hours of** _ _[*give range of hours*]_ _**, concerning the above-named case.**

[*Option 1: Request that tape be made available for copying.*]

You are also ordered to make that portion of the tape recording described below available to defendant's attorney or investigators for review and/or copying for a period of 30 days until _ _[*date*]_ _**, at which time the tape recording shall be released for regular use by the law enforcement department.**

[*Option 2: Request that law enforcement department copy tape.*]

You are also ordered to make a copy of the portions of the tape described below, and deliver them to _ _[*name of attorney or public office*]_ _ **by** _ _[*date*]_ _**.**

IT IS FURTHER ORDERED that the above items may not be destroyed until full compliance with this court order has occurred.

The following identifying information relates to this case:

Law Enforcement Report No. and Date: _ _[*Specify*]_ _**.**

Approximate Location of Incident: _ _[*Specify*]_ _**.**

Crime Charged: _ _[*Specify*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: This motion includes a proposed order. The motion may be modified to request preservation and copying

of a videotape. Tapes belonging to state agencies must be preserved for at least 2 years. 64 Ops Cal Atty Gen 435 (1981). City and county agencies must preserve "recordings of telephone and radio communications maintained by the department or special district" for at least 100 days and must maintain all routine videotapes for 1 year. If the recordings are evidence in any pending claim or litigation, they must be preserved through resolution of that litigation or claim. Govt C §26202.6(a). See *Nelson v Superior Court* (2001) 89 CA4th 565, 572, 107 CR2d 469. Because not all agencies observe these rules, it is important to request a copy of such a tape as soon as its existence is revealed.

Usually, direct notification to the agency that has the tape is the first step. The notice should be made in a manner that provides proof that the agency was notified, *e.g.,* certified mail, return receipt requested, or personal service. Some agencies will comply without a court order. A request for a copy of the tape should also be included in the informal discovery request submitted to the prosecution.

A subpoena duces tecum form should be attached to the motion (see §3.1) along with a copy of the crime report. The affidavit or declaration accompanying the subpoena should include any other information that will help law enforcement personnel locate the portion of the tape that is desired, such as the date and time of the radio transmission or phone call and the names of the officers who received and/or sent the transmission or taped the phone call. If the judge signs the order and issues the subpoena duces tecum, the original of each is served on the relevant law enforcement agency, and a copy with the signature of the person who received service is filed with the court that issued the order.

Possible prosecution arguments opposing the motion include the following:

- The defense did not include enough information to enable law enforcement to find the tape.
- The request is being made past the applicable deadline for preserving the tape.
- No supporting memorandum was included (see Cal Rules of Ct 4.111).
- No evidence exists that any such tape exists.

See *Fowler v Superior Court* (1984) 162 CA3d 215, 208 CR 408.

Cross-Reference: For further discussion of discovery, see Crim Law, chap 11.

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§11.10 J. Defense Motion for Transfer of Evidence for Retesting

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court compel the prosecution to transfer _ _[*describe type of sample, e.g., blood, DNA*]_ _ specimen from _ _[*name and address of laboratory where specimen is currently kept*]_ _ to _ _[*name and address of laboratory where defense wants evidence retested*]_ _ to permit defendant to obtain an independent analysis of said specimen for the presence of _ _[*state why being tested, e.g., heroin*]_ _. The particular specimen that is the subject of said motion is the _ _[*state type, e.g., blood, DNA*]_ _ taken from defendant _ _[*name*]_ _ on _ _[*date*]_ _, submitted to the _ _[*name of laboratory that now has sample*]_ _ by _ _[*name of city*]_ _ Police Department as recorded in their Report No. _ _[*number*]_ _, and listed at the _ _[*name of lab that now has sample*]_ _ as No. _ _[*number*]_ _.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

THE DEFENSE HAS THE RIGHT TO RETEST A _ _[*TYPE OF SAMPLE, E.G., BLOOD, DNA*]_ _ SAMPLE IF IT HAS BEEN PRESERVED

A defendant can have a _ _[*type of sample, e.g., blood, DNA*]_ _ sample retested by an independent laboratory if the sample was preserved. Title 17 of the California Code of Regulations sections 1219.1(g)(2), 1219.2(c)(1); Penal Code §299.5(g); *People v Washington* (1958) 163 CA2d 833, 330 P2d 67 (marijuana); *Prince v Superior Court* (1992) 8 CA4th 1176, 1180, 10 CR2d 855 (defendant should have independent, confidential access to crime scene DNA).

THE DEFENSE HAS THE RIGHT TO EXCULPATORY EVIDENCE; THE REQUESTED RETEST MAY PRODUCE EXCULPATORY EVIDENCE

The defense has the right to exculpatory evidence. Penal Code section 1054.1(e); *Brady v Maryland* (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194. If the retest of the sample of _ _[*e.g., defendant's blood, DNA*]_ _ shows that _ _[*state favorable outcome you anticipate from the retest*]_ _, this will be exculpatory evidence because _ _[*explain why*]_ _. See *Schindler v Superior Court* (1958) 161 CA2d 513, 520, 327 P2d 68, disapproved on other grounds in *People v Garner* (1961) 57 C2d 135, 142, 18 CR 40; *People v Nation* (1980) 26 C3d 169, 176, 161 CR 299. The defense therefore has the right to retest the sample of _ _[*e.g., defendant's blood, DNA*]_ _ taken on _ _[*date*]_ _.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER FOR TRANSFER OF EVIDENCE AND PROTECTIVE ORDER**
_ _[*Name*]_ _,	
Defendant.	
_____ /	

TO: _ _[*NAME OF LABORATORY WHERE PROSECUTION IS KEEPING SPECIMEN*]_ _**:**

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that _ _[*name of laboratory where prosecution is keeping specimen*]_ _ **physically deliver a portion of the specimen described below to** _ _[*name, address, and phone number of laboratory to which specimen is to be transferred/name of your investigator or expert if the specimen is to be given to him or her*]_ _**.**

SPECIMEN: _ _[*Describe specimen, where it came from, who it was given to, and give any numbers it might have, e.g., blood sample taken from defendant, on November 30, 2004, and submitted to the Institute of Forensic Sciences by the Center City Police Department, relative to Center City Police Report No. 1234, and listed at the Institute of Forensic Sciences as No. ABCD*]_ _**.**

Once the _ _[*name of laboratory where specimen is being sent for retest*]_ _ **has completed its duties with regard to said specimen, it shall immediately return the remaining specimen to** _ _[*name of laboratory where prosecution had specimen tested*]_ _**.**

Once the specimen is returned to the _ _[*name of prosecution laboratory*]_ _**, that laboratory will accept the remaining specimen and preserve it until there has been a final and complete disposition of the above-entitled action.**

[*Option: Include if results will be released only to defense counsel.*]

IT IS FURTHER ORDERED that _ _[*name of defense laboratory*]_ _ **will only release information regarding the samples in the above-entitled case, or any results from any testing done on those samples, to defense counsel. This means that no information concerning these samples is to be given to the District Attorney, the Sheriff's Department, or** _ _[*name every relevant law enforcement agency*]_ _**.**

[*Option: Include if results are to be examined by a neutral expert.*]

IT IS FURTHER ORDERED that _ _[*name of independent laboratory*]_ _ **will test the samples in the above-entitled case and results of that test shall be made available to both defense counsel and the prosecution.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: This motion includes a proposed order. The prosecution will usually stipulate to the transfer of a portion of the specimen for retesting because transfer of a specimen by one laboratory to another presents a de minimis possibility of evidence tampering. However, a stipulation may not be forthcoming if retesting will consume the rest of the

specimen. The court has the discretion to craft an appropriate discovery order. For example, the court may allow an independent expert to test the sample or instruct the defense expert to share results with the prosecution. *People v Varghese* (2008) 162 CA4th 1084, 76 CR3d 449.

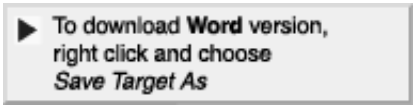
Most jurisdictions have set procedures and preprinted forms for stipulating to a retest. If not, the above order can be reworded and labeled as a stipulation. Most prosecutors, however, will not stipulate to the results of the retest only being given to the defense (see optional paragraph in proposed order above) and will insist on receiving a copy of the defense retest report. See Pen C §§1054.3-1054.4. The prosecution may also want to have its expert present during the retest.

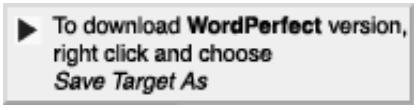
Cross-Reference: For further discussion of retesting, see Crim Law §§11.27, 55.21.

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.11 K. Defense Motion to Dismiss Because of Destruction or Loss of Evidence (Trombetta/Youngblood Motion)

§11.11 K. Defense Motion to Dismiss Because of Destruction or Loss of Evidence (*Trombetta/Youngblood* Motion)





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court dismiss the above-entitled case because of the destruction and/or loss of _ _[*specify evidence*]_ _ by _ _[*specify law enforcement agency*]_ _. That evidence was vital to the defense because _ _[*briefly state why*]_ _. This motion will be based on the attached supporting memorandum, _ _[*the attached declaration(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

STATEMENT OF FACTS

_ _[*Describe relevant facts of case. Include a description of the destroyed or lost items, how they were lost or destroyed and by whom, and facts concerning the case that demonstrate the importance of those items. Cite authority for these statements, e.g., a police report, and attach a copy as an exhibit*]_ _.

ARGUMENT

[*The following arguments are illustrative of those that may be made; select those relevant to your case, and add any others that apply.*]

THE PROSECUTION HAD A DUTY IN THIS CASE TO PRESERVE _ _[*BRIEFLY DESCRIBE THE DESTROYED OR LOST ITEMS*]_ _

The law does not impose a duty on the prosecution to collect evidence that might be beneficial to the defense; however, once collected, the prosecution does have a duty to preserve material evidence. (*In re Michael L.* (1985) 39 C3d 81, 216 CR 140; *People v Hogan* (1982) 31 C3d 815, 851, 183 CR 817, disapproved on other grounds in *People v Cooper* (1991) 53 C3d 771, 836, 281 CR 90.)

In this case, the _ _[*name of city*]_ _ **Police Department _ _**[*tell how they obtained the lost or destroyed evidence, then how it was lost or destroyed*]_ _**.**

THE _ _[*DESTROYED/LOST*]_ _ **EVIDENCE WAS MATERIAL TO THE DEFENSE CASE**

If the prosecution preserved and then destroyed or permanently lost evidence, the defense may make a motion for sanctions, called a *Trombetta* or *Youngblood* motion. The destroyed evidence must have been material to the defense case. (*California v Trombetta* (1984) 467 US 479, 488, 81 L Ed 2d 413, 422, 104 S Ct 2528.)

The materiality of evidence in California is determined under the *Trombetta/Youngblood* federal standard. (*People v Zapien* (1993) 4 C4th 929, 964, 17 CR2d 122; *People v Cooper* (1991) 53 C3d 771, 810, 281 CR 90; *People v Johnson* (1989) 47 C3d 1194, 1233, 255 CR 569.) Material evidence is evidence that might be expected to play a significant role in the suspect's defense. It must possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*California v Trombetta, supra.*)

The evidence that was _ _[*destroyed/lost*]**_ _ by the prosecution in this case was _ _**[*specify lost/destroyed evidence here, e.g., a bloody jacket, police officer notes*]**_ _. This evidence was material to the defendant's case because _ _**[*describe why evidence was material/favorable/exculpatory within the above guidelines*]**_ _. The _ _**[*favorable/exculpatory*]**_ _ value of the evidence was apparent before the evidence was _ _**[*destroyed/lost*]**_ _. _ _**[*Add further explanation if desired.*]**_ _ No comparable evidence can be obtained by the defense by any other reasonably available means. _ _**[*Add further explanation if desired.*]**_ _**

The above-described actions of _ _[*the prosecution/law enforcement*]**_ _ have summarily denied _ _**[*insert accused's name*]**_ _ the right to present favorable and material evidence that would play a significant role in _ _**[*his/her*]**_ _ defense.**

THE PROSECUTION ACTED IN BAD FAITH IN _ _[*DESTROYING/LOSING*]**_ _ THE EVIDENCE IN THIS CASE**

To support sanctions for loss or destruction of evidence under *Trombetta* and *Youngblood,* the prosecution must have acted in bad faith in destroying the evidence. (*Arizona v Youngblood* (1988) 488 US 51, 58, 102 L Ed 2d 281, 289, 109 S Ct 333.)

_ _[*Describe why law enforcement acted in bad faith in destroying or losing the evidence.*]_ _

THE APPROPRIATE SANCTION IN THIS CASE IS DISMISSAL

This Court should dismiss the instant action because _ _[*explain why*]**_ _. In the alternative, this Court should order sanctions that would ensure a fair trial for _ _**[*name of defendant*]**_ _. _ _**[*Suggested alternative sanctions, such as cautionary or directory instructions (Arizona v Youngblood (1988) 488 US 51, 54, 102 L Ed 2d 281, 287, 109 S Ct 333), or exclusion of the evidence (see California v Trombetta (1984) 467 US 479, 486, 81 L Ed 2d 413, 421, 104 S Ct 2528)*]**_ _.**

Date: _ _ _ _ _ _

Respectfully submitted,
__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]**_ _**

Comment: Any documents, such as police reports and declarations, that support the claim that particular evidence was seized by law enforcement, was destroyed, was material, and was lost or destroyed because of law enforcement bad faith should be attached as exhibits. When relevant, the supporting memorandum should also explain why other evidence cannot take the place of the missing evidence.

When possible, a motion for sanctions based on the destruction of evidence should be made in the trial court before the evidence at issue is introduced and after jeopardy has attached. *People v Taylor* (1977) 67 CA3d 403, 136 CR 640. The motion may be made before trial at the court's discretion; however, any such ruling is not binding on the trial judge. See *People v Rawlings* (1974) 42 CA3d 952, 959, 117 CR 651, disapproved on other grounds in *People v Chacon* (2007) 40 C4th 558, 565 n7, 53 CR3d 876; *People v Leighter* (1971) 15 CA3d 389, 394, 93 CR 136, disapproved on other grounds in *Madril v Superior Court* (1975) 15 C3d 73, 77, 123 CR 465. See also *Saidi-Tabatabai v Superior Court* (1967) 253 CA2d 257, 61 CR 510. The hearing on the motion is the same as any hearing on the admissibility of evidence.

The prosecution may oppose a pretrial determination concerning missing or destroyed evidence on grounds including the following:

- No final determination can be made before trial.
- The evidence is not material. *In re Michael L.* (1985) 39 C3d 81, 216 CR 140.
- The evidence was not "exculpatory" as required by *Trombetta* and/or was never collected. *California v Trombetta* (1984) 467 US 479, 488, 81 L Ed 2d 413, 422, 104 S Ct 2528; *People v Coles* (2005) 134 CA4th 1049, 1054, 36 CR3d 484.
- The defense has not shown that evidence comparable to the lost or destroyed evidence could not be obtained by other reasonably available means. *California v Trombetta* (1984) 467 US 479, 489, 81 L Ed 2d 413, 422, 104 S Ct 2528; *People v Angeles* (1985) 172 CA3d 1203, 1214, 218 CR 756.
- The defense has not shown that the exculpatory value of the evidence was apparent before it was destroyed. *California v Trombetta* (1984) 467 US 479, 489, 81 L Ed 2d 413, 422, 104 S Ct 2528; *People v Angeles* (1985) 172 CA3d 1203, 1214, 218 CR 756.
- The prosecution did not act in bad faith. *Arizona v Youngblood* (1988) 488 US 51, 58, 102 L Ed 2d 281, 289, 109 S Ct 333.

If the court finds that the prosecution did act in bad faith, a lesser sanction than dismissal may be imposed, *e.g.,* a cautionary jury instruction. 488 US at 54, 102 L Ed 2d at 287.

Cross-Reference: For discussion of *Trombetta/Youngblood* motions, see Crim Law §§11.27-11.29.

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.12 L. Defense Motion for Discovery of Police or Custodial Officer Conduct (Pitchess Motion)

§11.12 L. Defense Motion for Discovery of Police or Custodial Officer Conduct (*Pitchess* Motion)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, THE _ _[*CITY ATTORNEY OF _ _*[*NAME OF CITY*]*_ _I_ _ _ _ _ _ COUNTY COUNSEL*]*_ _*, **STATE OF CALIFORNIA, AND THE _ _**[*CHIEF OF POLICE OF _ _*[*NAME OF DEPARTMENT*]*_ _/SHERIFF OF _ _ _ _ _ _ COUNTY*]*_ _*:

PLEASE TAKE NOTICE that on _ _[*date*]*_ _*, **in Department _ _**[*number*]*_ _*, **at _ _**[*time*]*_ _*, **or as soon thereafter as the matter may be heard, the defendant, _ _**[*name*]*_ _*, **will move that the Court order the City Attorney's Office and the above-noticed law enforcement agency (at all times hereafter referred to as "The Department") to make available for examination, copying, and for the hearing on this motion the materials described below regarding the following _ _**[*name of police department*]*_ _* **officers: _ _**[*Give names of officers, and their badge numbers if known*]*_ _*.

_ _[*List materials desired. See the items listed in the Order at the end of this motion for examples. Begin a new paragraph with each one, and number them for easy reference during the hearing on this motion*]*_ _*.

Date: _ _ _ _ _ _

Respectfully submitted,
__[*Signature of attorney*]*__*
_ _[*Typed name*]*_ _*
_ _[*Title if in public defender office*]*_ _*
Attorney for _ _[*name of defendant*]*_ _*

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

The discovery desired of the _ _[*name of police or sheriff's department*]*_ _*, **hereafter "The Department," concerning officers _ _**[*state names, and badge numbers if known*]*_ _* **is listed below, with supporting authorities. All requests are based on federal due process (see *Brady v Maryland* (1963) 373 US 83, 87, 10 L Ed 2d 215, 218, 83 S Ct 1194), California due process, and California Constitution article I, section 28(f), in addition to the authorities cited below. All the information below is requested regardless of the disposition of the matters.**

1. The names, addresses, and telephone numbers of all persons who have filed complaints with The Department for acts indicating or constituting racial or ethnic prejudice, dishonesty, false arrest, illegal search and seizure, planting evidence, or the fabrication of charges and/or evidence by the above-named officer(s). (Evidence Code section 1045(a); *Pierre C. v Superior Court* (1984) 159 CA3d 1120, 206 CR 82; *Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897; *Cadena v Superior Court* (1978) 79 CA3d 212, 146 CR 390; *Arcelona v Municipal Court* (1980) 113 CA3d 523, 169 CR 877; *Gonzales v Municipal Court* (1977) 67 CA3d 111, 136 CR 475.)

2. The names addresses, and telephone numbers of all persons who have filed complaints with The Department against the above-named officers for any act involving morally lax character. (California Constitution article I, section 28(f); *People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418; *People v Mickle* (1991) 54 C3d 140, 168, 284 CR 511; *People v Harris* (1989) 47 C3d 1047, 1080-1082, 255 CR 352; *In re Ferguson* (1971) 5 C3d 525, 533, 96 CR 594; *People v Taylor* (1986) 180 CA3d 622, 225 CR 733.)

3. The names, addresses, and telephone numbers of all persons who have filed complaints with The Department against the above-named officers for unnecessary acts of aggressive behavior, acts of violence

and/or attempted violence, or acts of excessive force and/or attempted excessive force. (California Constitution article I, section 28(f); Evidence Code section 1045(a); *People v Wheeler, supra; People v Mickle, supra; City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 260 CR 520; *People v Harris, supra; Pitchess v Superior Court, supra; In re Ferguson, supra; Cadena v Superior Court, supra; Arcelona v Municipal Court, supra; Gonzales v Municipal Court, supra; People v Taylor, supra*.)

4. All statements, written or oral, by persons who have brought complaints against the above-named officers as described in Items 1, 2, and 3, above. (California Constitution article I, section 28(f); *Caldwell v Municipal Court* (1976) 58 CA3d 377, 129 CR 834; *Hinojosa v Superior Court* (1976) 55 CA3d 692, 127 CR 664; *Gonzales v Municipal Court, supra; People v Wheeler, supra*; *People v Mickle supra; People v Harris, supra; In re Ferguson, supra; People v Taylor, supra*.)

5. The names, addresses, and telephone numbers of all persons interviewed by The Department, its investigators and other personnel during investigation into complaints as described in Items 1, 2, and 3, above, against the above-named officer(s). (California Constitution article I, section 28(f); Evidence Code section 1045(a); *Pitchess v Superior Court, supra; Arcelona v Municipal Court, supra; Kelvin L. v Superior Court* (1976) 62 CA3d 823, 133 CR 325; *Lemelle v Superior Court* (1978) 77 CA3d 148, 143 CR 450; *Gonzales v Municipal Court, supra; People v Wheeler, supra; People v Mickle, supra; People v Harris, supra; In re Ferguson, supra; People v Taylor, supra*.)

6. All statements, written or oral, made by persons interviewed by the Department, its investigators and other personnel during their investigation into complaints as described in Item 5, above. (California Constitution article I, section 28(f); Evidence Code section 1045(a); *Caldwell v Municipal Court, supra; Hinojosa v Superior Court, supra; People v Matos* (1979) 92 CA3d 862, 155 CR 293; *Gonzales v Municipal Court, supra; People v Wheeler, supra; People v Mickle, supra; People v Harris, supra; In re Ferguson, supra; People v Taylor, supra*.)

7. All tape recordings and/or transcriptions thereof, and notes and memoranda by investigating personnel of The Department made in investigations described in Items 1, 2, 3 and 5, above. (California Constitution article I, section 28(f); *Caldwell v Municipal Court, supra; Hinojosa v Superior Court, supra; People v Mato*s (1979) 92 CA3d 862, 155 CR 293; *Arcelona v Municipal Court* (1980) 113 CA3d 523, 530, 169 CR 877; *People v Wheeler, supra; People v Mickle, supra; People v Harris, supra; In re Ferguson, supra; People v Taylor, supra*.)

8. The names and assignments of investigators and other personnel employed by The Department as described in Items 1, 2, 3, and 5. (*Caldwell v Municipal Court, supra; People v Wheeler, supra; People v Mickle, supra; People v Harris, supra; In re Ferguson, supra; People v Taylor, supra*.)

9. The written procedures established by The Department to investigate citizen complaints against The Department or its personnel. (Penal Code section 832.5(a).)

10. All records of The Department concerning records of statements and opinions, including, but not limited to, findings, letters, formal reports, and oral conversations made by superior officers and fellow officers, of the above-named police officer(s), that pertain to acts indicating or constituting racial or ethnic prejudice, dishonesty, false arrest, illegal search and seizure, the fabrication of charges and/or evidence, planting evidence, or any act demonstrating a morally lax character. (California Constitution article I, section 28(f); *Pierre C. v Superior Court, supra; Cadena v Superior Court, supra; Hinojosa v Superior Court, supra; Arcelona v Municipal Court supra; People v Wheeler, supra; People v Mickle, supra; People v Harris, supra; In re Ferguson, supra; People v Taylor, supra*.)

11. All records of The Department concerning records of statements and opinions, including, but not limited to, findings, letters, formal reports, and oral conversations made by superior officers and fellow officers, of the above-named police officer(s), that pertain to unnecessary acts of aggressive behavior, acts of violence and/or attempted violence, acts of excessive force and/or attempted excessive force, and acts demonstrating racial or ethnic prejudice, or any act demonstrating a morally lax character. (California Constitution article I, section 28(f); *Cadena v Superior Court, supra; Hinojosa v Superior Court, supra; Arcelona v Municipal Court, supra; People v Wheeler, supra; People v Mickle, supra; People v Harris, supra; In re Ferguson, supra; People v Taylor, supra*.)

12. All records of discipline imposed by The Department upon the above-named police officer(s) for conduct specified in Items 1, 2, 3, 10, and 11. (California Constitution article I, section 28(f); Evidence Code section 1045(a); *Arcelona v Municipal Court, supra; Cadena v Superior Court, supra; People v Wheeler, supra; People*

***v Mickle, supra; People v Harris, supra; In re Ferguson, supra; People v Taylor, supra*.)**

Date: _ _ _ _ _ _ **Respectfully submitted,**
__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

DECLARATION IN SUPPORT OF MOTION FOR PRETRIAL DISCOVERY

I, _ _[*name of declarant, usually defense counsel*]_ _**, declare:**

1. That I am _ _[*state title if in public office, e.g., an Assistant Public Defender for the County of _ _ _ _ _ _, and*]_ _ **the attorney of record for the above-named defendant.**

2. That I am informed and believe that _ _[*name of police or sheriff's department*]_ _**, hereafter "The Department," makes and keeps written records of complaints received by The Department and that such records are kept in files maintained by The Department.**

3. That I am informed and believe that from time to time persons give statements to The Department concerning officers of The Department, alleging that said officers _ _[*tell what the allegations are expected to be, e.g., committed acts indicating racial or ethnic prejudice, or dishonesty; acts constituting false arrest, illegal search and/or seizure, or the fabrication of charges and/or evidence; acts of aggressive behavior, and/or violence, and/or attempted violence, and/or excessive force, and/or attempted excessive force; acts involving a "morally lax" character*]_ _**.**

4. That I am informed and believe that The Department assigns personnel to investigate said complaints. That these personnel correspond with or interview complainants, witnesses, and other persons and make notes, memoranda, and records of conversations in connection with their investigations and prepare and file reports, findings, opinions, and conclusions concerning their investigations. That The Department keeps in its personnel record files, or other files, notes, findings, memoranda, recordings, reports, transcripts, opinions, and conclusions of the investigations made and of the disciplinary proceedings commenced as the result of such complaints. That said files contain the names, addresses, and telephone numbers of witnesses interviewed during such investigations and of persons) who initiate complaints (as are described in the preceding paragraph).

5. That I am informed and believe that the records, data, and materials described in paragraphs (1) through _ _[*give ending number*]_ _ **of the Notice of Motion, Supporting Memorandum, and Order for Pretrial Discovery filed and served herein are in the exclusive possession and control of The Department and/or the Office of _ _ _ _ _ _ County District Attorney, and are readily available to each of them; that said records, data, and materials are not known to either defendant or defense counsel and will not otherwise be made available to defendant or defense counsel.**

6. A substantial issue in the trial of this case may be _ _[*describe generally the potential defense or defenses to the pending charges relating to officer misconduct, e.g., the fabrication of charges and/or evidence by police, false arrest, illegal search and seizure, police officer perjury, excessive and illegal use of force or violence, the attempted use of excessive and illegal use of force or violence*]_ _ **on the part of the officers involved.**

7. Specifically, in this case, based on my information and belief, the factual foundation to support the defense argument of officer misconduct as detailed above is as follows: _ _[*describe plausible factual scenario of specific police misconduct supporting the general defense(s) put forth in item 6; or, if applicable and consistent with the defense(s) above, issue denial of the facts asserted by the officer(s) in the police report*]_ _**.**

[*Use those items below that are relevant to your case and add any others that fit the case.*]

8. The above-listed materials are necessary for the proper preparation of this case for trial. The materials may be used as follows:

(A) To locate and investigate witnesses or other evidence of the dishonest character of the officer(s) involved to show that the officer(s) acted in conformity with that character at the time of this incident;

(B) To locate and investigate witnesses or other evidence of aggressive character of the officer(s) involved to show that the officer(s) acted in conformity with that character at the time of this incident;

(C) To refresh the recollection of witnesses to incidents of fabrication of charges and/or evidence by the officer(s) involved and/or to incidents of the use of illegal or excessive force by the officer(s) so that defense counsel may accurately ascertain the facts and circumstances of those incidents;

(D) To properly prepare for cross-examination and impeachment of witnesses to be called by the prosecution;

(E) To properly assess the credibility of the defendant and defense witnesses; and

(F) To impeach the testimony of the officers involved with acts showing a morally lax character and hence a readiness to lie.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER**
_ _[*Name*]_ _,	
Defendant.	
_____ /	

TO _ _[*NAME OF CITY ATTORNEY OR COUNTY COUNSEL, AND TITLE*]_ _ **AND TO** _ _[*NAME OF POLICE CHIEF OR SHERIFF, AND TITLE*]_ _**:**

It appearing to this Court from the attached declaration, from testimony and argument at the hearing on this motion, and from information presented at an in chambers hearing held on this motion, that there are in your possession or under your control certain items that have a bearing on this action, and, GOOD CAUSE APPEARING THEREFOR:

IT IS HEREBY ORDERED that you and each of you make available to the attorney of record or _ _[*his/her*]_ _ **investigator in the above-entitled action for inspection and copying all the following information in your possession pertaining to** _ _[*give names of officers, and their badge numbers if known*]_ _**:**

1. The names, addresses, and telephone numbers of all persons who have filed complaints with the _ _[*name of law enforcement agency*]_ _**, hereafter "The Department," for acts indicating or constituting** _ _[*e.g., racial or ethnic prejudice, dishonesty, false arrest, illegal search and seizure, the fabrication of charges and/or evidence, any act involving morally lax character, unnecessary acts of aggressive behavior, acts of violence and/or attempted violence, acts of excessive force and/or attempted excessive force,*]_ _ **by the above-named officer(s).**

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

2. All statements, written or oral, by persons who have brought complaints as described in Item 1, above.

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

3. The names, addresses, and telephone numbers of all persons interviewed by The Department, its investigators and other personnel during investigation into complaints as described in Items 1 and 2, above, by the above-named officer(s).

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

4. All statements, written or oral, made by persons interviewed by the Department, its investigators and other personnel during investigation into complaints as described in Item 3, above.

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

5. All tape recordings and/or transcriptions thereof, and notes and memoranda by investigating personnel of The Department made pursuant to investigations described in Items 1 and 3, above.

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

6. The names and assignments of investigators and other personnel employed by The Department as described in Items 1 and 3, above.

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

7. The written procedures established by The Department to investigate citizen complaints against The Department or its personnel.

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

8. All records of The Department concerning records of statements, reputations and opinions, including, but not limited to, findings, letters, formal reports, and oral conversations made by superior officers and other officers, of the above-named police officer(s), which pertain to acts indicating or constituting _ _[*Specify area of interest, e.g., racial prejudice or acts of unnecessary violence.*]**_ _**

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

9. All records of discipline imposed by The Department on the above-named police officer(s) for conduct specified in Items 1 and 8, above.

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

10. In accordance with Evid C §1045(e) and *Alford v Superior Court* (2003) 29 C4th 1033, 1042, 130 CR2d 672, the information and/or records ordered to be disclosed herein shall not be used for any purpose other than in the underlying court proceeding.

ORDERED BY THE COURT: Granted ____ Denied ____

Modified: _____

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: This motion must be served on the government agency (*i.e.,* the police or sheriff's department) that has custody of the records. Evid C §1043(a). The motion must be served at least 16 court days before the date set for the hearing on the motion. This 16-day period applies when the motion is personally served. If the motion is faxed or served by express mail or another overnight delivery service, the 16-day notice period must be increased by 2 calendar days. If the motion is served by regular mail, the 16-day notice period must be increased by 5 calendar days if it is mailed from an address in California to an address in California, by 10 calendar days if either the mailing address or the delivery address is outside California, and by at least 20 calendar days if either the mailing address or the delivery address is outside the United States. Evid C §1043(a); CCP §1005(b).

The motion must include (Evid C §1043(b)):

- The name of the defendant and the criminal case for which the discovery is sought;
- The name of the police or custodial officer whose records are sought;
- A description of the records sought;
- Affidavits (or declarations, which may be substituted for affidavits under CCP §2015.5) that show good cause for the discovery or disclosure sought, describe the materiality of the subject matter, and set forth an allegation of a reasonable belief that the government agency identified in the request has the requested records; and
- The time and place the discovery motion will be heard.

A copy of the law enforcement report that sets forth the circumstances of the defendant's stop and arrest should be attached if excessive force is alleged. See Evid C §1046. In many cases, the court may wish to review the police report underlying the case "in conjunction" with the averments in defendant's motion. *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 89, 260 CR 520. See also *City of San Jose v Superior Court* (1998) 67 CA4th 1135, 1147, 79 CR2d 624. A subpoena duces tecum addressed to the Chief of Police or Sheriff, and listing the items that are in the order, should also be attached. Witness statements corroborating the alleged officer misconduct may be attached to strengthen the *Pitchess* motion, but they are not required. *Warrick v Superior Court* (2005) 35 C4th 1011, 1025, 29 CR3d 2.

The supporting declaration or affidavit required by Evid C §1043(b)(3) must make a plausible showing of justification for discovery and be sufficiently specific to allow the information to be identified. See Evid C §1043(b)(3); *City of San Jose,* 67 CA4th at 1147; *People v Memro* (1985) 38 C3d 658, 678 n19, 214 CR 832, disapproved on other grounds in *People v Gaines* (2009) 46 C4th 172, 181 n2, 92 CR3d 627. The declaration can be made by the defendant or defense counsel (see 38 C3d at 682) on information and belief as long as the statutory requirements of the motion are otherwise met. *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 89, 260 CR 520; *City of San Jose,* 67 CA4th at 1147.

To show good cause for discovery, the required declaration or affidavit must articulate certain facts. It must "propose a defense or defenses to the pending charges." *Warrick v Superior Court* (2005) 35 C4th 1011, 1024, 29 CR3d 2. See also *City of San Jose,* 67 CA4th at 1147. It must contain supporting facts that "describe a factual scenario that supports the claimed officer misconduct" that "might or could have occurred." *Warrick,* 35 C4th at 1024; *City of San Jose,* 67 CA4th at 1147. The description need not guess the motives of the police officers, and depending on the facts of the case, a general denial of the statements of police in the police report may suffice. *Warrick,* 35 C4th at 1024; see *People v Hustead* (1999) 74 CA4th 410, 416, 87 CR2d 875. The declaration or affidavit must also demonstrate how the requested information may lead to relevant evidence or may itself be admissible as direct or impeachment evidence.

Warrick, 35 C4th at 1024; *Hustead,* 74 CA4th at 417.

The affidavit may be filed under seal to protect against revelation of privileged information. The defense must show that the information in the affidavit is in fact privileged because it comes from the client or is core work product. If the court determines that the information is privileged, it must order that the affidavit be sealed. If the court rules that the information is not privileged, the court must allow defense counsel to amend to include (or exclude) privileged information, rewrite the affidavit as a denial, or agree that the affidavit will not be sealed. However, this procedure will not be required to be followed very often, because of the minimal showing necessary to compel the in camera review of the officer's personnel file. *Garcia v Superior Court* (2007) 42 C4th 63, 71, 63 CR3d 948.

If the trial court finds the defense has established good cause for discovery, it must then review the personnel records in chambers and order disclosure if they are relevant. See, *e.g., City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 260 CR 520. See also Evid C §§1043, 1045(b). It is customary for trial courts to order disclosure of only the names, addresses, and phone numbers of witnesses and dates of any prior complaints. 49 C3d at 84. In some cases, a supplemental motion may be warranted to obtain disclosure of additional information or the full verbatim police reports. *Alvarez v Superior Court* (2004) 117 CA4th 1107, 1112, 12 CR3d 252.

This motion includes a proposed order. If the judge signs the order, it should be served on the chief of police or sheriff along with a subpoena duces tecum. See *People v Superior Court (Broderick)* (1991) 231 CA3d 584, 282 CR 418. The court must order that the records disclosed may not be used for any purpose other than the underlying court proceeding. Evid C §1045(e); *Alford v Superior Court* (2003) 29 C4th 1033, 1042, 130 CR2d 672. The materials may be released, on request, to the officers who are the subject of the materials. *Becerrada v Superior Court* (2005) 131 CA4th 409, 31 CR3d 735.

Cross-Reference: For further discussion of *Pitchess* motions, see Crim Law §§11.19-11.24.

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.13 M. Defense Motion for Discovery of Victim's Violent Conduct

§11.13 M. Defense Motion for Discovery of Victim's Violent Conduct

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO: THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY AND THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that on _ _[*date*]_ _ at _ _[*time*]_ _ or as soon thereafter as the matter can be heard _ _[*in Department _ _ of the above-entitled court*]_ _, the defendant, _ _[*name*]_ _, will ask the court for an order directing the People of the State of California to make available for inspection and copying (1) the record of any criminal convictions of the victim that may be used for impeachment and (2) all records of violence of the alleged victim including charges, convictions, and police reports.

This motion is made on the grounds that the information requested is in the actual or constructive possession of the District Attorney or readily available to _ _[*him/her*]_ _ and is reasonably required by the defendant for the preparation of the defense for trial, and that the defendant cannot readily obtain the information through _ _[*his/her*]_ _ own efforts. The motion is based on the attached declaration, supporting memorandum, the records of the case, and such other evidence as may be presented, and is supplementary to the informal discovery already received by defendant.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

STATEMENT OF FACTS

_ _[*Describe relevant facts. Attach authority for all factual statements, e.g., declaration by defense counsel, police report, and attach a copy as an exhibit*]_ _.

ARGUMENT

I

THE DEFENDANT IS ENTITLED TO INSPECT THE RECORDS OF ANY CONVICTIONS SUFFERED BY THE ALLEGED VICTIM

Good cause for discovery in a criminal case can be established by a showing that the defendant cannot readily obtain the information requested and that the requested information could assist the defendant in the preparation of his or her case. (*Hill* v *Superior Court* (1974) 10 C3d 812, 817, 112 CR 257.) The defendant has no ready access to the alleged victim's record of conviction other than through the discovery process. Furthermore, under Evidence Code section 788, a witness's prior felony convictions are admissible as impeachment; evidence of relevant misdemeanor misconduct involving dishonesty or moral turpitude is also admissible for impeachment in criminal proceedings. (*People v Wheeler* (1992) 4 C4th 284, 291, 14 CR2d 418.) No further showing of good cause is required. (*Hill* v *Superior Court* (1974) 10 C3d 812, 816, 112 CR 257.)

II

THE DEFENDANT IS ENTITLED TO INSPECT ANY INFORMATION AVAILABLE TO THE PROSECTION REGARDING ACTS OF VIOLENCE COMMITTED BY THE ALLEGED VICTIM

Under Evidence Code section 1103, subdivision (a), specific acts of aggression by the alleged victim are admissible to show that the alleged victim was the aggressor. Consequently, on a showing of good cause, arrest records and police records of indicating that the alleged victim has engaged in violent activity, must be disclosed. (*Engstrom* v *Superior Court* (1971) 20 CA3d 240, 245, 97 CR 484.) "Where a claim of self-defense is offered, and the alleged victim of an offense is claimed to have been the aggressor, information concerning arrests for specific acts of aggression by the alleged victim must be produced if available to the prosecutor." (*Ibid.*) In this case, (1) the defendant is charged with assault; (2) the defendant intends to raise a defense of self-defense, as stated in the declaration of counsel attached to this motion; and (3) the defendant's statement to the police immediately after the incident (see police report, attached to this motion as Exhibit A) indicates that the victim was the aggressor.

CONCLUSION

For the foregoing reasons, good cause for the requested disclosure exists, and this Court must enter its order directing the prosecutor to make the above-described records available to defense counsel for inspection and copying.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF COUNSEL IN SUPPORT OF DISCOVERY MOTION

_ _[*Name*]_ _, attorney for defendant _ _[*name*]_ _, declares under penalty of perjury that:

1. _ _[*He/she*]_ _ is the attorney representing the defendant in this case;

2. _ _[*The defendant's statement to the police contains evidence that the victim was the aggressor in this case and the defendant acted in self-defenseIthe victim has a reputation for violence in the community/there is evidence in the police report that just before the shooting the victim threatened to kill the defendant.*]_ _

3. Declarant is informed and believes that records of violent conduct by the alleged victim are:

(a) In the actual or constructive possession of the District Attorney of _ _ _ _ _ County;

(b) Not available to defendant or _ _[*his/her*]_ _ counsel in the exercise of due diligence; and

(c) Necessary for the preparation of defendant's case for jury trial.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: This motion may be made only when there is a potential issue about the alleged victim's conduct, typically when the defendant asserts a claim of self-defense. A separate and specific request for such information is necessary because the issue arises only when there is a question about the alleged victim's conduct. It requires a

specific, factual showing of good cause.

Cross-Reference: On discovery generally, see Crim Law, chap 11.

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.14 N. Defense Ex Parte Motion for Production of Booking Photo or Latent Fingerprints

§11.14 N. Defense Ex Parte Motion for Production of Booking Photo or Latent Fingerprints

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT:

The defendant, by counsel, asks the Court for an ex parte order directing _ _[*name of law enforcement agency*]_ _ **to release a copy of** _ _[*the defendant's booking photo/the defendant's fingerprints and any latent fingerprints taken from the scene of the above-entitled case*]_ _**. This motion is based on the attached supporting memorandum, and on the court records and pleadings in the court files for this case.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum of points and authorities should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

The defense is entitled to a copy of _ _[*the defendant's fingerprints/the latent fingerprints lifted at the scene of the crime charged against the defendant*]_ _**. (Penal Code section 1054.1(c).)**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER FOR PRODUCTION OF** _ _[*BOOKING PHOTO/LATENT FINGERPRINTS*]_ _
_ _[*Name*]_ _,	
Defendant	
_____ /	

TO CONSOLIDATED CRIMINAL RECORDS, _ _[*NAME OF POLICE OR SHERIFF'S DEPARTMENT*]_ _**:**

[*Use for booking photo or fingerprint card*]

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the Consolidated Criminal Records Department of the _ _[*name of police or sheriff's department*]_ _ turn over to _ _[*name of investigator, or an investigator of the Public Defender's Office*]_ _ a copy of the _ _[*booking photo/booking fingerprint card*]_ _ of the defendant whose name, and date of birth are below.

[*Use for fingerprints*]

GOOD CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED that the Consolidated Criminal Records Department of the _ _[*name of police or sheriff's department*]_ _ provide access to latent fingerprints for the incident occurring on _ _[*date*]_ _, described in _ _[*name of law enforcement agency*]_ _ Report No. _ _[*number*]_ _, dated _ _[*date*]_ _, and provide legible copies of those latent prints to _ _[*name of defense investigator, or an investigator of the Public Defender's Office*]_ _.

NAME OF DEFENDANT: _ _[*name*]_ _

DOB: _ _[*date of birth*]_ _

IT IS SO ORDERED.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: It is common in many counties for the defense to request booking photos and fingerprints through ex parte orders rather than requesting them from the prosecutor; if that is the practice, a formal motion is not required. A proposed order is attached to the motion.

Cross-Reference: For further discussion of ex parte motions, see Crim Law §11.16.

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.15 O. Request for Disclosure of Juvenile Case File (Judicial Council Form JV-570)

§11.15 O. Request for Disclosure of Juvenile Case File (Judicial Council Form JV-570)



JV-570 Request for Disclosure of Juvenile Case File

Clerk stamps date here when form is filed.

If you are requesting a court order to obtain the juvenile case file of a child who is alive, fill out all items on this form, and file it with the court. You must also fill out and file Proof of Service—Request for Disclosure *(form JV-569).*

If you are a member of the public requesting the juvenile case file of a child who is deceased, you can:

a. *Fill out items 1–4 and 7 on this form and file it with the court. You must then provide a copy of this form to the Custodian of Records of the county child welfare agency, who will then provide notice of this request.*

Or

b. *Do not complete the form and request the juvenile case file from the child welfare agency under Welfare and Institutions Code section 10850.4.*

Fill in court name and street address:

Superior Court of California, County of

Fill in case number if known:

Case Number:

(1) Your name: _____

Relationship to child *(if any)*: _____

Street address: _____

City: _____ State: _____ Zip: _____

Telephone number: _____

Lawyer *(if any) (name, address, telephone numbers, and State Bar number)*: _____

_____

_____

(2) Name of child *(if known)*: _____

(3) Child's date of birth *(if known)*: _____

(4) a. ☐ A petition regarding the child in (2) has been filed under

- ☐ Welfare and Institutions Code section 300
- ☐ Welfare and Institutions Code section 601
- ☐ Welfare and Institutions Code section 602 **or**

b. ☐ I believe the child in (2) died as a result of abuse or neglect. Approximate date of death: _____

If you checked box b, you may skip items 5 and 6.

Note: You must provide a copy of this form to all interested parties if you know their names and addresses.

Print

Your name: _____ | Case Number:

5 The records I want are: *(Describe in detail. Attach more pages if you need more space.)*

_____

_____

_____

_____

_____

_____

_____

_____

☐ Continued on Attachment 5.

6 The reasons for this request are:

a. ☐ Civil court case pending in *(name of county):* _____
Case number: _____ Hearing date: _____

b ☐ Criminal court case pending in *(name of county):* _____
Case number: _____ Hearing date: _____

c. ☐ Juvenile court case pending in *(name of county):* _____
Case number: _____ Hearing date: _____

d. ☐ Other *(specify)*: _____
Case number: _____ Hearing date: _____

7 I need the records because: *(Describe in detail. Attach more pages if you need more space.)*

_____

_____

_____

_____

_____

_____

_____

_____

☐ Continued on Attachment 7.

8 I declare under penalty of perjury under the laws of the State of California that the information in this form is true and correct. This means that if I lie on this form, I am guilty of a crime.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

Comment: Use of this Judicial Council form is mandatory. Cal Rules of Ct 1.31.

Cross-Reference: On the confidentiality of juvenile court records, see California Criminal Law Procedure and Practice §§41.13-41.13A, 56.1, and 56.7 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.16 P. Acknowledgment of Discovery

§11.16 P. Acknowledgment of Discovery

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ACKNOWLEDGMENT OF DISCOVERY

Case No. _ _[*number*]_ _

_ _[*People v/In re*]_ _ _ _[*name of defendant*]_ _

Date: _ _ _ _ _ _

I, the undersigned, declare that I am the _ _[*prosecutor/attorney for defendant*]_ _ **in the above-entitled case.**

I have received copies or inspected the following documents contained in the _ _[*District Attorney's/defense attorney's*]_ _ **case file:**

Documents (list those applicable)	*Received Copy*	*Inspected Only*
Arrest report(s)		
Crime report(s)		
Property report(s)		
Supplemental report(s)		
Chemist report(s)		
Coroner's protocol		
Booking report(s)		
Accident report(s)		
Retest(s) of evidence		
Witness interview(s)		
Other reports (specify)		

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: This form may be used to acknowledge receipt of items in response to an informal request for discovery. See §§11.1, 11.4.

Cross-Reference: See California Criminal Law Procedure and Practice §11.3 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/11 Discovery/§11.17 Q. Motion for Conditional Examination

§11.17 Q. Motion for Conditional Examination

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO _ _[*THE PEOPLE/THE DEFENDANT*]_ _:

PLEASE TAKE NOTICE that, on _ _[*date*]_ _, at _ _[*time*]_ _, or as soon thereafter as the matter can be heard, the _ _[*People/defendant, _ _[name*]_ _]_ _ will move the Court, for conditional examination of _ _[*name of witness*]_ _ pursuant to Penal Code sections 1335 et seq., such conditional examination to take place at a date, time, and place to be determined by the Court at the hearing on this motion.

This motion is based on the attached declaration, together with such other evidence, oral or documentary, as may be introduced at the hearing on this motion.

[*Optional*]

Because time is of the essence, the _ _[*People seek/defendant seeks*]_ _ an order shortening time under the provisions of Code of Civil Procedure section 1005.

[*Continue*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

MEMORANDUM IN SUPPORT OF MOTION FOR CONDITIONAL EXAMINATION

A WITNESS MAY BE CONDITIONALLY EXAMINED WHEN _ _[*SPECIFY RELEVANT GROUND*]_ _

_ _[*Specify relevant grounds, e.g., the witness is about to leave the state, or is so sick that he or she will not be able to testify. Pen C §1336.*]_ _

_ _[*NAME*]_ _**, A WITNESS IN THIS CASE, WILL BE UNAVAILABLE TO TESTIFY AT TRIAL BECAUSE** _ _[*STATE GROUND*]_ _**; THIS GROUND SUPPORTS THE** _ _[*PEOPLE'S/DEFENDANT'S*]_ _ **REQUEST FOR A CONDITIONAL EXAMINATION OF THAT WITNESS**

_ _[*Explain why the witness will be unavailable. Refer to the facts in the declaration attached that is required by Pen C §§1336-1338.*]_ _

CONCLUSION

For the above-stated reasons, the _ _[*People request/Defendant requests*]_ _ that this Court order that a conditional examination of _ _[*name of witness*]_ _ be held at a date, time, and place to be determined by this Court at the hearing on this motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__

_ _[*Typed name*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION IN SUPPORT OF MOTION FOR CONDITIONAL EXAMINATION OF _ _[*NAME*]_ _

_ _[*Name of declarant*]_ _**, being duly sworn, deposes and says:**

That _ _[*he/she*]_ _ **is** _ _[*tell who declarant is, e.g., a Deputy District Attorney for the County of Los Angeles*]_ _**;**

That there is now pending before this Court a charge of violating section _ _[*number*]_ _ **of the California** _ _ _ _ _ _ **Code against the above-named defendant; that said charge is now at the** _ _[*tell stage, e.g., arraignment*]_ _ **stage.**

That in this action the _ _[*People/defendant*]_ _ **must have the testimony of** _ _[*name of witness*]_ _ **because** _ _[*explain why, e.g., the person is the victim in the action and her testimony is material to the case and necessary to prove the elements of the offense*]_ _**.**

That this witness will be unavailable to testify because _ _[*explain why*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: The motion for conditional examination of a witness requires no less than three days' notice to the opposing party. Pen C §1338. The affidavit attached to the motion satisfies the requirements of Pen C §1337 as to its contents. A witness is conditionally examined as if testifying at trial. See Pen C §§1335-1345. The defendant has the right to be present. Pen C §1340. A magistrate, prosecutor, and defense attorney are present. See Pen C §1339. A court reporter takes down the proceedings, which may also be videotaped. Pen C §1343.

Cross-Reference: For discussion of conditional examinations, see Crim Law §§31.20, 54.15.

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12

Public Records

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13

Motion to Set Aside Information or Quash Indictment

A. Defense Motion to Dismiss Information Under Pen C §995 §13.1
B. Defense Motion to Quash Indictment Under Pen C §995 §13.2
C. Memorandum in Opposition to Motion to Dismiss Under Pen C §995 §13.3
D. Motion to Compel Reinstatement of Complaint (Pen C §871.5) §13.4
E. Request for Preparation of Transcript §13.5
F. Memorandum in Support of Motion to Reinstate Complaint §13.6

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Source: Criminal Law/California Criminal Law Forms Manual/13 Motion to Set Aside Information or Quash Indictment/ §13.1 A. Defense Motion to Dismiss Information Under Pen C §995

§13.1 A. Defense Motion to Dismiss Information Under Pen C §995

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant will move that the Court set aside the information under Penal Code section 995 because _ _[*give the relevant ground(s) of §995: the defendant was not legally committed by the magistrate, and/or the defendant was committed without reasonable or probable cause*]_ _.

This motion will be based on the attached supporting memorandum, the preliminary hearing transcript, and on argument at the hearing on this motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two to three sentences.*]_ _

STATEMENT OF FACTS

_ _[*State facts based only on preliminary hearing transcript, unless one of the narrow exceptions that allows you to go outside the transcript applies. Those exceptions are discussed in Crim Law §13.4. Support each statement of fact by referring to the preliminary hearing transcript by page number, or page and line number. The usual style is RT (for Reporter's Transcript) followed by the page number, e.g., RT 4; line numbers are usually preceded by a colon (e.g., RT 4: 3-17).*]_ _

ARGUMENT

[*The following general arguments may be made in a §995 motion to dismiss. For discussion of the major issues, see Crim Law, chaps 8, 13. Most §995 motions concern fact-specific issues and require research to find cases on point.*]

THE INFORMATION CHARGES AN OFFENSE NOT NAMED IN THE ORDER OF COMMITMENT OR SHOWN BY THE EVIDENCE TO HAVE OCCURRED

An information may charge only an offense found by the magistrate to have occurred and named in the order of commitment, or an offense shown by the evidence to have occurred that arose out of the transaction that was the basis for the commitment on the related offense. (Penal Code section 739; *Jones v Superior Court* (1971) 4 C3d 660, 94 CR 289.)

_ _[*Describe which count was not named in the order of commitment or shown by the evidence to have occurred.*]_ _

AN OFFENSE DISMISSED BY THE MAGISTRATE AFTER A FACTUAL FINDING FATAL TO THE CHARGE MAY NOT BE RECHARGED IN THE INFORMATION

An offense dismissed by the magistrate after a factual finding fatal to the charge may not be recharged in the superior court information. (*Jones v Superior Court, supra; Walker v Superior Court* (1980) 107 CA3d 884, 166 CR 209.)

In this case, the magistrate _ _[*state the magistrate's factual findings, and explain why they were factual findings and not legal findings*]_ _**.**

THE RESTRICTION ON THE RIGHT TO CROSS-EXAMINE WITNESSES RESULTED IN AN ILLEGAL COMMITMENT

A defendant is denied a substantial right if defense counsel is limited in the cross-examination of the prosecution's witnesses. (*Jennings v Superior Court* (1967) 66 C2d 867, 59 CR 440. See Penal Code sections 865, 866(a).) Cross-examination may be for the purpose of raising an affirmative defense, negating an element of the offense (*Jennings v Superior Court, supra*), or impeaching a witness (*Alford v Superior Court* (1972) 29 CA3d 724, 105 CR 713). (Penal Code section 866(a).)

_ _[*Describe what cross-examination was denied the defense. Explain the purpose of the cross-examination. Hopefully, you can cross-refer to the preliminary hearing transcript page where defense counsel made an offer of proof that demonstrated the point of the cross-examination. Explain how the denied cross-examination would have fit into the above criteria, and why it was not just for purposes of discovery, which is not permitted (Pen C §866(b)).*]_ _

THE RESTRICTION ON THE RIGHT TO PRESENT A DEFENSE RESULTED IN AN ILLEGAL COMMITMENT

The defense is entitled to establish an affirmative defense at the preliminary hearing. (*Jennings v Superior Court* (1967) 66 C2d 867, 880, 59 CR 440; Penal Code section 866.) _ _[*Defendants have the absolute right to testify at the preliminary hearing. (People v Robles (1970) 2 C3d 205, 85 CR 166.)*]_ _

_ _[*Describe what affirmative defense counsel tried to put on at the preliminary hearing. You should be able to cross-refer to the preliminary hearing transcript page where defense counsel made an offer of proof that made clear that he or she wanted to put on an affirmative defense, and what that defense was going to be. See the affirmative defenses in Crim Law §§8.13, 32.12. If the defendant was not allowed to testify, argue that point too.*]_ _

THE ONLY EVIDENCE SUPPORTING THE COMMITMENT WAS OBTAINED AS THE RESULT OF AN ILLEGAL SEARCH AND SEIZURE

A commitment based on illegally seized evidence is not valid and must be set aside. (*Badillo v Superior Court* (1956) 46 C2d 269, 294 P2d 23; *Priestly v Superior Court* (1958) 50 C2d 812, 330 P2d 39.) The defendant challenged the search and seizure at the preliminary examination and objected to the introduction of _ _[*describe the evidence that was seized*]_ _ **on the grounds that** _ _[*state grounds*]_ _**.** _ _[*Cite to reporter's transcript page numbers.*]_ _ **That evidence was nevertheless admitted and considered by the magistrate, and a holding order resulted.**

The magistrate's ruling was in error because _ _[*State why, citing legal authorities and tying them to the facts of your case. If you filed a memorandum in support of your Pen C §1538.5 motion at the preliminary hearing, attach a copy to this motion as an exhibit and cross-refer to it.*]_ _

An information must be set aside unless the reviewing court finds sufficient competent evidence to support the magistrate's conclusion that there was probable cause to believe that a crime had been committed and that the defendant committed it. (*People v Lopez* (1975) 52 CA3d 263, 123 CR 855.) The evidence must present a *rational* basis for believing that the defendant is guilty. (*People v Slaughter* (1984) 35 C3d 629, 200 CR 448.)

_ _[*Although circumstantial evidence may be considered in making the determination, all inferences must be reasonable (Williams v Superior Court (1969) 71 C2d 1144, 80 CR 747); and any inferences which derive from*

speculation, conjecture, or guesswork must be discarded (Birt v Superior Court (1973) 34 CA3d 934, 110 CR 321).]_ _

If the _ _[*describe evidence*]_ _ **is suppressed, not enough evidence remains to support a holding order, and the information should be set aside.** _ _[*Explain why this is so.*]_ _

_ _[*SPECIFY ELEMENT OF OFFENSE NOT PROVEN AT PRELIMINARY HEARING, E.G., THE ELEMENT OF FORCE OR FEAR IN THE ROBBERY IN COUNT ONE*]_ _ **WAS NOT PROVEN, THEREFORE COUNT** _ _[*NUMBER*]_ _ **MUST BE DISMISSED**

There must be some evidence to support each and every element of an offense, or the finding must fall. (*Panos v Superior Court* (1984) 156 CA3d 626, 203 CR 115; *People v Superior Court (Mendella)* (1983) 33 C3d 754, 191 CR 1; *People v Shirley* (1978) 78 CA3d 424, 144 CR 282.) There was no evidence at the preliminary hearing in this case to support _ _[*Specify count and crime. Explain what element was missing. Support your argument with caselaw on point. See, e.g., Rodriguez v Superior Court (1984) 159 CA3d 821, 205 CR 750 (no showing of intent before force was used against victim); People v Caffero (1989) 207 CA3d 678, 255 CR 22 (in felony-murder case, no showing of malice aforethought). See other cases in Crim Law §13.9.*]_ _

THE TESTIFYING OFFICER DID NOT MEET THE REQUIREMENTS OF PENAL CODE SECTION 872(b)

In *Whitman v Superior Court* (1991) 54 C3d 1063, 2 CR2d 160, the Court held that Penal Code section 872(b) permits a properly qualified investigating officer to relate out-of-court statements by crime victims or witnesses, including other law enforcement personnel, without requiring the victims or witnesses to be present in court. It does not authorize a finding of probable cause based only on the testimony of a noninvestigating officer or "reader" who recites the police report of an investigating officer. The testifying officer "must have sufficient knowledge of the crime or the circumstances under which the out-of-court statement was made so as to meaningfully assist the magistrate in assessing the reliability of the statement." (54 C3d at 1075.)

In this case _ _[*describe what requirement was not met, e.g., the officer who testified did not have at least five years of law enforcement experience, or did not have the special training required*]_ _**. Because Officer** _ _[*name of officer*]_ _ **did not have** _ _[*describe what requirement was missing*]_ _**,** _ _[*his/her*]_ _ **testimony must be stricken. (See *Hollowell v Superior Court* (1992) 3 CA4th 391, 4 CR2d 321 (testimony stricken because of prosecution's failure to establish that training course was approved by POST).)**

THE MAGISTRATE ADMITTED MULTIPLE HEARSAY IN VIOLATION OF PENAL CODE SECTION 872(b) AND *WHITMAN v SUPERIOR COURT*

The California Supreme Court in *Whitman v Superior Court* (1991) 54 C3d 1063, 2 CR2d 160, expressly forbade the use of multiple hearsay. *Whitman* pointed out that Penal Code section 872(b) does not contain an exception to Evidence Code section 1201, which provides that multiple hearsay is allowed only if each level of hearsay is covered by a hearsay exception. This proscription was applied by the Court to exclude testimony in *Shannon v Superior Court* (1992) 5 CA4th 676, 7 CR2d 47; *People v Wimberly* (1992) 5 CA4th 439, 6 CR2d 800; and *Montez v Superior Court* (1992) 4 CA4th 577, 5 CR2d 723.

_ _[*Explain which officer testified to multiple hearsay at the preliminary hearing in your case, and why it was multiple hearsay.*]_ _

THE DENIAL OF A SUBSTANTIAL RIGHT AT THE PRELIMINARY HEARING RENDERS THE COMMITMENT ILLEGAL AND ENTITLES THE DEFENDANT TO A DISMISSAL OF THE INFORMATION

The denial of a substantial right at the preliminary examination renders the ensuing commitment illegal and entitles a defendant to dismissal of the information on timely motion. (See *People v Pompa-Ortiz* (1980) 27 C3d 519, 523, 165 CR 851.)

_ _[*Specify what substantial right was violated, e.g., the right to counsel, to an interpreter, or for the defendant to be present. Support the facts with relevant caselaw. See Crim Law, chaps 8, 13.*]_ _

_ _[*Add additional arguments.*]_ _

CONCLUSION

For the reasons stated above, the defendant respectfully requests that this Penal Code section 995 motion be granted and _ _[*specify the desired relief, e.g., counts one and two be dismissed*]_ _.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: Penal Code §995 motions are made in the superior court. Pen C §995(a). Most counties have local rules of court that specify the type of notice required, deadlines for filing the motion, the court that will hear the motion, and the days of the week and times these motions are heard. Defense counsel usually notice §995 motions orally at arraignment in superior court, and are given a date for hearing on the motion by the arraignment judge. A supporting memorandum must accompany the motion. Cal Rules of Ct 4.111; see §18.2.

While Pen C §995 motions must usually be based exclusively on the preliminary hearing transcript (see *Stanton v Superior Court* (1987) 193 CA3d 265, 270, 239 CR 328), there are exceptions (see Crim Law §13.4). Examples of some of the issues that may be raised by §995 motion are in Crim Law §§13.6-13.23. Examples of issues that may not be raised by a Pen C §995 motion are in Crim Law §13.21.

Preliminary hearing transcripts must be filed with the county clerk within ten calendar days of the close of the preliminary hearing (Pen C §869(e)); the §995 judge usually has a copy of the transcript in the court file. Usually, the defense and prosecution are sent a copy of the transcript a few days before the superior court arraignment. An attorney unfamiliar with practice in a particular county should inquire whether a copy of the preliminary hearing transcript must be attached to the motion.

When a Pen C §1538.5 motion is made at the preliminary hearing, it may be challenged by Pen C §995 motion; an appropriate Pen C §1538.5 motion may also be made in superior court. *People v Laiwa* (1983) 34 C3d 711, 195 CR 503. See Crim Law §16.25.

Cross-Reference: For further discussion of Pen C §995 motions, see Crim Law, chap 13. See also Crim Law, chap 8 on preliminary hearings.

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Source: Criminal Law/California Criminal Law Forms Manual/13 Motion to Set Aside Information or Quash Indictment/ §13.2 B. Defense Motion to Quash Indictment Under Pen C §995

§13.2 B. Defense Motion to Quash Indictment Under Pen C §995

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court quash the indictment in the above-titled case because _ _[*choose the applicable argument(s): (1) the indictment was not found, presented, or endorsed as required by the Penal Code; (2) the defendant has been indicted without reasonable or probable cause; (3) the indictment was based on evidence (other than the sworn testimony of a law enforcement officer, qualified under Penal Code section 939.6(c), relating the out-of-court statement of a declarant and offered for the truth of the matter asserted) that would not be admissible over objection at the trial of a criminal case, and without that evidence there is not sufficient evidence to support an indictment*]_ _. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two or three sentences.*]_ _

STATEMENT OF FACTS

_ _[*Summarize the facts concerning the crime(s) charged as brought out in testimony before the grand jury. Identify in some manner (e.g., in parentheses following the relevant statements) testimony and evidence (other than the sworn testimony of a law enforcement officer, qualified under Penal Code section 939.6(c), relating the out-of-court statement of a declarant and offered for the truth of the matter asserted) that would not have been admissible over objection. Follow each summary of particular testimony with a citation (usually in parentheses) to the page (and line, if you wish) of the grand jury transcript on which that testimony may be found.*]_ _

[*Example*]

David Jones, the manager of the Villa Motel, testified before the grand jury in this case to the following information. On the morning of June 14, 2004, Mr. Jones was notified by a maid that the television was missing from Room 24 of the Villa Motel. (RT 5) (The maid did not testify. The only testimony concerning the fact that the TV was missing was that of Mr. Jones.)

_ _[*State what charges were found against the defendant by the grand jury, and on what date.*]_ _

ARGUMENT

[*The following argument alleges that the indictment was based on evidence (other than officer testimony specifically permitted under Penal Code section 939.6(c)) that would not be admissible over objection at the trial of a criminal case. See Crim Law §13.22 for discussion of other possible errors in grand jury proceedings, and the forms in §§9.1-9.2 of this forms manual.*]

THE GRAND JURY MAY NOT RECEIVE EVIDENCE (OTHER THAN OFFICER TESTIMONY SPECIFICALLY PERMITTED UNDER PENAL CODE SECTION 939.6(c)) THAT WOULD BE INADMISSIBLE ON OBJECTION

A grand jury may not receive evidence (other than officer testimony specifically permitted under Penal Code section 939.6(c)) that would be inadmissible on objection at the trial of a criminal case. (Penal Code section 939.6(b)-(c).) This means that a proper foundation must be laid for the admission of documentary evidence, and that all other evidentiary requirements must be met by the prosecutor.

AFTER ELIMINATING EVIDENCE (OTHER THAN OFFICER TESTIMONY SPECIFICALLY PERMITTED UNDER PENAL CODE SECTION 939.6(c)) THAT WOULD HAVE BEEN INADMISSIBLE ON OBJECTION, AN INDICTMENT MAY BE SUSTAINED ONLY IF THERE REMAINS SUFFICIENT ADMISSIBLE EVIDENCE TO SUPPORT IT

The hearsay exceptions of section 30(b) of article I of the California Constitution and Penal Code section 872(b) do not apply to grand jury proceedings. By statute, with the exception for officer testimony specifically permitted under Penal Code section 939.6(c), the normal rules of hearsay apply in grand jury proceedings (Penal Code section 939.6(b)-(c)), and an indictment may not be based entirely on hearsay evidence (*Cook v Superior Court* (1970) 4 CA3d 822, 84 CR 664).

[*Continue with separate headings, discussion, and citation to authority concerning each alleged item of inadmissible evidence presented to the grand jury, as in the following example.*]

THE TESTIMONY OF MR. JONES THAT A TELEVISION WAS STOLEN IS HEARSAY

The only evidence presented to the grand jury that returned the indictment in this case concerning a stolen television was the testimony of Mr. Jones that a maid told him that the television was missing from Room 24 of the Villa Motel, of which Mr. Jones is the manager. (RT 5) The maid did not testify. The only testimony concerning the fact that the TV was missing was that of Mr. Jones; that testimony is hearsay.

Hearsay evidence is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evidence Code section 1200(a).) The maid's statement to Mr. Jones was hearsay.

THERE IS NO EXCEPTION TO THE HEARSAY RULE THAT WOULD HAVE PERMITTED THE GRAND JURY TO BASE THE INDICTMENT ON THE HEARSAY TESTIMONY OF MR. JONES

There are exceptions to the rule that hearsay is inadmissible; there are none, however, that apply to the testimony of Mr. Jones. The hearsay exceptions of section 30(b) of article I of the California Constitution and Penal Code section 872(b), which allow hearsay at preliminary hearings, do not apply to grand jury proceedings. The exception for officer testimony under Penal Code section 939.6(c) does not apply here because Mr. Jones is not an officer. Otherwise, by statute, the normal rules of hearsay apply in grand jury proceedings. (Penal Code section 939.6(b).)

AFTER ELIMINATING MR. JONES' TESTIMONY CONCERNING THE STOLEN TV, THERE IS NO EVIDENCE THAT A TV WAS STOLEN, AND THEREFORE NO BASIS FOR THE GRAND JURY CHARGE THAT A TV WAS STOLEN FROM THE VILLA MOTEL BY THE DEFENDANT

There is no evidence to prove that a television was stolen from the Villa Motel, after eliminating the testimony of Mr. Jones. There is thus no proof that the TV set found in the trunk of the defendant's car had been stolen.

[*Continue*]

A MOTION TO QUASH AN INDICTMENT BECAUSE THERE IS INSUFFICIENT COMPETENT EVIDENCE TO SUPPORT IT AFTER ELIMINATING EVIDENCE INADMISSIBLE ON OBJECTION IS PROPERLY MADE FOR THE

FIRST TIME BY A MOTION PURSUANT TO PENAL CODE SECTION 995

An indictment based on insufficient admissible evidence may be challenged by a motion to dismiss pursuant to Penal Code section 995. (See *People v Backus* (1979) 23 C3d 360, 152 CR 710; *Cook v Superior Court* (1970) 4 CA3d 822, 84 CR 664.) Further, because a defendant has no opportunity to object to hearsay presented to a grand jury, that hearsay may be objected to for the first time in a motion pursuant to Penal Code section 995. (*Dong Haw v Superior Court* (1947) 81 CA2d 153, 183 P2d 724.)

CONCLUSION

Defendant moves to _ _[*quash the indictment/quash _ _*[*specify the counts to be quashed if not all counts are based on inadmissible evidence*]_ _]_ _ **because there is insufficient admissible evidence to support _ _**[*it/them*]_ _ **based on the reasons stated above.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: See the Comment to §13.1 for discussion of Pen C §995 motions in general. In general, the prosecution argues that, whatever error occurred in the grand jury proceedings, it was not extreme enough to constitute a denial of due process. See *People v Backus* (1979) 23 C3d 360, 391, 152 CR 710. With regard to the existence of incompetent evidence presented to the grand jury, even if the grand jury heard evidence that would be inadmissible at trial, the indictment is *not* void if sufficient competent evidence to support the indictment was also presented to the grand jury. Pen C §939.6(b). See also *People v Olf* (1961) 195 CA2d 97, 15 CR 390.

If counsel wishes to quash the indictment based on error in grand jury composition, see the form in §9.1. A motion to quash the indictment because the prosecutor did not inform the jury of evidence reasonably tending to negate guilt (commonly called a *Johnson* motion) is in §9.2.

Cross-Reference: See discussion of Pen C §995 motions in Crim Law, chap 13, and discussion of grand jury proceedings in Crim Law, chap 9.

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Source: Criminal Law/California Criminal Law Forms Manual/13 Motion to Set Aside Information or Quash Indictment/ §13.3 C. Memorandum in Opposition to Motion to Dismiss Under Pen C §995

§13.3 C. Memorandum in Opposition to Motion to Dismiss Under Pen C §995

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS UNDER PENAL CODE SECTION 995

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two to three sentences, concluding with your position that the defense motion should be denied.*]_ _

SUMMARY OF FACTS

[*Select one of the following paragraphs.*]

The defense statement of facts is hereby adopted by reference.

[*Or*]

The defense statement of facts is hereby adopted by reference and augmented as follows: _ _[*Add additional facts from preliminary hearing or grand jury proceedings, supported by reference to the Reporter's Transcript, page, or page and line, e.g., RT 2; or RT 2, Lines 3-14; or RT 2: 3-14.*]_ _

[*Or*]

The testimony given _ _[*at the preliminary hearing/before the grand jury*]_ _**, together with all reasonable inferences to be drawn therefrom, indicates the following as to Count** _ _[*specify count number*]_ _ **of the** _ _[*Information/Indictment*]_ _**:** _ _[*State only facts based on preliminary hearing or grand jury transcript. Refer to the Reporter's Transcript, page, or page and line.*]_ _

[*Continue*]

ARGUMENT

[*The following are examples of general arguments that may be made in opposition to a §995 motion to dismiss an information or indictment. For discussion of the major issues, see California Criminal Law Procedure and Practice, chaps 8, 13 (Cal CEB Annual). Most §995 motions concern fact-specific issues and require research in case law to find cases on point.*]

A PENAL CODE SECTION 995 MOTION IS NOT THE APPROPRIATE PROCEDURE FOR THE DEFENSE ARGUMENT

_ _[*State why a §995 motion is inappropriate. Examples include a defense argument based on information that goes outside the preliminary hearing transcript (Stanton v Superior Court (1987) 193 CA3d 265, 270, 239 CR 328); a juvenile court order that a minor must be tried as an adult (Ramona R. v Superior Court (1985) 37 C3d 802, 210 CR 204); and misjoinder (People v Cummings (1959) 173 CA2d 721, 343 P2d 944). For other examples, see Crim Law §13.21.*]_ _

NO OBJECTION WAS MADE AT THE PRELIMINARY HEARING

_ _[*State why an objection was required.*]_ _

THE DEFENSE IN ITS PENAL CODE SECTION 995 MOTION USED THE WRONG STANDARD FOR REVIEWING THE MAGISTRATE'S RULING

The defense supports its argument that the evidence is insufficient by citing cases that concern *convictions.* Review of a conviction requires a different and much higher standard (beyond a reasonable doubt) than does review of a holding order. A holding order must be upheld on Penal Code section 995 review as long as the reviewing Court finds a rational ground to support the holding order. (*People v Slaughter* (1984) 35 C3d 629, 200 CR 448; *People v Caffero* (1989) 207 CA3d 678, 255 CR 22.) Therefore, the defense arguments regarding the sufficiency of the evidence as to Count _ _[*number*]**_ _ are irrelevant and should be disregarded.**

THE MAGISTRATE MADE LEGAL FINDINGS, NOT FACTUAL FINDINGS

Legal findings are not binding on the prosecution after the preliminary hearing; factual findings are binding. (*People v Uhlemann* (1973) 9 C3d 662, 108 CR 657.) When, as in this case, the magistrate has accepted the evidence but concluded that on legal grounds one or more charges have not been proven, that is a legal conclusion. Examples are: _ _[*Give examples close to the facts of your case that show that the magistrate's legal ruling was wrong, and relate them to your case. See, e.g., People v Superior Court (Henderson) (1986) 178 CA3d 516, 223 CR 741; **People v Superior Court (Gibson) (1980) 101 CA3d 551, 161 CR 923***.]**_ _**

[*Add if applicable*]

Further, if a magistrate focuses on one discrepancy and ignores other far more powerful evidence, any factual findings made at the preliminary hearing are not controlling. (*People v McGlothen* (1987) 190 CA3d 1005, 235 CR 745.) _ _[*Describe how facts of your case fit within this argument.*]**_ _**

[*Continue*]

ANY ERROR WAS MINOR AND THEREFORE NOT A DENIAL OF A SUBSTANTIAL RIGHT

For the Court to find that a defendant was denied a substantial right at the preliminary hearing, the error must be more than a minor one. (*People v Sheets* (1967) 251 CA2d 759, 767, 59 CR 777.) _ _[*Explain why the error in your case, if any, was minor. Cite cases close to the facts of your case.*]**_ _**

CONCLUSION

_ _[*If there was a minor error of omission, an ambiguity, or a technical defect that can be corrected without a rehearing of a substantial portion of the evidence, you may want to admit the error and ask the court to remand the case to the committing magistrate to correct it, based on Pen C §995a(b)(1). Alternatively, you may want to wait until the hearing on the §995 motion to make that request.*]**_ _**

For the reasons stated above, the People respectfully request that the defendant's motion under Penal Code section 995 be denied.

Date: _ _ _ _ _ _

Respectfully submitted,

_ _[*Name of District Attorney*]**_ _**
District Attorney

__[*Signature of deputy district attorney*]**__**
_ _[*Typed name*]**_ _**
Deputy District Attorney

Comment: Unless otherwise ordered or provided, opposition papers must include a memorandum. Cal Rules of Ct 4.111; see §18.2. Local rules should be consulted for other requirements.

Cross-Reference: For discussion of the §995 opposition memorandum, substantive §995 issues, and possible actions if the §995 motion is granted, see Crim Law, chap 13.

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§13.4 D. Motion to Compel Reinstatement of Complaint (Pen C §871.5)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE HONORABLE _ _[*NAME OF MAGISTRATE*]_ _, JUDGE OF THE SUPERIOR COURT OF THE _ _ _ _ _ _ JUDICIAL DISTRICT OF THE STATE OF CALIFORNIA, COUNTY OF _ _ _ _ _ _, AND TO THE DEFENDANT:

[*Option 1*]

PLEASE TAKE NOTICE that on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _ of the Superior Court, or as soon thereafter as the matter can be heard, the People of the State of California will move under Penal Code section 871.5 to compel reinstatement of _ _[*specify what you want reinstated, e.g., counts 2 and 3 of the complaint in Action No. 871999 of the above-entitled Superior Court*]_ _ _ _[*, and reinstatement of the custodial status of the defendant under the same terms and conditions as when _ _[she/he]_ _ last appeared before the magistrate*]_ _. Such counts were discharged on _ _[*date*]_ _ pursuant to Penal Code section 871.

[*Option 2*]

PLEASE TAKE NOTICE that pursuant to Penal Code section 871.5, the People of the State of California hereby move this Court to compel reinstatement of the complaint in Action _ _[*number*]_ _ of the above-entitled Superior Court _ _[*, and reinstatement of the prior custodial status of the defendant*]_ _. Such action was discharged pursuant to Penal Code section 871.

[*Continue*]

In connection with the above motion, it is requested that this Court set a date for hearing on this motion no sooner than _ _[*number of days*]_ _ court days from this date.

This motion is based on this notice, the brief or briefs to be filed before the date of the hearing on this matter, the preliminary hearing transcript in this case, and argument on this motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: Depending on local practice, the prosecution should either obtain a hearing date for the motion from the superior court clerk before formally noticing the motion, or file the notice requesting a date. The motion must be made in the superior court within 15 calendar days of the dismissal. Pen C §871.5(a); *People v Dethloff* (1992) 9 CA4th 620, 11 CR2d 814. A hearing on the motion, however, need not occur within the 15-day period. *People v Dianda* (1986) 178 CA3d 174, 223 CR 635. Notice must be given to the magistrate who ordered the dismissal, and to the defendant. Pen C §871.5(a)-(b).

Cross-Reference: See California Criminal Law Procedure and Practice §§8.44, 13.32-13.36 (Cal CEB Annual).

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§13.5 E. Request for Preparation of Transcript

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

The People of the State of California hereby request that there be prepared a written transcript of the court reporter's notes of the proceedings at the preliminary hearing in the above-entitled action, which took place on _ _[*date*]_ _, in Department No. _ _[*number*]_ _ of this Court. Penal Code section 871.5(d) provides that the reporter shall immediately transcribe his or her shorthand notes pursuant to Penal Code Section 869, and file with the Clerk of the Superior Court an original plus one copy, and as many copies as there are defendants. The reporter is entitled to compensation in accordance with the provisions of Section 869.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: The prosecution must file a written request for a transcript of the preliminary hearing within ten calendar days of the dismissal. Pen C §871.5(d). Copies of the transcript must be provided to the prosecutor and all defendants, without cost, in the manner prescribed in Pen C §869. Pen C §871.5(d).

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Source: Criminal Law/California Criminal Law Forms Manual/13 Motion to Set Aside Information or Quash Indictment/ §13.6 F. Memorandum in Support of Motion to Reinstate Complaint

§13.6 F. Memorandum in Support of Motion to Reinstate Complaint

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

MEMORANDUM IN SUPPORT OF MOTION TO REINSTATE COMPLAINT

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two to three sentences.*]_ _

STATEMENT OF FACTS

_ _[*Summarize the facts concerning the testimony at the preliminary hearing that are relevant to the charges dismissed. After each summary of particular testimony, cite the page (and line, if you wish) of the preliminary hearing transcript on which that testimony may be found (for example, page 4, lines 3 through 20, are typically cited as "RT 4:3-20"). You may want to ask the superior court to take judicial notice of records in the action below, e.g., the Clerk's Docket and Minutes, and also attach certified copies to your motion. These attachments are usually labeled "Exhibits" and given a number, e.g., "Exhibit 1."*]_ _

ARGUMENT

_ _[*State your arguments for reinstatement of each dismissed count. These arguments should be very fact-specific. See generally discussion of Pen C §871.5 motions in California Criminal Law Procedure and Practice §§13.32-13.36 (Cal CEB Annual).*]_ _

CONCLUSION

It appears clear that the dismissal of _ _[*this action/count(s)* _ _[*number(s)*]_ _]_ _ **in the court below was required by no provision of law and was thus totally improper. As such, it is equally clear that "as a matter of law, the magistrate erroneously dismissed the action." (Penal Code section 871.5(b).) Accordingly, we request reinstatement of** _ _[*specify which counts, and whether you want the custodial status of the defendant restored*]_ _**.**

Date: _ _ _ _ _ _

Respectfully submitted,

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

THE PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER FOR REINSTATEMENT OF**

_ _[*Name*]_ _, **COMPLAINT**

Defendant.

_____ /

TO THE HONORABLE _ _[*NAME OF MAGISTRATE*]_ _, IN _ _[*HIS/HER*]_ _ OFFICIAL CAPACITY AS MAGISTRATE, AND TO THE CLERK OF THE SUPERIOR COURT OF THE _ _ _ _ _ _ JUDICIAL DISTRICT OF THE STATE OF CALIFORNIA, COUNTY OF _ _ _ _ _ _:

The motion of the People of the State of California for reinstatement of _ _[*specify what is being reinstated, e.g., the complaint, or counts 2 and 3*]_ _ _ _[*and the custodial status of the defendant*]_ _ under Penal Code section 871.5 in the above-entitled action having come on for hearing before me on this date, and sufficient cause to reinstate the complaint and the custodial status of the defendant appearing in the record of the proceedings below, therefore

YOU ARE ORDERED:

1. To resume proceedings in this action on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _, or at such time on that date as may be convenient to the Court and the parties (Penal Code section 871.5(e)); and

2. To vacate your order of _ _[*date*]_ _ discharging _ _[*state what was discharged, e.g., the defendant pursuant to Penal Code section 1050*]_ _; and

3. To reinstate the complaint charging defendant with _ violation of _ _[*specify code sections*]_ _; and

4. To set, in your discretion an appropriate bail for the reinstated offenses.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__

_ _[*Typed name*]_ _

Judge of the Superior Court

Comment: It is common under either local rules or practice for the first court date on this motion to be a setting date, at which time the court sets briefing dates.

A prosecutor may challenge a magistrate's dismissal under Pen C §§859b, 861, 871, 1008, 1381, 1381.5, 1387, or 1389, or under Veh C §41403, of a complaint, a count, or a special circumstances allegation by noticing a motion in superior court to compel the magistrate to reinstate the complaint (or the portion that was dismissed) and reinstate the defendant's custodial status. Pen C §871.5(a); *Ramos v Superior Court* (1982) 32 C3d 26, 37, 184 CR 622. The superior court judge must uphold the magistrate's dismissal as a matter of law unless the court finds that the evidence provides a rational basis for believing the defendant is guilty.

A Pen C §871.5 motion may not be used to attack a magistrate's *factual* (as opposed to his or her *legal*) findings. *People v Childs* (1991) 226 CA3d 1397, 1405, 277 CR 456. When the magistrate made findings of fact favorable to the defense at the preliminary hearing, the superior court judge is bound by those findings if they are supported by substantial evidence. See *People v Slaughter* (1984) 35 C3d 629, 633, 200 CR 448. Section 871.5 review is also not available after dismissal of a portion of a complaint if it can be charged in the information under Pen C §739. Pen C §871.5(a). Section 871.5 is the only method of reviewing a case dismissed by the magistrate. *People v Mimms* (1988) 204 CA3d 471, 479, 251 CR 672.

The magistrate may be ordered to hold the defendant to answer. See *People v Childs* (1991) 226 CA3d 1397, 1408, 277 CR 456.

A defense ruling on a §871.5 motion is a bar to refiling the dismissed complaint or portion of the complaint. Pen C §871.5(c). The prosecution may, however, appeal such a ruling under Pen C §1238(a)(9). Pen C §871.5(f).

Cross-Reference: For further discussion, see Crim Law §§13.32-13.36.

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14

Pretrial and Trial Publicity

A. Media Request to Photograph, Record, or Broadcast (Judicial Council Form MC-500) §14.1
B. Order on Media Request to Permit Coverage (Judicial Council Form MC-510) §14.2

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Source: Criminal Law/California Criminal Law Forms Manual/14 Pretrial and Trial Publicity/§14.1 A. Media Request to Photograph, Record, or Broadcast (Judicial Council Form MC-500)

§14.1 A. Media Request to Photograph, Record, or Broadcast (Judicial Council Form MC-500)

Print

MC-500

MEDIA AGENCY *(name):* CHANNEL/FREQUENCY NO.: PERSON SUBMITTING REQUEST *(name):* ADDRESS: TELEPHONE NO.:	*FOR COURT USE ONLY*
Insert name of court and name of judicial district and branch court, if any:	
TITLE OF CASE:	
NAME OF JUDGE: **MEDIA REQUEST TO PHOTOGRAPH, RECORD, OR BROADCAST**	CASE NUMBER:

1. PORTION OF THE PROCEEDINGS TO BE COVERED *(e.g., particular witnesses at trial, the sentencing hearing, etc.):*

2. DATE OF PROPOSED COVERAGE *(specify):* . *(File this form at least five court days before the proposed coverage date. If not feasible, explain good cause for noncompliance):*

3. TYPE OF COVERAGE
   a. ☐ TV camera and recorder
   b. ☐ Still camera
   c. ☐ Motion picture camera
   d. ☐ Audio
   e. ☐ Other *(specify):*

4. ☐ SPECIAL REQUESTS OR ANTICIPATED PROBLEMS *(specify):*

5. ☐ INCREASED COSTS. This agency acknowledges that it will be responsible for increased court-incurred costs, if any, resulting from this media coverage *(estimate):* $
   ☐ Amount unknown

6. PROPOSED ORDER. A completed, proposed order on Judicial Council form MC- 510 is attached *(required by Cal. Rules of Court, rule 1.150).*

CERTIFICATION

I certify that if the court permits media coverage in this case, all participating personnel in this media agency will be informed of and will abide by the provisions of California Rules of Court, rule 1.150, the provisions of the court order, and any additional restrictions imposed by the court.

Date:

..... (TYPE OR PRINT NAME)

▶ _____ (SIGNATURE)

Telephone No.:

_____ (SUPERVISORY POSITION IN MEDIA AGENCY)

NOTICE OF HEARING (*A hearing is optional.*)

A HEARING will be held as follows:

Date:	Time:	Dept./Div.:	Room:
Address of the Court:			

Clerk, by _____ , Deputy

Comment: The use of this form is mandatory. Media coverage of a criminal trial does not in itself violate due process. *Chandler v Florida* (1981) 449 US 560, 66 L Ed 2d 740, 101 S Ct 802. Factors the court should consider in responding to a request for media coverage are listed in Cal Rules of Ct 1.150. A media outlet that wants to photograph a judicial proceeding must make the request on this Judicial Council form. See Cal Rules of Ct 1.150(e)(1).
Cross-Reference: For discussion of pretrial and trial publicity, see California Criminal Law Procedure and Practice, chap 14 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/14 Pretrial and Trial Publicity/§14.2 B. Order on Media Request to Permit Coverage (Judicial Council Form MC-510)

§14.2 B. Order on Media Request to Permit Coverage (Judicial Council Form MC-510)

Print

MC-510

MEDIA AGENCY *(name):* CHANNEL/FREQUENCY NO. PERSON SUBMITTING REQUEST *(name):* ADDRESS: TELEPHONE NO.:	*FOR COURT USE ONLY*
Insert name of court and name of judicial district and branch court, if any:	
TITLE OF CASE:	
NAME OF JUDGE:	
ORDER ON MEDIA REQUEST TO PERMIT COVERAGE	CASE NUMBER:

AGENCY MAKING REQUEST *(name):*

1. a. ☐ No hearing was held.
   b ☐ Date of hearing: Time: Dept./Div.: Room:
2. The court considered all the relevant factors listed in subdivision (e)(3) of California Rules of Court, rule 1.150 *(see reverse).*
3. ☐ **THE COURT FINDS** *(findings or a statement of decision are optional):* ☐ Attached ☐ As follows:

THE COURT ORDERS

4. The request to photograph, record, or broadcast is
   a. ☐ **denied.**
   b. ☐ **granted** subject to the conditions in rule 1.150, California Rules of Court, **AND the following:**
      (1) ☐ The local rules of this court regulating media activity outside the courtroom *(copy attached).*
      (2) ☐ The order of the presiding or supervising judge regulating media activity outside the courtroom *(copy attached).*
      (3) ☐ Payment to the clerk of increased court- incurred costs of *(specify):* $ ☐ to be determined.
      (4) ☐ The media agency shall demonstrate to the court that the proposed personnel and equipment comply with California Rules of Court, rule 1.150, and any local rule or order.
      (5) ☐ Personnel and equipment shall be placed ☐ as directed ☐ as indicated in the attachment ☐ as follows *(specify):*

      (6) (i) ☐ The attached statement of agreed pooling arrangements is approved.
      (ii) ☐ A statement of agreed pooling arrangements satisfactory to the court shall be filed before coverage begins.
      (7) ☐ This order
      (i) ☐ shall not apply to allow coverage of proceedings that are continued.
      (ii) ☐ shall apply to allow coverage of proceedings that are continued.
      (8) ☐ Other *(specify):*

5. Coverage granted in item 4b is permitted in the following proceedings:
   a. ☐ All proceedings, except those prohibited by California Rules of Court, rule 1.150, and those proceedings prohibited by further court order.
   b. ☐ Only the following proceedings *(specify type or date or both):*
6. ☐ The order made on *(date):* is ☐ terminated ☐ modified as follows *(specify):*

7. ☐ Number of pages attached:

Date:

JUDGE

(See reverse for additional information)

Form Adopted for Mandatory Use
Judicial Council of California
MC-510 [Rev. January 1, 2007]

Cal. Rules of Court rule 1.150
www.courtinfo.ca.gov

Print

MC-510

CASE NAME:	CASE NUMBER:
—	

FACTORS CONSIDERED BY THE JUDGE IN MAKING THIS ORDER (Rule 1.150)

1. Importance of maintaining public trust and confidence in the judicial system
2. Importance of promoting public access to the judicial system
3. Parties' support of or opposition to the request
4. Nature of the case
5. Privacy rights of all participants in the proceeding, including witnesses, jurors, and victims
6. Effect on any minor who is a party, prospective witness, victim, or other participant in the proceeding
7. Effect on the parties' ability to select a fair and unbiased jury
8. Effect on any ongoing law enforcement activity in the case
9. Effect on any unresolved identification issues
10. Effect on any subsequent proceedings in the case
11. Effect of coverage on the willingness of witnesses to cooperate, including the risk that coverage will engender threats to the health or safety of any witness
12. Effect on excluded witnesses who would have access to the televised testimony of prior witnesses
13. Scope of the coverage and whether partial coverage might unfairly influence or distract the jury
14. Difficulty of jury selection if a mistrial is declared
15. Security and dignity of the court
16. Undue administrative or financial burden to the court or participants
17. Interference with neighboring courtrooms
18. Maintaining orderly conduct of the proceeding
19. Any other factor the judge deems relevant

PROHIBITED COVERAGE (Rule 1.150)

This order does not permit photographing, recording, or broadcasting of the following in the court:

1. The jury or the spectators
2. Jury selection
3. A conference between an attorney and a client, witness, or aide
4. A conference between attorneys
5. A conference between counsel and the judge at the bench ("sidebars")
6. A proceeding closed to the public
7. A proceeding held in chambers

MEDIA PERSONNEL AND EQUIPMENT (Rule 1.150)

NOTE: These requirements apply unless the judge orders otherwise. Refer to the order for additional requirements.

1. No more than one television camera
2. No more than one still photographer
3. No more than one microphone operator and no obtrusive microphones or wiring
4. No operator entry or exit or other distraction when the court is in session
5. No moving equipment when the court is in session
6. No distracting sounds or lights
7. No visible signal light or device that shows when equipment is operating
8. No disruption of proceedings, nor public expense, to install, operate, or remove modifications to existing sound and lighting systems
9. No media agency insignia or marking on equipment or clothing

SANCTIONS FOR VIOLATING THIS ORDER (Rule 1.150)

Any violation of this order or rule 1.150 is an unlawful interference with the proceedings of the court. The violation may result in an order terminating media coverage, a citation for contempt of court, or an order imposing monetary or other sanctions.

Comment: The use of this form is mandatory. A proposed order on Judicial Council Form MC-510 must be completed and filed along with any request for media coverage. Cal Rules of Ct 1.150(e)(1).

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15

Change of Venue

Motion for Change of Venue §15.1

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Source: Criminal Law/California Criminal Law Forms Manual/15 Change of Venue/§15.1 Motion for Change of Venue

§15.1 Motion for Change of Venue

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move for an order transferring this case from this Court to a court in another county.

This motion will be based on the attached supporting memorandum, the attached declaration, _ _[*the attached exhibit(s),*]_ _ evidence taken at the hearing on this motion and argument at that hearing, and on all papers filed and records in this action.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

Venue must be changed to another county on the defendant's motion when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be held in the county. Pen C §1033. Penal Code section 1033 is a codification of the standard of reasonableness laid down in *Maine v Superior Court* (1968) 68 C2d 375, 383, 66 CR 724. The court in *Maine* indicated that the determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. 68 C2d at 383.

The California Supreme Court has settled on five factors that the courts should take into account in deciding whether the reasonable likelihood standard has been met: (1) the nature and gravity of the offense; (2) the nature and extent of the news coverage; (3) the size of the community; (4) the status of the defendant in the community; and (5) the popularity and prominence of the victim. *People v Davis* (2009) 46 C4th 539, 578, 94 CR3d 322; *People v Harris* (1981) 28 C3d 935, 948, 171 CR 679.

_ _[*Analyze each factor, showing how it tends to support a change of venue, and emphasizing those that most strongly support a change, with reference to such attachments as supporting declarations (e.g., by defendant's counsel, based on his or her review of relevant items) and exhibits (e.g., public opinion survey).*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: The most common reason for requesting a change of venue is pretrial publicity. In a high-publicity case,

counsel should begin to assemble information pertinent to deciding whether to seek a change of venue from the time he or she first becomes involved with the case. Early steps include systematically documenting all media coverage. It is also important to obtain expert assistance as soon as possible. An expert can assist counsel in obtaining funding, design and administer a public opinion survey to assess the impact of the publicity on community attitudes, help counsel assess whether a change of venue motion should be made, and testify at the evidentiary hearing.

The sample change of venue motion in this section is necessarily a skeletal version of a change of venue motion, because the five factors the court will consider in determining whether to grant the motion (see, *e.g., People v Davis* (2009) 46 C4th 539, 578, 94 CR3d 322; *People v Staten* (2000) 24 C4th 434, 449, 101 CR2d 213) are highly dependent on the facts of each case.

Cross-Reference: Change of venue is discussed at length in Crim Law, chap 15.

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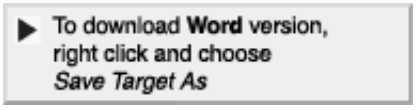
Search and Seizure Motions

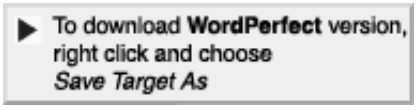
A. Motion to Suppress Evidence Seized Without Warrant (Pen C §1538.5) §16.1
B. Defense Motion to Quash Warrant and Suppress Evidence (Pen C §1538.5) §16.2
C. Defense Motion to Controvert (Traverse) Search Warrant and to Suppress Evidence (Pen C §1538.5) §16.3
D. Defense Memorandum in Support of Motion to Suppress Evidence Under Pen C §1538.5 §16.4
E. Prosecution Opposition to Defense Pen C §1538.5 Motion §16.5
F. Defense Motion for Information on Contents of Search Warrant Affidavit (*Luttenberger* Motion) §16.6
G. Prosecution Request for Special Search and Seizure Hearing (Pen C §1538.5(j)) §16.7
H. Motion for Return of Seized Property (Pen C §1536) §16.8

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Source: Criminal Law/California Criminal Law Forms Manual/16 Search and Seizure Motions/§16.1 A. Motion to Suppress Evidence Seized Without Warrant (Pen C §1538.5)

§16.1 A. Motion to Suppress Evidence Seized Without Warrant (Pen C §1538.5)





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that, at the time of the Penal Code section 1538.5 hearing now set for _ _[*date*]**_ _, at _ _**[*time*]**_ _, defendant, _ _**[*name*]**_ _, will move to suppress evidence under Penal Code section 1538.5, seized by _ _**[*name of police department*]**_ _ from _ _**[*location*]**_ _ on _ _**[*date*]**_ _. _ _**[*That search is described in the police report attached as Exhibit A.*]**_ _**

The evidence that defendant seeks to suppress includes, but is not limited to, the following indicated items:

All physical (and intangible) evidence seized or obtained as a result of this search will be challenged based on search and seizure violations that occurred during:

[*Check relevant items*]

___ Defendant's detention.

___ The search, pat-down, or frisk of defendant's person.

___ Defendant's arrest.

The physical (and intangible) evidence seized or obtained from this search occurred at the following place(s), including:

___ The residence, building, structure, or premises entered or invaded by the police in this cause.

___ The box(es), package(s), or other containers opened or invaded by the police in this cause.

___ The vehicle(s) entered or invaded by the police in this cause.

This motion challenges all physical (and intangible) evidence seized or obtained as a result of the deprivation of the liberty or right to privacy of the following persons: _ _[*List person or persons.*]**_ _**

This motion challenges the following physical (and intangible) evidence allegedly recovered as a result of the alleged violation: _ _[*List particular evidence recovered.*]**_ _**

This motion also challenges all other evidence seized as a result of the alleged violation. _ _[*Check if local rules permit.*]**_ _**

The complained of search and seizure violates defendant's Fourth Amendment rights under the United States Constitution.

More specifically, this motion is based on violation of defendant's reasonable expectation of privacy, as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and on the following particular grounds:

[*Check relevant items*]

___ The defendant was unlawfully _ _[*detained/frisked*]_ _ because the circumstances did not give to a reasonable suspicion that the defendant was _ _[*armed/engaged in criminal activity*]_ _.

___ The _ _[*search/seizure/arrest*]_ _ was without a warrant, and lacked probable cause.

___ The police action was without warrant and relied on hearsay information from other police sources; the defense therefore requests that said sources be produced in court (*People v Harvey* (1958) 156 CA2d 516, 319 P2d 689; *People v Madden* (1970) 2 C3d 1017, 88 CR 171).

___ The arrest was in defendant's place of residence without a warrant and there was no showing of exigent circumstances.

___ The search or seizure was beyond the scope of consent and/or after consent was revoked.

_ _[*Add any other relevant grounds*]_ _

This motion will be based on the following evidence:

[*Check relevant items*]

___ Evidence to be presented at the hearing on this motion.

___ Supporting affidavits (attached to this motion).

___ Supporting declarations (attached to this motion).

___ Transcript of preliminary hearing _ _[*in court file; the defendant hereby requests that the court take judicial notice of the contents of this transcript*]_ _**.**

___ Supporting memorandum (attached to this motion).

___ Supplemental supporting memorandum, to be filed after the hearing on this motion.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

The police actions on the date listed in the Notice of this Motion and/or any attached exhibits were accomplished without the aid of a warrant to search or arrest the defendant. For this reason, they are presumptively unreliable and must be justified by the prosecution. *People v Williams* (1999) 20 C4th 119, 136, 83 CR2d 275.

The defense contends that the actions of the police officers in this case were unreasonable and no exception to the warrant requirement applies. Further, the defendant contends that all of the evidence alleged to have been seized, as enumerated in the Notice of this Motion, represents the fruits of this unlawful seizure and must therefore be suppressed.

The defense submits the following additional authorities in support of these arguments:

Fourth Amendment, United States Constitution.

Penal Code section 1538.5.

***Payton v New York* (1980) 445 US 573, 576, 63 L Ed 2d 639, 645, 100 S Ct 1371 (absent exigent circumstances, warrantless searches and seizures of persons in their homes to make routine felony arrests are prohibited).**

***U.S. v Watson* (1976) 423 US 411, 417, 46 L Ed 2d 598, 606, 96 S Ct 820 (officer must possess reasonable belief that there was reasonable cause for warrantless arrest).**

***U.S. v Place* (1983) 462 US 696, 700, 77 L Ed 2d 110, 116, 103 S Ct 2637 (absent exigent circumstances, seizure of personal property is per se unreasonable in absence of judicial warrant from neutral magistrate based on probable cause and describing items with particularity).**

Defendant requests leave to file an additional supporting memorandum after the hearing on the motion, because evidence may be adduced at the hearing that will require further briefing by the parties.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: This motion is used if there was no warrant. The notice of motion portion may be submitted as a checklist, as it appears in this form, or the relevant items may be described in complete sentences.

Local rules. Be sure to check local rules for any special requirements; they are common concerning Pen C §1538.5 motions, particularly in felony cases.

Notice. Notice is required for Pen C §1538.5 hearings held in misdemeanor cases; any local rules requiring written notice must be followed. See *People v Lewis* (1977) 71 CA3d 817, 139 CR 673. Written notice must be served on the prosecutor at least ten court days before a 1538.5 hearing is held after the information or indictment is filed in a felony case, unless the prosecutor waives a portion of this time. Pen C §1538.5(i). At least five court days' written notice is required for 1538.5 motions made at the preliminary hearing. Pen C §1538.5(f).

Content of motion. The evidence that defense counsel seeks to suppress must be specified in detail. See *People v Manning* (1973) 33 CA3d 586, 109 CR 531. However, because only what is specified may be suppressed, defense counsel should add a more general phrase if permitted by local rules (see, *e.g.,* Orange County Super Ct R 800(E), which does not permit such a phrase), such as "and all other evidence seized as a result of the alleged violation." Because local rules vary, this phrase is included to be optionally checked in the motion form above. Counsel may include the phrase or substitute another phrase tailored to local rules.

When making a Pen C §1538.5 motion challenging a warrantless search, the defense must first assert the absence of a warrant and make a sufficient prima facie showing to support that assertion. The prosecution then has the burden of producing evidence that the warrantless search or seizure was reasonable. *People v Williams* (1999) 20 C4th 119, 130, 83 CR2d 275. However, if the defendant plans to make any argument asserting the unreasonableness of the search aside from the absence of a warrant, such as a violation of the knock-notice requirement argument, the defendant must specify that additional argument as part of the motion to suppress so that the prosecution has the opportunity to respond. *People v Williams* (1999) 20 C4th 119, 130, 83 CR2d 275; *People v Oldham* (2000) 81 CA4th 1, 13, 96 CR2d 343.

The defense motion should provide enough information that the district attorney knows what witnesses to subpoena. Check local practice; in some counties, it is also common to call a deputy district attorney well before the hearing and tell him or her which witnesses to subpoena to the hearing. If the defense decides to postpone or cancel the hearing, the district attorney should be given sufficient notice to be able to notify witnesses so they do not have to miss work unnecessarily.

Because the burden of proof is on the prosecution, only *after* the prosecution has offered its justification for the warrantless search, either in a written response before the hearing, or at the time of the hearing, does the defense need to answer with its arguments why the justification is inadequate. *People v Williams* (1999) 20 C4th 119, 83 CR2d

275. See also Crim Law §16.9.

If the defense needs witnesses for the 1538.5 hearing, *e.g.,* on the issue whether the defendant had a reasonable expectation of privacy, be sure to subpoena them in sufficient time to appear.

Time for motion. To obtain pretrial review of denial of a Pen C §1538.5 motion, the motion must have been "made" no later than 45 calendar days after arraignment in misdemeanor cases, and no more than 60 calendar days after arraignment on the information or indictment in felony cases. Pen C §1510. A motion is made when the motion is filed. CCP §1005.5. Reserving or noticing the motion is not enough. *Smith v Superior Court* (1978) 76 CA3d 731, 143 CR 109. Therefore, title the written motion either "notice of motion and motion" or "motion."

Reasonable expectation of privacy. The defense bears the burden of proving that the defendant had a reasonable expectation of privacy in the place searched or the items seized. See *Rakas v Illinois* (1978) 439 US 128, 58 L Ed 2d 387, 99 S Ct 421; Crim Law §§16.11-16.13. The trial court is not obligated to require the defense to show a reasonable expectation of privacy before the prosecution demonstrates the reasonableness of the warrantless search; however, the court *may* do so, as the order of proof is within the trial court's discretion. *People v Contreras* (1989) 210 CA3d 450, 456, 259 CR 290.

NOTE: Some California cases still use the word "standing" when referring to the defendant's right to challenge a search or seizure on Fourth Amendment grounds. See *People v Ayala* (2000) 23 C4th 225, 254 n3, 96 CR2d 682.

Opposing suppression motion. Possible technical objections to a defense motion to suppress the fruits of a warrantless search or seizure include the following:

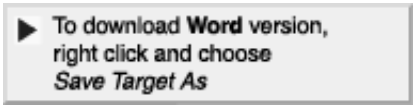
- No accompanying memorandum (see Cal Rules of Ct 4.111).
- The motion does not comply with the requirements of Pen C §1538.5 or local rule requirements.
- At the preliminary hearing, only evidence presented by the People can be suppressed (Pen C §1538.5(f)).
- The defense cannot suppress evidence it failed to specify as subject to its suppression motion.
- The defendant has not shown a reasonable expectation of privacy (*In re Lance W.* (1985) 37 C3d 873, 879, 210 CR 631).

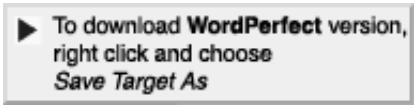
Cross-References: For discussion of search and seizure motions, see Crim Law, chap 16; on search and seizure generally, see California Judges Benchbook: Search and Seizure (2d ed CJER-CEB 2002).

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Source: Criminal Law/California Criminal Law Forms Manual/16 Search and Seizure Motions/§16.2 B. Defense Motion to Quash Warrant and Suppress Evidence (Pen C §1538.5)

§16.2 B. Defense Motion to Quash Warrant and Suppress Evidence (Pen C §1538.5)





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court quash search warrant _ _[*number*]_ _, and suppress as evidence and restore to the defendant all property seized under or during the execution of those warrants.

The motion will be made on the following grounds:

[*Check relevant grounds*]

___ The search warrant was issued without probable cause and the good faith exception to the exclusionary rule is inapplicable because _ _[*a reasonable and well-trained officer would have known that the affidavit failed to establish probable cause, would not have acted with reckless disregard for the truth, would not have ignored that the magistrate had abandoned his or her judicial neutrality, and would not have applied for a warrant / the warrant was so facially deficient that a reasonable officer could not have had a good faith belief in its sufficiency / the warrant was based on information the officer knew or should have known was false***]_ _.**

___ Because the magistrate wholly abandoned _ _[*his/her*]_ _ judicial rule, the search warrant was not issued by a neutral and detached magistrate.

___ The search exceeded the authority of the search warrant.

___ The _ _[*place to be searched/property to be seized*]_ _ was not described with sufficient particularity in the search warrant.

___ The search warrant is the product of a prior unlawful search and seizure conducted under search warrant _ _[*number*]_ _.

___ _ _[*List other relevant grounds.*]_ _

[*Continue*]

This motion will be based on the attached supporting memorandum, all papers filed and records in this action, _ _[*the attached declaration(s),***]_ _ _ _[***the attached exhibit(s),***]_ _ _ _[***a supplemental supporting memorandum to be filed after the hearing on this motion,***]_ _ evidence taken at this hearing on this motion, and argument at that hearing.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant***]_ _**

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal*

CEB Annual).]

SUPPORTING MEMORANDUM

[*Select relevant arguments, add additional authority, and apply each argument to the facts of your case. Add any additional arguments that apply to your case.*]

DEFENDANT HAS THE RIGHT TO MOVE TO QUASH THIS WARRANT

A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the ground that the search or seizure with a warrant was unreasonable because _ _[*state the ground that applies to the facts of your case, e.g.: the warrant lacked probable cause and the good faith exception to the exclusionary rule does not apply; the warrant is insufficient on its face; the property or evidence obtained is not that described in the warrant; Pen C §1538.5(a)(1)*]**_ _.**

THE AFFIDAVIT IS SO LACKING IN INDICIA OF PROBABLE CAUSE THAT THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY

The affidavit in support of the search warrant in this case fails to establish probable cause for its issuance, and a reasonably well-trained officer would have known that the affidavit was insufficient and would not have applied for a warrant. *U.S. v Leon* (1984) 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405; *People v Camarella* (1991) 54 C3d 592, 602, 286 CR 780.

_ _[*Discuss the facts of your case and relate them to relevant cases; see search and seizure resources in the cross-reference at the end of this motion.*]_ _

THE SEARCH WARRANT IS A GENERAL WARRANT, AND THEREFORE ILLEGAL

The search warrant in this case is a general warrant, permitting exploratory searches, insofar as it purports to authorize the seizure of _ _[*state type of evidence seized, e.g., business records*]**_ _ that are not specifically described, in violation of the First, Fourth, and Fourteenth Amendments to the United States Constitution. The search warrant fails to establish probable cause to believe that any particular _ _**[*e.g., business records*]**_ _ are present at the premises to be searched.**

_ _[*Add discussion of facts of case and relevant case law; see, e.g., Stanford v Texas (1965) 379 US 476, 13 L Ed 2d 431, 85 S Ct 506; Griffin v Superior Court (1972) 26 CA3d 672, 695, 103 CR 379;* ***Aday v Municipal Court (1962) 210 CA2d 229, 26 CR 576****.*]_ _

DEFENDANT ASKS PERMISSION TO FILE SUPPLEMENTAL SUPPORTING MEMORANDUM AFTER THE HEARING ON THIS MOTION

Defendant requests permission to file a supplemental supporting memorandum after the hearing on this motion, to address the testimony at that hearing, and the prosecution's arguments.

CONCLUSION

For all of the foregoing reasons, this motion should be granted, the search warrant quashed, and all evidence seized under the authority of that warrant suppressed.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]**_ _**

Comment: This motion is used to challenge the lawfulness of a warrant and to suppress evidence obtained with the warrant, when the alleged deficiency in the warrant is apparent on its face. When the ground for suppression of the evidence obtained with a search warrant is not apparent on the face of the warrant (for example, when the allegation is that the showing of probable cause in the affidavit in support of the warrant was based on false or unreliable

information), the defense should file a motion to "controvert" or "traverse" the warrant. See §16.3 for a sample motion to controvert the warrant.

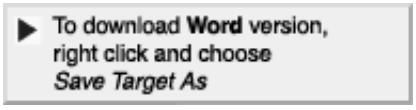
One major difference between a motion based on a warrant and the motion in §16.1, which is based on a warrantless search, is that the defendant has the burden of presenting evidence when a warrant was used. The defendant must subpoena witnesses to the hearing on the motion to establish the truth of the allegations in the motion.

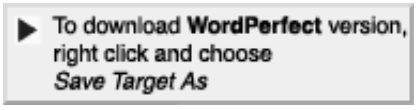
Cross-Reference: For discussion of search and seizure motions, see Crim Law, chap 16; California Judges Benchbook: Search and Seizure (2d ed CJER-CEB 2002).

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Source: Criminal Law/California Criminal Law Forms Manual/16 Search and Seizure Motions/§16.3 C. Defense Motion to Controvert (Traverse) Search Warrant and to Suppress Evidence (Pen C §1538.5)

§16.3 C. Defense Motion to Controvert (Traverse) Search Warrant and to Suppress Evidence (Pen C §1538.5)





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that, on _ _[*date*]_ _, at _ _[*time*]_ _, in Department No. _ _[*number*]_ _ of the above-entitled Court, the time and place set for the motion to suppress pursuant to Penal Code section 1538.5, the defense will move to controvert and to quash Warrant No. _ _[*number*]_ _ on the following _ _[*ground/grounds*]_ _:

[*Check relevant grounds*]

___ The affidavit for the search warrant does not constitute probable cause for its issuance.

___ The warrant is defective in that it does not specify the things to be seized or the persons to be searched, or does not specify with particularity the place to be searched.

___ The warrant was not timely or properly served (see Penal Code sections 840, 841, 842, 1531).

___ The affidavit supporting the warrant in this cause was made defective by _ _[*the omission of material facts/the inclusion of erroneous information*]_ _ described in the attached supporting memorandum;

___ The search was unreasonable or excessive in its scope.

___ _ _[*Add other relevant grounds.*]_ _

[*Continue*]

This motion will be based on the attached supporting memorandum, all papers filed and records in this action, _ _[*the attached declaration(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ _ _[*a supplemental supporting memorandum to be filed after the hearing on this motion,*]_ _ evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two to three sentences.*]_ _

STATEMENT OF FACTS

_ _[*Give the relevant facts concerning the search and seizure. Be brief. Support the facts with references to facts sworn to in declarations and documents attached to the motion as exhibits, e.g., the warrant.*]_ _

ARGUMENT

_ _[*State individual arguments here. See the arguments in the Comment to this motion, and in the supporting memorandum in §16.4. Your argument should convincingly demonstrate that misstatements or omissions in the affidavit are material and that when they are disregarded, there is no probable cause. See, e.g., US Const, amend IV; Pen C §1538.5; Illinois v Gates (1983) 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317; Franks v Delaware (1978) 438 US 154, 155, 57 L Ed 2d 667, 672, 98 S Ct 2674; People v Box (1993) 14 CA4th 177, 183, 17 CR2d 504; and cases in the resources listed in the Cross-Reference at the end of this motion.*]_ _

[*Optional*]

OFFER OF PROOF RE WARRANT CONTROVERSION

_ _[*Name of police officer*]_ _ **of the** _ _[*name of police department*]_ _ **will testify to the fact that** _ _[*summarize anticipated testimony and attach any written documentation of that testimony as an exhibit*]_ _**.**

[*Optional*]

DEFENDANT ASKS PERMISSION TO FILE SUPPLEMENTAL SUPPORTING MEMORANDUM AFTER THE HEARING ON THIS MOTION

Defendant requests permission to file a supplemental supporting memorandum after the hearing on this motion, to address the testimony at that hearing and the prosecution's arguments.

CONCLUSION

For the above reasons, the defense requests that this Court find the statements discussed above to be deliberately false, or made in reckless disregard of the truth, to find that what remains in the affidavit after excising the false statements is insufficient to support a finding of probable cause, and that the court quash Warrant No. _ _[*number*]_ _, and suppress all evidence seized under the authority of that warrant.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: To controvert or traverse (the two words are used interchangeably) a warrant means to challenge the factual showing on which it was issued. Defense counsel must set forth, "with some specificity, reasons for contending that the affidavit is inaccurate," before a hearing is required. *Theodor v Superior Court* (1972) 8 C3d 77, 103, 104 CR 226.

This is a factual showing. The defendant bears the burden of establishing as a matter of fact that (1) the affidavit contains material misstatements of fact or that material facts were omitted from it; (2) the affiant was deliberately false or acted in reckless disregard of the truth; *and* (3) what remains in the affidavit after excising the false statements or adding the omitted information is insufficient to support a finding of probable cause. *Franks v Delaware* (1978) 438 US 154, 155, 57 L Ed 2d 667, 672, 98 S Ct 2674.

To obtain a hearing on the motion, counsel must accompany the motion with documentary evidence and sworn statements that, if uncontroverted, establish all three of these premises. 438 US at 171, 57 L Ed 2d at 682. See also *People v Box* (1993) 14 CA4th 177, 183, 17 CR2d 504. At a *Franks* hearing, the defense bears the burden of proof and must subpoena witnesses to the hearing. A hearing is not required on this motion unless the defense provides specific reasons in its notice of reasons for contending that the affidavit is inaccurate. *Theodor v Superior Court* (1972) 8 C3d 77, 104 CR 226. If the court agrees to hold a hearing, the court is required not only to find that statements in the

affidavit are deliberately false, or false and made in reckless disregard of the truth, but must also find that after deleting these false statements, there is insufficient probable cause to support the warrant. *People v Luttenberger* (1990) 50 C3d 1, 265 CR 690.

Before making this motion to traverse, the defense may need to make a motion to discover information with which to controvert the warrant, commonly called a *Luttenberger* motion. See Crim Law §16.19A.

Cross-Reference: For further discussion of controverting the warrant, see Crim Law §§16.19-16.19B; California Judges Benchbook: Search and Seizure (2d ed CJER-CEB 2002).

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Source: Criminal Law/California Criminal Law Forms Manual/16 Search and Seizure Motions/§16.4 D. Defense Memorandum in Support of Motion to Suppress Evidence Under Pen C §1538.5

§16.4 D. Defense Memorandum in Support of Motion to Suppress Evidence Under Pen C §1538.5

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

SUMMARY OF ARGUMENT

_ _[*Summarize your arguments in two to three sentences.*]_ _

STATEMENT OF FACTS

_ _[*Summarize the facts at the 1538.5 hearing. Cite to line and page number of the reporter's transcript, if one is available, and attach it to the motion as an exhibit.*]_ _

ARGUMENT

[*The following are sample arguments for some of the more common search and seizure issues. Use those that are relevant, add cases on point to your case (good resources for search and seizure cases are given in the Cross-Reference at the end of this motion), and argue them in relation to the facts as they came out at the hearing. Add any additional arguments that apply to your case.*]

THE DEFENDANT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE _ _[*PLACE SEARCHED/ITEMS SEIZED*]_ _

> **A defendant may challenge the propriety of a search or seizure that violates the defendant's own reasonable expectations of privacy in the area searched or the item seized. (*Rakas v Illinois* (1978) 439 US 128, 58 L Ed 2d 387, 99 S Ct 421. See also *Mancusi v DeForte* (1968) 392 US 364, 20 L Ed 2d 1154, 88 S Ct 2120.)**

***Mancusi* involved the search of offices shared by several union officials, one of them named DeForte. The Court found the following facts:**

> **[T]he office where DeForte worked consisted of one large room, which he shared with several other union officials. The record does not show from what part of the office the records were taken, and DeForte does not claim that it was a part reserved for his exclusive personal use. The parties have stipulated that DeForte spent "a considerable amount of time" in the office, and that he had custody of the papers at the moment of their seizure. (392 US at 368, 20 L Ed 2d at 1159.)**

The Court found that DeForte had standing and that "the situation was not fundamentally changed because DeForte shared an office":

> **DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched.... *This expectation was inevitably defeated by the entrance of state officials*.... (392 US at 369, 20 L Ed 2d at 1160; emphasis added.)**

In *Mancusi,* the court held that the right to claim Fourth Amendment protection depends "not upon a property interest in the invaded place but upon whether the area was one in which there was a reasonable expectation of *freedom from governmental intrusion*." (392 US at 368, 20 L Ed 2d at 1159; emphasis added.) The *Mancusi* court referred to *Jones v U.S.* (1960) 362 US 257, 4 L Ed 2d 697, 80 S Ct 725, overruled on other grounds in *U.S. v Savucci* (1980) 448 US 83, 85, 65 L Ed 2d 619, 624, 100 S Ct 2547, and emphasized that "like DeForte, Jones had little expectation of absolute privacy, since the owner and those authorized by him were free to enter," but "we think that our decision that Jones had standing clearly points to the result which we reach here." (392 US at 370, 20 L Ed 2d at 1160.)

In *Jones v U.S., supra,* the police searched the premises of another person and found narcotics. Jones was present in the house at the time of the search and later testified that the place belonged to a friend who had given him the key and access to the apartment. The Court held that Jones had standing to contest the search.

***Jones* is still good law to the extent that it stands for the**

> **proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from *unreasonable governmental intrusion into that place*. (*Rakas v Illinois* (1978) 439 US 128, 142, 58 L Ed 2d 387, 400, 99 S Ct 421; emphasis added. See *Rawlings v Kentucky* (1980) 448 US 98, 104, 65 L Ed 2d 633, 641, 100 S Ct 2556.)**

Professor LaFave, in his analysis of *Rakas'*s effect on residential searches, concluded that:

> **[I]f the police, without required notice or without probable cause or without a required search warrant, burst into B's home and disrupt a dinner party at which A is present as a guest, then certainly A should be deemed to have standing to object—just as passengers in a car may object to its illegal stopping. Dinner guest A has had *his* freedom, privacy and solitude intruded upon by the police, and thus he has standing to object to that encroachment upon his rights, even if it led to the discovery of evidence in B's basement, a place A (in Justice Rehnquist's language) "has never seen, or been permitted to visit." (6 LaFave, Search and Seizure: A Treatise on the Fourth Amendment §11.3(b) (4th ed 2004).)**

A DEFENDANT MAY DENY OWNERSHIP OF CONTRABAND BUT STILL ASSERT A REASONABLE EXPECTATION OF PRIVACY IN THE AREA SEARCHED

A defendant's disclaimer of ownership is not necessarily inconsistent with a claim that the area invaded by the police officers during their search was one in which the defendant possessed a reasonable expectation of privacy, and the law "does not permit the government to argue possession but deny expectation of privacy where the circumstances of the case make such positions necessarily inconsistent." (*U.S. v Issacs* (1983) 708 F2d 1365, 1368.)

In *Issacs,* the police seized journals kept in Issacs' safe. The Ninth Circuit held that Issacs could simultaneously argue that the journals did not belong to him *and* that the search violated his reasonable expectation of privacy in the contents of his safe.

Neither ownership of premises nor presence at scene are required to assert standing in searched premises if there is a "formalized arrangement… indicating joint control and supervision." (*U.S. v Johns* (9th Cir 1988) 851 F2d 1131, 1136.) The possessory interest must exist at the time of the search. (See also *U.S. v Perez* (9th Cir 1982) 689 F2d 1336 (defendants had standing in truck not owned by them, but which they were closely following and supervising as it transported heroin).)

THE DEFENDANT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE AREA SEARCHED

[*Describe the area and why there was an expectation of privacy; an example follows.*]

Evidence was presented that the defendant was driving the automobile with the owner's permission and possessed keys to the ignition and the camper shell. This same type of evidence was sufficient to confer standing to challenge the search of a truck and camper shell in *People v Carvajal* (1988) 202 CA3d 487, 249 CR 368.

THE BURDEN OF JUSTIFYING A WARRANTLESS SEARCH OR SEIZURE IS ON THE PROSECUTOR

The burden of justifying a warrantless search, seizure, arrest, or detention falls on the prosecution. (*Badillo v Superior Court* (1956) 46 C2d 269, 294 P2d 23; *Wilder v Superior Court* (1979) 92 CA3d 90, 294, 154 CR 494; *People v Sedillo* (1982) 135 CA3d 616, 623, 185 CR 475, disapproved on other grounds in *People v Williams* (1999) 20 C4th 119, 135, 83 CR2d 275. See also *People v Williams* (1988) 45 C3d 1268, 248 CR 834, modified on other grounds by *People v Guiuan (1998) 18 C4th 558, 560, 76 CR2d 239*.)

The defendant's only burden is to show, by competent evidence presented or stipulation entered into at the hearing, that the search or seizure occurred without a search or arrest warrant.

Once the defendant has shown this, it is the People's burden to offer evidence and authorities to justify

dispensing with a warrant. *People v Williams* (1999) 20 C4th 119, 83 CR2d 275.

THERE WAS NO LEGAL JUSTIFICATION TO DETAIN THE DEFENDANT

A police officer may only detain a citizen if the police officer possesses

> **specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity. [This suspicion] … must be *objectively reasonable* for him to do so: the facts must be such as would cause any reasonable police officer in a like position, drawing when appropriate on his training and experience … to suspect the same criminal activity and the same involvement by the person in question.[ ] The corollary to this rule, of course, is that an investigative stop or detention predicated on mere curiosity, rumor or hunch is unlawful, even though the officer may be acting in complete good faith. (*In re Tony C.* (1978) 21 C3d 888, 893, 148 CR 366 (emphasis added); see *Graham v Connor* (1989) 490 US 386, 397, 104 L Ed 2d 443, 456, 109 S Ct 1865.) (Some language has been deleted from the quotation because reasonable suspicion is no longer measured by a particular officer's subjective state of mind at time of stop or detention.)**

THE FACT THAT THE INCIDENT OCCURRED IN A "HIGH CRIME AREA" DOES NOT SUPPORT THE ACTION TAKEN BY THE POLICE

***People v Bower* (1979) 24 C3d 638, 156 CR 856, holds that:**

> **[t]he "high crime area" factor is *not* an "activity" of an individual. Many citizens of this state are forced to live in areas that have "high crime" rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas. As a result, this court has appraised this factor with caution and has been reluctant to conclude that a location's crime rate transforms otherwise innocent-appearing circumstances into circumstances justifying the seizure of an individual. (Citations omitted.) (24 C3d at 645; emphasis added.)**

Accord, *People v Loewen* (1983) 35 C3d 117, 124, 196 CR 846; *People v Huntsman* (1984) 152 CA3d 1073, 200 CR 89.

EVIDENCE OF PREVIOUS ARRESTS IN THE SAME AREA, WITHOUT ADDITIONAL EVIDENCE OF THE PROPRIETY OF SUCH ARRESTS OR EVIDENCE OF CONVICTIONS RESULTING THEREFROM, DOES NOT JUSTIFY DETENTION, SEARCH, OR ARREST

In *People v Bower* (1979) 24 C3d 638, 646, 156 CR 856, the court stated:

> **[T]his court has warned of the "dangers" of using an officer's experience as to prior arrests to conclude that a location's crime rate is high. (Citation omitted.) Where there is no indication that those arrests were themselves proper or that they resulted in convictions of the persons arrested, it is impossible to use them as an accurate assessment of crime rate for the purpose of evaluating the validity of a later intrusion upon an individual's security.**

Accord, *Remers v Superior Court* (1970) 2 C3d 659, 668, 87 CR 202; *Cunha v Superior Court* (1970) 2 C3d 352, 357, 85 CR 160.

AVOIDING THE POLICE DOES NOT FURNISH GROUNDS TO DETAIN OR ARREST DEFENDANT

In *Bower,* the court noted:

> **In our society, private individuals are free to conduct their own lives, seeking to mingle with or to avoid whomever they please. They certainly are under no legal duty to submit to the attentions of another private person. Unlike a private party, however, a police officer does have the power to insist upon an encounter—that is, an officer has the power to "detain"—but only when he or she has adequate cause. Lacking such a basis, an officer may not detain an individual, and the individual, unless he or she is properly detained and so notified, is as free to avoid the officer as to avoid any other person. *To hold that the mere exercise of this liberty justifies a detention would be tantamount to holding that an officer may insist upon an encounter without adequate cause.* (24 C3d at 648; emphasis added.)**

Accord, *People v Aldridge* (1984) 35 C3d 473, 479, 198 CR 538.

THERE WAS NO PROBABLE CAUSE TO ARREST DEFENDANT

An officer may arrest a person without a warrant whenever probable cause exists to believe (a) the person has committed a felony (Penal Code Section 836) or (b) a misdemeanor has been committed in the officer's presence. (Penal Code Section 836; *In re Thierry S.* (1977) 19 C3d 727, 139 CR 708.)

This reasonable cause is shown if a person of ordinary care and prudence would be led to "believe and conscientiously entertain an honest and strong suspicion" that the accused is guilty. (*People v Ingle* (1960) 53 C2d 407, 412, 2 CR 14.)

An arrest takes place "when a person is restricted in his or her liberty of movement." (*Call v U.S.* (9th Cir 1969) 417 F2d 462.)

Although there is no fixed test to determine exactly when an arrest has taken place, several cases have held that certain actions raise the presumption of arrest. (See, *e.g., Florida v Royer* (1983) 460 US 491, 75 L Ed 2d 229, 103 S Ct 1319 (if officer testifies he or she would not have let defendant go or if defendant's property is taken from him or her and kept by police); *U.S. v Marin* (2d Cir 1982) 669 F2d 73; *U.S. v Strickler* (9th Cir 1974) 490 F2d 378 (show of weapons).)

A WARRANTLESS ARREST WITHIN A HOME IS UNREASONABLE WITHOUT A SHOWING OF EXIGENT CIRCUMSTANCES

A warrantless arrest in a home is per se unreasonable, unless the prosecution can prove both probable cause (*U.S. v Howard* (9th Cir 1987) 828 F2d 552) and exigent circumstances excusing the police from obtaining a warrant (*U.S. v Rubin* (3d Cir 1973) 474 F2d 262; *People v Ramey* (1976) 16 C3d 263, 127 CR 629; see *Payton v New York* (1980) 445 US 573, 63 L Ed 2d 639, 100 S Ct 1371).

The exigency must be provided by an imminent or substantial threat to life, health or property. (*Horack v Superior Court* (1970) 3 C3d 720, 91 CR 569.)

The structure does not have to be the arrestee's own home; it can be any place in which the occupant has acquired a "legitimate expectation of privacy." (*People v Willis* (1980) 104 CA3d 433, 163 CR 718, disapproved on other grounds in *People v Davis* (2009) 46 C4th 539, 594 n4, 94 CR3d 322).

Entry into a residence without a *search* warrant to look for a third party for whom the police had an *arrest* warrant is illegal. (*Steagald v U.S.* (1981) 451 US 204, 68 L Ed 2d 38, 101 S Ct 1642.)

THE OFFICER'S OBSERVATIONS DID NOT PROVIDE PROBABLE CAUSE TO ARREST DEFENDANT

The validity of an arrest depends on whether the "facts and circumstances within (the officers') knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." (*Beck v Ohio* (1964) 379 US 89, 91, 13 L Ed 2d 142, 145, 85 S Ct 223.) Subjective good faith alone is not enough. (*Beck v Ohio, supra.*)

In some cases, a particularly experienced officer can arrest based on observations that are meaningful only to him or her due to his or her expertise. Conversely, when an officer does not possess such expertise, the arrest would not be justified. (*Cunha v Superior Court* (1970) 2 C3d 352, 85 CR 160; *People v Knisely* (1976) 64 CA3d 110, 134 CR 269; *Remers v Superior Court* (1970) 2 C3d 659, 87 CR 202; cf. *Texas v Brown* (1983) 460 US 730, 75 L Ed 2d 502, 103 S Ct 1535 (officer was experienced).)

Additionally, if the objects seen are not necessarily contraband, an arrest will not be justified. (*Thomas v Superior Court* (1972) 22 CA3d 972, 99 CR 647 (hand-rolled cigarette not contraband on its face); *Cunha v Superior Court, supra* (unknown substance); *Remers v Superior Court, supra* (tin-foil package).

THE FRUITS OF AN ILLEGAL ACT ARE TAINTED AND CANNOT BE USED AS EVIDENCE

Evidence seized as the result of a search or seizure (or an arrest) that has exceeded permissible bounds is the "fruit of the poisonous tree" and must be excluded. (*Wong Sun v U.S.* (1963) 371 US 471, 9 L Ed 2d 441, 83 S Ct 407.)

Thus confessions, admissions and physical evidence may be barred (*Lockridge v Superior Court* (1970) 3 C3d 166, 89 CR 731), as may be testimony as to the identity of stolen goods (*People v Dowdy* (1975) 50 CA3d

180, 123 CR 155) and tape recordings (*People v Coyle* (1969) 2 CA3d 60, 83 CR 924). (See also *Ruiz v Craven* (9th Cir 1970) 425 F2d 235 (confession after confrontation with illegally seized heroin).)

Also, tangible evidence obtained as the fruit of a *Miranda* violation is inadmissible and may be suppressed under Penal Code section 1538.5 if it is the fruit of an error that may be challenged under section 1538.5. (*People v Abbott* (1970) 3 CA3d 966, 84 CR 40; *U.S. v Cassell* (7th Cir 1971) 452 F2d 533; *People v Superior Court (Keithley)* (1975) 13 C3d 406, 118 CR 617.) An admission or confession or other intangible fruit that is the result of an illegal arrest can be challenged under section 1538.5. (*Wong Sun v U.S.* (1963) 371 US 471, 9 L Ed 2d 441, 83 S Ct 407; *People v DeVaughn* (1977) 18 C3d 889, 135 CR 786.)

Once it is shown that a statement was the fruit of a violation of the constitutional proscription against unreasonable searches and seizures, it is the People's burden to try to purge the evidence of its taint. A mere giving of the *Miranda* admonition is not enough. (*Brown v Illinois* (1975) 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254.)

THE PROSECUTION MUST PROVIDE THE SOURCE OF INFORMATION TRANSMITTED THROUGH OFFICIAL CHANNELS WHEN CHALLENGED

It is the prosecution's burden, on defense request, to show that information received by an officer through official channels had a legitimate source. Therefore, when challenged by the defense, the prosecution must produce either the original informant (the source of the information relied on) or the officer who received the information from the informant. (*People v Madden* (1970) 2 C3d 1017, 88 CR 171; *People v Harvey* (1958) 156 CA2d 516, 319 P2d 689; *People v Lara* (1967) 67 C2d 365, 62 CR 586; *People v Adkins* (1969) 273 CA2d 196, 78 CR 397; see also *Whiteley v Warden* (1971) 401 US 560, 28 L Ed 2d 306, 91 S Ct 1031; 2 LaFave, Search and Seizure §3.5.)

This rule applies at hearings on motions to suppress evidence under Penal Code Section 1538.5. (*Ojeda v Superior Court* (1970) 12 CA3d 909, 91 CR 145.)

This rule applies to detentions as well: The prosecution must produce either the informant or the initiating officer when challenged. (*People v Collin* (1973) 35 CA3d 416, 110 CR 869.)

INFORMATION FROM A KNOWN BUT UNTESTED INFORMANT DOES NOT FURNISH PROBABLE CAUSE TO ARREST

Information provided by a known but untested informant justifies further investigation by police but does not furnish probable cause for an arrest (*People v Fein* (1971) 4 C3d 747, 94 CR 607) unless corroborated by other facts or circumstances. (*People v Lara* (1967) 67 C2d 365, 62 CR 586.) This corroboration must pertain to defendant's criminal activity. (*People v Fein, supra*.) The burden of providing this corroborative evidence falls on the prosecution. And while information provided by a "citizen-informant" does give the police probable cause to arrest, the prosecution bears the burden of proving that the informant is a citizen-informant. (*People v Herdan* (1974) 42 CA3d 300, 116 CR 641.) The information still requires a basis of credibility and some corroboration of the alleged criminal act. (*People v Zimnicki* (1972) 29 CA3d 577, 105 CR 614.)

Illinois v Gates (1983) 462 US 213, 76 L Ed 2d 527, 103 S Ct 2317, may have eliminated the *Aguilar/Spinelli* test of probable cause (*Aguilar v Texas* (1964) 378 US 108, 12 L Ed 2d 723, 84 S Ct 1509; *Spinelli v U.S.* (1969) 393 US 410, 21 L Ed 2d 637, 89 S Ct 584) and substituted a "totality of the circumstances" test that permits the issuance of a warrant based on a partially corroborated anonymous informant's tip, but it is distinguishable. In *Gates,* the tipster had described the defendants' modus operandi in some detail. Police surveillance, although not disclosing criminal activity, corroborated the actions. Five justices held that the magistrate's determination of probable cause was justified.

Its rule applies to searches conducted *pursuant to warrant*: and the high court has not suggested it should be extended to warrantless searches. The decision reiterates the comment in *Spinelli* that "'a magistrate's determination of probable cause should be paid great deference by reviewing courts'" (393 US at 419, 21 L Ed 2d at 645). This is a totally different situation from that presented by a warrantless search, where no independent judicial determination by a "neutral and detached magistrate" has been made. (See generally *U.S. v Ventresca* (1965) 380 US 102, 13 L Ed 2d 684, 85 S Ct 741; 2 LaFave, Search and Seizure §4.1.)

Gates should be read with care by California trial courts, and not be extended further than its holding. (See

Abramovsky, *Illinois v Gates*: *A New Standard for Evaluating Probable Cause*, Search and Seizure Law Report, vol 10, No. 7 (Aug. 1983).)

BEFORE THE PAT SEARCH OF A DEFENDANT MAY BE FOUND PROPER, THE PROSECUTOR MUST SHOW THAT THE POLICE HAD A REASONABLE BELIEF THAT THE DEFENDANT WAS ARMED AND DANGEROUS

If an officer does not have grounds to detain, he or she does not have grounds to frisk. (*Terry v Ohio* (1968) 392 US 1, 20 L Ed 2d 889, 88 S Ct 1868.) If an officer does not have sufficient cause to make a *Terry* stop, he or she may not frisk the person even if he or she suspects the person is armed. (*Terry v Ohio, supra*.)

In addition, to have grounds to frisk, the evidence must show that "the officer was rightfully in the presence of the party frisked so as to be endangered if that person was armed." (4 LaFave, Search and Seizure §9.6.)

Justice Harlan's concurrence in *Terry* squarely addresses the question:

> **[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist upon an encounter, to make a *forcible* stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. *I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime*. (392 US at 33, 20 L Ed 2d at 912; emphasis added).)**

CONCLUSION

For all the reasons given above, and because the prosecution has not borne its burden in the instant case, the motion to suppress should be granted, _ _[*the warrant quashed,*]_ _ and the evidence seized by the police in this case should be suppressed.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: This memorandum primarily concerns issues involved in warrantless searches and arrests. It summarizes major principles and cites some of the leading cases, and may be useful as a starting point in drafting a memorandum in a particular case. Determining whether a particular police intrusion violates the Fourth Amendment is, however, necessarily a fact-specific enterprise, and the generic arguments outlined here must be refined and tailored to the facts of the individual case to be effective.

In some counties, it may be possible to file a skeletal memorandum along with the motion and obtain permission from the court to file a more detailed argument after the evidence has been presented. This approach avoids tipping your hand to the prosecutor and perhaps giving him or her an opportunity to shore up weak points in the evidence that might otherwise have gone unnoticed. However, this approach risks losing the motion altogether if it is heard by a judge who is inclined to rule on the motion right away.

Cross-Reference: For discussion of search and seizure motions, see California Criminal Law Procedure and Practice, chap 16 (Cal CEB Annual); California Judges Benchbook: Search and Seizure (2d ed CJER-CEB 2002).

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Source: Criminal Law/California Criminal Law Forms Manual/16 Search and Seizure Motions/§16.5 E. Prosecution Opposition to Defense Pen C §1538.5 Motion

§16.5 E. Prosecution Opposition to Defense Pen C §1538.5 Motion

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

OPPOSITION MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your arguments in two to three sentences.*]_ _

SUMMARY OF FACTS

_ _[*Briefly describe the relevant facts. If a reporter's transcript of the hearing is available, attach it to your opposition as an exhibit and refer to it here by page and line.*]_ _

ARGUMENT

[*Use those arguments below that fit your case, and any additional ones needed.*]

DEFENDANT HAS NOT SHOWN THAT _ _[*HE/SHE*]_ _ HAD A REASONABLE EXPECTATION OF PRIVACY IN THE _ _[*PLACE SEARCHED/ITEMS SEIZED*]_ _

_ _[*See cases on reasonable expectation of privacy in California Criminal Law Procedure and Practice §16.13 (Cal CEB Annual).*]_ _

[*Use the following if defendant seeks to controvert the warrant.*]

DEFENDANT HAS NOT MADE A SUFFICIENT SHOWING TO REQUIRE THE COURT TO ALLOW THE DEFENSE TO CONTROVERT THE WARRANT

_ _[*Argue why there is not a sufficient showing, e.g., the reasons are not given with specificity (Theodor v Superior Court (1972) 8 C3d 77, 103, 104 CR 226), or the defendant did not make a substantial preliminary showing, e.g., through declarations, that the affiant made statements that were deliberately false or in reckless disregard of the truth and that what remains in the affidavit after excising the false statements is insufficient to support a finding of probable cause (Franks v Delaware (1978) 438 US 154, 155, 57 L Ed 2d 667, 672, 98 S Ct 2674; People v Box (1993) 14 CA4th 177, 17 CR2d 504).*]_ _

[*If defendant seeks only to quash the warrant (not controvert it, also), the specific issues raised by the defense should be addressed; general points that you also may wish to make follow.*]

___ A search warrant and the affidavit underlying that warrant are presumed to be valid. (*People v Luttenberger* (1990) 50 C3d 1, 265 CR 690.)

___ The defense did not present prima facie evidence of an illegal arrest or illegal search and seizure. (*Badillo v Superior Court* (1956) 46 C2d 269, 294 P2d 23; *People v Carson* (1970) 4 CA3d 782, 84 CR 699.) If the moving party does not meet this burden, the motion to suppress should be denied. (4 CA3d at 786.)

___ The defense did not move the warrant into evidence, so there is no evidence on which to base a ruling. (*People v Wohlleben* (1968) 261 CA2d 461, 67 CR 826.)

___ Even if the warrant is invalid, the evidence is admissible if the officer serving the warrant acted in good faith reliance on the warrant's validity. (*U.S. v Leon* (1984) 468 US 897, 82 L Ed 2d 677, 104 S Ct 3405; *People v Camarella* (1991) 54 C3d 592, 286 CR 780.) The government has the burden of establishing "objectively

reasonable" reliance. (468 US at 924, 82 L Ed 2d at 699; 54 C3d at 596.)

[*If there was no warrant, the specific issues raised by the defense should be addressed.*]

CONCLUSION

The People request that this Court deny the defense Penal Code section 1538.5 motion to suppress evidence for the reasons stated above.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

_ _[*Signature of deputy district attorney*]_ _
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: The prosecution must file and serve any response to a Pen C §1538.5 motion that is to be heard at the preliminary hearing at least two court days before the hearing. Pen C §1538.5(f)(3). It is common for special deadlines to be set either by local rule or by practice concerning Pen C §1538.5 motions. Local rules in some jurisdictions require a written response from the prosecution to defense counsel's written motion. The prosecution should advance in the opposition whatever theories it wants to preserve for appellate review, because new theories cannot be advanced for the first time on appeal (*Mestas v Superior Court* (1972) 7 C3d 537, 102 CR 729; *People v Miller* (1972) 7 C3d 219, 101 CR 860) unless the factual record is sufficient to decide the theory as a matter of law (see *Green v Superior Court* (1985) 40 C3d 126, 219 CR 186).

When the defense raises a new issue or ground (oral or written) within the hearing or at argument following the evidentiary hearing itself, the prosecution should consider whether to ask the court to allow it to reopen in order to meet the issue.

Cross-Reference: For further discussion of search and seizure, see Crim Law, chap 16; California Judges Benchbook: Search and Seizure (2d ed CJER-CEB 2002).

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Source: Criminal Law/California Criminal Law Forms Manual/16 Search and Seizure Motions/§16.6 F. Defense Motion for Information on Contents of Search Warrant Affidavit (Luttenberger Motion)

§16.6 F. Defense Motion for Information on Contents of Search Warrant Affidavit (*Luttenberger* Motion)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court order the prosecution to make available to the defense the following information: _ _[*Describe information desired*]_ _. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two to three sentences.*]_ _

SUMMARY OF FACTS

_ _[*Briefly summarize the facts relevant to this motion.*]_ _

ARGUMENT

[*Detail under separate subheads the information that leads you to believe that there are material misstatements and/or omissions in the search warrant affidavit. Cite relevant legal authority, e.g., US Const amend IV; Pen C §1538.5; People v Luttenberger (1990) 50 C3d 1, 265 CR 690;* ***Badillo v Superior Court (1956) 46 C2d 269, 294 P2d 23****;* ***Alexander v Superior Court (1973) 9 C3d 387, 390, 107 CR 483****; Franks v Delaware (1978) 438 US 154, 155, 57 L Ed 2d 667, 672, 98 S Ct 2674; Theodor v Superior Court (1972) 8 C3d 77, 103, 104 CR 226; People v Box (1993) 14 CA4th 177, 183, 17 CR2d 504.*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Begin the following on a new page. Caption is unnecessary if attached to papers with caption and first page caption*

includes all parts of motion. See §1.9; Crim Law §18.5.]

OFFER OF PROOF RE WARRANT CONTROVERSION

_ _[*Name of police officer*]_ _ **of the** _ _[*name of police department*]_ _ **will testify to the fact that** _ _[*summarize anticipated testimony; attach as an exhibit a copy of any written documentation of the anticipated testimony, and refer to it here*]_ _**.**

Date: _ _ _ _ _ _

Respectfully submitted,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: If evidence that might cast doubt on the veracity of the affiant is unavailable to the defendant because, *e.g.,* the prosecution refuses to disclose the identity of an informant on whose evidence the affiant relied, the defendant may request the court to review specified records or hear testimony of a specified witness in chambers to determine whether the confidential evidence should be revealed to the defendant. To obtain such in chambers review, the defense must support the motion with evidence "casting some reasonable doubt on the veracity of material statements made by the affiant." *People v Luttenberger* (1990) 50 C3d 1, 265 CR 690. This motion, sometimes called a *Luttenberger* motion, may provide evidence on which to base a motion to traverse the search warrant.

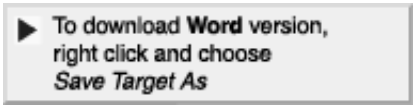
A *Luttenberger* motion, though aimed at discovering evidence that may lead to a Fourth Amendment claim, is a discovery motion and should be made far enough in advance of trial so that, if successful, it will be possible to file a timely motion to traverse the search warrant. Local rules should be checked for additional requirements. It is common for special deadlines to be set either by local rule or by practice concerning Pen C §1538.5 motions. This discovery motion must be set enough in advance of the 1538.5 hearing to allow time for it to be heard, and a ruling issued, before the 1538.5 hearing.

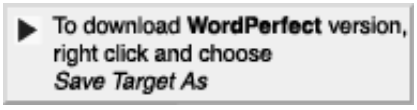
Cross-Reference: For further discussion of *Luttenberger* motions, see Crim Law §§16.19-16.19B; California Judges Benchbook: Search and Seizure (2d ed CJER-CEB 2002).

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Source: Criminal Law/California Criminal Law Forms Manual/16 Search and Seizure Motions/§16.7 G. Prosecution Request for Special Search and Seizure Hearing (Pen C §1538.5(j))

§16.7 G. Prosecution Request for Special Search and Seizure Hearing (Pen C §1538.5(j))





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, DEFENDANT, AND DEFENSE COUNSEL:

In the above case, the defendant, _ _[*name*]_ _, was held to answer, but the magistrate granted defendant's motion for the suppression of evidence and/or the return of property. The People, in accordance with Penal Code section 1538.5(j), request a special hearing. The date of this hearing shall be determined on the day of arraignment, which is _ _[*date*]_ _. Notice of this request was given in open court to the defendant, defense counsel, and the Superior Court on _ _[*date*]_ _.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: A motion for a special hearing under Pen C §1538.5(j) must be filed within 15 calendar days after the preliminary hearing.

When a defendant successfully moves to suppress evidence at the preliminary hearing, and the complaint is not dismissed, the prosecution may relitigate the validity of the search or seizure at a special de novo hearing provided for in Pen C §1538.5(j). If the evidence is once again suppressed, the prosecutor may litigate the issue once again at trial if evidence not presented at the special hearing becomes available and if the prosecutor can show good cause why (1) the evidence was not presented at the special hearing and (2) the earlier ruling should not bind the trial court. Pen C §1538.5(j).

Cross-Reference: For further discussion of Pen C §1538.5(j) hearings, see California Criminal Law Procedure and Practice §§16.28-16.29, 16.31-16.32 (Cal CEB Annual); California Judges Benchbook: Search and Seizure (2d ed CJER-CEB 2002).

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Source: Criminal Law/California Criminal Law Forms Manual/16 Search and Seizure Motions/§16.8 H. Motion for Return of Seized Property (Pen C §1536)

§16.8 H. Motion for Return of Seized Property (Pen C §1536)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move for an order directing the _ _[*name of police department*]_ _, the Office of the District Attorney of _ _[*name*]_ _ County, and their agents to turn over to _ _[*name*]_ _, attorney for defendant, the following property seized from defendant's _ _[*residence/vehicle/person*]_ _ on _ _[*date*]_ _ by agents and representatives of the _ _[*name*]_ _ police department _ _[*under _ _[name]_ _ Court search warrant no. _ _[specify]_ _]_ _: _ _[List items]_ _.

This motion will be based on the attached supporting memorandum, the attached declaration(s), _ _[*the attached exhibit(s),*]_ _ evidence taken at the hearing on this motion and argument at that hearing, and on all papers filed and records in this action.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

A court in possession of property legally seized under a search warrant has authority to direct its delivery to the persons entitled to it on a showing of good cause. This authority is within the express power conferred by Penal Code section 1536 and is further within the scope of the inherent power of the court to control and prevent the abuse of its process. *Buker v Superior Court* (1972) 25 CA3d 1085, 1089, 102 CR 494. The same rule applies when property is seized without a warrant. See *Gershenhorn v Superior Court* (1964) 227 CA2d 361, 366, 38 CR 576.

_ _[*Specify why good cause for return of the property is shown under the facts of your case (e.g., retention of property not required for trial preparation or as evidence at trial, possession of property required by defendant), with reference to supporting declaration(s) (e.g., by attorney and defendant).*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER FOR RETURN OF PROPERTY**
_ _[*Name*]_ _,	
Defendant.	
_____ /	

TO _ _[*NAME OF POLICE CHIEF*]_ _**, POLICE CHIEF OF** _ _[*NAME OF POLICE DEPARTMENT*]_ _ **POLICE DEPARTMENT:**

On GOOD CAUSE SHOWN, you are ordered to turn over to the defendant, _ _[*name of defendant and any identifying information*]_ _**, the following item, listed in the police report number** _ _ _ **(attached), and seized on** _ _[*date*]_ _**, from the defendant by** _ _[*name of officer*]_ _**:**

_ _[*List items to be returned*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Comment: This motion includes a proposed order. A certified copy of the order will be required by the police department property room for release of the seized property.

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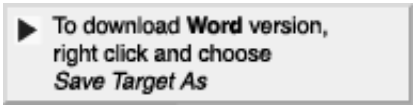
Motion to Disclose Informant's Identity

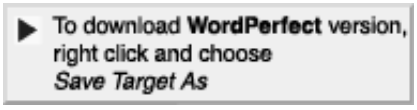
A. Motion to Disclose Identity and Present Whereabouts of Informant or, Alternatively, to Dismiss §17.1
B. Supplementary Defense Motion Concerning In Camera Hearing Procedures §17.2

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Source: Criminal Law/California Criminal Law Forms Manual/17 Motion to Disclose Informant's Identity/§17.1 A. Motion to Disclose Identity and Present Whereabouts of Informant or, Alternatively, to Dismiss

§17.1 A. Motion to Disclose Identity and Present Whereabouts of Informant or, Alternatively, to Dismiss





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court order the prosecution to disclose the true identity and present whereabouts of the informant in the above case, or dismiss the accusatory pleading. This motion will be based on the attached supporting memorandum, _ _[*and/or the attached declaration(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

STATEMENT OF FACTS

_ _[*State facts of case, supported by information in police report or search warrant affidavit. Attach copies of those relevant documents as exhibits. Identify number of exhibits attached.*]_ _

ARGUMENT

_ _[*Articulate ways in which informant could exonerate your client. Reasonable speculation is acceptable. Try to be factual and specific. Some examples follow.*]_ _

IF THE INFORMANT IS MATERIAL TO THE GUILT OR INNOCENCE OF THE DEFENDANT, DISMISSAL IS REQUIRED IF THE PROSECUTION REFUSES TO REVEAL THE INFORMANT'S IDENTITY AND PRESENT LOCATION

The police must yield information regarding a confidential informant when the defense makes a showing that the informant might be material on the issue of guilt or innocence. (*Eleazer v Superior Court* (1970) 1 C3d 847, 83 CR 586.) The penalty for failing to do so is dismissal. (*People v Borunda* (1974) 11 C3d 523, 527, 113 CR 825.)

To be a material witness, the informant need not be present at the time of the actual arrest (*People v Williams* (1958) 51 C2d 355, 333 P2d 19), nor is it necessary for the defendant to prove that the informant is certain to provide material evidence. The defense need show only "some evidence of a possibility" (*Price v Superior Court* (1970) 1 C3d 836, 843, 83 CR 369) or a "reasonable *possibility* that the anonymous informant… could give evidence on the issue of guilt which might result in defendant's exoneration" (*People v Garcia*

(1967) 67 C2d 830, 840, 64 CR 110 (emphasis added)).

A defendant need not demonstrate that an informant *would* give favorable testimony or show *what* that informant's testimony would be. (*People v Tolliver* (1975) 53 CA3d 1036, 1043, 125 CR 905.) Rather, the accused need only show that the informant was "in a position to perceive '... either the commission or the antecedents of the alleged crime.'" (*People v Ingram* (1978) 87 CA3d 832, 839, 151 CR 239, quoting *Williams v Superior Court* (1974) 38 CA3d 412, 423, 112 CR 485.) The court in *Williams* analyzed the controlling Supreme Court decisions and concluded:

> **[T]he evidentiary showing required by those decisions is not as to the exculpatory nature of the informer's potential testimony but merely as to the quality of the vantage point from which the informer viewed either the commission or the immediate antecedents of the alleged crime. The noted Supreme Court cases ask in effect, "What was the informer *in a position* to perceive?" If the evidence shows that the informer had a sufficiently proximate vantage point, those Supreme Court decisions simply speculate concerning the informer's potential testimony and hold that the defendant has demonstrated a reasonable possibility that the informant would give evidence which might result in the defendant's exoneration. Speculation as to such an informer's testimony is consistent with cases which discern a constitutional right in the accused to seek out the informer to inquire what he knows. (38 CA3d at 423 (emphasis in original).)**

Once the defendant has met this minimal showing, disclosure is immediately required unless the prosecution requests a hearing in chambers at which the informant is required to testify under oath. (*People v Gooch* (1983) 139 CA3d 342, 188 CR 673.)

After the hearing, disclosure is required unless the Court concludes that there is *no* reasonable possibility that nondisclosure could deprive the defendant of a fair trial. (*People v Viramontes* (1978) 85 CA3d 585, 590, 149 CR 607; *People v Blouin* (1978) 80 CA3d 269, 286, 145 CR 701; *Williams v Superior Court* (1974) 38 CA3d 412, 112 CR 485.)

If the informant is unavailable for the hearing in chambers, dismissal is mandated. (*People v Allen* (1980) 101 CA3d 285, 291, 161 CR 568.)

It is important to note that the courts have reversed convictions even in cases in which sales were made directly to police officers, and the officers testified to the identity of the seller. (See *People v Durazo* (1959) 52 C2d 354, 340 P2d 594; *People v Williams* (1958) 51 C2d 355, 333 P2d 19; *Bowens v Superior Court* (1975) 47 CA3d 127, 120 CR 474.)

The federal law on informant disclosure is in accord. (See *Roviaro v U.S.* (1957) 353 US 53, 1 L Ed 2d 639, 77 S Ct 623; *Velarde-Villarreal v U.S.* (9th Cir 1965) 354 F2d 9.)

THE INFORMANT IS MATERIAL TO THE GUILT OR INNOCENCE OF THE DEFENDANT

_ _[*Apply cases cited above and others relevant to your factual situation.*]_ _

CONCLUSION

Defendant has made an ample showing of the possible materiality of the informant's evidence. The threshold burden has been met. It is now up to the People to prove to the Court, through the testimony of the informant, that the informant is not in fact material and could in no way aid the defense. If no such testimony is presented, defendant will move for a dismissal.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION IN SUPPORT OF MOTION TO DISCOVER IDENTITY AND LOCATION OF INFORMANT

I, _ _[*name of declarant*]_ _, declare the following:

I am an attorney _ _[*employed by the _ _ _ _ _ _ County Public Defender's Office,*]_ _ and represent _ _[*name of defendant*]_ _ in the above-entitled matter.

In the _ _[*information/indictment/complaint*]_ _, defendant is charged with violating _ _[*specify code sections*]_ _.

I have read _ _[*specify document, e.g., the affidavit for the search warrant in the above-entitled case; crime report No. X; the preliminary hearing transcript*]_ _.

_ _[*Specify what information in the document cited immediately above supports the theory that the informant is a material witness on the issue of guilt. For example, it may be apparent from one or more of the above documents that the informant was the sole witness to the alleged crime.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: This is a discovery motion. Before filing a formal motion for disclosure of the identity of an informant, defense counsel should make an informal request for disclosure. Pen C §1054.5(b). See also Crim Law, chap 11.

It is important to make a sufficient factual showing to support a finding of materiality. See Evid C §1042(c). A declaration of counsel, the defendant, or a witness is usually required to support the allegation that the informant is a material witness on guilt.

CAUTION: Do not include the address or phone number of a victim or witness in the motion if you are giving a copy to the defendant. See Pen C §1054.2.

A copy of the search warrant affidavit should be attached as an exhibit when a search warrant was involved.

If, without disclosing the identity of the informant, the prosecution is able to persuade the trial judge that the defendant has not made out a prima facie case for disclosure, *i.e.*, that the informant is not a material witness on the issue of guilt, disclosure is not required. If the defense does meet its initial burden, or if the prosecution cannot respond to the defendant's allegations without disclosing the informant's identity, the prosecutor may request a hearing in chambers. Evid C §1042(d). Disclosure must be ordered if the evidence presented at both the public and in chambers hearings establishes a reasonable possibility that "nondisclosure might deprive the defendant of a fair trial." Evid C §1042(d); Crim Law §§17.15-17.19. If the prosecution chooses not to reveal the identity of the informant after the court has concluded that disclosure is necessary to assure the defendant's right to a fair trial, the court must dismiss.

NOTE: In some cases (usually drug cases), the informant's testimony may be relevant only to the sale of the drug, not to possession. In that situation, the prosecution may want to request that the court reduce the charge to possession rather than dismissing the charges altogether.

At the hearing in chambers, the prosecution will have the opportunity to establish that nondisclosure would not compromise the defendant's due process rights, even when the defendant has established a prima facie case for disclosure. *People v Lanfrey* (1988) 204 CA3d 491, 502, 251 CR 189.

When an informant's information is relevant only to the question of whether there was probable cause to support the issuance of a search warrant, the court is not required to reveal the informant's identity. Evid C §§1041, 1042(b). See *People v Hobbs* (1994) 7 C4th 948, 959, 30 CR2d 651 (probable cause determination may be made in chambers). For discussion see Crim Law §16.19B.

Cross-Reference: For discussion of motions to disclose the identity of an informant, see Crim Law, chap 17.

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Source: Criminal Law/California Criminal Law Forms Manual/17 Motion to Disclose Informant's Identity/§17.2 B. Supplementary Defense Motion Concerning In Camera Hearing Procedures

§17.2 B. Supplementary Defense Motion Concerning In Camera Hearing Procedures

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court, in holding a hearing in chambers on disclosure of the identity of the informant, follow certain procedures, discussed below, in the conduct of that hearing in chambers. Defendant does not by this motion withdraw _ _[*his/her*]_ _ objection to the holding of such a hearing in chambers, and this supplementary motion is made without intending to vitiate that objection in any way. I propose these procedures to try to ensure the defendant's right to confront witnesses:

1. That defense counsel be notified of the time and place of the hearing in chambers so that counsel may be present in the courtroom while the hearing in chambers is being held.

2. That other witnesses, including police officers, be excluded from the hearing in chambers during the testimony of the informant.

3. That the testimony of the informant be taken under oath and be recorded by a court reporter.

4. That, if the informant is shown a photographic lineup, it include at least _ _ photos, arranged and fixed on a neutral background, and that the photo lineup be shown to defense counsel before it is shown to the informant.

5. That, if the informant is to be fingerprinted, the fingerprints be given to defense counsel for comparison purposes.

6. That, if the informant's handwriting exemplars are to be taken in chambers, copies also be provided to defense counsel.

7. That at the time of the hearing in chambers, defense counsel be allowed to send written questions into the hearing room for informant to answer. Informant is to answer all the questions. The answers to the questions are to be sent out to defense counsel in the courtroom. Defense counsel will then have the opportunity to send in more questions to be answered in the same way. If the District Attorney believes that any particular answer may tend to disclose the identity of the informant, the District Attorney may object to that answer being sent out to defense counsel, although that answer must be given to the Court and taken down by the court reporter.

8. Defense counsel wishes to bring to the Court's attention that the informant should be warned of _ _[*his/her*]_ _ privilege against self-incrimination before _ _[*he/she*]_ _ testifies.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

Evidence Code section 1042(d) requires the Court to order appropriate sanctions when it concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. This decision may be based, according to Evidence Code section 1042(d), on evidence taken in open court and in chambers. (See also *People v Hobbs* (1994) 7 C4th 948, 961, 30 CR2d 651.)

Evidence Code section 1042 sets out no details concerning how the proceeding in chambers should be conducted. Defendant in the above-entitled case requests that this Court follow the procedures outlined in the Notice of Motion Concerning Procedures at In Camera Hearing because they will provide defendant with due process protection.

Date: _ _ _ _ _ _

Respectfully submitted,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: See Comment in §17.1.

Cross-Reference: For discussion of motions to disclose the identity of an informant, see Crim Law, chap 17.

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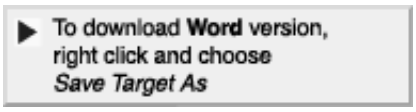
Selected Pretrial Motions

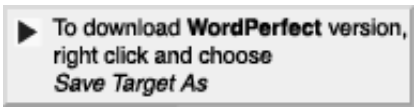
A. Pretrial Notice of Motion, Notice of Motion and Motion, or Motion §18.1
B. Memorandum in Support of Motion §18.2
C. Declaration in Support of Motion §18.3
D. Affidavit in Support of Motion §18.4
E. Proposed Order §18.5
F. Declaration of Service by Mail (Documents Deposited in Mail) §18.6
G. Declaration of Service by Mail (Documents Placed for Collection and Mailing) §18.7
H. Attorney Certification of Service by Mail (Documents Deposited in Mail) §18.8
I. Declaration of Service by Hand Delivery §18.9
J. Application for Order Shortening Time; Order §18.10
K. Memorandum Opposing Motion §18.11
L. Motion to Disqualify (Recuse) Prosecutor's Office for Bias and Prejudice §18.12
M. Defense Motion for Discovery (*Murgia* Motion) §18.13
N. Notice of Motion for Reconsideration and Supporting Memorandum §18.14

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Source: Criminal Law/California Criminal Law Forms Manual/18 Selected Pretrial Motions/§18.1 A. Pretrial Notice of Motion, Notice of Motion and Motion, or Motion

§18.1 A. Pretrial Notice of Motion, Notice of Motion and Motion, or Motion





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

[*Option 1: Prosecution notice*]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that, on _ _[*date*]_ _**, at** _ _[*time*]_ _**, in Department** _ _[*number*]_ _ **of the above-entitled Court, or as soon thereafter as the matter may be heard, the District Attorney will move the Court for an order** _ _[*state nature of motion and grounds*]_ _**.**

This motion will be based on the attached supporting memorandum, _ _[*the attached declaration(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ _ _[*evidence taken at the hearing on this motion, and argument at that hearing,*]_ _ **and on all papers filed and records in this action.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of district attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Option 2: Defense notice*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ **COUNTY, STATE OF CALIFORNIA:**

PLEASE TAKE NOTICE that, on _ _[*date*]_ _**, in Department** _ _[*number*]_ _ **at** _ _[*time*]_ _**, or as soon thereafter as the matter may be heard, the defendant will move the Court for an order** _ _[*state nature of motion and grounds*]_ _**.**

This motion will be based on the attached supporting memorandum, _ _[*the attached declaration(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ _ _[*evidence taken at the hearing on this motion, and argument at that hearing,*]_ _ **and on all papers filed and records in this action.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: The terms "notice of motion," "notice of motion and motion," and "motion," as used by California lawyers, are sometimes confusing to new practitioners and attorneys who have practiced in other jurisdictions. The term "notice of motion" is customarily used because the motion papers are often the first notification the court and other parties receive that the moving party is seeking a legal ruling from the court. When the notice of motion has been served and filed, a motion is deemed to be pending "on all the grounds stated in the written notice." CCP §1005.5. Consequently, no separate "motion" is required. Depending on local practice, the document filed may be called simply "notice of

motion" or it may be called "notice of motion and motion."

At arraignment or at a pretrial appearance, the court may set future hearing dates for pretrial motions, either on its own motion or at the request of counsel. When a date for a motion has already been set in court, the term "motion" is sometimes used instead of the more common "notice of motion" designation.

NOTE: In most circumstances, the terminology used for the title is less important than the content of the papers. However, when the date on which a motion was made may become important, you may want to title your pretrial papers "Notice of Motion and Motion."

Parts of motion. The notice of motion must state the date and time for the hearing. A pretrial motion should include the following parts unless other requirements are set out for that motion by statute or by local rule:

- Notice of motion or motion (see CCP §§1005.5, 1010);
- A supporting memorandum (Cal Rules of Ct 4.111); and
- Proof of service (Cal Rules of Ct 4.111; see CCP §1013a); proof of service comes at the end of all papers, including any order, declaration, or exhibit.

A proposed order is frequently attached for the judge's signature. In addition, many motions require that evidence to support the motion be attached, *e.g.,* an exhibit or a declaration.

Requirement that motion be in writing. Pretrial motions must be in writing, accompanied by a supporting memorandum, unless otherwise ordered by the court or specifically provided by law. Cal Rules of Ct 4.111.

NOTE: Demurrers must be in writing. Pen C §1005.

Setting a hearing date. If there is no preset date for a motion, counsel should check with the clerk's office before filing a motion to find out the local practice for setting hearing dates on pretrial motions. There may be special requirements for setting a motion that will require the presentation of evidence.

Time for filing. Pretrial motions, accompanied by a supporting memorandum, must be served and filed at least 10 court days before the time the motion is set for hearing. Proof of service of the moving papers must be filed no later than 5 court days before the time set for the hearing. Cal Rules of Ct 4.111(a). Failure to file, without good cause, a supporting memorandum within the deadline may be considered an admission that the motion is without merit. Rule 4.111(b).

Formatting. The formatting requirements for motions are the same as for other court papers. They are described in §§1.3-1.11.

Where to file papers. Check with the criminal court clerk to find out where to file papers if you are unfamiliar with local practice. It is common to file pretrial motions with the clerk of the judge who will hear the motion, when that information is known.

Clerk can refuse to file papers. Unless good cause is shown for the failure, the clerk of the court must refuse to accept filing papers that do not comply with the format requirements of Cal Rules of Ct 2.3, 2.100-2.119. Cal Rules of Ct 2.118. On Cal Rules of Ct 2.100-2.119, see §§1.3-1.11.

NOTE: An exception is also made for handwritten papers (see Cal Rules of Ct 2.118(a)); the clerk must not reject a paper for filing solely on the ground that it does not contain an attorney's or a party's fax number or e-mail address on the first page (see Cal Rules of Ct 2.118(b)).

Where motion will be heard. Many counties have either all pretrial motions or certain types of pretrial motions (*e.g.,* §995 or §1538.5 motions) heard by one judge on a particular day of the week (*e.g.,* Monday).

Cross-Reference: See California Criminal Law Procedure and Practice, chap 18 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/18 Selected Pretrial Motions/§18.2 B. Memorandum in Support of Motion

§18.2 B. Memorandum in Support of Motion

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[*The memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

_ _[*SUMMARY OF ARGUMENT*]_ _

_ _[*The summary of argument section is an optional one. Some lawyers and judges think it is very helpful to be oriented immediately to the main issues being raised. It should be short—one or two paragraphs.*]_ _

_ _[*STATEMENT OF FACTS*]_ _

_ _[*A statement of facts section in the memorandum is optional for most pretrial motions. You should use it when it will help the judge in deciding your motion. For example, a statement of facts is usually included in the supporting memorandum that accompanies a Pen C §995 motion. When a statement of facts is used, it should cite to one or more relevant sources for the facts, e.g., a preliminary hearing transcript, a transcript of a prior hearing, or a police report. Cite to the document by name and by the number or letter you have given it, and to the page number within the document. The documents cited to should be attached as exhibits. See §1.25. If the procedural posture of the case is confusing, you may want to have a separate "statement of the case."*]_ _

_ _[*ARGUMENT*]_ _

_ _[*The "Argument" heading is optional. When a statement of facts section or a summary of argument section is used, you may wish to add an "Argument" heading to let the reader know that the actual argument section has started.*]_ _

I. _ _[*Title of first argument. Argument headings are usually put in capital letters and either centered, or each line is indented the same number of spaces. A roman numeral is usually put in front of each one, but that is not required. Some lawyers do not number them, while others use Arabic numerals. While Cal Rules of Ct 2.108(1) generally requires either double or one-and-one-half line spacing, some attorneys single-space the argument headings. Check local practice.*]_ _

_ _[*Under the heading, it is common to skip a line, then begin the argument. You should set out the law that supports the heading in simple, declarative sentences, then apply it to the facts of your case. (See the examples in the memorandums for the various motions in this forms manual.) Judges read many motions and prefer concise language and short memorandums. Be sure that your cites are accurate. Shepardize them to make sure cases have not been overruled or depublished. Statutes, rules, and case citations are either underlined or in italics, and usually put in parentheses. The official California citation style is in Jessen, California Style Manual (4th ed 2000).*]_ _

[II.]_ _[*Continue stating points, citing authorities, and arguing position advanced.*]_ _

[III]. CONCLUSION

_ _[*Summarize in one brief paragraph the relief you are requesting and why it should be granted. (For examples, see the conclusions in the various memorandums in this forms manual.) It is not uncommon for lawyers to neglect to specify the relief they desire; the judge may deny a motion if he or she has not been asked for any particular relief.*]_ _

[*Option 1: Prosecution signature block*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney
__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Option 2: Public defender signature block*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name and title of Public Defender if filed by a public defender*]_ _
__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Option 3: Private defense counsel signature block*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: A memorandum must be filed in support of a pretrial motion in a criminal case unless the court orders otherwise, or unless case law or statute specifically does not require it. Cal Rules of Ct 4.111(a). If the moving party fails to include a memorandum *without good cause*, the court may consider that failure to be an admission that the motion is without merit. Rule 4.111(b). Despite this rule, it is common in some counties for counsel, particularly the Public Defender, to argue some pretrial motions orally, without a supporting written motion. You should check the practice in the court in which your motion will be heard.

Written pretrial motions must be filed with the court at least 10 court days before the hearing on the motion; proof of service must be filed at least 5 court days before the hearing on the motion. Cal Rules of Ct 4.111(a).

It is helpful to begin work on the supporting memorandum by listing each heading before writing the arguments that go under them. The headings should lead logically through each step in the argument to the conclusion. In writing the arguments, the law should be stated as briefly as possible, followed by application of the law to the facts of the case.

Cross-Reference: For more detailed discussion of pretrial motions, see Crim Law, chap 18.

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§18.3 C. Declaration in Support of Motion

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[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

DECLARATION OF _ _[*NAME*]_ _ **IN SUPPORT OF**
_ _[*IDENTIFY MOTION*]_ _

I, _ _[*name*]_ _**, declare** _ _[*under penalty of perjury/on information and belief*]_ _**:**

1. I am _ _[*identity of declarant, e.g., the attorney for the defendant in this case*]_ _**.** _ _[*Continue with statements of fact in successively numbered paragraphs*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: A declaration may be substituted for an affidavit. CCP §2015.5. Declarations are usually used because they do not require the services of a notary public. The caption of the declaration must state the name of the declarant and specifically identify the motion it supports or opposes. See Cal Rules of Ct 3.1115 (civil law and motion). See also Cal Rules of Ct 1.6(21).

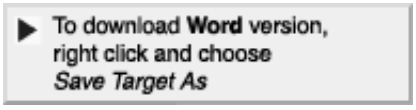
The closing paragraph of this form may be used when the declaration is made either within or outside California. See CCP §2015.5.

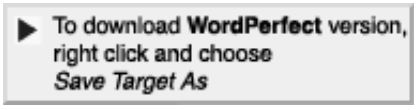
Declarations may be made under penalty of perjury, or on information and belief, depending on the use being made of the declaration. When a declaration is being used as evidence of facts, it must be made under penalty of perjury. See *Star Motor Imports, Inc. v Superior Court* (1979) 88 CA3d 201, 151 CR 721; *Tyler v Superior Court* (1980) 102 CA3d 82, 162 CR 82. However, affidavits on information and belief by defense counsel have been accepted to support *Pitchess* motions. See, *e.g., People v Municipal Court (Hayden)* (1980) 102 CA3d 181, 162 CR 347.

Cross-Reference: For further discussion of declarations, see Crim Law §18.5.

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§18.4 D. Affidavit in Support of Motion





[*An affidavit filed separately from the notice of motion or motion must have a caption. See the sample caption in §1.12. Otherwise, no caption is needed. See Cal Rules of Ct 2.111 (caption required on first page only). Each affidavit accompanying a motion should begin on a separate page.*]

AFFIDAVIT OF _ _[*NAME*]_ _ **IN SUPPORT OF** _ _[*SPECIFY MOTION*]_ _

_ _[*Name of affiant*]_ _**, being sworn, says** _ _[*under penalty of perjury/on information and belief*]_ _**:**

1. I am _ _[*identity of affiant*]_ _**.**

2. _ _[*Continue with statements of fact in successively numbered paragraphs*]_ _**.**

3. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__[*Signature of affiant*]__
_ _[*Typed name*]_ _

Subscribed and sworn to before me on _ _[*date*]_ _**, at** _ _[*state and county*]_ _**.**

[*Notary or officer's seal*] __[*Signature of notary or officer*]__
_ _[*Typed name*]_ _
_ _[*Title, e.g., Notary Public*]_ _

Comment: A notary public must witness the signature on an affidavit; however, a declaration does not require a notary public. A declaration may be substituted for an affidavit. CCP §2015.5. For this reason, attorneys usually use declarations. See §18.3.

The caption of an affidavit must state the name of the declarant and specifically identify the motion it supports or opposes. See Cal Rules of Ct 3.1115 (civil law and motion). See also Cal Rules of Ct 1.6(21) (declaration includes affidavit).

The closing paragraph of this form may be used when the affidavit is made either within or outside California. See CCP §2015.5.

Cross-Reference: For more information on affidavits and declarations, see California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).

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§18.5 E. Proposed Order

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[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, below.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff**	**Dept.** _ _[*number*]_ _
vs	**No.** _ _[*case number*]_ _
_ _[*Name*]_ _, **Defendant.**	**[PROPOSED] ORDER** _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _
_____ /	

The _ _[*defendant's/prosecution's*]_ _ **motion for** _ _[*specify nature of order sought*]_ _ **was regularly heard on** _ _[*date*]_ _**. Present at the hearing were** _ _[*give names of attorney for defendant, and of prosecutor*]_ _**.**

Satisfactory proof having been made and good cause appearing,

IT IS ORDERED that:

1. _ _[*Set out each term of the order in numbered paragraphs*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

[*If judge requests that order be approved as to form by opposing counsel:*]

Approved as to form and content:

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _

Comment: A proposed order should always include a separate caption. If incorporated in or attached to the motion, the proposed order usually follows all other parts of the motion except the proof of service. Counsel should consult local rules or the court clerk in the county in which the motion is being filed for information about local practice with respect to proposed orders. In Los Angeles County, for example, the proposed order should be served and filed with the motion papers, but it should not be included in or attached to the motion papers. Los Angeles Ct R 6.5(b). The proposed order is lodged with the court but is not filed until signed by the judge. Los Angeles Ct R 6.5(b).

The nature of the order should be specified in the caption. "Order" or "Order of Court" with nothing more is insufficient. Examples of a proper description of the paper include "Order for Blood Sample to Be Transferred" or "Order Sustaining Demurrer."

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Source: Criminal Law/California Criminal Law Forms Manual/18 Selected Pretrial Motions/§18.6 F. Declaration of Service by Mail (Documents Deposited in Mail)

§18.6 F. Declaration of Service by Mail (Documents Deposited in Mail)

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PROOF OF SERVICE BY MAIL

I, _ _[*name*]_ _, declare:

I am over age 18, not a party to this action, and _ _[*reside/am employed*]_ _ in _ _ _ _ _ _ County at _ _[*address*]_ _. On _ _[*date*]_ _, I deposited in the United States mail at _ _[*place, e.g., city and state*]_ _ a copy of the attached _ _[*title or description of each paper*]_ _ in a sealed envelope, with postage fully prepaid, addressed to _ _[*name and address of each person served*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Comment: Attach the declaration of service to the back of papers being filed. Declarations of service by mail are governed by CCP §§1012-1013a. Alternative forms for service are in §§18.7-18.9.

If you are filing by mail, enclose a self-addressed stamped envelope large enough and with enough postage for the clerk to return a date/time stamped copy to you confirming that the motion was filed.

Cross-Reference: See general discussion of service in California Criminal Law Procedure and Practice §18.7 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/18 Selected Pretrial Motions/§18.7 G. Declaration of Service by Mail (Documents Placed for Collection and Mailing)

§18.7 G. Declaration of Service by Mail (Documents Placed for Collection and Mailing)

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PROOF OF SERVICE BY MAIL

I, _ _[*name*]_ _, declare:

I am over age 18, not a party to this action, and _ _[*reside/am employed*]_ _ in _ _ _ _ _ _ County at _ _[*address*]_ _. On _ _[*date*]_ _, following ordinary business practices, I placed for collection and mailing at the office of _ _[*name of business*]_ _, located at _ _[*address*]_ _, a copy of the attached _ _[*title or description of each paper*]_ _ in a sealed envelope, with postage fully prepaid, addressed to _ _[*name and address of each person served*]_ _.

I am readily familiar with the business's practice for collection and processing of correspondence for mailing with the United States Postal Service and, in the ordinary course of business, the correspondence would be deposited with the United States Postal Service on the day on which it is collected at the business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Comment: Attach the declaration of service to back of papers to be filed. Declarations of service by mail are governed by CCP §§1012-1013a. Alternative forms for service are in §§18.6, 18.8-18.9.

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Source: Criminal Law/California Criminal Law Forms Manual/18 Selected Pretrial Motions/§18.8 H. Attorney Declaration of Service by Mail (Documents Deposited in Mail)

§18.8 H. Attorney Declaration of Service by Mail (Documents Deposited in Mail)

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PROOF OF SERVICE BY MAIL

I, _ _[*name*]_ _, certify:

I am an active member of the State Bar of California and am not a party to this action. My business address is _ _[*address*]_ _. On _ _[*date*]_ _, I deposited in the United States mail at _ _[*place, e.g., city and state*]_ _ a copy of the attached _ _[*title or description of each paper*]_ _ in a sealed envelope, with postage fully prepaid, addressed to _ _[*name and address of each person served*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

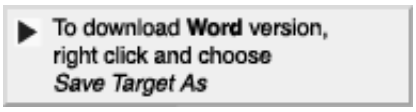
Comment: Attach the declaration of service to the back of papers being filed. Declarations of service by mail are governed by CCP §§1012-1013a. Alternative proof of service forms are in §§18.6-18.7, 18.9.

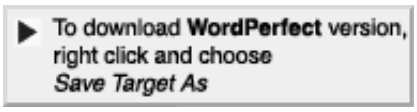
Cross-Reference: See the general discussion of service in California Criminal Law Procedure and Practice §18.7 (Cal CEB Annual).

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§18.9 I. Declaration of Service by Hand Delivery





[*Option 1: Declaration of personal service*]

The undersigned deposes and says:

That I am an employee of the _ _[*name of law office*]_ _**; that I am over the age of 18 years and not a party to the above-mentioned action; that my business address is** _ _[*address*]_ _**.**

That, on _ _[*date*]_ _**, I personally served a true copy of** _ _[*title of document served*]_ _ **in the matter of *People vs.*** _ _[*name of defendant*]_ _ **on the following party:** _ _[*Name*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

[*Option 2: Acknowledgment of receipt*]

Received by: _ _[*signature of person accepting motion*; *usually either counsel or counsel's office staff*]_ _

Date: _ _ _ _ _ _

Comment: Personal or substituted service of pretrial motions is allowed under CCP §1011. It is common for public defenders and alternate counsel in the same building as the district attorney to have their office staff personally serve the district attorney. Defense counsel may also personally serve the district attorney when in the courthouse for an appearance. When this is done, counsel usually has the deputy district attorney to whom the papers are given write on defense counsel's copy of the motion "Received by," followed by the deputy's name, and the date. On the less frequent occasions when the prosecution is filing a motion, the same process may be used.

Alternate forms for service are in §§18.6-18.8.

Cross-Reference: For further discussion of service, see California Criminal Law Procedure and Practice §18.7 (Cal CEB Annual).

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§18.10 J. Application for Order Shortening Time; Order

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[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

APPLICATION FOR EX PARTE ORDER SHORTENING NOTICE TIME ON _ _[*NAME*]_ _'S MOTION FOR _ _[*SPECIFY NATURE OF ORDER SOUGHT*]_ _; DECLARATION

1. I am _ _[*e.g., the prosecutor*]_ _ in this action.

2. It is necessary that the hearing on the attached motion for _ _[*specify nature of order sought*]_ _ take place, and the order issue, on _ _[*date*]_ _, for the following reasons: _ _[*State reasons*]_ _.

3. I have notified _ _[*describe counsel who have been notified, e.g., the Public Defender*]_ _ that this application would be presented at this time and place by _ _[*briefly describe method of notifying other counsel*]_ _.

4. _ _[*Continue declarant's statements, if any*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

[PROPOSED] ORDER

Good cause appearing,

IT IS ORDERED that:

1. The motion of _ _[*e.g., the prosecution*]_ _ for an order _ _[*state nature of order*]_ _ _ _[*, papers for which were submitted with the above application,*]_ _ may be heard on _ _[*date*]_ _.

2. This order and the attached notice of motion and supporting papers must be served _ _[*by personal delivery*]_ _ on the attorney of record for each party _ _[*and on each unrepresented party*]_ _ by _ _[*date*]_ _.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: If an attorney needs to have a hearing on a motion sooner than the 10 court days prescribed by Cal Rules of Ct 4.111(a), counsel should apply for an order shortening time. If possible, counsel should obtain opposing counsel's stipulation and attach that to the application. The application may be typed at the end of the notice of motion or on a separate sheet attached to and served with the moving papers. The application for order shortening time should be accompanied by a declaration. See Cal Rules of Ct 3.1300(b) (affidavit or declaration must accompany application

for order shortening time in civil law and motion cases). See also Cal Rules of Ct 1.6(21) (declaration includes affidavit). Because applications for orders shortening time are made ex parte, counsel should be sure to serve opposing counsel and provide proof of service. See Cal Rules of Ct 3.1206. Many courts allow the request to be made orally at the time the motion is set in court, and rule on it at that time.

Cross-Reference: Applications for orders shortening time are discussed in Crim Law §18.6.

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§18.11 K. Memorandum Opposing Motion

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[*The memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

MEMORANDUM IN OPPOSITION

_ _[*SUMMARY OF ARGUMENT*]_ _

_ _[*Optional. Some lawyers and judges think it is very helpful to be oriented immediately to the main issues being raised. If you include a summary of argument, it should be short—one or two paragraphs.*]_ _

_ _[*STATEMENT OF FACTS*]_ _

_ _[*Optional. Start with a statement of the facts relevant to the motion if the moving party did not accurately state the facts in his or her motion. For detailed discussion of the statement of facts section, see §18.2.*]_ _

_ _[*ARGUMENT*]_ _

[*The heading "Argument" is only needed if you have included either a Statement of Facts or a Summary of Argument section.*]

I. _ _[*Title of first argument.*]_ _ _ _[*State points of law, authorities, and argument concerning the first argument. For further discussion, see §18.2.*]_ _

[II.]_ _[*Continue stating points, citing authorities, and arguing position advanced.*]_ _

[III.] CONCLUSION

WHEREFORE, _ _[*e.g., the prosecutor*]_ _ respectfully requests that _ _[*name*]_ _'s motion _ _[*specify nature of motion*]_ _ be denied.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: It is common in many counties for the prosecution not to file a written opposition to most pretrial motions. Some motions, such as Pen C §§995 and 1538.5 motions, are commonly governed by local rules. When the defense opposes a prosecution motion, written opposition is usually filed.

The opposition memorandum is prepared in the same format as that of the moving party. See §§1.3-1.11. It must have a caption and a proof of service. Cal Rules of Ct 2.111, 4.111. It may also include declarations or affidavits, depending on the requirements of the particular motion. See CCP §§2003, 2009, 2015.5. It must be filed at least 5 court days before the hearing on the motion. Cal Rules of Ct 4.111.

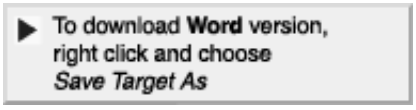
A reply to an opposition memorandum is not required, nor is it commonly filed. When used, it follows the same format as the opposition memorandum.

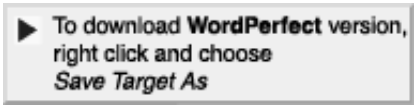
Cross-Reference: On responding to pretrial motions, see Crim Law §18.8.

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Source: Criminal Law/California Criminal Law Forms Manual/18 Selected Pretrial Motions/§18.12 L. Motion to Disqualify (Recuse) Prosecutor's Office for Bias and Prejudice

§18.12 L. Motion to Disqualify (Recuse) Prosecutor's Office for Bias and Prejudice





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court make an order under Penal Code section 1424 recusing _ _[*Deputy District Attorney _ _[name]_ _/the Office of the District Attorney of _ _ _ _ _ _ County*]_ _ from performing any prosecution duties in the above-entitled case. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

DECLARATION OF _ _[*NAME*]_ _ IN SUPPORT OF RECUSAL MOTION

I, _ _[*name*]_ _, declare as follows:

1. I am the attorney of record for defendant _ _[*name*]_ _ in the above-entitled case.

2. The following facts exist that create a conflict of interest between _ _[*Deputy District Attorney _ _[name]_ _/the Office of the District Attorney of _ _ _ _ _ _ County*]_ _ that would render it unlikely that defendant would receive a fair trial: _ _[*State facts that provide grounds for recusal*]_ _.

_ _[*State legal authorities in support of motion. See cases in Crim Law §§18.26-18.31.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of defendant*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER RECUSING**
_ _[*Name*]_ _,	_ _[*NAME OF DEPUTY OR OFFICE BEING RECUSED*]_ _
Defendant.	
_____ /	

This action came on regularly for hearing on _ _[*date*]_ _**, in Department** _ _[*number*]_ _ **of this Court, the Honorable** _ _[*name*]_ _**, Judge, presiding.** _ _[*Name*]_ _ **appeared as attorney for the People and** _ _[*name*]_ _ **appeared as attorney for the defendant. Oral and documentary evidence was presented and the matter submitted for decision. The Court makes the following findings based on that evidence:** _ _[*State findings*]_ _**.**

Good cause appearing,

IT IS HEREBY ORDERED that, pursuant to Code of Civil Procedure section 128 and Penal Code section 1424 _ _[*Deputy District Attorney* _ _[*name*]_ _*/the Office of the District Attorney of* _ _ _ _ _ _ *County*]_ _ **is recused from performing the duties of prosecutor in the above-entitled case.**

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: Notice of a recusal motion must be served on the district attorney and the Attorney General at least 10 court days before the hearing date on the motion. Any motion to disqualify a prosecutor must contain a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied on by the moving party and must be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit. Pen C §1424(a)(1).

Cross-Reference: For further discussion of recusal motions, see Crim Law §§18.26-18.31.

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Source: Criminal Law/California Criminal Law Forms Manual/18 Selected Pretrial Motions/§18.13 M. Defense Motion for Discovery (Murgia Motion)

§18.13 M. Defense Motion for Discovery (*Murgia* Motion)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move the Court for an order to produce, for inspection and copying, the documents and other items and information listed in Exhibit A, which is attached to this notice of motion.

This motion is made on the ground that good cause exists for granting the discovery requested, in that defendant seeks discovery of specific evidence within the possession, custody, or control of the State of California by its agent, _ _[*name*]_ _, and the District Attorney's office, that is material to the defense of selective prosecution.

This motion is based on this notice, the records and files in this action, the attached supporting memorandum, the attached declaration of _ _[*name*]_ _, attorney for defendant, the attached exhibit (Exhibit A), and any oral and documentary evidence that may be presented at the hearing on this motion.

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

I. RIGHT TO DISCOVERY

The defendant in a criminal proceeding is entitled to discover all relevant and reasonably accessible information in the possession of the prosecution that will enable the defendant to prepare and present the defense. *Murgia v Municipal Court* (1975) 15 C3d 286, 124 CR 204; *Pitchess v Superior Court* (1974) 11 C3d 531, 113 CR 897; *Hill v Superior Court* (1974) 10 C3d 812, 112 CR 257.

The defendant in this case needs the requested discovery to show that _ _[*he/she*]_ _ was deliberately singled out for prosecution on the basis of an invidious criterion, and that this prosecution would not have occurred but for the discriminatory design of the prosecution. See *People v Superior Court (Hartway)* (1977) 19 C3d 338, 348, 138 CR 66; *People v Superior Court (Baez)* (2000) 79 CA4th 1177, 94 CR2d 706.

II. GOOD CAUSE

"If an individual can show that he would not have been prosecuted except for such invidious discrimination against him, a basic constitutional principle has been violated, and such a prosecution must collapse upon the sands of prejudice." *Murgia v Municipal Court* (1975) 15 C3d 286, 290, 124 CR 204. _ _[*Discuss cases tending to support discovery of information showing discriminatory prosecution of the kind that you maintain is present in this case. Apply those cases to the facts in your case.*]_ _

III. CONCLUSION

Because the documents and records listed in Exhibit A are relevant to the defense in this case, and because the contents of those documents and records are otherwise inaccessible, defendant asks this court to exercise its discretion to order production of those documents and records listed in Exhibit A. The interests of justice mandate disclosure of this information lest defendant lose the fundamental right to a fair trial.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION

I, _ _[*name*]_ _**, declare that:**

1. I am the attorney for the defendant, _ _[*name*]_ _**, in this action.**

2. On information and belief, there is good cause to require production of the information sought by this motion (and listed in Exhibit A, which is attached to this motion) for the following reasons: _ _[*Set forth facts sufficient to show good cause under the particular facts of the case, i.e., the reasons that defendant alleges he or she has been the victim of discriminatory enforcement.*]_ _

3. On information and belief, _ _[*name of agency or officer having custody of information sought*]_ _ **has possession or control of the information requested in this motion, and this information is inaccessible to defendant.**

4. The evidence sought to be discovered is material to defendant's defense of discriminatory prosecution.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

EXHIBIT A

[*List all documents, records, statements, and other information to be discovered that would tend to show discriminatory enforcement.*]

Comment: A criminal defendant may obtain dismissal of the criminal charges brought by the government on the ground that the prosecution is being conducted in an arbitrary or discriminatory manner. Known as a *Murgia* motion, after the landmark case of *Murgia v Municipal Court* (1975) 15 C3d 286, 291, 124 CR 204, the first step is to make a motion to obtain discovery, typically records relating to other arrests or prosecutions for the same offense, that would prove that the government is acting in an impermissibly discriminatory manner. Because a *Murgia* motion is a discovery motion, it may only be brought after the prosecution has failed to respond to an informal request for the information sought. Pen C §1054.5(b).

A declaration in support of a *Murgia* motion may be made on information and belief. *Griffin v Municipal Court* (1977) 20 C3d 300, 142 CR 286.

Cross-Reference: See Crim Law §§18.16-18.25.

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Source: Criminal Law/California Criminal Law Forms Manual/18 Selected Pretrial Motions/§18.14 N. Notice of Motion for Reconsideration and Supporting Memorandum

§18.14 N. Notice of Motion for Reconsideration and Supporting Memorandum

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[*Option 1: Prosecution notice*]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that, on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _ of the above-entitled Court, or as soon thereafter as the matter may be heard, the District Attorney will move for reconsideration of _ _[*describe order or ruling*]_ _.

The moving party believes the above-described _ _[*order/ruling*]_ _ should be reconsidered by the Court because _ _[*state reason*]_ _.

This motion will be based on the attached supporting memorandum, _ _[*the attached declaration(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ _ _[*evidence taken at the hearing on this motion, and argument at that hearing,*]_ _ and on all papers filed and records in this action.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of district attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Option 2: Defense notice*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that, on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant will move for reconsideration of _ _[*describe order or ruling*]_ _.

The moving party believes the above-described _ _[*order/ruling*]_ _ should be reconsidered by the Court because _ _[*state reason*]_ _.

This motion will be based on the attached supporting memorandum, _ _[*the attached declaration(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ _ _[*evidence taken at the hearing on this motion, and argument at that hearing,*]_ _ and on all papers filed and records in this action.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page*

caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).]

SUPPORTING MEMORANDUM

[*Option 1: Motion made before entry of judgment*]

A court may correct judicial error in the making of interim orders or in limine rulings until pronouncement or entry of a judgment. (*People v DeLouize* (2004) 32 C4th 1223, 1231, 13 CR3d 302.) The _ _[*order/ruling*]_ _ _ _[*describe order or ruling*]_ _ is pre-judgment. A motion for reconsideration made before entry of judgment may be based on an error in law, facts or both.

[*Option 2: Motion made after entry of judgment*]

Post-judgment reconsideration can only be sought for a material change in law (*People v DeLouize* (2004) 32 C4th 1223, 1233, 13 CR3d 302) or clerical error (*People v McGee* (1991) 232 CA3d 620, 624, 283 CR 528). The distinction between clerical error and judicial error is whether the error was made in rendering the judgment or in recording the judgment rendered. *Smith v Superior Court* (1981) 115 CA3d 285, 290, 171 CR 387.

[*Continue*]

[*State facts and argument supporting reconsideration*]

[*Option 1: Prosecution signature block*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney
__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Option 2: Public defender signature block*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name and title of Public Defender if filed by a public defender*]_ _
__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Option 3: Private defense counsel signature block*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: Motions for reconsideration are disfavored. *People v DeLouize* (2004) 32 C4th 1223, 1232, 13 CR3d 302. The Code of Civil Procedure sections (CCP §§128, 473, 1008) that govern motions for reconsideration in civil cases do not apply in criminal cases. *Smith v Superior Court* (1981) 115 CA3d 285, 291, 171 CR 387.

A court may correct judicial error in the making of interim orders or in limine rulings until pronouncement or entry of a judgment. *People v DeLouize* (2004) 32 C4th 1223, 1231, 13 CR3d 302. An order granting a new trial, because it requires further proceedings before a judgment, is also an interim order. 32 C4th at 1232.

On the other hand, post-judgment reconsideration can only be sought for a material change in law (32 C4th at 1233) or clerical error (*People v McGee* (1991) 232 CA3d 620, 624, 283 CR 528).

Cross-Reference: See Crim Law §§18.2-18.9.

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19

Right to Speedy Trial

A. Defense Motion to Dismiss (Due Process) §19.1
B. Defense Motion to Dismiss (Speedy Trial) §19.2
C. Defense Motion to Dismiss for Violation of Statutory Deadlines §19.3
D. Notice of Intent to Withdraw General Time Waiver §19.4
E. Demand by Prisoner to Dismiss Under Pen C §1381 or §1381.5 §19.5

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Source: Criminal Law/California Criminal Law Forms Manual/19 Right to Speedy Trial/§19.1 A. Defense Motion to Dismiss (Due Process)

§19.1 A. Defense Motion to Dismiss (Due Process)

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TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court dismiss the accusatory pleading filed herein on the grounds that the prosecution of the defendant has been unreasonably delayed, violating the defendant's right to due process guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. The delay was _ _[*specify duration, e.g., more than 14 months from the date the crime allegedly occurred on September 27, 2005, until the defendant was arrested on November 30, 2006*]_ _. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations*[*s*],]_ _ _ _[*the attached exhibit*[*s*],]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two to three sentences.*]_ _

STATEMENT OF FACTS

_ _[*Give the relevant facts, e.g., the dates that frame the due process issue, information on the defendant's availability during this period, and prosecution efforts to find the defendant. Give the relevant information about the prejudice the defendant has suffered. Cite to authority such as police reports and witness statements, and attach them as exhibits.*]_ _

ARGUMENT

[*Select those arguments that follow that are relevant, and add any others that apply*]

PREACCUSATION DELAY IS COVERED BY THE RIGHT TO DUE PROCESS OF LAW GUARANTEED UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

A delay between the time a crime is committed and the filing of a formal accusation or arrest, whichever comes first, is covered by the constitutional right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. (*Scherling v Superior Court* (1978) 22 C3d 493, 505, 149 CR 597.) The right of due process protects a criminal defendant's interest in

fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, the loss or destruction of material physical evidence (*People v Martinez* (2000) 22 C4th 750, 767, 94 CR2d 381), and the change of a material witness's testimony over time (*People v Mirenda* (2009) 174 CA4th 1313, 1331, 95 CR3d 702). The initial burden in establishing the due process violation is on the defendant seeking dismissal who must demonstrate prejudice attributable to the delay in arrest. Only after the defendant has done so must the court determine if the delay was justified and engage in the balancing process. (*People v Lowe* (2007) 40 C4th 937, 943, 56 CR3d 209; *Serna v Superior Court* (1985) 40 C3d 239, 249, 219 CR 420; *Scherling v Superior Court* (1978) 22 C3d 493, 505, 149 CR 597.)

In the present case, the crime allegedly occurred on _ _[*date*]_ _, while the prosecution did not begin until _ _[*a complaint was filed/the defendant was arrested/an indictment issued*]_ _ on _ _[*date*]_ _. The period of delay was _ _[*specify duration*]_ _.

THE DELAY IN THIS CASE PREJUDICED THE DEFENDANT'S ABILITY TO PREPARE THE DEFENSE

_ _[*You must show actual prejudice. Serna v Superior Court, supra. Tailor the following material to fit the facts of your case. The two main factors are the length of delay and the prejudice to the defendant. For example, if it is a felony case, select published cases that concern felonies with a period of delay and/or the types of prejudice similar to those that exist in your case.*]_ _

The delay of _ _[*specify period of delay*]_ _ in the instant case is longer than delays found unreasonable in _ _[*use those cases of the following (and other cases you find) with periods of delay shorter than that in your case*]_ _. (See *Kehlor v Municipal Court* (1953) 116 CA2d 845, 254 P2d 897 (seven weeks may be de facto unreasonable); *Rost v Municipal Court* (1960) 184 CA2d 507, 7 CR 869 (lapse of 140 days between filing of complaint and service of arrest warrant without explanation held on its face to be unreasonable when defendant was otherwise available for service); *People v Kerwin* (1972) 23 CA3d 466, 100 CR 240 (90-day delay in bringing defendant to trial unreasonable under circumstances).)

Defendant was prejudiced because _ _[*explain why, e.g., a material witness was deported (People v Mejia (1976) 57 CA3d 574, 579, 129 CR 192), evidence has disappeared, the memory of a potential witness has faded (People v Lowe (2007) 40 C4th 937, 946, 56 CR3d 209), or the defendant cannot now remember where he or she was at the time the crime allegedly occurred. Use those cases of the following, and others you find through your research, that concern the types of prejudice in your case.*]_ _.

Prejudice may be shown by loss of a material witness or other material evidence, material change in the testimony of an independent eyewitness, or fading memory caused by lapse of time. (*People v Lowe* (2007) 40 C4th 937, 946, 56 CR3d 209; *People v Archerd* (1970) 3 C3d 615, 91 CR 397; *Barker v Wingo* (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182; *People v Mirenda* (2009) 174 CA4th 1313, 1331, 95 CR3d 702; *People v Sahagun* (1979) 89 CA3d 1, 152 CR 233.)

In *Rice v Superior Court* (1975) 49 CA3d 200, 122 CR 389, there had been an eleven-month delay between the issuance of the indictment and the warrant and the defendant's arrest on the charges. Despite the fact that the police had made some effort to locate the defendant, the court of appeal felt that simple investigative techniques would have, in fact, located the defendant earlier, and ordered the indictment dismissed. The court said:

> **The same issue was faced in *Jones, supra,* [citation omitted] also involving a delayed arrest. At page 740 the court said: "Petitioner was clearly prejudiced. The most obvious prejudicial effect of the long pre-arrest delay was to seriously impair his ability to recall and secure evidence of his activities at the time of the event in question". 'Delaying the arrest of the accused may hinder his ability to recall or reconstruct his whereabouts at the time the alleged offense occurred….' " (*Rice v Superior Court, supra,* at p. 206.)**

Other cases reiterate the above principles. In *People v Hill* (1984) 37 C3d 491, 209 CR 323, the California Supreme Court held that a showing that *prosecution* witnesses' memories were fading was sufficient to support a finding that the delay prejudiced the defendant's rights to due process and a speedy trial.

In *People v Mirenda* (2009) 174 CA4th 1313, 95 CR3d 702, the court ruled that an unjustified 25-year delay supported dismissal of prosecution before trial when prejudice to the defendant arose from the death of important witnesses, the irreparable fading of memories, and the complete inability to mount a defense.

In *Ibarra v Municipal Court* (1984) 162 CA3d 853, 208 CR 783, the court held that a defendant's allegation of

his own memory impairment **was sufficient to shift the burden of justifying the delay to the prosecution. Because the prosecution had not justified the delay, the court of appeal reversed the trial court's finding.**

In *Garcia v Superior Court* (1984) 163 CA3d 148, 209 CR 205, the court ruled that, on a showing that witnesses were unable to recall the events of the case due to the delay, the burden of justifying the delay shifted to the prosecution.

In *Fowler v Superior Court* (1984) 162 CA3d 215, 208 CR 408, evidence was lost due to the delay. No justification was presented to the trial court by the prosecution. The court of appeal remanded the matter to the trial court for reconsideration of the denial of defendant's motion.

[*Tell what efforts defendant has engaged in to attempt to refresh recollection. See Serna v Superior Court (1985) 40 C3d 239, 219 CR 420.*]

[*Continue*]

The defendant in this case has been prejudiced both by _ _[*summarize the prejudice suffered by the defendant, already described above*]**_ _, and by the other factors recognized by the United States Supreme Court in *U.S. v Marion* (1971) 404 US 307, 30 L Ed 2d 468, 92 S Ct 455, as quoted in *Serna v Superior Court* (1985) 40 C3d 239, 251, 219 CR 420:**

> **Inordinate delay between arrest, indictment and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends.…**

ONCE THE DEFENDANT SHOWS PREJUDICE, THE BURDEN SHIFTS TO THE PROSECUTION TO SHOW JUSTIFICATION. THE COURT MUST WEIGH ANY JUSTIFICATION AGAINST THE PREJUDICE, AND IF THE JUSTIFICATION DOES NOT OUTWEIGH THE PREJUDICE, MUST DISMISS THE CHARGES.

Once the defendant has shown prejudice, as the defendant has in this case, the burden shifts to the prosecution to try to demonstrate justification for the delay. (See *Scherling v Superior Court* (1978) 22 C3d 493, 505, 149 CR 597; *People v Mirenda* (2009) 174 CA4th 1313, 1329, 95 CR3d 702.) The court must then weigh any prejudice to the defendant resulting from the delay against justification for the delay. (*People v Catlin* (2001) 26 C4th 81, 109 CR2d 31; *Scherling v Superior Court* (1978) 22 C3d 493, 505, 149 CR 597. See also *Barker v Wingo* (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182; *Serna v Superior Court* (1985) 40 C3d 239, 219 CR 420.) If the justification does not outweigh the prejudice, the court must dismiss the charges. See *Jones v Superior Court* (1970) 3 C3d 734, 91 CR 578. Minimal prejudice may support dismissal if the prosecution does not justify the delay. *People v Mirenda* (2009) 174 CA4th 1313, 1327, 95 CR3d 702.

UNDER CALIFORNIA LAW, DELAY IN PROSECUTING A CASE IS UNLAWFUL WHETHER NEGLIGENT OR PURPOSEFUL

Under California law, evidence of deprivation of due process sufficient to warrant dismissal does *not* require a showing of purposeful delay by the prosecution. Prejudicial delay caused by negligence of law enforcement agencies or by the prosecution is sufficient to deny a defendant the right to due process. (*Scherling v Superior Court* (1978) 22 C3d 493, 507, 149 CR 597; *Penney v Superior Court* (1972) 28 CA3d 941, 953, 105 CR 162.)

Even if the delay is merely the result of administrative misfeasance or simple negligence on the part of the state or its officers, it is clear that there must, nonetheless, be a dismissal. (*Plezbert v Superior Court* (1971) 22 CA3d 169, 99 CR 340; *Penney v Superior Court* (1972) 28 CA3d 941, 105 CR 162; *Rice v Superior Court* (1975) 49 CA3d 200, 205, 122 CR 389; *Sykes v Superior Court* (1973) 9 C3d 83, 106 CR 786; *Jones v Superior Court, supra*; *Barker v Wingo, supra.*)

[*If a federal due process claim will be made, it probably must be shown that the delay was both prejudicial and intentional. See U.S. v Crouch (5th Cir 1996) 84 F3d 1497, 1509.*]

CONCLUSION

The delay of _ _[*specify nature of delay*]_ _ was a violation of defendant's right to due process under the _ _[*United States Constitution/California Constitution/Constitutions of the United States and California*]_ _ because _ _[*explain why; e.g., the delay was lengthy, the defendant was prejudiced by the delay, the prosecution made no effort whatsoever to try to locate the defendant, and there appears to be no justification for this delay*]_ _. The defendant therefore respectfully asks this Court to dismiss the accusatory pleading.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

[*The following declaration is an example of a declaration made by defense counsel*]

DECLARATION OF _ _[*NAME OF DECLARANT*]_ _ IN SUPPORT OF MOTION TO DISMISS

1. I, _ _[*name of declarant*]_ _, am the attorney for the defendant in the above-entitled case.

2. I declare under penalty of perjury that _ _[*State facts within your personal knowledge supporting contention that government's delay caused prejudice to defendant or that delay was intentional. See discussion in Crim Law §19.3. Note that the defense has the burden of showing prejudice by competent evidence at the hearing. Defendant should also execute a declaration because most facts will be within his or her knowledge. See sample defendant's declaration immediately following this one*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

[*The following declaration is an example of a declaration made by the defendant.*]

DECLARATION OF _ _[*NAME OF DEFENDANT*]_ _ IN SUPPORT OF MOTION TO DISMISS

I, _ _[*name of defendant*]_ _, declare as follows:

1. From _ _[*date*]_ _, and continuing until _ _[*date*]_ _, I resided at _ _[*address, city, state*]_ _, and since then continuing to the present, I have resided at _ _[*address, city, state*]_ _.

2. On _ _[*date*]_ _, I was first _ _[*specify how defendant first became aware of this case, e.g., arrested*]_ _ regarding this case. Before that date, I did not know that this case existed.

3. On _ _[*date*]_ _, I was first furnished a copy of the police report concerning this case.

4. I have done nothing to avoid service or cause delay in the prosecution of this case.

_ _[*Add other relevant information, e.g., the delivery of a letter from the police department to defendant's home after defendant had moved; the fact that defendant was in jail (particularly if defendant was in custody with same authorities who eventually arrested him or her on the present case). Describe any prejudice. Attach as exhibits whatever is relevant.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of defendant*]__
_ _[*Typed name*]_ _

Comment: Due process, rather than speedy trial, covers preaccusation delay between the time a crime is committed and the time a person is arrested or charged, whichever is first. *People v Belton* (1992) 6 CA4th 1425, 1433, 8 CR2d 669. While dismissal generally is the remedy for a due process violation, the court has the discretion to fashion another remedy. *People v Mirenda* (2009) 174 CA4th 1313, 1330, 95 CR3d 702.

These motions may be decided on the basis of declarations and affidavits. See *People v Sahagun* (1979) 89 CA3d 1, 152 CR 233. Declarations made on information and belief are insufficient to establish facts. The declarations attached to this motion, therefore, should not be made on information and belief. See *City of Santa Cruz v Municipal Court* (1989) 49 C3d 74, 87, 260 CR 520, citing *Brown v Happy Valley Fruit Growers* (1929) 206 C 515, 520, 274 P 977.

Cross-Reference: For further discussion, see Crim Law §§19.3, 19.9-19.12.

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Source: Criminal Law/California Criminal Law Forms Manual/19 Right to Speedy Trial/§19.2 B. Defense Motion to Dismiss (Speedy Trial)

§19.2 B. Defense Motion to Dismiss (Speedy Trial)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court dismiss the accusatory pleading filed herein on the grounds that the prosecution of the defendant has been unreasonably delayed, violating the defendant's right to a speedy trial guaranteed by _ _[*the Sixth and Fourteenth Amendments to the United States Constitution/article I, section 15 of the California Constitution*]_ _. The delay was _ _[*specify duration, e.g., more than 14 months from the filing of the complaint on September 27, 2005, until the defendant was arrested on November 30, 2006*]_ _. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two to three sentences.*]_ _

STATEMENT OF FACTS

_ _[*Give the relevant facts, e.g., the dates that frame the speedy trial issue, information on the defendant's availability during this period, and prosecution efforts to find the defendant.*]_ _

ARGUMENT

THE RIGHT TO A SPEEDY TRIAL GUARANTEED UNDER _ _[*SPECIFY WHETHER ERROR IS ALLEGED UNDER U.S. OR CALIFORNIA CONSTITUTION, OR BOTH*]_ _ APPLIES TO THIS CASE

[*The following arguments concern denial under the U.S. Constitution. A person becomes an accused under that constitution in misdemeanor cases on arrest or when a complaint is filed. In a felony case, a person becomes an accused under the U.S. Constitution only when an indictment issues or an information is filed. The U.S. Constitution is most commonly used in misdemeanor cases and when an indictment issues. It is also used when no actual prejudice can be shown because that is not required under the U.S. Constitution.*]

The Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, provides, in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial…." The right to a speedy trial is a "fundamental right granted to the accused and … the policy of the law since the time of the promulgation of the Magna Carta and the Habeas Corpus Act." (*Harris v Municipal Court* (1930) 209 C 55, 60, 285 P 699.)

The constitutional right to a speedy trial is triggered when a defendant becomes "an accused." _ _[*Under the United States Constitution, a person becomes an accused in a misdemeanor case on arrest or when a misdemeanor complaint is filed, whichever occurs first. (Serna v Superior Court (1985) 40 C3d 239, 262, 219 CR 420.) In felony cases, a person becomes an accused under the United States Constitution only on a holding order following a preliminary hearing, or when an indictment is filed. (People v Hannon (1977) 19 C3d 588, 605, 138 CR 885.)*]_ _**.**

In the present case, _ _[*the defendant was arrested/a misdemeanor complaint was filed/an indictment issued/a holding order issued*]_ _ **on _ _**[*date*]_ _**. The prosecution did not begin until _ _**[*specify when prosecution began, e.g., _ _*[*date*]_ _*, when defendant was arraigned in Department _ _*[*number*]_ _ *of this Court*]_ _**.**

Under federal speedy trial analysis, the trial court is to consider and balance the following four factors to evaluate a claimed violation: length of the delay; reason for the delay, defendant's assertion of the right; and prejudice to the defendant. (*Vermont v Brillon* (2009) ___ US ___, 173 L Ed 2d 231, 239, 129 S Ct 1283; *Doggett v U.S.* (1992) 505 US 647, 120 L Ed 2d 520, 112 S Ct 2686; *Barker v Wingo* (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182.) The length of the delay is to some extent a triggering mechanism. Until there is some delay that is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. *Barker v Wingo* (1972) 407 US 514, 530, 33 L Ed 2d 101, 92 S Ct 2182.

[*Use when prejudice may be presumed for purposes of requiring a hearing.*]

THE DELAY IN THIS CASE WAS SUFFICIENTLY PREJUDICIAL TO REQUIRE A HEARING

At a certain point, delay in prosecution becomes so prejudicial that the "defendant need not establish actual prejudice as a prerequisite to a hearing" at which the trial court must weigh this prejudice against the justification offered by the People. (*Serna v Superior Court* (1985) 40 C3d 239, 252, 219 CR 420; *Stabio v Superior Court* (1994) 21 CA4th 1488, 26 CR2d 615; *Barker v Wingo* (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182; *Harris v Municipal Court* (1930) 209 C 55, 285 P 699; *Gutterman v Municipal Court* (1930) 209 C 65, 285 P 703.) This is sometimes called "presumed prejudice."

_ _[*Apply above cases to your facts. Note that if the offense is a misdemeanor, a delay of more than the one-year statute of limitations period is presumed prejudicial. Serna v Superior Court, supra. In a felony case, a delay exceeding the applicable felony statute of limitations period is presumptively prejudicial. Stabio v Superior Court, supra.*]_ _

_ _[*Apply the Barker v Wingo analysis to the facts of your case. See the cases on prejudice that begin on p 7 of this motion; some may be relevant to your arguments.*]_ _

[*The following arguments concern denial under the California Constitution.*]

Postaccusation delay is covered by article I, section 15 of the California Constitution: "The defendant in a criminal cause has the right to a speedy public trial…." (See also Penal Code section 686.) The California provision for a speedy trial "'reflects the letter and spirit of' the Sixth Amendment to the United States Constitution…." (*People v Wilson* (1963) 60 C2d 139, 144 n2, 32 CR 44.)

The right to a speedy trial is a "fundamental right granted to the accused and… the policy of the law since the time of the promulgation of the Magna Carta and the Habeas Corpus Act." (*Harris v Municipal Court* (1930) 209 C 55, 60, 285 P 699.) In an effort to implement this constitutional right, the California legislature has enacted a number of specific provisions providing certain time limits. However, the constitutional guarantees are self-executing, and specific legislation is not necessary to bring into effect the rights guaranteed thereunder. (*Harris v Municipal Court* (1930) 209 C 55, 60, 285 P 699.) Consequently, it remains for the courts to determine whether a defendant's constitutional rights have been impinged, even though no specific statute may have been violated. (*Jones v Superior Cour*t (1970) 3 C3d 734, 91 CR 578; *Barker v Municipal Court* (1966) 64 C2d 806, 51 CR 921; *Rost v Municipal Court* (1960) 184 CA2d 507, 7 CR 869.)

These constitutional rights are triggered when a defendant becomes "an accused." Under the California Constitution, a defendant becomes an accused when a complaint in either a felony or misdemeanor case is filed, when an indictment issues, or on arrest. (*Serna v Superior Court* (1985) 40 C3d 239, 219 CR 420.)

In the present case, the _ _[*defendant was arrested/complaint was filed/indictment issued*]**_ _ on _ _**[*date*]**_ _.** **_ _**[*Describe what ended the period of delay. Most commonly, the filing of a complaint begins the time period, and the defendant's arrest ends the period of delay.*]**_ _**

The test that applies to the right to speedy trial under the California Constitution is that any actual prejudice to the defendant resulting from the delay must be weighed against any justification for the delay. (*People v Hill* (1984) 37 C3d 491, 496, 209 CR 323.)

[*Use to show actual prejudice.*]

THE DELAY IN THIS CASE PREJUDICED THE DEFENDANT'S ABILITY TO PREPARE THE DEFENSE

[*Tailor the following material to show that actual prejudice occurred in your case. For example, if it is a felony case, select published cases that concern felonies with a period of delay and/or the types of prejudice that are similar to those that exist in your case.*]

The delay of _ _[*specify period of delay*]**_ _ in the instant case is longer than delays found unreasonable in _ _**[*use those cases of the following (and other cases you find) with periods of delay longer than that in your case. See, e.g., Kehlor v Municipal Court (1953) 116 CA2d 845, 254 P2d 897 (seven weeks may be de facto unreasonable); Rost v Municipal Court (1960) 184 CA2d 507, 7 CR 869 (lapse of 140 days between filing of a complaint and service of the arrest warrant without explanation held on its face to be unreasonable when defendant was otherwise available for service); People v Kerwin (1972) 23 CA3d 466, 100 CR 240 (90-day delay in bringing defendant to trial unreasonable under the circumstances).*]**_ _**

Defendant was prejudiced because _ _[*explain why, e.g., a material witness was deported, or defendant cannot now remember where he or she was at the time the crime allegedly occurred. Add factors such as anxiety, loss of income, and curtailment of speech and association, when relevant. U.S. v Ewell (1966) 383 US 116, 15 L Ed 2d 627, 86 S Ct 773. Use those cases of the following, and others you find through your research, that concern the types of prejudice in your case. Try to select cases in which the rulings are based on the Constitution on which you are relying.*]**_ _**

Prejudice may be shown by loss of a material witness or other material evidence, or fading memory caused by lapse of time. (*People v Archerd* (1970) 3 C3d 615, 91 CR 397; *Barker v Wingo* (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182; *People v Sahagun* (1979) 89 CA3d 1, 152 CR 233.) In *Rice v Superior Court* (1975) 49 CA3d 200, 122 CR 389, there had been an 11-month delay between the issuance of the indictment and the warrant and the defendant's arrest on the charges. Despite the fact that the police had made some effort to locate the defendant, the court of appeal felt that simple investigative techniques would have, in fact, located the defendant earlier, and ordered the indictment dismissed. The court said:

The same issue was faced in *Jones v Superior Court* (1970) 3 C3d 734, 91 CR 578, also involving a delayed arrest:

> **Petitioner was clearly prejudiced. The most obvious prejudicial effect of the long pre-arrest delay was to seriously impair his ability to recall and secure evidence of his activities at the time of the event in question.**

3 C3d at 740. Delaying the arrest of the accused may hinder his or her ability to recall or reconstruct his or her whereabouts at the time the alleged offense occurred. (*Rice v Superior Court* (1975) 49 CA3d 200, 206, 122 CR 389.)

Other cases reiterate the above principles. In *People v Hill* (1984) 37 C3d 491, 209 CR 323, the California Supreme Court held that a showing that *prosecution* witnesses' memories were fading was sufficient to support a finding that the delay prejudiced the defendant's rights to due process and a speedy trial.

In *Ibarra v Municipal Court* (1984) 162 CA3d 853, 208 CR 783, the court held that a defendant's allegation of *his own memory impairment* was sufficient to shift the burden of justifying the delay to the prosecution. Because the prosecution had not justified the delay, the court of appeal reversed the trial court's finding.

In *Garcia v Superior Court* (1984) 163 CA3d 148, 209 CR 205, the court ruled that, on a showing that witnesses were unable to recall the events of the case due to the delay, the burden of justifying the delay shifted to the prosecution.

In *Fowler v Superior Court* (1984) 162 CA3d 215, 208 CR 408, evidence was lost due to the delay. No justification was presented to the trial court by the prosecution. The court of appeal remanded the matter to the trial court for reconsideration of the denial of defendant's motion.

[*Continue*]

The defendant in this case has been prejudiced both by _ _[*summarize the prejudice suffered by the defendant, already described above*]_ _, and by the other factors recognized by the United States Supreme Court in *U.S. v Marion* (1971) 404 US 307, 30 L Ed 2d 468, 92 S Ct 455, as quoted in *Serna v Superior Court* (1985) 40 C3d 239, 251, 219 CR 420:

> **Inordinate delay between arrest, indictment and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and friends….**

[*Use the following to argue error under the California Constitution. To argue under the federal Constitution, argue four factors: prejudice, justification, length of delay, and defendant's assertion of the right. See Crim Law §§19.5-19.6.*]

ONCE THE DEFENDANT SHOWS PREJUDICE, THE BURDEN SHIFTS TO THE PROSECUTION TO SHOW JUSTIFICATION; THE COURT MUST WEIGH ANY JUSTIFICATION AGAINST THE PREJUDICE AND, IF THE JUSTIFICATION DOES NOT OUTWEIGH THE PREJUDICE, MUST DISMISS THE CHARGES

Once the defendant has shown prejudice, as the defendant has in this case, the burden shifts to the prosecution to try to demonstrate justification. (See *Scherling v Superior Court* (1978) 22 C3d 493, 505, 149 CR 597.) The court must then weigh "any prejudice to the defendant resulting from the delay… against justification for the delay." (22 C3d at 505; see *People v Sahagun* (1979) 89 CA3d 1, 152 CR 233; *Jones v Superior Court* (1970) 3 C3d 734, 741 n1, 91 CR 578. See also *Barker v Wingo* (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182; *Serna v Superior Court* (1985) 40 C3d 239, 219 CR 420.)

_ _[*Describe those prosecution efforts at locating the defendant that are known to you and why they are outweighed by the prejudice to the defendant.*]_ _

THE PROSECUTION FAILED TO PROCEED WITH SATISFACTORY DILIGENCE IN PROSECUTING THIS OFFENSE

The prosecution has a duty to employ all reasonable means to bring an accused promptly to trial. (*Rice v Superior Court* (1975) 49 CA3d 200, 122 CR 389; *Plezbert v Superior Court* (1971) 22 CA3d 169, 99 CR 340; *Jones v Superior Court* (1970) 3 C3d 734, 91 CR 578.) In both *Jones* and *Rice* it was held that there is "no requirement that an accused must seek out the police and invite arrest." (*Jones v Superior Court* (1970) 3 C3d 734, 741, 91 CR 578; *Rice v Superior Court* (1975) 49 CA3d 200, 205, 122 CR 389.) And in *Sykes v Superior Court* (1973) 9 C3d 83, 94, 106 CR 786, the California Supreme Court held that "a speedy trial requires prompt action upon the part of all who are officially concerned, at the least, to the extent that adjudication of a defendant's rights shall not be stifled by the procrastination of officials."

_ _[*Describe prosecution efforts to find the defendant, referring to facts in documents attached to this motion as exhibits, and describe defendant's availability, referring to facts in either counsel's or defendant's declaration, which is attached to this motion. Use cases similar on their facts to those in your case to show how unreasonable the prosecution efforts were at bringing the defendant before the court. See, e.g., the cases in Crim Law §§19.11-19.12.*]_ _

DELAY IN PROSECUTING A CASE IS UNLAWFUL WHETHER NEGLIGENT OR PURPOSEFUL

Evidence of deprivation of defendant's right to a speedy trial sufficient to warrant dismissal does *not* require a showing of purposeful delay by the prosecution. Prejudicial delay caused by negligence of law enforcement agencies or by the prosecution is sufficient to deny a defendant the right to due process. (*Scherling v Superior Court* (1978) 22 C3d 493, 507, 149 CR 597; *Penney v Superior Court* (1972) 28 CA3d 941, 953, 105 CR 162.)

Even if the delay is merely the result of administrative misfeasance or simple negligence on the part of the

state or its officers, it is clear that there must, nonetheless, be a dismissal. (*Plezbert v Superior Court* (1971) 22 CA3d 169, 99 CR 340; *Penney v Superior Court* (1972) 28 CA3d 941, 105 CR 162; *Rice v Superior Court* (1975) 49 CA3d 200, 205, 122 CR 389; *Sykes v Superior Court* (1973) 9 C3d 83, 106 CR 786; *Jones v Superior Court, supra*; *Barker v Wingo* (1972) 407 US 514, 33 L Ed 2d 101, 92 S Ct 2182.)

CONCLUSION

The delay of _ _[*specify nature of delay*]**_ _ was a violation of the defendant's right to a speedy trial under the _ _**[*United States Constitution/California Constitution/Constitutions of the United States and California*]**_ _ because _ _**[*explain why; e.g., the delay was lengthy, the defendant was prejudiced by the delay, and the prosecution made no effort whatsoever to try to locate the defendant*]**_ _. The defendant therefore respectfully asks this Court to dismiss the accusatory pleading.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

[*The following declaration is made by defendant.*]

DECLARATION OF _ _[*NAME OF DECLARANT*]**_ _ IN SUPPORT OF MOTION TO DISMISS**

1. I, _ _[*name of declarant*]**_ _, am the defendant in the above-entitled case.**

2. I declare under penalty of perjury that _ _[*state facts supporting contention that government's delay caused prejudice to defendant or that delay is presumptively prejudicial. (Note that burden of showing prejudice will have to be proven at hearing by competent evidence.)*]**_ _.**

3. At all times from the alleged commission of this offense, I was _ _[*state the defendant's whereabouts and arrest record since the alleged commission of the offense. (Be detailed. You may want to attach as exhibits (and have defendant refer in this declaration) to evidentiary support, e.g., rent receipts, phone bills, arrest reports.)*]**_ _.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Comment: The speedy trial right covers the period of postaccusation delay, between the time when a defendant becomes "an accused" and when he or she is first made aware of the case (usually by being arrested). See *Serna v Superior Court* (1985) 40 C3d 239, 219 CR 420; *People v Hannon* (1977) 19 C3d 588, 138 CR 885. The tests used under the federal and state constitutions are different, as is, perhaps, the time when the right attaches. On the difference between state and federal speedy trial guaranties, see Crim Law §§19.4-19.6.

Cross-Reference: On the right to speedy trial generally, see Crim Law, chap 19.

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§19.3 C. Defense Motion to Dismiss for Violation of Statutory Deadlines

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TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court dismiss the above-described accusatory pleading on the grounds that _ _[*specify violation, e.g., defendant's preliminary hearing is set for a date beyond the ten-day requirement of Pen C §859b*]_ _. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

[*This memorandum contains authorities to fit a variety of factual situations. Edit out inapplicable authorities and discuss your facts in light of the relevant ones. Add other cases and arguments you find through your research.*]

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in two to three sentences.*]_ _

SUMMARY OF FACTS

_ _[*Briefly give the relevant facts, e.g., the statutory authority for the issue involved, the date time began to run and when it ended, and when the trial court has set the case for the relevant hearing or trial.*]_ _

ARGUMENT

THE PROSECUTION VIOLATED THE DEFENDANT'S SPEEDY TRIAL RIGHTS UNDER _ _[*SPECIFY RELEVANT STATUTE, E.G., PEN C §1382*]_ _

Penal Code section _ _[*specify statute, e.g., 1382*]_ _ **states in relevant part: _ _**[*quote the relevant portion of the applicable statute*]_ _**. _ _**[*Describe how the facts of your case fit in the requirements of this statute.*]_ _

DEFENDANT OBJECTED TO THE _ _[*SPECIFY RELEVANT STATUTE, E.G., PENAL CODE SECTION 1382*]_ _ **VIOLATION IN A TIMELY FASHION.**

Defendant's only duties concerning statutory deadlines are to object when the date is set beyond the time period, and to move to dismiss when the period expires, or simply to move to dismiss if the period expires

without a date being set. (*Sykes v Superior Court* (1973) 9 C3d 83, 94, 106 CR 786; *Vukman v Superior Court* (1981) 116 CA3d 341, 349, 172 CR 44, overruled on other grounds in *People v Cuevas* (1995) 12 C4th 252, 275, 48 CR2d 135 (no duty to object when date already expired).) This defendant has done.

In this case, defendant neither applied for nor acquiesced in an extension of the _ _[*specify applicable deadline*]**_ _-day period beginning on _ _**[*date*]**_ _. On _ _**[*date*]**_ _, defendant objected to the date requested by the prosecution, but defendant's objection was overruled. This has resulted in a violation of Penal Code section _ _**[*specify relevant section, e.g., 1382*]**_ _. Thus, this court must dismiss the action. (*Owens v Superior Court* (1980) 28 C3d 238, 168 CR 466; *People v Johnson* (1980) 26 C3d 557, 162 CR 431; *Sykes v Superior Court* (1973) 9 C3d 83, 106 CR 786.)**

DEFENDANT'S _ _[*TYPE OF PROCEEDING, E.G., TRIAL*]**_ _ WAS DELAYED BEYOND THE PERIOD PRESCRIBED IN PENAL CODE SECTION _ _**[*SECTION NUMBER, E.G., 849(a)*]**_ _ _ _**[*AND DEFENDANT SUFFERED PREJUDICE DUE TO THE DELAY*]**_ _.**

_ _[*Specify the statute involved, give the relevant facts in your case, and apply the statute and relevant cases to your facts. The most common issues challenged are delay of the preliminary hearing (Pen C §859b); failure to file the information within 15 calendar days after the defendant was held to answer (Pen C §1382(a)(1)); delay of the trial (Pen C §1382(a)(2)); violation of a statute of limitations; and failure to try or sentence a prisoner serving time on another case who has asked to be tried or sentenced on a pending case (Pen C §§1381, 1381.5, 1389). On the statutory right to speedy trial, see Crim Law §§19.13-19.32.*]_ _

THERE WAS NO GOOD CAUSE FOR A CONTINUANCE.

Good cause for the court's continuance was not shown. "Good cause" has been held not to exist when, *e.g.,* the cause of delay was court congestion and lack of resources (*People v Flores* (2009) 173 CA4th Supp 9, 92 CR3d 582); the district attorney wishes to await results of a probation revocation (*Ayers v Superior Court* (1978) 86 CA3d 945, 150 CR 485); courts were unavailable because judges were at a seminar (*Lewis v Superior Court* (1981) 122 CA3d 494, 176 CR 80); the trial calendar was congested and an amendment to the accusatory pleading did not go to the substance of the charge (*Perez v Superior Court* (1980) 111 CA3d 994, 169 CR 45); courtrooms were unavailable when civil matters were still being heard (*Tudman v Superior Court* (1972) 29 CA3d 129, 105 CR 391); a material witness was absent and no diligence was shown in obtaining the witness (*Owens v Superior Court* (1980) 28 C3d 238, 168 CR 466; *Cunningham v Municipal Court* (1976) 62 CA3d 153, 156, 133 CR 18; *People v Bracamonte* (1967) 253 CA2d 980, 984, 61 CR 830).

CONCLUSION

Defendant respectfully submits that there has been a violation of the time limits set forth in Penal Code section _ _[*specify relevant section, e.g., 1382*]**_ _.** _ _[*Explain briefly that you have met the other requirements, e.g., that such violation has not been justified by the People, that the defendant has properly preserved the issue by objection and motion, and has not waived any of the rights under this section, and that therefore dismissal is mandatory under the law.*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]**_ _**

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF _ _[*NAME OF DECLARANT*]**_ _ IN SUPPORT OF MOTION TO DISMISS**

1. I declare under penalty of perjury that the facts stated in the below document not otherwise supported by citations to the record, exhibits, or other documents are true and correct of my own knowledge. I further declare as to any facts alleged on information and belief, that I believe them to be true and correct under penalty of perjury.

2. _ _[*State facts of case. Specify dates and state what was said in court. Declaration must state that defendant did not waive time, or that defendant withdrew time waiver (specify when withdrawn); that defendant objected to date set; when time ran; any excuses given by D.A. or court to show good cause for delay; and any other facts that are necessary to decide issue as to information alleged only on information and belief, state that in the relevant numbered paragraph(s).*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: If the defendant neither applied for nor acquiesced in an extension of statutory deadline, objected to the date requested by the prosecution, and that objection was overruled, the violation of the statutory deadline may require dismissal of the action. See *Owens v Superior Court* (1980) 28 C3d 238, 168 CR 466; *People v Johnson* (1980) 26 C3d 557, 162 CR 431; *Sykes v Superior Court* (1973) 9 C3d 83, 106 CR 786.

Cross-Reference: For discussion of statutory speedy trial issues, see Crim Law §§19.13-19.33.

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§19.4 D. Notice of Intent to Withdraw General Time Waiver

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, defendant will withdraw the previously entered general time waiver.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

Penal Code section _ _[*1382(a)(2)(A)/1382(a)(3)(A)*]_ _ permits defendants in _ _[*misdemeanor/felony*]_ _ **cases to withdraw in open court a general time waiver after notice to all parties:** _ _[*Quote applicable section: Pen C §1382(a)(2)(A) (felony cases) or Pen C §1382(a)(3)(A) (misdemeanor cases)*]__**.**

This notice is intended to serve the purpose of the statute.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

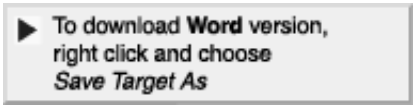
Comment: This form may be used as a notice of intent to withdraw a general time waiver in either a felony or misdemeanor case. After notice to all parties, the withdrawal must be made in open court; time deadlines begin from that date. See Pen C §1382(a)(2)(A), (a)(3)(A).

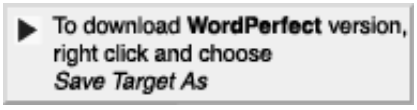
Cross-Reference: On the speedy trial right generally, see Crim Law chap 19.

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Source: Criminal Law/California Criminal Law Forms Manual/19 Right to Speedy Trial/§19.5 E. Demand by Prisoner to Dismiss Under Pen C §1381 or §1381.5

§19.5 E. Demand by Prisoner to Dismiss Under Pen C §1381 or §1381.5





_ _[*Attorney's letterhead*]_ _

To: _ _[*Name of inmate*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
RE: Request for Penal Code Section _ _[*1381/1381.5*]_ _ **Demand**

Dear _ _[*name of inmate*]_ _**:**

Attached please find forms for your use. Please fill in and sign the three copies of the forms, _ _[*in Pen C §1381 demands add: and have the warden or jailer fill out and sign the Endorsement,*]_ _ **then return all three copies in the enclosed self-addressed envelope and we will serve the District Attorney.**

Date: _ _ _ _ _ _ **Very truly yours,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _

_ _[*Name of inmate*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
To: Office of the District Attorney
_ _[*Name of county*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _

[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

NOTICE OF DEMAND FOR TRIAL OR DISPOSITION PURSUANT TO PENAL CODE SECTION _ _[*1381/1381.5*]_ _

TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY:

PLEASE TAKE NOTICE that I, _ _[*name of inmate; give aliases, if relevant*]_ _**, was sentenced on or about** _ _[*date*]_ _**, to serve a term of** _ _[*length of term*]_ _ **in** _ _[*name of correctional institution*]_ _**, located at** _ _[*address*]_ _**. On or about** _ _[*date*]_ _**, in** _ _ _ _ _ _ **County, I was** _ _[*charged with/convicted of*]_ _ **violating** _ _[*specify section of Penal or other Code or name of offense*]_ _**. The** _ _[*name of county*]_ _ **County case number is** _ _[*case number/warrant number*]_ _**. Under the provisions of Penal Code section** _ _[*1381/1381.5*]_ _**, I desire, and hereby demand, that I be** _ _[*brought to trial/sentenced*]_ _ **on the charge(s) set forth above, and on any and all other pending charges.**

Date: _ _ _ _ _ _ _ _[*Signature of inmate*]_ _
_ _[*Typed name*]_ _

[*Use the following for Pen C §1381 demands*]

ENDORSEMENT OF CUSTODIAL LAW ENFORCEMENT:

Cause of Commitment: _____

Date of Commitment: _____

Date of Release: _____

__[*Signature of warden or jailer*]__
_ _[*Typed name*]_ _
_ _[*Title*]_ _

Comment: Motions to dismiss (or try or sentence) a prisoner are brought under Pen C §1381 when the prisoner is in jail or in state prison in California serving time on another case. Motions to dismiss (or try or sentence) a prisoner are brought under Pen C §1381.5 when the prisoner is in a federal prison in California serving time on another case. Unlike Pen C §1381, Pen C §1381.5 does not require that the defendant be brought to court until federal authorities agree to release the defendant for purposes of complying with the §1381.5 request.

Many defense attorneys completely fill out the form before sending it to the prisoner for his or her signature in case the prisoner has trouble filling it in correctly or does not have the information.

The cover letter accompanying the notice asks the prisoner to sign the notice and return it to the attorney, who then forwards it to the district attorney. This is important. Proof of service on the district attorney is crucial. Certified mail, return receipt requested, is recommended, or a copy should be personally served on the district attorney's office, and a signature obtained from the person who accepted receipt.

If the case is dismissed, the prosecution may refile as long as the prosecution is not precluded from doing so by Pen C §1387.

Cross-Reference: For discussion of Pen C §§1381 and 1381.5 demands, see California Criminal Law Procedure and Practice §§19.33-19.34 (Cal CEB Annual).

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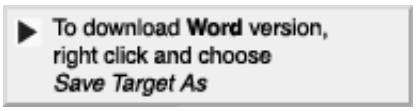
Continuances

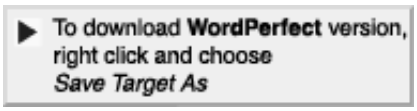
Motion for Continuance §20.1

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Source: Criminal Law/California Criminal Law Forms Manual/20 Continuances/§20.1 Motion for Continuance

§20.1 Motion for Continuance





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT AND TO _ _[*THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA/THE DEFENDANT AND DEFENSE COUNSEL*]**_ _:**

PLEASE TAKE NOTICE that, on _ _[*date*]**_ _, in Department _ _**[*number*]**_ _ at _ _**[*time*]**_ _, or as soon thereafter as the matter may be heard, _ _**[*the District Attorney/defendant*]**_ _, _ _**[*name*]**_ _ will make a motion that the court order the above-entitled matter continued pursuant to Penal Code section 1050 until _ _**[*date*]**_ _. The matter is currently scheduled for _ _**[*specify proceeding, e.g., trial*]**_ _ on _ _**[*date*]**_ _.**

This motion is made on the following grounds: _ _[*summarize factual grounds supporting continuance request*]**_ _.**

This motion will be based on the attached supporting memorandum, all papers filed and records in this action, _ _[*the attached declaration(s),*]**_ _ _ _**[*the attached exhibit(s),*]**_ _ evidence taken at the hearing on this motion, and argument at that hearing.**

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]**_ _**

[*The supporting memorandum of points and authorities should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

[*Option 1: DEFENSE memorandum*]

SUPPORTING MEMORANDUM

THE DEFENDANT IS ENTITLED TO A CONTINUANCE ON A SHOWING OF GOOD CAUSE

Penal Code section 1050(b) provides that:

> **To continue any hearing in a criminal proceeding, including the trial, (1) a written notice shall be filed and served on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary….**

Penal Code section 1050(e) further provides that "Continuances shall be granted only upon a showing of good cause." The request must be supported by declarations, unless the court first finds good cause to excuse the notice and declaration requirement. The declaration must be executed under penalty of perjury. (*Brown v Superior Court* (1987) 189 CA3d 260, 265, 234 CR 416.) _ _[*Discuss how you have met each of these requirements.*]**_ _.**

The grant or denial of a motion for continuance is an act within the Court's discretion (*Ungar v Sarafite* (1964) 376 US 575, 589, 11 L Ed 2d 921, 931, 84 S Ct 841), but this discretion is not without bounds:

> **While the determination of whether in any given case a continuance should be granted normally rests in the discretion of the trial court, that discretion may not be exercised in such a manner as to deprive the defendant of a reasonable opportunity to prepare his defense. (*Jennings v Superior Court* (1967) 66 C2d 867, 59 CR 440.)**

Although the Court must consider the welfare of witnesses (Pen C §1050(g)) and the right of the People to a speedy disposition (Pen C §1050(a)), it must also consider the defendant's right to a fair trial. (*People v Courts*

(1985) 37 C3d 784, 794, 210 CR 193. See also *People v Murphy* (1963) 59 C2d 818, 31 CR 306 (error to deny continuance to prepare following last-minute amendment by prosecution).)

[*Add specific arguments relevant to your situation. The following are examples that may be applied to the facts of your case if relevant.*]

The defendant is entitled by statute to a continuance at arraignment to secure counsel. (Penal Code section 859.)

The defendant is entitled by statute to a continuance at the time set for preliminary hearing to secure counsel. (Penal Code section 860.)

If a defendant cannot secure counsel for the preliminary hearing, it must be postponed "for not less than two nor more than five days." (Penal Code section 860.)

The constitutional right to counsel (United States Constitution, Amendment VI; California Constitution article I, section 15) requires that a defendant be given a reasonable continuance to secure counsel of his or her choice (*People v Courts* (1985) 37 C3d 784, 789, 210 CR 193; *People v Byoune* (1966) 65 C2d 345, 54 CR 749), if the defendant can show that he or she is financially able to secure counsel (*People v Lee* (1967) 249 CA2d 234, 241, 57 CR 281; see *People v Parks* (1964) 230 CA2d 805, 811, 41 CR 329).

The right to counsel (United States Constitution, Amendment VI; California Constitution article I, section 15) includes the right to adequately prepare a defense (*People v Maddox* (1967) 67 C2d 647, 652, 63 CR 371), including the right to prepare and argue motions and objections before, during, and after trial. (*Cooper v Superior Court* (1961) 55 C2d 291, 302, 10 CR 842. See also Pen C §1049 (five-day period to prepare for trial required after plea).)

New counsel has the same right to a reasonable time to prepare as did previous counsel. (See *People v Simpson* (1939) 31 CA2d 267, 88 P2d 175.)

The unavailability of a witness whose testimony has a legitimate tendency to prove or disprove a fact that could influence the decision in the case is good cause for a continuance. (See *People v Dunstan* (1922) 59 CA 574, 584, 211 P 813. See also *Owens v Superior Court* (1980) 28 C3d 238, 250, 168 CR 466.) _ _[*Describe what you expect the testimony to be; explain why the testimony is not cumulative of other evidence; specify efforts used to secure the witness's presence; explain how counsel can secure the witness's attendance within a reasonable time. See the information in the declaration below concerning an unavailable witness.*]_ _

Physical incapacity of the defendant or defense counsel is good cause for a continuance. (*People v Crovedi* (1966) 65 C2d 199, 53 CR 284.)

When a defendant joins in requesting a continuance caused by defense counsel's court commitments on behalf of other clients, the court must grant the continuance until either defense counsel can appear or the defendant can obtain other counsel. (*People v Manchetti* (1946) 29 C2d 452, 458, 175 P2d 533.)

CONCLUSION

For the above reasons, defendant requests a continuance of _ _[*specify type of proceeding*]_ _ **from** _ _[*date now set*]_ _ **to** _ _[*date you want matter continued to*]_ _**.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Option 2: PROSECUTION memorandum*]

SUPPORTING MEMORANDUM

THE PROSECUTION HAS COMPLIED WITH THE PENAL CODE SECTION 1050(b) REQUIREMENTS

The prosecution has complied with the procedural requirements of Penal Code section 1050(b): This motion is in writing, accompanied by a declaration detailing specific facts showing that a continuance is necessary, and was served on all parties to the proceeding _ _[*state how many days before the proceeding you served other parties; service must be at least two court days before the proceeding sought to be continued*]_ _**.**

GOOD CAUSE FOR A CONTINUANCE EXISTS BECAUSE _ _[*SUMMARIZE WHY THERE IS GOOD CAUSE FOR A CONTINUANCE*]_ _

Penal Code section 1050(e) allows the prosecution to obtain a continuance of any hearing, _ _[*including the trial,*]_ _ **on a showing of good cause. Good cause for a continuance of the** _ _[*hearing/trial*]_ _ **in this case exists because** _ _[*specify why*]_ _**.**

[*Add specific arguments relevant to your situation. The following is a sampling of relevant authorities.*]

The charge in this case, _ _[*state charge*]_ _**, is an offense listed in Penal Code section** _ _[*specify section, e.g., 11165.1(a)*]_ _**. The deputy assigned to this case,** _ _[*name*]_ _**, has another** _ _[*specify proceeding, e.g., trial; state department in which deputy works; state why another deputy cannot try the case; and estimate how long the other proceeding is expected to take*]_ _**. This constitutes good cause for a continuance under Penal Code Section 1050(g).**

This case is set for _ _[*specify proceeding, e.g., trial*]_ _ **on** _ _[*date*]_ _**.** _ _[*If no speedy trial statute will be violated by continuing the matter to a particular date in the future, state that. Then explain why you need a continuance.*]_ _

The codefendant in this case, _ _[*name*]_ _**, has had** _ _[*his/her*]_ _ **case continued to** _ _[*date*]_ _**. This is good cause under Penal Code section 1050.1 for continuing the defendant's case to the same date so that the cases may remain joined.**

_ _[*The defendant/A defense witness*]_ _ **testified at trial, which was not anticipated by the prosecution because** _ _[*explain why, e.g., the defense gave you no discovery concerning this witness, or because the witness testified to matters outside the discovery given to you*]_ _**. This is good cause under Penal Code section 1051 for a continuance.**

The unavailability of a witness whose testimony has a legitimate tendency to prove or disprove a fact that could influence the decision in the case is good cause for a continuance. (See *People v Dunstan* (1922) 59 CA 574, 584, 211 P 813. See also *Owens v Superior Court* (1980) 28 C3d 238, 250, 168 CR 466.) _ _[*Describe what you expect the testimony to be; explain why the testimony is not cumulative of other evidence; specify efforts used to secure the witness's presence; explain how counsel can secure the witness's attendance within a reasonable time. See the information in the declaration below concerning an unavailable witness.*]_ _

The defense has consented to a continuance of this matter. Although that does not by itself constitute good cause, it is a factor to be considered in making a good cause determination.

CONCLUSION

For the above reasons, defendant requests a continuance of _ _[*specify type of proceeding*]_ _ **from** _ _[*date now set*]_ _ **to** _ _[*date you want matter continued to*]_ _**.**

Date: _ _ _ _ _ _

Respectfully submitted,

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Continue*]

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with*

caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.]

[*The following is a declaration in support of a generic motion for continuance.*]

DECLARATION OF _ _[*NAME OF DECLARANT*]_ _ IN SUPPORT OF MOTION FOR CONTINUANCE

I, _ _[*name of declarant*]_ _, do hereby declare:

1. That I am _ _[*e.g., the attorney for _ _[name of defendant]_ _, or the deputy district attorney assigned to the above-entitled case*]_ _.

2. That this case is presently set for _ _[*specify proceeding, e.g., trial*]_ _ at _ _[*time*]_ _ on _ _[*date*]_ _ in Department _ _[*number*]_ _.

3. That a continuance of the _ _[*specify proceeding, e.g., trial*]_ _ for at least _ _[*number*]_ _ days is necessary because _ _[*state reasons the requested number of days is required*]_ _.

4. That I have notified the _ _[*defense/prosecution*]_ _ witnesses of this motion, the date of the hearing on this motion, and their right to be heard by the court, as required by Penal Code section 1050(b).

[*Add if relevant*]

5. That this motion was not filed two court days before the _ _[*specify proceeding, e.g., trial*]_ _, as required by Penal Code section 1050(b), because _ _[*state reasons*]_ _.

[*Add if relevant*]

_ _[*6./5.*]_ _ **That the defendant is willing to waive time for this purpose.**

[*Continue*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

[*The following is a declaration in support of a motion for continuance based on the need for time to secure a witness.*]

DECLARATION OF _ _[*NAME OF DECLARANT*]_ _ IN SUPPORT OF MOTION FOR CONTINUANCE

I, _ _[*name of declarant*]_ _ do hereby declare:

1. That I am _ _[*e.g., the deputy district attorney assigned to the above-entitled case/the attorney for _ _[name of defendant]_ _]_ _.

2. That this case is presently set for _ _[*specify proceeding, e.g., trial*]_ _ at _ _[*time*]_ _ on _ _[*date*]_ _ in Department _ _[*number*]_ _.

3. That a continuance is required to secure _ _[*name of witness*]_ _ as a witness in this case.

4. That _ _[*name of witness*]_ _ of _ _[*address of witness*]_ _ is a necessary witness for the _ _[*defense/prosecution*]_ _ in this case, in that _ _[*he/she*]_ _ would testify to the following facts: _ _[*state general substance of the proposed testimony*]_ _.

5. That this proposed testimony is material to guilt or innocence in that this testimony is the only way to _ _[*state the effect of the proposed testimony on the case*]_ _**.**

6. That the facts contained in the proposed testimony cannot be proven by any other available evidence.

7. That _ _[*state efforts to secure attendance of witness*]_ _**.**

8. That _ _[*name of witness*]_ _ **will be available to testify on** _ _[*date*]_ _**.**

9. That this motion was not filed two court days before the _ _[*specify proceeding, e.g., trial*]_ _**, as required by Penal Code section 1050(b), because** _ _[*state reasons*]_ _**.**

[*Add if relevant*]

10. That the defendant is willing to waive time for this purpose.

[*Continue*]

_ _[*10./11*]_ _. **That I have notified the** _ _[*defense/prosecution*]_ _ **witnesses of this motion, the date of the hearing on this motion, and of their right to be heard by the Court, as required by Penal Code section 1050(b).**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: A declaration or affidavit in support of a continuance motion must be attached to the motion. Pen C §1050(b). Counsel should include in the declaration or affidavit the minimum length of time needed for a continuance to give some guidance to the court and to allow counsel to develop a factual record to support the time necessary for the continuance. See *People v Weston* (1981) 114 CA3d 764, 777, 170 CR 856. The declaration must be made under penalty of perjury; it should not be made on information and belief. See *Brown v Superior Court* (1987) 189 CA3d 260, 265, 234 CR 416.

On a showing of good cause, the court may allow a continuance motion that does not comply with the notice requirements of Pen C §1050(b). Pen C §1050(c).

The motion must be filed and served at least *two court days* before the hearing to be continued. Pen C §1050(b). In computing the time, exclude the first day and include the last. *People v Harvey* (1987) 193 CA3d 767, 238 CR 516. A party is not deemed served until he or she actually has received a copy of the continuance motion, unless timely notice is waived. Pen C §1050(b). An attorney with a conflict in the scheduling of a court hearing must notify the calendar clerk of each court involved which hearing was set first. Notice must be in writing and within two court days after the attorney learns of the conflict. Pen C §1050(b). Failure to comply with the requirements of Pen C §1050(b) can result in sanctions: a fine of up to $1000 and a disciplinary report to the State Bar. Pen C §§1050(b)-(c), 1050.5.

Regardless of who moves for a continuance, the defense is responsible for notifying defense witnesses and the prosecution is responsible for notifying prosecution witnesses of the motion, of the hearing date, and of the witness's right to be heard. Pen C §1050(b).

Cross-Reference: For discussion of motions for continuance, see Crim Law, chap 20.

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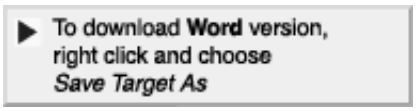
Disqualification of Judge

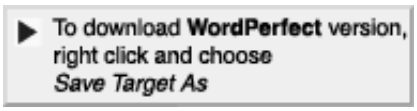
Peremptory Challenge §21.1

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Source: Criminal Law/California Criminal Law Forms Manual/21 Disqualification of Judge/§21.1 Peremptory Challenge

§21.1 Peremptory Challenge





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

I, _ _[*name of declarant*]_ _, declare:

1. I am _ _[*e.g., the defendant/the prosecutor/the attorney for _ _[name of defendant*]_ _]_ _ in this case.

2. The Honorable _ _[*name of judge*]_ _, the judge to whom this case is assigned, is prejudiced against _ _[*name*]_ _ or the interests of _ _[*name*]_ _, so that _ _[*the defense/the prosecution*]_ _ cannot, or believes that it cannot, have a fair and impartial _ _[*trial/hearing*]_ _ before this judge.

WHEREFORE it is requested that the Honorable _ _[*name of judge,*]_ _ be disqualified under CCP §170.6 from _ _[*trying/hearing*]_ _ any matter in this case and that this Court issue an order reassigning this case to a different judge for further proceedings.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: The trial court may have its own standard form, which should be used. This form is usually filed in court, and a copy given at that time to opposing counsel. Special care must be taken to ensure that the form is filed in a timely manner. When a case is assigned in open court to a particular department, the challenge should be made and the form should be filed at the time of the assignment.

Cross-Reference: For discussion of challenges to judges, see California Criminal Law Procedure and Practice, chap 21 (Cal CEB Annual).

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22

Lineups and Identification

A. Lineup Characteristics Chart §22.1
B. Witness Identification Sheet §22.2
C. Notice of Motion and Motion for Lineup (*Evans* Motion) §22.3
D. Motion to Suppress Eyewitness Identification §22.4
E. Prosecution Motion for Lineup §22.5

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Source: Criminal Law/California Criminal Law Forms Manual/22 Lineups and Identification/§22.1 A. Lineup Characteristics Chart

§22.1 A. Lineup Characteristics Chart

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Lineup No.:	1	2	3	4	5	6	7	8
Sex:								
Height:								
Weight:								
Age:								
Build:								
Hair color/style:								
Eyes:								
Complexion:								
Glasses/Contacts:								
If glasses, style:								
Jewelry:								
Disability:								
Voice/Accent:								
Ethnicity:								
Facial hair:								
Scars:								
Nose:								
Teeth:								
Accent:								
Clothing condition:								
Fit of clothes:								
Shoes:								
Socks:								
Hat:								
Pants:								
Dress:								
Skirt:								
Jacket:								
Coat:								

Sneakers:								
Shoelaces:								
Boots:								
Jewelry:								
Weapon:								
Tattoos:								
Special characteristics:								
Unusual features:								
Performance during lineup:								

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Source: Criminal Law/California Criminal Law Forms Manual/22 Lineups and Identification/§22.2 B. Witness Identification Sheet

§22.2 B. Witness Identification Sheet

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Name of Witness:_____

Sex: _____ Age: _____ Height: _____ Ethnicity:_____

Weight: _____ Hair Color: _____ Eye Color:_____

Clothing:_____

_____

Glasses/contacts:_____

Hearing aid:_____

Disability:_____

_____

With friend:_____

Made mark on paper:_____

Who did witness ID:_____

_____

Communicated with someone before making ID:_____

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Source: Criminal Law/California Criminal Law Forms Manual/22 Lineups and Identification/§22.3 C. Notice of Motion and Motion for Lineup (Evans Motion)

§22.3 C. Notice of Motion and Motion for Lineup (*Evans* Motion)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will argue and does hereby move that the Court order the District Attorney of _ _ _ _ _ _ County and the _ _[*name of police department*]_ _ Police Department to conduct a physical lineup in which the defendant will be exhibited to the complaining witness in this case, _ _[*name of complaining witness*]_ _*, and to* _ _[*witness/witnesses*]_ _, _ _[*name(s) of other witness(es)*]_ _.

This motion is made on the grounds that evidence of eyewitness identification is a material issue in this case and there exists a reasonable likelihood of mistaken identification, which a lineup would tend to resolve. This motion will be based on the attached supporting memorandum, _ _[*the attached declaration(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

A DEFENDANT IS ENTITLED TO COMPEL THE PROSECUTION TO CONDUCT A PRETRIAL LINEUP UNDER THE CIRCUMSTANCES OF THIS CASE

In *Evans v Superior Court* (1974) 11 C3d 617, 625, 114 CR 121, the California Supreme Court held that "due process requires in an appropriate case that the accused, upon timely request... be afforded a pretrial lineup in which witnesses to the alleged criminal conduct can participate." This ruling applies when identification is a material issue and mistaken identification is a reasonable likelihood. (See *Garcia v Superior Court* (1991) 1 CA4th 979, 987, 2 CR2d 707.) Defense counsel is entitled to be present at the lineup. (*People v Williams* (1971) 3 C3d 853, 856, 92 CR 6.)

_ _[*Explain why identification is a material issue and mistaken identification a reasonable likelihood. Refer to attached declarations and/or exhibits that support your argument. If an eyewitness to the crime has not yet identified the defendant, state so. See People v Harmon (1989) 215 CA3d 552, 263 CR 623.*]_ _

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION IN SUPPORT OF MOTION FOR ORDER TO CONDUCT LINEUP

I, _ _[*name of declarant*]_ _, declare as follows:

1. I _ _[*am an attorney with the _ _ _ _ _ _ County Public Defender's Office and represent the defendant/am the attorney appointed to represent the defendant/represent the defendant*]_ _.

2. I have reviewed all of the police reports made available to me in this case, including the statements of complaining witness, _ _[*name*]_ _, and witness, _ _[*name*]_ _. _ _[*A copy of _ _[name of police department*]_ _ *Police Department Report No. _ _[number*]_ _ *is attached as Exhibit A.*]_ _

[*Use if defendant will not otherwise be in a lineup before the preliminary hearing.*]

3. At the preliminary hearing and at trial, witnesses _ _[*names of witnesses*]_ _ will be asked if they can identify the defendant, who will be seated next to me at the counsel table. The inherent suggestiveness in such a proceeding may be remedied by a properly conducted physical lineup before the preliminary hearing.

[*Use if sheriff's department and police department will both be involved in the lineup.*]

4. As defendant is currently confined at _ _[*place of confinement*]_ _, it is submitted that the lineup should be conducted by the _ _[*name of police department*]_ _ Police Department in conjunction with the _ _[*name of sheriff's department*]_ _ County Sheriff's Department.

[*Continue*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

[*A proposed order should begin on a new page. Even if filed as part of the motion, it should have a separate caption. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER TO CONDUCT LINEUP**
_ _[*Name*]_ _,	
Defendant.	
_____ /	

TO _ _[*NAME OF SHERIFF*]_ _**, SHERIFF OF** _ _ _ _ _ _ **COUNTY, AND** _ _[*NAME OF POLICE CHIEF*]_ _**, POLICE CHIEF OF** _ _[*NAME OF POLICE DEPARTMENT*]_ _ **POLICE DEPARTMENT, AND** _ _[*NAME OF DEFENDANT*]_ _**:**

This matter came on regularly for hearing on the _ _[*leave underlined blank space for judge to fill in date*]_ _ day of _ _[*leave underlined blank space for judge to fill in month*]_ _, _ _[*year*]_ _, pursuant to a notice of motion and motion filed herein by the defendant. Counsel for the defendant and for the People have both appeared. Counsel for the defendant moved in open court for an order compelling a lineup.

The Court having read the memorandum and declaration submitted in support of the motion, and having heard the arguments of counsel on the motion,

IT IS HEREBY ORDERED that:

1. _ _[*Specify law enforcement agencies*]_ _ are to conduct a lineup for the defendant. The lineup shall contain a total of at least six persons, including the defendant. All of these persons shall be of the same general physical appearance and dress as the defendant. The participants in the lineup shall be selected from the population of inmates.

2. Defense counsel shall be notified of the time and place of the lineup at least twenty-four hours in advance of said lineup.

3. Defense counsel shall be given a reasonable opportunity at the location of the lineup to interview the witnesses before and after the lineup is conducted.

4. Defense counsel shall be given a reasonable opportunity to preview the proposed lineup.

5. The witnesses are not to be shown any photographs prior to the lineup, regardless of whether they have viewed photographs previously.

6. All witnesses attending the lineup shall be given a standard witness card for their responses to the lineup.

7. Defense counsel shall be permitted to be present and permitted to overhear any conversations of the witnesses that involve the identification of the perpetrator of the crime of which defendant is accused, whether such conversation is held during or after said lineup.

[*Either*]

8. The defendant is ordered to make _ _[*himself/herself*]_ _ available at the time and place designated by _ _[*name of law enforcement agency that will hold lineup*]_ _ for the lineup and is ordered to participate in the lineup and to follow the directions of the officials conducting the lineup.

[*Or*]

8. The defendant is presently not in custody. The _ _[*Sheriff/ Police Chief*]_ _ is directed to contact defendant's attorney, _ _[*name of attorney*]_ _, at _ _[*phone number*]_ _, who will arrange for the defendant to appear for the lineup and/or any pre-lineup activities.

[*Continue*]

9. The _ _[*name of law enforcement agency conducting lineup*]_ _ is directed to allow the defendant, _ _[*name*]_ _, to enter the jail facilities for the purpose of the lineup and any activity necessary for the preparation therefore. Immediately after the lineup or after any activity in preparation therefore, defendant shall be immediately allowed to exit and be released from the jail.

Date:_ _ _ _ _ _ __[*Signature of magistrate*]__
_ _[*Typed name*]_ _
_ _[*Title*]_ _

Comment: In an appropriate case, due process requires that the defendant be afforded a pretrial lineup on a timely request. *Evans v Superior Court* (1974) 11 C3d 617, 625, 114 CR 121. When identification is a material issue and mistaken identification is a reasonable likelihood, the defendant is entitled to a lineup. See *Garcia v Superior Court* (1991) 1 CA4th 979, 987, 2 CR2d 707.

Cross-Reference: See discussion of defense lineups in Crim Law §22.17.

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§22.4 D. Motion to Suppress Eyewitness Identification

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TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court order the suppression of any in-court eyewitness identifications of the defendant made by _ _[*names of witnesses*]_ _ as being the product of unduly suggestive law enforcement procedures.

This motion will be based on the testimony of _ _[*state names of witnesses to be called; give badge numbers, when possible, of law enforcement officers*]_ _, as well as any other _ _[*name of law enforcement agency*]_ _ _ _[*police officers/sheriff's deputies*]_ _ conducting photo lineups, physical lineups, or showups at which the defendant was identified by the above witnesses.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

THE IDENTIFICATION PROCEDURE IN THIS CASE WAS TAINTED.

_ _[*Describe the identification procedure involved. Attach as exhibits (see §1.25) any evidence relevant to this description, e.g., copies of photos of those involved in physical lineup. Explain why it was tainted, with support of relevant case law. See, e.g., People v Wash (1993) 6 C4th 215, 244, 24 CR2d 421; People v Gordon (1990) 50 C3d 1223, 1242, 270 CR 451, overruled on other grounds as stated in People v Hamilton (2009) 45 C4th 863, 926, 89 CR3d 286; People v Contreras (1993) 17 CA4th 813, 819, 21 CR2d 496.*]_ _

THE _ _[*WITNESS IDENTIFICATION(S)*]_ _ OF THE DEFENDANT _ _[*HAS/HAVE*]_ _ BEEN TAINTED BY THE IDENTIFICATION PROCEDURE.

Once the trial court finds that an identification procedure was tainted, the burden shifts to the prosecution to prove by clear and convincing evidence that the in-court identification was based on observations at the scene of the crime, and was not tainted by the identification procedure. (*People v Martin* (1970) 2 C3d 822, 87 CR 709.)

_ _[*Describe why the witness's observations at the scene of the crime were not the basis for the identification. For example, in a police report, or in response to your questions at the preliminary hearing, the witness may have said that his or her view of the perpetrator at the time of the crime was brief (one or two seconds); that the witness was not wearing his or her glasses; that it was dark; that the perpetrator was far away; and so on. If the witness was unable to identify the defendant at any proceeding, or identified the wrong person, point that out. If there are discrepancies between the defendant's appearance and the description of the perpetrator given by the witness right after the crime,*

state that. Attach as exhibits the documents that support the statements in this section.]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _

Comment: This motion is usually made at trial because pretrial evidentiary rulings are not binding on the trial court absent an agreement. See *People v Leighter* (1971) 15 CA3d 389, 394, 93 CR 136, disapproved on other grounds in *Madril v Superior Court* (1975) 15 C3d 73, 77, 123 CR 465. Counsel must subpoena the witnesses needed to testify at the hearing on the motion. When the identity of the witnesses is not apparent from police reports, the preliminary hearing, and so forth, the names and addresses of relevant witnesses can be obtained from the district attorney. When law enforcement officers are involved, more stringent time requirements are involved for subpoenaing them. See Crim Law §4.30.

The documents that support the allegations that the identification was tainted, *e.g.,* a police report or selected pages from the preliminary hearing transcript, should be attached to the motion as exhibits. See discussion of exhibits in §1.25.

The prosecution may argue that the court should wait until later in the case before hearing or ruling on the motion so that it has more information on which to base a decision; there is no taint, and, that if the pretrial identification procedure was tainted, an independent source exists for the witness's in-court identification.

If evidence concerning the identification was introduced at the preliminary hearing, that evidence may be attacked by way of a Pen C §995 motion. See §13.1. For discussion of §995 motions, see Crim Law, chap 13.

Cross-Reference: For discussion of timing and content of motions challenging eyewitness identification, see Crim Law §§22.21-22.31.

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§22.5 E. Prosecution Motion for Lineup

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TO THE ABOVE-ENTITLED COURT, _ _[*NAME OF SUSPECT*]_ _, AND _ _[*NAME OF DEFENSE ATTORNEY*]_ _:

1. An affidavit is attached showing the factual circumstances that support a finding of probable cause that the suspect, _ _[*name*]_ _, committed a crime and that a lineup is necessary.

2. Probable cause exists for the suspect's arrest, but the decision has been made not to subject the suspect to the inconvenience and expense of an arrest unless additional evidence is obtained.

3. Therefore, I request an order directing _ _[*name of suspect*]_ _ to surrender _ _[*himself/herself*]_ _ into the custody of the _ _[*name of police agency*]_ _, _ _[*address*]_ _, for the limited purpose of participation in a lineup, with the understanding that _ _[*he/she*]_ _ will be released immediately on completion of the lineup. I further request an order directing the _ _[*name of police agency*]_ _ to conduct such a lineup and to release _ _[*name*]_ _ immediately on completion of the lineup.

Date:_ _ _ _ _ _ _ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Each affidavit attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

AFFIDAVIT IN SUPPORT OF REQUEST FOR LINEUP

1. Your affiant, _ _[*name of affiant*]_ _ is a peace officer for the _ _[*name of law enforcement agency*]_ _ and is the investigator assigned to a matter involving the commission of _ _[*specify types of crime, e.g., robbery*]_ _.

2. Attached to this affidavit and request are police reports that set out facts that support a finding of probable cause to believe _ _[*name of suspect*]_ _ is the perpetrator.

3. It is necessary to conduct a formal lineup with the suspect to properly investigate this matter.

4. _ _[*Name*]_ _ **has been advised of** _ _[*his/her*]_ _ **right to counsel and** _ _[*has been provided with counsel/has waived the right to counsel*]_ _**.**

5. I therefore request an order directing _ _[*name*]_ _ to cooperate in a formal lineup and directing law enforcement officers to use reasonable force to compel _ _[*his/her*]_ _ participation if _ _[*he/she*]_ _ refuses to cooperate.

Date: _ _ _ _ _ _ __[*Signature of notary or magistrate*]__
_ _[*Typed name*]_ _

Subscribed and sworn before me

Date: _ _ _ _ _ _ __[*Signature of notary or magistrate*]__

_ _[*Typed name*]_ _

[*Begin the following on a new page.*]

IN THE SUPERIOR COURT OF THE _ _ _ _ _ _ JUDICIAL DISTRICT OF THE STATE OF CALIFORNIA COUNTY OF _ _ _ _ _ _

IN THE MATTER OF _ _[*NAME OF SUSPECT*]_ _ ORDER FOR LINEUP

TO _ _[*NAME OF POLICE AGENCY*]_ _ AND _ _[*NAME OF SUSPECT*]_ _:

Good cause having been shown by the accompanying request and affidavit, the _ _[*name of police agency*]_ _ is ordered to conduct a lineup in which _ _[*name of suspect*]_ _ will be a participant. Such lineup is to be conducted in accordance with the laws of this state and the rules of the _ _[*name of police agency*]_ _. The lineup is to be conducted on _ _[*date and time specified by police agency holding the lineup*]_ _ at _ _[*location*]_ _.

[*Either*]

The _ _[*name of police agency*]_ _ is ordered to take _ _[*name*]_ _ into custody for the period of time necessary to conduct the lineup and to release _ _[*him/her*]_ _ from custody immediately on completion of the lineup.

[*Or*]

_ _[*Name*]_ _ is ordered to appear at _ _[*location of relevant law enforcement agency*]_ _ at _ _[*time*]_ _ for the purpose of allowing law enforcement officers to photograph _ _[*him/her*]_ _ and evaluate _ _[*his/her*]_ _ general appearance so that suitable coparticipants in the lineup may be selected from the jail population. _ _[*Name*]_ _ is ordered to surrender _ _[*himself/herself*]_ _ into custody at _ _[*location of lineup*]_ _ for _ _[*specify number of hours needed by law enforcement*]_ _ so that _ _[*he/she*]_ _ may be prepared for the lineup.

[*Continue*]

_ _[*Name*]_ _ is ordered to cooperate in all lineup procedures and to obey all rules of the jail and all directions of law enforcement officers relevant to the lineup.

Date: _ _ _ _ _ _ __[*Signature of magistrate*]__
_ _[*Typed name*]_ _

Comment: A deputy district attorney or district attorney investigator usually brings these papers to a magistrate in chambers for signature. This is a request, not a motion, because the suspect is not yet charged. It is common to include an affidavit and order along with the request. No filing and service is necessary, because the defendant is not yet charged.

It is necessary, however, to make sure that the defendant either has counsel or waives counsel before the lineup. Under the California Constitution, defendants who will be placed in a lineup, whether before or after having been charged, have the right to counsel. *People v Bustamante* (1981) 30 C3d 88, 177 CR 576. See *Raven v Deukmejian* (1990) 52 C3d 336, 354, 276 CR 326. However, the exclusionary rule set out in *Bustamante* was abrogated by Cal Const art I, §28(f)(2), as there is no corresponding right under the federal Constitution. *People v Cook* (2007) 40 C4th 1334, 1353, 58 CR3d 340. If the defendant waives counsel, the waiver should be in writing.

If the defendant is in custody and refuses to appear in a lineup, the request may be adapted into a motion.

Cross-Reference: On lineups generally, see Crim Law, chap 22.

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23

Confessions and Admissions

A. Invocation of Right to Counsel §23.1
B. Defense Motion to Suppress Statement as Product of Fourth Amendment Violation §23.2
C. Defense Motion to Exclude Statement §23.3

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§23.1 A. Invocation of Right to Counsel

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The above-named defendant hereby invokes _ _[*his/her*]_ _ right to counsel, including the right to have counsel present, the right to remain silent, and the privilege against self-incrimination, as to this case and any other matter, whether or not an accusatory pleading has been filed therein, as provided under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution. This invocation includes, but is not limited to, all of the rights available under *Miranda v Arizona* (1966) 384 US 436, 16 L Ed 2d 694, 86 S Ct 1602, and *Edwards v Arizona* (1981) 451 US 477, 68 L Ed 2d 378, 101 S Ct 1880, including, but not limited to, the Fifth and Sixth Amendment right to counsel.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: This form is intended to address the holding of *McNeil v Wisconsin* (1991) 501 US 171, 115 L Ed 2d 158, 111 S Ct 2204, to the effect that, although a defendant has counsel in a particular case, that representation does not bar police from interrogating the defendant as to other crimes, without notice to or the presence of counsel, as long as a *Miranda* waiver is obtained. See dissenting opinion by Justice Stevens, 501 US at 183, 115 L Ed 2d at 172. The filing of this form puts the police on notice that the defendant wishes to be and is represented in all criminal cases, requiring the police to contact counsel before questioning the defendant.

The form should be filed in court, with an oral statement for the record, at the first possible appearance. If the defendant is unable to sign for any reason, counsel should sign on the defendant's behalf. When the defendant is able to sign, another form should be filed, with an oral statement for the record, at the next opportunity.

NOTE: If counsel believes questioning on other charges, or by other law enforcement agencies, is likely, counsel should also serve copies of this invocation on all local police agencies so that they have actual notice.

Cross-Reference: See discussion of waiver in California Criminal Law Procedure and Practice §23.44 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/23 Confessions and Admissions/§23.2 B. Defense Motion to Suppress Statement as Product of Fourth Amendment Violation

§23.2 B. Defense Motion to Suppress Statement as Product of Fourth Amendment Violation

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TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY:

PLEASE TAKE NOTICE that, at the time of the Penal Code section 1538.5 hearing now set for _ _[*date*]_ _, at _ _[*time*]_ _, defendant, _ _[*name*]_ _, will move to suppress defendant's statement under Penal Code section 1538.5 because it was a product of an illegal search.

This motion is based on violation of defendant's reasonable expectation of privacy, as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and on the following particular grounds: _ _[*State grounds*]_ _.

This motion will be based on the attached supporting memorandum, _ _[*the attached declaration,*]_ _ _ _[*the transcript of the preliminary hearing (in the court file; the defendant hereby requests that the court take judicial notice of the contents of this transcript),*]_ _ _ _[*a supplemental memorandum of points and authorities, to be filed after the hearing on this motion,*]_ _ all papers filed and records in this action, evidence presented at the hearing on this motion, and any argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

SUMMARY OF ARGUMENT

_ _[*Summarize your argument in a few sentences.*]_ _

SUMMARY OF FACTS

_ _[*Briefly summarize the facts relative to this motion.*]_ _

ARGUMENT

Penal Code section 1538.5 is the proper vehicle for excluding defendant's statement.

The procedures provided by Penal Code section 1538.5 are the proper way of moving to suppress statements obtained in violation of the protections of the Fourth and Fourteenth Amendments to the United States Constitution. (*People v Takencareof* (1981) 119 CA3d 492, 496, 174 CR 112, disapproved on other grounds in *People v Towne* (2008) 44 C4th 63, 85, 78 CR 3d 530; see also *People v Johnson* (1969) 70 C2d 541, 545, 75 CR 401, disapproved on other grounds in *People v De Vaughn* (1977) 18 C3d 889, 899 n8, 135 CR 786.)

[*Continue with appropriate headings and arguments. Some examples follow.*]

DEFENDANT'S STATEMENT WAS THE RESULT OF AN ILLEGAL SEARCH

Statements obtained as the result of an illegal search or seizure must be suppressed as "'fruit' of official illegality." (*Wong Sun v U.S.* (1963) 371 US 471, 485, 9 L Ed 2d 441, 454, 83 S Ct 407.) _ _[*Describe why the search in your case was illegal and why the defendant's statement was a result of that illegal search.*]_ _

DEFENDANT'S STATEMENT WAS THE RESULT OF AN ILLEGAL _ _[*DETENTION/ARREST*]**_ _**

Statements obtained as the result of an illegal detention or arrest must be suppressed. (*Taylor v Alabama* (1982) 457 US 687, 73 L Ed 2d 314, 102 S Ct 2664; *Dunaway v New York* (1979) 442 US 200, 60 L Ed 2d 824, 99 S Ct 2248; *Brown v Illinois* (1975) 422 US 590, 45 L Ed 2d 416, 95 S Ct 2254.) _ _[*Describe why the detention or arrest was illegal and why the defendant's statement was a result of that illegal detention or arrest.*]**_ _**

DEFENDANT'S STATEMENT WAS OBTAINED BY TELLING DEFENDANT OF EVIDENCE THAT HAD BEEN ILLEGALLY SEIZED

A statement that is obtained by informing the defendant of evidence obtained in violation of the Fourth Amendment must be suppressed. (*People v Johnson* (1969) 70 C2d 541, 75 CR 401, disapproved on other grounds in *People v De Vaughn* (1977) 18 C3d 889, 899 n8, 135 CR 786.) _ _[*Describe what evidence was used to get the defendant to make a statement, why it should be considered to have been illegally seized, and why it was what caused the defendant to make a statement.*]**_ _**

THE CAUSAL CONNECTION BETWEEN THE _ _[*DESCRIBE THE ILLEGALITY, E.G., THE ILLEGAL DETENTION*]**_ _ AND DEFENDANT'S STATEMENT WAS NOT ATTENUATED BY READING DEFENDANT _ _**[*HIS/HER*]**_ _ *MIRANDA* RIGHTS.**

Simply advising a defendant of his or her *Miranda* rights is not sufficient per se to vitiate the taint of a Fourth Amendment violation:

> **In order for the causal chain, between the illegal arrest and the statements made subsequent thereto, to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it is "sufficiently an act of free will to purge the primary taint."**
>
> **But, the *Miranda* warnings, *alone* and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. (*Brown v Illinois* (1975) 422 US 590, 602, 45 L Ed 2d 416, 426, 95 S Ct 2254; emphasis in original.)**

(See also *Taylor v Alabama* (1982) 457 US 687, 73 L Ed 2d 314, 102 S Ct 2664; *Dunaway v New York* (1979) 442 US 200, 60 L Ed 2d 824, 99 S Ct 2248.)

CONCLUSION

Defendant moves to suppress _ _[*his/her*]**_ _ statement as the fruit of _ _**[*describe the Fourth Amendment violation*]**_ _.**

Defendant requests leave to file a supplemental memorandum after the hearing on the motion, because evidence may be adduced at the hearing that will require further briefing by the parties.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]**_ _**

Comment: A motion to exclude, or an objection to the admission of, a statement on the ground that it violates the Fifth Amendment may be made in limine or at trial. See, *e.g.*, *People v Dykes* (2009) 46 C4th 731, 748, 95 CR3d 78 (motion in limine). When, however, the ground for suppressing a confession or admission is that it is the fruit of an unlawful search or seizure, the motion is alleging a Fourth Amendment violation and the procedures set forth in Pen C §1538.5 are applicable. Failure to request suppression of a statement obtained in violation of the Fourth Amendment under §1538.5 (or in conjunction with the motion to suppress other evidence under §1538.5) waives the issue.

Cross-Reference: For further discussion, see Crim Law §§23.9-23.10. See also Crim Law, chap 16 on search and seizure generally.

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§23.3 C. Defense Motion to Exclude Statement

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF THE COUNTY OF _ _ _ _ _ _:

PLEASE TAKE NOTICE that _ _[*on particular date if motion is to be heard before trial/whenever the matter is assigned for trial*]**_ _, defendant, _ _**[*name*]**_ _, will make a motion that the Court order the suppression as evidence of defendant's statement _ _**[*specify statement to be suppressed, e.g., made to the police on November 30, 2004*]**_ _.**

This motion will be made on the ground(s) that the statement was taken in violation of defendant's constitutional right _ _[*specify right, e.g., to counsel, to remain silent, and to due process under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution/to privileged communications under one of the statutory privileges*]**_ _.**

This motion will be based on this notice, the attached supporting memorandum, _ _[*the attached exhibits,*]**_ _ all papers filed and records in this action, and on such oral and documentary evidence and argument as may be presented at the hearing on this motion.**

[*Use the following if requesting witnesses.*]

The witnesses needed for this hearing will be: _ _[*give name(s) of law enforcement witness(es)*]**_ _. The defense will rely on the prosecution to arrange for the presence of these witnesses unless otherwise advised by the prosecutor.**

[*Continue*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]**_ _**

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

When the existence of a preliminary fact concerning the admissibility of a statement of the defendant is disputed, the trial court shall hear and determine the question out of the presence and hearing of the jury on the request of any party. (Evidence Code section 402.) The preliminary fact to be determined in this case is _ _[*state what it is, e.g., that the Miranda warnings were required but were not given*]**_ _.**

[*The arguments below are examples of those you might wish to make. Choose those that apply to your case and add any others that fit the facts.*]

THE DEFENDANT'S STATEMENT MUST BE EXCLUDED BECAUSE _ _[*HE/SHE*]**_ _ WAS IN CUSTODY, QUESTIONED BY THE POLICE, AND NOT TOLD OF _ _**[*HIS/HER*]**_ _ *MIRANDA* RIGHTS**

> **[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.… Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. (*Miranda v Arizona* (1966) 384 US 436, 444, 16 L Ed 2d 694, 706, 86 S Ct 1602.)**

In this case, _ _[*describe the facts concerning the statement, tell why Miranda was required to be given before the*

defendant was questioned by the police, and attach exhibits or declarations that support your factual assertions]_ _. **Defendant's statement to the police on _ _[*date*]_ _, therefore, must be suppressed.**

POLICE SHOULD HAVE STOPPED INTERROGATING DEFENDANT WHEN _ _[*HE/SHE*]_ _ ASSERTED _ _[*HIS/HER*]_ _ RIGHT TO COUNSEL; DEFENDANT'S STATEMENT WAS THEREFORE OBTAINED IN VIOLATION OF *MIRANDA*

> **Once a person in custody indicates to the police… in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (*Miranda v Arizona* (1966) 384 US 436, 444, 16 L Ed 2d 694, 706, 86 S Ct 1602.)**

_ _[*Describe what constituted the defendant's invocation of Miranda and integrate discussion of cases with similar fact patterns. Refer to declarations or exhibits attached to the motion that support your factual assertions.*]_ _

DEFENDANT INVOKED _ _[*HIS/HER*]_ _ RIGHT TO COUNSEL AND DID NOT THEREAFTER VOLUNTARILY INITIATE CONVERSATION WITH LAW ENFORCEMENT; DEFENDANT'S STATEMENT WAS THEREFORE OBTAINED IN VIOLATION OF *MIRANDA*

> **[W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused…, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. (*Edwards v Arizona* (1981) 451 US 477, 484, 68 L Ed 2d 378, 386, 101 S Ct 1880.)**

_ _[*Describe how defendant invoked the right to counsel and why his or her later statements were not volunteered, integrating discussion of cases with similar fact patterns. Refer to exhibits or declarations attached to the motion that support your factual assertions.*]_ _

DEFENDANT DID NOT VOLUNTARILY, KNOWINGLY, AND INTELLIGENTLY WAIVE _ _[*HIS/HER*]_ _ *MIRANDA* RIGHTS

> **First, the relinquishment of the [defendant's Fifth Amendment] right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. (*Moran v Burbine* (1986) 475 US 412, 421, 89 L Ed 2d 410, 421, 106 S Ct 1135.)**

> **[T]he constitutional inquiry is not whether the conduct of state officials in obtaining the confession was shocking, but whether the confession was "free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any exertion of any improper influence." (*Malloy v Hogan* (1964) 378 US 1, 17, 12 L Ed 2d 653, 659, 84 S Ct 1489.)**

_ _[*Describe facts that show defendant cannot be considered to have waived his or her Miranda rights, integrating discussion of cases with similar fact patterns. Refer to exhibits or declarations attached to the e motion that support your factual assertions.*]_ _

DEFENDANT'S STATEMENT MUST BE SUPPRESSED BECAUSE IT WAS DELIBERATELY ELICITED AFTER THE RIGHT TO COUNSEL HAD ATTACHED, IN VIOLATION OF *MASSIAH*

After the right to counsel has attached, whether the defendant is in custody or not, statements deliberately elicited by government agents without the protection afforded by the presence of counsel are inadmissible. (*Patterson v Illinois* (1988) 487 US 285, 101 L Ed 2d 261, 108 S Ct 2389; *Massiah v U.S.* (1964) 377 US 201, 12 L Ed 2d 246, 84 S Ct 1199.) _ _[*Describe facts concerning when and why right to counsel attached, integrating discussion of cases with similar fact patterns. Refer to exhibits or declarations attached to the motion that support your factual assertions.*]_ _

CONCLUSION

Defendant requests leave to file a supplemental supporting memorandum after the hearing on the motion, because evidence may be adduced at the hearing that will require further briefing by the parties.

Defendant moves to suppress _ _[*his/her*]_ _ statement, made on _ _[*date*]_ _ for the reasons given above.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: The statements sought to be suppressed should be identified with specificity, although the motion may need to be expanded if the hearing produces other evidence of statements. There may be alternative grounds for the motion; each should be stated with specificity. The form's sample grounds for objection are some of the most common. Any declarations and any exhibits, such as police reports or preliminary hearing transcript pages, that are required to support the factual assertions made in your supporting memorandum should be attached to the motion. In almost all instances, the primary witnesses will be police officers. In many jurisdictions, if given adequate notice, the prosecutor will arrange for the presence of those witnesses.

Motions in limine must specify the evidence to be admitted or excluded, and the grounds. See Evid C §§402-405. In limine motions are commonly made in chambers before trial begins. Rulings on motions made before trial, however, are not binding on the trial court, unless a statutory exception applies, *e.g.,* Pen C §1538.5. See *People v Leighter* (1971) 15 CA3d 389, 394, 93 CR 136, disapproved on other grounds in *Madril v Superior Court* (1975) 15 C3d 73, 77, 123 CR 465. Any objection must be renewed at the time the evidence is offered during trial or the objection is waived, with several exceptions. *People v Morris* (1991) 53 C3d 152, 188, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. The exceptions are:

- A stipulation by the defense and prosecution that no further objection is required to preserve the objection (*People v Morris, supra*);
- An objection that is specifically directed to an identifiable body of evidence and advanced when the court can see that evidence in context (*People v Morris, supra*); and
- An objection concerning evidence that might impinge on the defendant's constitutional or statutory rights, *e.g.,* an involuntary statement (see *People v Cahill* (1994) 22 CA4th 296, 309 n3, 28 CR2d 1).

The tactical considerations in deciding whether to make this motion before trial, or in the trial court, are discussed in Crim Law §23.10.

Some of the most common procedural attacks on motions to suppress are:

- Failure to comply with California Rules of Court or local rules concerning timing, content, and notice of motion;
- No standing; and
- Defense failed to subpoena witnesses for hearing, so no basis for court ruling.

Even if the defense motion is successful, the prosecution may still use a defendant's voluntary statement for impeachment if it was excluded because of *Miranda* error (*People v May* (1988) 44 C3d 309, 243 CR 369), Fourth Amendment error (*People v Moore* (1988) 201 CA3d 877, 247 CR 353), or Sixth Amendment error (*Kansas v Ventris* (2009) ___ US ___, 173 L Ed 2d 801, 808, 129 S Ct 1841). Defense counsel also may "open the door" to admission of an otherwise inadmissible statement. See *People v Rich* (1988) 45 C3d 1036, 248 CR 510. In addition, a defendant's statement to mental health professionals during a court-ordered competency examination is inadmissible at trial for purposes of impeachment. *People v Pokovich* (2006) 39 C4th 1240, 1252, 48 CR3d 158.

Cross-Reference: On confessions and admissions generally, see Crim Law, chap 23.

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24

Prior Convictions and Uncharged Misconduct

A. Defense Motion to Strike Prior Conviction §24.1
B. Motion to Preclude Impeachment With Prior Conviction §24.2

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Source: Criminal Law/California Criminal Law Forms Manual/24 Prior Convictions and Uncharged Misconduct/§24.1 A. Defense Motion to Strike Prior Conviction

§24.1 A. Defense Motion to Strike Prior Conviction

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court order the following alleged prior conviction of defendant to be stricken: _ _[*number seriatim*]_ _ on _ _[*date of conviction*]_ _ in _ _ _ _ _ _ County for _ _[*specify offense*]_ _.

This motion will be made on the ground that _ _[*give ground, e.g., the prior conviction was constitutionally invalid in that the defendant did not freely, voluntarily, and intelligently waive the constitutional right to counsel, the privilege against compulsory self-incrimination, the right to jury trial, and the right to confront accusers*]_ _.

This motion will be based on this notice, the attached supporting memorandum, _ _[*the attached _ _[specify attached documents, e.g., transcript of the plea, the minute order on plea, the written plea form, the declaration of the defendant*]_ _,]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

[*The following argument is an example.*]

A DEFENDANT MUST BE INFORMED ON THE RECORD OF HIS OR HER CONSTITUTIONAL RIGHTS BEFORE ENTERING A GUILTY PLEA

Defendants in misdemeanor and felony cases (see *Mills v Municipal Court* (1973) 10 C3d 288, 110 CR 329) must be informed on the record of the following constitutional rights before entering a valid plea of guilty: the right to counsel; the privilege against compulsory self-incrimination; the right to trial by jury; and the right to confront accusers. (*People v Howard* (1992) 1 C4th 1132, 5 CR2d 268; see *People v Sumstine* (1984) 36 C3d 909, 914, 206 CR 707; *Boykin v Alabama* (1969) 395 US 238, 23 L Ed 2d 274, 89 S Ct 1709; *In re Tahl* (1969) 1 C3d 122, 132, 81 CR 577.)

A VALID GUILTY PLEA MUST BE VOLUNTARY AND INTELLIGENT UNDER THE TOTALITY OF THE CIRCUMSTANCES

A prior conviction by guilty plea is not constitutionally valid unless the record affirmatively shows that it was voluntary and intelligent under the totality of the circumstances. (*People v Howard* (1992) 1 C4th 1132, 1175, 5 CR2d 268.)

A CHALLENGE TO THE CONSTITUTIONAL VALIDITY OF A PRIOR CONVICTION CHARGED IN A PENDING CASE IS PROPERLY DECIDED BY THE TRIAL COURT IN WHICH THE CURRENT CASE IS PENDING

The court in which a case is pending that charges a prior conviction is the proper place to raise a challenge to the prior. *People v Sumstine, supra*.

When a defendant has raised the issue of the constitutional validity of a prior conviction, "the court shall, prior to trial, hold a hearing outside the presence of the jury in order to determine the constitutional validity of the charged prior or priors in issue." (*People v Coffey* (1967) 67 C2d 204, 217, 60 CR 457.)

The trial court "shall strike from the accusatory pleading any prior conviction found to be constitutionally invalid." (*People v Coffey, supra*.)

THE PRIOR CONVICTION MUST BE STRICKEN BECAUSE DEFENDANT'S GUILTY PLEA WAS NOT VOLUNTARY AND INTELLIGENT UNDER THE TOTALITY OF THE CIRCUMSTANCES

_ _[*Give the details of defendant's plea: (1) date; (2) court; (3) charges; (4) rights given; (5) rights waived; (6) was defendant represented by counsel; (7) was there a written plea form (if so, attach a copy); (8) was the advice and waiver reported (if so, attach a copy). If you have sent for the plea form and/or transcript, but have not received it yet, you may want to attach a declaration from the defendant. Give case law support for your argument, selecting cases with facts similar to those of your case.*]_ _

CONCLUSION

For the above reasons, defendant requests that this court strike the prior conviction charged in the _ _[*complaint/information*]_ _ **in this case.**

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF DEFENDANT IN SUPPORT OF MOTION TO STRIKE PRIOR CONVICTION

I, _ _[*name*]_ _**, am the defendant in the above-entitled action. On** _ _[*date of conviction*]_ _ **in** _ _ _ _ _ _ **County, I was convicted of** _ _[*specify offense*]_ _**. At the time of my plea in the latter conviction, I did not know of my** _ _[*specify right(s) in question, e.g., right to counsel, privilege against compulsory self-incrimination, right to jury trial, right to confront accusers, etc.*]_ _**. If I had known of** _ _[*this right/these rights*]_ _**, I would not have pled guilty.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

Comment: A motion to strike a prior conviction on constitutional grounds may be made at any time from the date of the plea to the pronouncement of judgment. The defendant bears the burden of proving the constitutional invalidity of the prior conviction by a preponderance of the evidence. *People v Curl* (2009) 46 C4th 339, 351, 93 CR3d 537; *Curl v Superior Court* (1990) 51 C3d 1292, 1296, 276 CR 49.

Content. The defendant cannot rely solely on a silent record to establish violation of the *Boykin-Tahl* rights. Even if the transcript of the plea to the prior shows no advisements, the defendant must affirmatively allege that he or she was not aware of the rights. The defendant must also allege that he or she would not have pled guilty if aware of the rights. *People v Cooper* (1992) 7 CA4th 593, 597, 8 CR2d 912. The defendant can meet this burden by testifying, or by producing an affidavit or declaration signed under penalty of perjury about the defect. If an affidavit or declaration is

used, the defendant must still be available at the hearing for cross-examination. Alternatively, trial counsel on the prior may be asked to submit a declaration.

NOTE: The defendant cannot attack the validity of a prior used to enhance a sentence on the ground of ineffective assistance of counsel, as distinguished from violation of the right to be represented by counsel, in the prior proceeding. *Custis v U.S.* (1994) 511 US 485, 128 L Ed 2d 517, 114 S Ct 1732; *Garcia v Superior Court* (1997) 14 C4th 953, 59 CR2d 858.

Exhibits. A certified copy of the reporter's transcript of the plea or, if none is available, a copy of the minute order concerning the plea, and a copy of the written waiver form, if one was executed, should be attached to the motion as exhibits. See §1.25 on exhibits.

Challenge to certain Vehicle Code priors. When the prior conviction is under Veh C §§14601, 14601.1, 14601.2, 23152, 23153, and 23103 as specified in Veh C §23103.5, the motion to strike is controlled by Veh C §41403. To challenge these priors on constitutional grounds, the defendant must state in writing, and with specificity, how he or she was deprived of his or her constitutional rights. This statement is filed with the clerk of the court. Service must be made on the prosecution in the current action and on the court that rendered the prior judgment at least 5 court days before the hearing on the motion. Veh C §41403(a). If the defense fails to comply with the above notice requirement and does not show good cause for the failure to comply, the court must hear the motion at the time of sentencing. Veh C §41403(c).

Opposing the motion. The prosecution may file an opposition to the defense motion. Opposition is particularly important when it appears evidence exists to rebut the defendant's contention that the prior is constitutionally infirm. See *People v Howard* (1992) 1 C4th 1132, 1175, 5 CR2d 268; *People v Cooper* (1992) 7 CA4th 593, 8 CR2d 912.

Cross-Reference: On motions to strike priors, see Crim Law §§24.28-24.44, 26.7-26.22.

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Source: Criminal Law/California Criminal Law Forms Manual/24 Prior Convictions and Uncharged Misconduct/§24.2 B. Motion to Preclude Impeachment With Prior Conviction

§24.2 B. Motion to Preclude Impeachment With Prior Conviction

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

PLEASE TAKE NOTICE that on _ _[*date*]_ _ in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the _ _[*defendant/District Attorney*]_ _ will move the Court for an order precluding impeachment of _ _[*name of witness*]_ _ with the following prior conviction: _ _[*number seriatim*]_ _ on _ _[*date of conviction*]_ _ in _ _ _ _ _ _ County for _ _[*specify offense*]_ _.

This motion will be made on the ground that the probative value on credibility of such prior conviction is outweighed by the risk of undue prejudice.

[*Add if relevant*]

This motion will be made on the further grounds that defendant's conviction for _ _[*specify offense*]_ _ may not be used for impeachment because it is not a crime of moral turpitude.

[*Continue*]

This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

[*Select relevant arguments from examples, and include any additional relevant ones.*]

THE COURT MUST PRECLUDE IMPEACHMENT OF THE DEFENDANT WITH A PRIOR CONVICTION IF ITS PROBATIVE VALUE ON CREDIBILITY IS OUTWEIGHED BY THE RISK OF UNDUE PREJUDICE

On motion by the defendant, the trial court must weigh the probative value of a prior conviction against its prejudicial impact and preclude its use to impeach the defendant if the risk of prejudice outweighs any probative value. (Evid C §352; *People v Collins* (1986) 42 C3d 378, 389, 228 CR 899; *People v Castro* (1985) 38 C3d 301, 306, 211 CR 719.)

Among the nonexclusive factors the trial court may consider in exercising its discretion to exclude evidence are whether the prior conviction is near or remote in time to the present offense, whether the prior conviction is for conduct similar to the present offense, and whether impeachment will affect the defendant's decision to testify. (*People v Collins* (1986) 42 C3d 378, 391, 228 CR 899; *People v Beagle* (1972) 6 C3d 441, 453, 99 CR 313.) Other circumstances of the case that may be relevant may also be taken into account. *People v Collins, supra*.

_ _[*Tell what factors exist in your case that argue in favor of exclusion. Attach any documents as exhibits that support your assertions, and refer to them.*]_ _

A PRIOR CONVICTION THAT DOES NOT INVOLVE MORAL TURPITUDE MAY NOT BE USED FOR IMPEACHMENT

A prior conviction is inadmissible as a matter of law if the least adjudicated elements of the conviction do not necessarily involve moral turpitude. (*People v Collins* (1986) 42 C3d 378, 389, 228 CR 899; *People v Castro* (1985) 38 C3d 301, 317, 211 CR 719.)

_ _[*Cite specific authority in support of argument that the offense in question is not one of moral turpitude. See list of authorities in Crim Law §24.46.*]_ _

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: Both defense and prosecution witnesses may be impeached with prior felony convictions (Cal Const art I, §28(f)(4); Evid C §788) or with prior misdemeanor conduct (*People v Wheeler* (1992) 4 C4th 284, 14 CR2d 418).

An opposition to the motion may be filed. Opposition is especially important when it is alleged that the prior conviction does not involve moral turpitude and there is case authority to the contrary or the issue has not been resolved.

NOTE: If the prior is similar to the present offense, the prosecution may wish to use it as a prior bad act under Evid C §1101 or may wish to sanitize it. See *People v Foreman* (1985) 174 CA3d 175, 219 CR 759.

Cross-Reference: For discussion of impeachment, see Crim Law §§24.45-24.51. Bad acts ("similars") are discussed in Crim Law §§24.52-24.55.

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25

Termination of Prosecution Without Judgment

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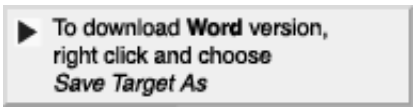
Pleas and Case Settlement

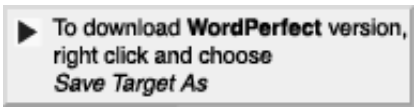
A. Checklist: Felony Guilty Plea §26.1
B. Plea Form, With Explanations and Waiver of Rights—Felony (Judicial Council Form CR-101) §26.2

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Source: Criminal Law/California Criminal Law Forms Manual/26 Pleas and Case Settlement/§26.1 Checklist: Felony Guilty Plea

§26.1 Checklist: Felony Guilty Plea





NAME OF DEFENDANT

CASE NO. _____

- 1. HAS THE DEFENDANT GIVEN HIS OR HER TRUE NAME?
- 2. PROPER CHARGES (*include priors, enhancements, and no-probation allegations*)
- 3. IF PRO PER, the right to an attorney, appointed if necessary
- 4. TERMS OF PLEA BARGAIN (OMIT IF OPEN PLEA). SET FORTH AGREEMENT (*e.g., does defendant wish to plead guilty/nolo contendere to petty theft, a violation of Pen C §488, to receive the agreed-to/court-indicated sentence of six months in the county jail, and dismissal of the two grand theft counts, violations of Pen C §487*)
- 5. REASONS FOR PLEA BARGAIN (*if charge is contained in Pen C §1192.7(a); see also Pen C §1192.6*)

6. AGREEMENT CONDITIONAL ON:

- (a) True name as stated
- (b) Obeying all orders of court and appear as ordered if released pending sentencing (*Cruz* waiver; *People v Cruz* (1988) 44 C3d 1247, 246 CR 1)
- (c) No violation of any laws other than minor traffic offenses
- (d) No prior convictions except as set forth

If any of the above is untrue or if conditions have been violated, the court can sentence to maximum penalty as set forth hereafter and plea cannot be withdrawn.

- 7. CONSTITUTIONAL RIGHT RE CHARGES AND ALL ALLEGATIONS (PRIORS, ETC.) TO JURY TRIAL/COURT TRIAL (*and preliminary hearing, if certified plea*)
- 8. CONSTITUTIONAL RIGHT RE CHARGES AND ALL ALLEGATIONS (PRIORS, ETC.) TO CONFRONTATION AND CROSS-EXAMINATION
- 9. CONSTITUTIONAL RIGHT RE CHARGES AND ALL ALLEGATIONS (PRIORS, ETC.) TO NOT INCRIMINATE ONESELF
- 10. CONSTITUTIONAL RIGHT RE CHARGES AND ALL ALLEGATIONS (PRIORS, ETC.) TO PRESENT EVIDENCE; SUBPOENA WITNESSES AT NO COST; TESTIFY ON OWN BEHALF
- 11. MAXIMUM SENTENCE. (*If minimum sentences or parole eligibility for life crimes are discussed, be sure of accuracy. Do not discuss Board of Prison Terms guidelines or Matrices.*)
- 12. IF IMMEDIATE PRISON: State prison for _____ years. Parole thereafter for _____ years (*see below*).

13. PAROLE:

- (a) Determinate sentence: 3 years (Pen C §3000). Additional 1-year maximum for parole violation plus 1 year for misconduct during revocation confinement (Pen C §3057).
- (b) Life sentence, nonmurder: 5 years (Pen C §3000). Additional 1-year maximum for parole violation plus 1 year for misconduct during revocation confinement (Pen C §3057).
- (c) Life sentence, specified felony sex offenses (under Pen C §§667.61, 667.71): 10 years (Pen C §3000). Additional 1-year maximum for parole violation plus 1 year for misconduct during revocation confinement (Pen C §3057).

- (d) Murder sentence, parole for life (Pen C §3000.1).

14. PROBATION: (*No immediate state prison, i.e., imposition of sentence suspended; or ___ years state prison, execution of sentence suspended plus probation.*)

- (a) Ineligible.
- (b) Eligible:
- Possible 1-year county jail term per count
- Minimum jail term, if applicable (*see, e.g., Health & S C §11550(a)*)
- Up to 5 years probation
- Conditions of probation (*e.g., search, testing, restitution*)
- Up to maximum prison term if probation violated and revoked after PV hearing (*with parole consequences thereafter*)

15. FINES:

- General (Pen C §672)
- Restitution Fund fines (Pen C §1202.4; *People v Soria* (2010) 48 C4th 58, 63, 104 CR3d 780)
- Drug fines (see, *e.g.,* Health & S C §§11350, 11352.5, 11360, 11372)

16. OTHER CONSEQUENCES (*if applicable*):

- (a) Registration: narcotics (Health & S C §11590); sex offenses (Pen C §§290-290.023); arson (Pen C §457.1)
- (b) Payment of costs or fees such as drug education (Health & S C §11372.7); AIDS education program fee (Health & S C §§11350(c), 11377(c))
- (c) AIDS testing (Pen C §1202.1)
- (d) Revocation or suspension of driver's license (Veh C §§13202, 13202.5, 13350-13392)
- (e) Possible commitment to Division of Juvenile Facilities (Welf & I C §§1731, 1731.5); if not accepted, possible state prison; note Welf & I C §707.2 cases
- (f) Serious felony (Pen C §1192.7(c))
- (g) Deportation, exclusion, or denial of naturalization (Pen C §1016.5)
- (h) Waiver of appellate rights (*all or particular ones, e.g., re previous unsuccessful motion to suppress*)
- (i) Waiver of custody credit
- (j) Effect on any current probation or parole

17. ACKNOWLEDGMENTS

- (a) Free and voluntary
- (b) No promises or threats
- (c) Discussed elements, defenses, and consequences with attorney
- (d) Not under influence of alcohol, drugs, or medicine
- (e) Sentence imposed by different judge (*Arbuckle* waiver (*People v Arbuckle* (1978) 22 C3d 749, 150 CR 778) (*particularly in certified pleas*)
- (f) Sentencing judge may consider criminal history and entire factual background of case, including unfiled, dismissed, or stricken charges or allegations when granting probation, ordering restitution, or imposing sentence (*Harvey* waiver) (*People v Harvey* (1979) 25 C3d 754, 159 CR 696)
- (g) Effect of plea of nolo contendere
- (h) Pleading guilty because guilty in truth and in fact or other evidentiary basis
- Factual admission by defendant

- Stipulation by counsel
- Court review of evidence
- *People v West* (1970) 3 C3d 595, 91 CR 385 (defendant taking advantage of plea bargain agreement)

- 18. DOES COURT WISH TO INQUIRE ABOUT PLEA?
- 19. TAKE PLEA/ADMISSIONS (PRIORS, ETC.)
- 20. COUNSEL JOINS IN WAIVERS AND CONCURS IN PLEA
- 21. PEOPLE JOIN IN WAIVERS AND CONCUR IN PLEA
- 22. COURT MAKES FINDING OF FREE, VOLUNTARY, AND KNOWING WAIVER AND ACCEPTS PLEA

Cross-Reference: See California Criminal Law Procedure and Practice §§26.7-26.22, 26.36-26.50 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/26 Pleas and Case Settlement/§26.2 B. Plea Form, With Explanations and Waiver of Rights--Felony (Judicial Council Form CR-101)

§26.2 B. Plea Form, With Explanations and Waiver of Rights—Felony (Judicial Council Form CR-101)



SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA *v.* DEFENDANT:	
PLEA FORM, WITH EXPLANATIONS AND WAIVER OF RIGHTS—FELONY	CASE NUMBER:

INSTRUCTIONS: (1) Fill out this form if you want to plead guilty or no contest.

(2) Read this form carefully. For each item, if you understand and agree with what you read, put your initials in the box to the right of the item. For any item that does not apply to you or that you do not understand, leave the box blank.

(3) On page 6, sign and date the form under "DEFENDANT'S STATEMENT."

(4) Keep in mind that the court cannot give legal advice. If you have any questions about anything in this form, ask your attorney.

1. **CHARGES AND MAXIMUM TERM** I want to plead guilty or no contest ("nolo contendere") to the charges and allegations listed below. I understand that the minimum and maximum penalties for the charges to which I am pleading guilty or no contest are listed below.

COUNT	CHARGES (SECTION & DESCRIPTION)	YEARS/MONTHS		PRIOR CONVICTIONS, ENHANCEMENTS, & SPECIAL ALLEGATIONS (SECTION & DESCRIPTION)	YEARS/MONTHS		TOTAL MAXIMUM TIME
		MINIMUM	MAXIMUM		MINIMUM	MAXIMUM	
				AGGREGATE MAXIMUM TIME OF IMPRISONMENT			

2. **PLEA AGREEMENT** I understand that I must tell the court on this form about any promises anyone has made to me about the sentence I will receive or the sentence recommendations that will be made to the court.

My attorney, the court, or the prosecutor has explained to me that if I plead guilty or no contest to the charges and admit the allegations listed above, the court will sentence me as follows:

a. **State Prison** (or the Division of Juvenile Justice) for: INITIALS

☐ (1) _____ years and _____ months or

☐ (2) not less than _____ years and _____ months and/or not more than _____ years and _____ months.

☐ (3) Other: *(specify):*

b. **Probation** for _____ years under conditions to be set by the court, including:

☐ _____ days in the **county jail** or

☐ up to _____ days in the **county jail**.

I understand that a violation of any of the conditions of probation, including failure to complete a drug education or treatment program, if ordered by the court, may cause the court to send me to **state prison** for up to the **"Aggregate Maximum Time of Imprisonment"** specified in item 1.

Form Approved for Optional Use
Judicial Council of California
CR-101 [Rev. January 1, 2010]

Penal Code, §1016
www.courtinfo.ca.gov
CEB

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

INITIALS

2. c. **Narcotics Addiction Confinement** ☐
I understand that if the court finds that I am addicted to or in immediate danger of becoming a narcotics addict, the court may send me to a narcotics detention, treatment, and rehabilitation facility for up to the amount of time I would otherwise have served in prison.

d. **Open Plea** ☐

1. ☐ I understand the maximum and minimum sentence for the charges and allegations set forth on page 1. No one has made any other promises to me about what sentence the court may order.
2. ☐ I understand that I am not eligible for probation.
3. ☐ I understand that I will not be granted probation unless the court finds at the time of sentencing that this is an unusual case where the interests of justice would be best served by granting probation.

e. **Restitution, Statutory Fees, and Assessments** ☐
I understand that the court will order me to pay the following amounts (if an amount is not yet known, "TBD" for "to be determined" is entered next to the $); I must prepare financial disclosure statements to assist the court in determining my ability to pay; and refusal or failure to prepare the required financial disclosure statements may be used against me at sentencing:

1. ☐ $ _____ **to the Victim Restitution Fund** *(between $200 and $10,000)*
2. ☐ $ _____ **restitution to actual victims**
3. ☐ $ _____ **restitution to the State of California, Victims of Crime Fund**
4. ☐ $ _____ **court security fees**
5. ☐ $ _____ **other** *(specify):* _____
6. ☐ $ _____ **other** *(specify):* _____
7. ☐ An (additional) amount to be determined by the court at sentencing or such other hearing as the court may set.

f. **Parole Revocation or Probation Revocation Fine** ☐
I understand that if I am sentenced to **state prison**, the court **will** impose a parole revocation fine, which will be collected only if my parole is later revoked. I also understand that if I am granted probation, the court **will** impose a probation revocation fine, which will be collected only if my probation is later revoked.

g. **Dismissal of Other Counts** ☐
I understand that as part of the plea agreement bargain, the following counts will be dismissed after sentencing:

_____

I understand and agree that the sentencing judge may consider facts underlying dismissed counts to determine restitution and to sentence me on the counts to which I am entering a plea. ☐

h. **Other Terms *(specify):*** ☐

_____

_____

_____

_____

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

3. **CONSEQUENCES OF MY PLEA** INITIALS

a. **No Contest ("Nolo Contendere") Plea** ☐

I understand that a no contest plea is the same as pleading guilty and that if I plead no contest I will be convicted and my no contest plea could be used against me in a civil case.

b. **Parole** ☐

I understand that if I am sentenced to **state prison** or a **narcotics treatment facility**:
(1) I will be placed on parole for up to _____ years after my release.
(2) If I violate any of the terms or conditions of my parole, I can be returned to **state prison** for up to one year for each violation, up to a maximum of _____ years.
(3) If I abscond from parole supervision, this can extend the total time of parole supervision.

c. **Effect of Conviction on Other Cases** ☐

I understand that a conviction in this case may constitute a violation of any other current grant of parole or probation in any other case and that I may receive additional punishment as a result of that violation.

d. **Registration** ☐

I understand that I will be required to register with the local police agency or sheriff's department in the city or county in which I reside as:

(1) ☐ an arson offender.
(2) ☐ a gang member.
(3) ☐ a narcotics offender.
(4) ☐ a sex offender **(this registration is a lifelong requirement)**.
(5) ☐ other *(specify)*: _____.

and that if I fail to register or to keep my registration current for any reason, new felony criminal charges may be filed against me.

e. **Prints and DNA Samples** ☐

I understand that I must provide biological samples and prints for identification purposes, including buccal (mouth) swab samples, right thumb prints, palm prints of each hand, and blood specimens or other biological samples required by law and that failure to do so constitutes a new criminal offense.

f. **Serious or Violent Felony** ☐

(1) ☐ I understand that by pleading guilty or no contest to a serious or violent felony ("strike"), the penalty for any future felony conviction will be increased as a result of my conviction in this case, depending on the number of strikes I have, up to a mandatory prison sentence of double the term otherwise provided or a term of at least 25 years to life.

(2) ☐ I understand that jail or prison conduct/work-time credit I may accrue will not exceed 15%.

(3) ☐ I understand that if I am admitting a prior strike conviction, prison work-time credit that I may accrue will not exceed 20% of the total term of imprisonment.

(4) ☐ I understand that if I am convicted of murder or a third felony conviction of certain offenses, I am ineligible to receive work-time credits. Count _____ is such an offense.

g. **Prior Prison Term** ☐

I understand that if I am sentenced to prison, the penalty for any future felony conviction may be increased as a result of my prison term in this case.

h. **Driver's License and Vehicle Forfeiture** ☐

I understand that my privilege to drive a motor vehicle may be revoked or suspended by the court or the California Department of Motor Vehicles and my vehicle may be ordered forfeited if it was involved in the offense.

PEOPLE OF THE STATE OF CALIFORNIA v.	CASE NUMBER:
DEFENDANT:	

INITIALS

i. **Immigration Consequences** ☐

I understand that if I am not a citizen of the United States, my plea of guilty or no contest may or, with certain offenses, **will** result in my deportation, exclusion from reentry to the United States, and denial of naturalization and amnesty and that the appropriate consulate may be informed of my conviction. The offenses that **will** result in such immigration action include, but are not limited to, an aggravated felony, conspiracy, a controlled substance offense, a firearm offense, and, under certain circumstances, a moral turpitude offense.

j. **Firearms** ☐

I understand that federal and state law prohibit a convicted felon from possessing firearms for life.

k. **Other Consequences** *(specify):* ☐

_____

_____

_____

4. **RIGHT TO AN ATTORNEY**

I understand that I have the right to an attorney of my choice to represent me throughout the proceedings. If I cannot afford to hire an attorney, the court will appoint one to represent me. ☐

I hereby give up my right to be represented by an attorney. ☐

5. **OTHER CONSTITUTIONAL RIGHTS**

I understand that I am entitled to each of the following rights as to the charges listed in item 1 (on page 1):

a. **Right to a Jury Trial** ☐

I understand that I have a right to a speedy and public jury trial. At the trial, I would be presumed to be innocent, and I could not be convicted unless, after hearing all of the evidence, 12 impartial jurors chosen from the community were convinced beyond a reasonable doubt that I am guilty.

b. **Right to a Court Trial** ☐

I understand that, as an alternative to a jury trial, if the prosecutor agrees, I may give up a jury trial and have a court trial in which the judge alone, without a jury, hears the evidence. I still could not be convicted unless, after hearing all of the evidence, the judge was convinced beyond a reasonable doubt that I am guilty.

c. **Right to Confront and Cross-Examine Witnesses** ☐

I understand that I have the right to confront and cross-examine all witnesses testifying against me. This means that the prosecution must produce the witnesses in court, they must testify under oath in my presence, and my attorney may question them.

d. **Right to Remain Silent and Not to Incriminate Myself** ☐

I understand that I have the right to remain silent and my silence cannot be considered as evidence against me. I understand that I also have the right not to incriminate myself and I cannot be forced to testify.

e. **Right to Produce Evidence and to Present a Defense** ☐

I understand that I have a right to present evidence and to have the court issue subpoenas to bring to court all witnesses and evidence favorable to me, at no cost to me. I also have the right to testify on my own behalf.

6. **BEFORE THE PLEA**

a. **Discussion With My Attorney** ☐

Before entering this plea, I have had a full opportunity to discuss the following with my attorney:

(1) The facts of my case;
(2) The elements of the charged offenses, prior convictions, enhancements, and special allegations;
(3) Any defenses that I may have;
(4) My constitutional and statutory rights and waiver of those rights;
(5) The consequences of this plea; and
(6) Anything else I think is important to my case.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

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6. b. **Questions**

I have no further questions of the court or of my attorney with regard to my plea and admissions in this case, any of the rights, or anything else on this form. ☐

c. **Stipulation to Commissioner**

I understand that I have the right to have a judge take my plea and sentence me. I give up this right and agree to have a commissioner, sitting as a temporary judge, take my plea and sentence me. ☐

d. **Medications or Controlled Substances**

I am not taking any medication that affects my ability to understand this form and the consequences of my plea, have not recently consumed any alcohol or drugs, and am not suffering from any medical condition, except for the following: _____ ☐

_____

e. **Discovery of New Facts**

I understand that the plea agreement in item 2 (on pages 1 and 2) is based on the facts before the court, and, if the court discovers new facts, such as an additional prior felony conviction not listed on this form, the court may refuse to accept the plea agreement. If the court discovers new facts and refuses to accept this plea agreement, I understand that I will be allowed to withdraw my plea. ☐

7. **STATUTORY RIGHT TO A PRELIMINARY HEARING**

I understand that before I have a trial, the law gives me the right to a speedy preliminary hearing at which the prosecution would produce evidence and the court must find reasonable cause to believe I committed the crimes with which I have been charged. I understand that I have all of the above constitutional rights at the preliminary hearing, except for the right to a jury trial. ☐

I give up my right to a preliminary hearing and the constitutional rights listed in item 5, (on page 4).

8. **WAIVER OF CONSTITUTIONAL RIGHTS**

I give up, for each of the charges and allegations listed in item 1 (on page 1) my right to a jury trial, my right to a court trial, my right to confront and cross-examine witnesses, my right to remain silent and not to incriminate myself, and my right to produce evidence and to present a defense, including my right to testify on my own behalf. I understand that I am, in fact, incriminating myself with my plea. ☐

9. **THE PLEA**

I freely and voluntarily plead ☐ GUILTY ☐ NO CONTEST to the charges listed in item 1 (on page 1) and admit the allegations listed in item 1 (on page 1), understanding that this plea and admission will lead to the penalties listed in item 2 (on pages 1 and 2). ☐

a. I offer my plea of guilty or no contest freely and voluntarily and with full understanding of everything in this form. No one has made any threats; used any force against me, my family, or loved ones; or made any promises to me, except as listed in this form, in order to convince me to plead guilty or no contest. ☐

b. **I understand that the court is required to find a factual basis for my plea to make sure that I am entering a plea to the proper offenses under the facts of the case.**

I offer to the court the following as the basis for my plea of guilty or no contest and any admissions:

(1) **I understand that the court may consider the following as proof of the factual basis for my plea:** ☐

(a) ☐ Preliminary hearing transcript
(b) ☐ Police report
(c) ☐ Probation report
(d) ☐ Welfare investigator's declaration
(e) ☐ Court documents regarding any alleged prior offenses
(f) ☐ Other *(specify)*: _____
(g) ☐ *(Specify facts)*: _____

_____

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

INITIALS

9. b. (2) **I am pleading guilty or no contest to take advantage of a plea agreement (my attorney will stipulate to a factual basis for the plea).** *(People v. West* (1970) 3 Cal.3d 595.*)* ☐

10. **AFTER THE PLEA**

a. **Surrender**
I understand that the court is allowing me to surrender at a later date to begin serving time in custody. ☐

If the box to the right is initialed, I agree that if I fail to appear on the date set for surrender without a legal excuse, my plea will become an "open plea" to the court, I will not be allowed to withdraw my plea, and I may be sentenced up to the maximum allowed by law. ☐

b. **Sentencing Court**
I understand that I have the right to be sentenced by the same judge or commissioner who takes my plea. I give up that right and agree that any judge or commissioner may sentence me. ☐

c. **Sentencing Date**
I understand that I have the right to be sentenced within 20 court days. I give up that right and agree to a later date. ☐

11. **MANDATORY WARNING** ☐

I understand that if I am charged with violating Vehicle Code section 23103, as specified in Vehicle Code section 23103.5, or Vehicle Code sections 23152 or 23153, the following warning applies:

You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and as a result of that driving someone is killed, you can be charged with murder.

DEFENDANT'S STATEMENT

I have read or have had read to me this form and have initialed each of the items that applies to my case. If I have an attorney, I have discussed each item with my attorney. By putting my initials next to the items in this form, I am indicating that I understand and agree with what is stated in each item that I have initialed. The nature of the charges, possible defenses, and the effects of any prior convictions, enhancements, and special allegations have been explained to me. I understand each of the rights outlined above, and I give up each of them to enter my plea.

DEFENDANT'S SIGNATURE _____ DATE _____

ATTORNEY'S STATEMENT

I am the attorney of record for the defendant. I have reviewed this form with my client. I have explained each of the items in the form, including the defendant's constitutional and statutory rights, to the defendant and have answered all of his or her questions with regard to those rights, the other items in this form, and the plea agreement. I have also discussed the facts of the case with the defendant and have explained the nature and elements of each charge, any possible defenses to the charges, the effect of any prior convictions, enhancements, and special allegations, and the consequences of the plea.

I concur in the plea and admissions and join in the waiver of defendant's constitutional and statutory rights, and I hereby stipulate that there is a factual basis for the plea and refer the court to the ☐ police report ☐ preliminary hearing transcript ☐ probation report ☐ other *(specify):* _____ *(People v. West* (1970) 3 Cal.3d 595.)

ATTORNEY'S SIGNATURE _____ DATE _____

CR-101

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

INTERPRETER'S STATEMENT

I, having been duly sworn or having a written oath on file, certify that I truly translated this form to the defendant in the language noted below. The defendant stated that he or she understood the contents on the form and then initialed and signed the form.

Language: ☐ Spanish ☐ Other *(specify)*: _____

INTERPRETER'S SIGNATURE _____ DATE _____

INTERPRETER'S NAME (TYPE OR PRINT) _____

DISTRICT ATTORNEY'S STATEMENT

I have read this form and understand the terms of the plea agreement.

I ☐ agree ☐ do not agree with the terms of the plea agreement and the indicated sentence.

ATTORNEY'S SIGNATURE _____ DATE _____

COURT'S FINDINGS AND ORDER

The court, having reviewed this form (and any addenda), and having orally examined the defendant, finds as follows:

1. The defendant has read or has had read to him or her and understands each of the initialed items in this form.
2. The defendant understands the nature of the crimes and allegations listed in item 1 (on page 1) and the consequences of the plea and any admissions.
3. The defendant expressly, knowingly, understandingly, and intelligently waives his or her constitutional and statutory rights.
4. The defendant's plea, admissions, and waiver of rights are made freely and voluntarily.
5. A factual basis exists for the plea and admissions, or the defendant is pleading pursuant to a plea bargain under *People v. West*.

The court accepts the defendant's plea, admissions, and waiver of rights, and the defendant is hereby convicted based thereon.

It is ordered that this document be filed with the court's records of this case and that the defendant's plea, admissions, and waiver of rights be accepted and entered in the minutes of this court.

JUDGE'S SIGNATURE _____ DATE _____

Comment: The use of this form is optional. It may be used when the defendant pleads guilty or no contest to a

felony. A no-contest plea must be approved by the judge, who will make a finding that the defendant understands the nature and legal effect of the plea. Pen C §1016. See Pen C §1017. Counsel should be prepared to offer any admissions and the factual bases (specifying relevant documents) that support the plea. The completed form must be signed and dated by the defendant's counsel, the defendant, the prosecuting attorney, the judge, and, if one was used, the interpreter.

Cross-Reference: See California Criminal Law Procedure and Practice §§26.5, 26.7-26.22, 26.36-26.51 (Cal CEB Annual).

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27

Deferred Entry of Judgment, Diversion, and Preplea Probation Report

Declaration of Ineligibility for Deferred Entry of Judgment §27.1

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§27.1 Declaration of Ineligibility for Deferred Entry of Judgment

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

I, _ _[*name of declarant*]_ _, do hereby declare as follows:

I am a Deputy District Attorney of the County of _ _ _ _ _ _. I am informed and believe that there is evidence from _ _[*e.g., available police reports, interviews, personal observations*]_ _ that the defendant, _ _[*name*]_ _, is ineligible for deferred entry of judgment under Penal Code section 1000.

Penal Code section 1000(a) in substance provides that a defendant is ineligible for deferred entry of judgment if any of the following apply to the defendant:

(1) The defendant has a prior conviction for a controlled substance offense.

(2) The present offense involves violence or threat of violence.

(3) There is evidence of a violation relating to narcotics or restricted dangerous drugs other than a violation of the sections mentioned in Penal Code section 1000(a).

(4) The defendant has had probation or parole revoked without thereafter completing it.

(5) The defendant has successfully completed or been terminated from diversion or deferred entry of judgment within five years of the present offense.

(6) The defendant has a felony conviction within five years of the present offense.

The specific facts within Penal Code section 1000(a)(1)-(6) providing that defendant is ineligible for deferred entry of judgment are as follows: _ _[*Specify*]_ _.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of declarant*]__
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: If the defendant is found ineligible for deferred entry of judgment, the prosecuting attorney must either file with the court a declaration in writing or state for the record the grounds on which the determination is based. This information must be made available to the defendant and defense counsel. The sole remedy of a defendant who is found ineligible for deferred entry of judgment is a postconviction appeal. Pen C §1000(b). See *People v Sturiale* (2000) 82 CA4th 1308, 1313, 98 CR2d 865.

Cross-Reference: See California Criminal Law Procedure and Practice, chap 27 (Cal CEB Annual).

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28

Trial by Court or Jury

This manual is a companion volume to California Criminal Law Procedure and Practice (Cal CEB Annual). This chapter is reserved.

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29

Jury Selection

Michael Begovich

A. Jury Selection Chart §29.1
B. Sample Jury Questionnaire §29.2
C. Sample Jury Questionnaire: Capital Case §29.2A
D. Juror Questionnaire for Criminal Cases (Judicial Council Form MC-002) §29.3
E. Sample Questions (No Questionnaire): Sexual Molestation of Boys §29.4
F. Sample Questions (No Questionnaire): Rape of Woman by Former Boyfriend §29.5
G. Sample Questions (No Questionnaire): Murder of Infirm Family Member §29.6

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Source: Criminal Law/California Criminal Law Forms Manual/29 Jury Selection/§29.1 A. Jury Selection Chart

§29.1 A. Jury Selection Chart

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Juror No. 7	Juror No. 8	Juror No. 9	Juror No. 10	Juror No. 11	Juror No. 12
Juror No. 1	Juror No. 2	Juror No. 3	Juror No. 4	Juror No. 5	Juror No. 6

Juror name(s)	*Sex*	*Age*	*Occupation*	*Marital Status*	*Children*	*Spouse's occupation*	*Personal knowledge of witnesses/ victim?*	*Past jury duty?*	*Verdict*	*Hung jury?*
Juror No. 1										
Juror No. 2										
Juror No. 3										
Juror No. 4										
Juror No. 5										
Juror No. 6										
Juror No. 7										
Juror No. 8										
Juror No. 9										
Juror No. 10										

Juror No. 11										
Juror No. 12										

Juror name(s)	*Seen publicity?*	*Where?*	*When?*	*Formed opinion based on publicity?*	*Overall feeling about juror*	*Challenged for cause?*	*Peremptory challenge by defense?*	*Wheeler challenge (by whom)?*	*Miscellaneous information*
Juror No. 1									
Juror No. 2									
Juror No. 3									
Juror No. 4									
Juror No. 5									
Juror No. 6									
Juror No. 7									
Juror No. 8									
Juror No. 9									
Juror No. 10									
Juror No. 11									
Juror No. 12									

Comment: Check with the trial judge's clerk at the beginning of the trial to find out how that judge numbers the jury seats and modify the 12-space chart accordingly. Many trial judges use a "six-pack" approach whereby between 18 and 24 jurors are in the panel that gets questioned. After challenges are exercised, and if less than 12 jurors remain, the judge calls additional prospective jurors to fill the empty seats. Trial attorneys on both sides traditionally use a chart like the one printed above during jury selection and voir dire to take notes on the personalities, preferences, and any special concerns with respect to prospective jury members.

Most felony criminal trials in California last 3 to 5 court days. Voir dire for defense counsel is often limited to no more than 30 minutes per panel by the trial judge. Consequently, questions need to be focused and case-specific to succeed in persuading those potential jurors who are predisposed not to disclose to, in fact, disclose. Body language is considered in the calculus of whether to exercise a peremptory or cause challenge on a particular juror. If defense counsel writes feverishly instead of maintaining eye contact when listening to a response, then body language is missed. Accordingly, the author uses the jury selection chart given to counsel by the court clerk, uses the smallest Post-it Notes, and only writes a few things such as "+", "−", or "?". To sum up the author's experience, the most effective voir dire is achieved by writing less and watching more.

However, if counsel wishes to utilize a more formalized chart, then the chart provided above allows trial counsel to integrate key responses elicited in the voir dire process, assists in prioritizing which jurors to excuse and in what order, and allows counsel to list key facts that would support a *Batson-Wheeler* motion under the "Miscellaneous information" heading. While the type of chart is determined by counsel's preference, the key point is to avoid keeping one's head buried in note-taking instead of intently watching the prospective jurors. Active listening must be employed to truly "understand" the jurors' responses. Voir dire is not the time for trial counsel to give a lecture, as the best voir dire occurs when the prospective jurors do most of the talking.

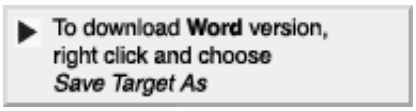
In that regard, counsel should be particularly careful to make notes of the specific reasons he or she plans to challenge any juror. While an attorney need not initially articulate the reasons for dismissing a juror with a peremptory challenge, both prosecutors and defense attorneys may be subject to *Batson-Wheeler* challenges when jurors of certain protected classes are dismissed. See *Snyder v Louisiana* (2008) 552 US 472, 170 L Ed 2d 175, 128 S Ct 1203; *People v Wheeler* (1978) 22 C3d 258, 276, 148 CR 890, overruled on other grounds in *Johnson v California* (2005) 545 US 162, 173, 162 L Ed 2d 129, 141, 125 S Ct 2410; *Batson v Kentucky* (1986) 476 US 79, 84, 90 L Ed 2d 69, 79, 106 S Ct 1712; *Georgia v McCollum* (1992) 505 US 42, 59, 120 L Ed 2d 33, 51, 112 S Ct 2348; *People v Willis* (2002) 27 C4th 811, 118 CR2d 301; see CCP §231.5 (peremptory challenges may not be used to remove juror under presumption that he or she is biased "merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds"). After a *Batson-Wheeler* motion is made in court, the trial judge usually calls upon the attorney who dismissed the challenged juror to articulate his or her "legitimate, non-suspect" reasons for the peremptory challenge. See *People v Gray* (2001) 87 CA4th 781, 788, 104 CR2d 848. Keeping detailed notes of the specific race-neutral, gender-neutral, and other neutral reasons for challenging a juror (*e.g.,* "juror was not paying attention," "juror was wearing political t-shirt," "juror expressed mistrust of police officers") will enable counsel to articulate those neutral reasons quickly and specifically after a *Batson-Wheeler* challenge, causing the challenge to be more easily defeated in court and better preserving the record for appeal.

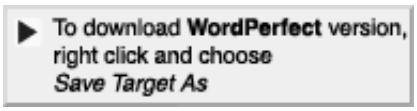
Cross-Reference: For discussion of jury selection, including the attorney's right to question jurors directly, jury questionnaires, challenges for cause and peremptory challenges, and *Batson-Wheeler* motions, see California Criminal Law Procedure and Practice §§29.7-29.37 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/29 Jury Selection/§29.2 B. Sample Jury Questionnaire

§29.2 B. Sample Jury Questionnaire





INSTRUCTIONS FOR JURY QUESTIONNAIRE

This questionnaire is designed to shorten the time needed to obtain information about your background as it relates to your possible service as a fair and impartial juror in this case. We use the questionnaire to avoid putting each of these questions to each prospective juror in open court, which takes a great deal longer.

The California courts, in accordance with constitutional principles, have held that the answers contained in this questionnaire are part of the public record, and as such are not confidential. That means that your completed questionnaire must be released to representatives of the media if they so request. This court would have no choice but to comply with such a request if made.

Therefore, to best protect your privacy, while upholding the mandated principles of our constitution, the Court advises the following:

If you wish to keep any of the answers to any of the questions confidential for personal privacy reasons, please so indicate in the space provided for the particular answer. The question can then be answered orally, in the privacy of the judge's chambers, in the presence of the attorneys. If the Court then determines that your request for privacy is proper, your answer to the question will be sealed and not released to the media or repeated in open court.

During questioning by the Court, you will be given an opportunity to explain your responses if necessary. In any instance where you feel your answers may invade your right to privacy or might be embarrassing to you, indicate this to the court. The Court will then give you an opportunity to speak to the Court and counsel outside the hearing of the other jurors.

Please respond to each question as fully and completely as possible, and print your name at the top of each page. Please use dark ink. If you require additional space for your response or wish to make further comments regarding any of your answers, please use the explanation sheet attached to the back of your questionnaire. If you do not understand a question, please place a large question mark (?) in the space for an answer.

Your complete candor is necessary so that both the prosecution and defense will have a meaningful opportunity to select a fair and impartial jury. Your cooperation is of vital importance.

Because this questionnaire is part of the jury selection process, the questions are to be answered under your oath as a prospective juror to tell the truth. You are instructed not to discuss this case or questionnaire with anyone, including fellow jurors.

Please keep in mind that there are no "right" or "wrong" answers, only complete and incomplete answers. Complete answers are far more helpful than incomplete answers. They assist all parties in obtaining a fair and impartial jury.

JURY QUESTIONNAIRE

PLEASE PRINT LEGIBLY AND USE A DARK INK PEN

BACKGROUND AND EMPLOYMENT

NAME_____

AREA OF RESIDENCE_____

1. AGE _____

2. SEX _____

3. PLACE OF BIRTH_____

4. EMPLOYMENT OUTSIDE THE HOME? YES ___ NO ___

RETIRED? YES ___ NO ___

IF EMPLOYED OUTSIDE THE HOME:_____

EMPLOYER_____

JOB TITLE_____

DESCRIPTION OF DUTIES_____

HOW LONG WITH PRESENT EMPLOYER?_____

ALL JURORS:

IF YOU HAD A PREVIOUS JOB, HOW LONG DID YOU WORK AT THAT JOB?

PREVIOUS JOB/OCCUPATION:_____

HAVE YOU EVER BEEN IN BUSINESS FOR YOURSELF? YES ___ NO ___

IF "YES," PLEASE BRIEFLY EXPLAIN:_____

HAVE YOU EVER HAD ANY SUPERVISORY EXPERIENCE AT WORK? YES ___ NO ___

IF "YES," PLEASE BRIEFLY DESCRIBE:_____

5. HOW LONG HAVE YOU LIVED AT YOUR CURRENT ADDRESS?

_____

DO YOU OWN?_____

RENT?_____

LIVE WITH FAMILY?_____

OTHER?_____

HOW LONG DID YOU LIVE AT THE PLACE YOU LIVED JUST BEFORE YOU MOVED TO YOUR PRESENT HOME?

6. MARITAL STATUS: MARRIED SINGLE DIVORCED WIDOWED DOMESTIC PARTNER

IF MARRIED OR PARTNERED, IS YOUR SPOUSE OR PARTNER EMPLOYED? YES ___ NO ___

IF YES, WHERE AND WHAT TYPE OF EMPLOYMENT?_____

IF DIVORCED OR WIDOWED, WHAT WAS YOUR SPOUSE'S OCCUPATION?

7. DO YOU HAVE CHILDREN? YES ___ NO ___

HOW MANY? _____ AGES: _____

DO YOU HAVE GRANDCHILDREN? YES ___ NO ___

HOW MANY? _____ AGES: _____

IF APPLICABLE, WHAT ARE THEIR JOBS OR OCCUPATIONS?

_____

8. ARE THERE ANY OTHER ADULTS RESIDING IN YOUR HOME? YES ___ NO ___

IF YES, WHAT IS THEIR RELATIONSHIP TO YOU?_____

WHAT ARE THEIR JOBS OR OCCUPATIONS?_____

EDUCATION

9. ELEMENTARY SCHOOL? YES ___ NO ___ JUNIOR HIGH SCHOOL? YES ___ NO ___ HIGH SCHOOL? YES ___ NO ___COLLEGE? YES ___ NO ___POST-GRADUATE? YES ___ NO ___

PLEASE LIST ALL DEGREES, CERTIFICATES, LICENSES, AND MAJOR AREAS OF STUDY, TELLING WHEN AND FROM WHAT INSTITUTION.

_____

_____

10. HAVE YOU EVER STUDIED MEDICINE, NURSING, PHARMACOLOGY OR ANY RELATED SUBJECT? YES ___ NO ___

IF YES, PLEASE EXPLAIN. _____

11. HAVE YOU EVER STUDIED OR RECEIVED TRAINING IN PSYCHOLOGY, PSYCHIATRY, SOCIAL WORK, SOCIOLOGY, OR COUNSELING? YES ___ NO ___

IF YES, PLEASE EXPLAIN. _____

12. HAVE YOU RECEIVED ANY TRAINING IN LAW, LAW ENFORCEMENT, OR CRIMINOLOGY? YES ___ NO ___

IF YES, PLEASE EXPLAIN. _____

13. ARE YOU CURRENTLY ATTENDING SCHOOL? YES ___ NO ___

IF YES, STATE YOUR AREA OF STUDY:_____

14. DO YOU HAVE FURTHER EDUCATIONAL PLANS FOR THE FUTURE? YES ___ NO ___

IF YES, PLEASE EXPLAIN. _____

MILITARY

15. WERE YOU IN THE MILITARY? YES ___ NO ___

IF YES, ANSWER THE FOLLOWING:

BRANCH OF SERVICE:_____

DATES OF SERVICE: _____

RATE OR RANK:_____

WHERE WERE YOU STATIONED?_____

CHARACTER OF DISCHARGE (E.G., HONORABLE, GENERAL):_____

REASON FOR DISCHARGE:_____

WHAT WERE YOUR DUTIES?_____

WERE YOU EVER INVOLVED IN ANY WAY WITH MILITARY LAW ENFORCEMENT, NONJUDICIAL PUNISHMENT, COURTS MARTIAL, OR ADMINISTRATIVE BOARDS OR HEARINGS? YES ___ NO ___

WERE YOU EVER IN COMBAT? YES ___ NO ___

IF YES, WHEN AND WHERE WERE YOU IN COMBAT?_____

_____

HAVE YOU EVER BEEN IN A COMBAT AREA? YES ___ NO ___

HAVE YOU BEEN IN THE RESERVES OR NATIONAL GUARD? YES ___ NO ___

FIREARMS

16. DO YOU OR DOES ANYONE ELSE IN YOUR HOME OWN A GUN? YES ___ NO ___

IF YES: WHO? _____

WHAT KIND AND HOW MANY?

REASON FOR OWNING GUN?_____

PERSONAL

17. WHAT ARE YOUR FAVORITE HOBBIES AND/OR PASTIMES?

_____

18. TO WHAT CLUBS OR ORGANIZATIONS DO YOU BELONG?

_____

HAVE YOU EVER HELD A LEADERSHIP POSITION IN THESE ORGANIZATIONS? YES ___ NO ___

IF YES, PLEASE DESCRIBE:_____

19. ARE YOU REGISTERED TO VOTE? YES ___ NO ___

DID YOU VOTE IN THE LAST ELECTION? YES ___ NO ___

20. WHAT KIND OF BOOKS OR MAGAZINES DO YOU READ?

_____

21. WHAT TELEVISION AND RADIO PROGRAMS DO YOU VIEW OR LISTEN TO ON A REGULAR BASIS?

_____

22. DO YOU HAVE A HOME AND/OR LAPTOP COMPUTER? YES ___ NO ___

23. DO YOU LOG ON TO INTERNET CHAT ROOMS? YES ___ NO ___

IF YES, WHAT TOPICS?_____

WHAT ARE YOUR FAVORITE WEBSITES AND WHY?

_____

DO YOU PARTICIPATE WITH MYSPACE, FACEBOOK, TWITTER, AND/OR OTHER "SOCIAL NETWORKING" WEBSITES? YES ___ NO ___

IF YES, PLEASE LIST EACH SITE YOU GO TO, HOW OFTEN EACH DAY YOU ARE ON THE SITE, AND DESCRIBE YOUR PRIMARY PURPOSE FOR USE OF THAT SITE.

_____

DO YOU READ "BLOGS"? IF SO, WHICH ONES AND WHY?

_____

DO YOU WRITE A BLOG OR BLOGS? YES ___ NO ___

IF YES, DESCRIBE THE LENGTH AND CONTENT OF YOUR BLOG(S) AND HOW OFTEN YOU WRITE FOR EACH BLOG.

_____

24. DO YOU READ A NEWSPAPER ON A REGULAR BASIS? YES ___ NO ___

IF YES, WHICH ONE(S)?_____

25. WHAT KINDS OF BOOKS DO YOU LIKE TO READ? (*e.g.,* novels, other fiction, biography, current events, historical accounts, treatises)

_____

26. WHAT WAS THE LAST BOOK YOU READ?_____

27. WHAT WAS IT ABOUT?_____

28. NAME TWO OR THREE PEOPLE YOU KNOW OR HAVE HEARD OF WHOM YOU RESPECT THE MOST:

a. _____b. _____

PLEASE EXPLAIN WHY:_____

29. DO YOU HAVE ANY BUMPER STICKERS OR PERSONALIZED LICENSE PLATE HOLDERS ON YOUR CAR? YES ___ NO ___

IF YES, PLEASE DESCRIBE:_____

COUNSELING AND TREATMENT

30. HAVE YOU EVER RECEIVED ANY TYPE OF MENTAL HEALTH COUNSELING OR THERAPY? YES ___ NO ___

IF YES, PLEASE PROVIDE DATES, TYPE OF PROBLEM, LENGTH OF TREATMENT, AND RESULTS:

31. HAS A FAMILY MEMBER OR CLOSE FRIEND EVER RECEIVED ANY TYPE OF MENTAL HEALTH COUNSELING OR THERAPY? YES ___ NO ___

IF YES, PLEASE PROVIDE DETAILS:_____

32. HAVE YOU OR ANY FAMILY MEMBER EVER RECEIVED ANY TYPE OF DRUG OR ALCOHOL COUNSELING? YES ___ NO ___

IF YES, PLEASE PROVIDE DETAILS:_____

33. DO YOU HAVE ANY PRECONCEIVED NOTIONS ABOUT PEOPLE WHO HAVE SEEN A COUNSELOR OR THERAPIST? YES ___ NO ___

IF YES, PLEASE DESCRIBE:_____

JURY SERVICE

34. DO YOU HAVE ANY TYPE OF HEALTH OR LANGUAGE PROBLEM THAT YOU BELIEVE MAY AFFECT YOUR DUTIES AS

A JUROR? (Please indicate any hearing or eyesight problem specifically.) YES ___ NO ___

IF YES, WHAT?_____

35. IF YOU HAVE EVER BEEN A JUROR BEFORE, PLEASE STATE THE FOLLOWING FOR EACH CASE:

A. SUPERIOR OR FEDERAL COURT_____

B. YEAR_____

C. TYPE OF CASE (Civil or Criminal)_____

D. IF CRIMINAL, THE CHARGE OR NATURE OF THE CASE_____

E. WAS THE CASE SUBMITTED TO A JURY FOR DECISION?
YES ___ NO ___

F. WAS A VERDICT REACHED? YES ___ NO ___

IF A VERDICT WAS NOT REACHED IN A CASE, WAS THAT BECAUSE THE JURY COULD NOT AGREE ON A VERDICT OR BECAUSE OF SOME OTHER REASON?_____

G. WERE YOU EVER THE FOREPERSON? YES ___ NO ___

IF YES, PLEASE DESCRIBE THE EXPERIENCE: _____

36. HOW DO YOU FEEL ABOUT JURY SERVICE? _____

_____

37. DO YOU HAVE ANY PROBLEMS AT HOME OR ON THE JOB THAT WOULD MAKE IT DIFFICULT TO BE A JUROR ON THIS TRIAL? YES ___ NO ___

IF YES, WHAT?_____

38. DO YOU HAVE ANY RELIGIOUS OR OTHER BELIEFS THAT MIGHT CONFLICT WITH THE DUTIES OF A JUROR? YES ___ NO ___

IF YES, EXPLAIN_____

39. DO YOU FEEL YOU CAN BE AN IMPARTIAL JUROR? YES ___ NO ___

WHY?_____

40. WOULD YOU LIKE TO BE A JUROR IN THIS CASE? YES ___ NO ___

WHY?_____

41. DO YOU FEEL YOU CAN BE AN IMPARTIAL JUROR? YES ___ NO ___

WHY?_____

LAW ENFORCEMENT AND JUDICIAL CONTACTS

42. HAVE YOU, ANY RELATIVES, OR FRIENDS EVER BEEN ARRESTED, CHARGED WITH A CRIMINAL OFFENSE (OTHER THAN MINOR TRAFFIC VIOLATIONS), OR CONVICTED OF A CRIME? YES ___ NO ___

IF YES, FOR EACH CASE:

EXPLAIN WHO, WHEN, THE CHARGES, AND THE OUTCOME:

_____

EXPLAIN HOW YOU FEEL ABOUT THE WAY EACH MATTER WAS HANDLED BY THE POLICE, PROSECUTION, DEFENSE ATTORNEY, COURTS, PROBATION DEPARTMENT, AND OTHERS INVOLVED IN THE LAW ENFORCEMENT AND JUDICIAL SYSTEMS

_____

_____

43. HAVE YOU, OR ANY MEMBER OF YOUR FAMILY, OR CLOSE FRIENDS, EVER BEEN THE VICTIM OR WITNESS TO ANY CRIME? YES ___ NO ___

IF YES, PLEASE EXPLAIN:_____

_____

IF YES, WAS THE CRIME REPORTED TO THE POLICE? YES ___ NO ___

HOW DO YOU FEEL ABOUT THE WAY THE POLICE HANDLED THE CASE?

_____

_____

44. HAVE YOU EVER PARTICIPATED IN A TRIAL AS A PARTY, WITNESS, OR INTERESTED OBSERVER? YES ___ NO ___

IF YES, EXPLAIN_____

45. HAVE YOU EVER HAD YOUR DEPOSITION TAKEN IN A LAWSUIT? YES ___ NO ___

46. HAVE YOU OR ANY MEMBER OF YOUR FAMILY EVER BEEN A PARTY TO A LAWSUIT INCLUDING A SMALL CLAIMS SUIT? YES ___ NO ___

IF YES, WHAT KIND OF LAWSUIT, YOUR INVOLVEMENT, AND THE OUTCOME?

47. ARE YOU ACQUAINTED WITH ANY JUDGES, PROSECUTING ATTORNEYS, OR CRIMINAL DEFENSE ATTORNEYS? YES ___ NO ___

IF YES, PLEASE GIVE THE NAME AND POSITION OF THE PERSON(S), HOW YOU CAME TO KNOW THEM, AND THE EXTENT OF YOUR RELATIONSHIP WITH THEM._____

_____

48. DO YOU HAVE ANY FRIENDS OR RELATIVES INVOLVED IN LAW ENFORCEMENT (F.B.I., C.I.A., N.S.A., D.E.A., BORDER PATROL, N.I.S., MILITARY POLICE, LOCAL SHERIFF'S DEPARTMENT, AND/OR POLICE DEPARTMENT, CALIFORNIA HIGHWAY PATROL, AND/OR EMPLOYEES AND/OR INDEPENDENT CONTRACTORS FROM ANY SUCH AGENCY)? YES ___ NO ___

IF YES, EXPLAIN_____

49. WHAT IS YOUR ATTITUDE, IN GENERAL, TOWARD LAW ENFORCEMENT OFFICERS?

50. HAVE YOU EVER HAD ANY GOOD EXPERIENCES WITH POLICE, SHERIFF'S, AND/OR OTHER LAW ENFORCEMENT PERSONNEL?

YES ___ NO ___

IF YES, EXPLAIN_____

51. HAVE YOU EVER HAD BAD EXPERIENCES WITH POLICE, SHERIFF'S, AND/OR LAW ENFORCEMENT PERSONNEL? YES ___ NO ___

IF YES, EXPLAIN_____

52. HAVE YOU EVER VISITED OR BEEN INSIDE A JAIL, PRISON, OR ANY OTHER PLACE OF INCARCERATION, EITHER FOR JUVENILES OR ADULTS?_____

YES ___ NO ___

IF YES, PLEASE EXPLAIN:_____

EVALUATING TESTIMONY AND EVIDENCE

53. WE ALL HAVE BIASES, PREJUDICES OR PRECONCEIVED NOTIONS. DO YOU HAVE ANY THAT WOULD AFFECT THE WAY YOU DECIDE THIS CASE? YES ___ NO ___

IF YES, PLEASE EXPLAIN:_____

54. IN THE COURSE OF THIS TRIAL, BOTH SIDES MAY PRESENT EXPERT WITNESSES TO HELP THE JURY UNDERSTAND MENTAL HEALTH, TECHNICAL, OR SCIENTIFIC ISSUES WHICH ARE NOT A PART OF EVERYDAY, COMMON EXPERIENCE. THE JURY WILL BE INSTRUCTED BY THE JUDGE THAT IT MAY ACCEPT THE EXPERT'S OPINION, IN WHOLE OR IN PART, IF IT IS REASONABLE, OR REJECT IT IF IT IS UNREASONABLE. WOULD YOU BE ABLE TO LISTEN OPEN-MINDEDLY TO SUCH AN EXPERT WITNESS? YES ___ NO ___

IF NO, PLEASE EXPLAIN:_____

55. WOULD YOU BE ABLE TO ACCEPT THE EXPERT'S OPINION IF IT SEEMED REASONABLE TO YOU? YES ___ NO ___

56. WOULD YOU BE ABLE TO DISREGARD THE EXPERT'S OPINION IF IT SEEMED UNREASONABLE? YES ___ NO ___

57. DO YOU HAVE ANY STRONGLY HELD FEELINGS ABOUT MENTAL HEALTH PROFESSIONALS OR ABOUT PSYCHIATRIC OR PSYCHOLOGICAL EVIDENCE? YES ___ NO ___

IF YES, PLEASE EXPLAIN:_____

58. IF, AFTER HEARING THE EVIDENCE, YOU BELIEVE THE DEFENDANT'S GUILT HAS NOT BEEN PROVEN BEYOND A REASONABLE DOUBT, WOULD YOU BE ABLE TO RETURN A NOT GUILTY VERDICT? YES ___ NO ___

PLEASE EXPLAIN:_____

KNOWLEDGE OF PARTICIPANTS

59. DO YOU KNOW OR RECOGNIZE THE DEFENDANT, THE PROSECUTOR, THE DEFENSE ATTORNEY, THE JUDGE, OR ANY OTHER COURT PERSONNEL INVOLVED IN THIS CASE? YES ___ NO ___

IF YES, PLEASE EXPLAIN:_____

60. DO YOU KNOW ANY OF THE WITNESSES LISTED ON EXHIBIT A? YES ___ NO ___

IF YES, PLEASE EXPLAIN:_____

61. DO YOU KNOW ANY OF THE OTHER JURORS? YES ___ NO ___

IF YES, PLEASE EXPLAIN:_____

CONCLUSION

62. IS THERE ANYTHING ELSE YOU WANT TO TELL US THAT YOU HAVEN'T ALREADY SHARED? YES ___ NO ___

IF YES, PLEASE EXPLAIN:_____

63. IS THERE ANY REASON WHY YOU COULD NOT BE A FAIR AND IMPARTIAL JUROR IN THIS CASE? YES ___ NO ___

IF YES, PLEASE EXPLAIN:_____

Comment: Jury questionnaires tend to be used in capital cases, other murder cases, and in aggravated sex crimes and other serious felony matters. This sample questionnaire focuses on these types of cases and is intended to give the practicing trial attorney "coverage" for most general areas important in voir dire of those cases. There is an emphasis on questions germane to mental health issues, since they commonly arise in these types of cases. Case-specific questions are not included; counsel should consider inserting case-specific questions to enhance the voir dire process.

The trial court must conduct an initial examination of prospective jurors orally, or by questionnaire, or by both methods. Cal Rules of Ct 4.201. Before jury selection begins, the court must meet with counsel to discuss certain issues pertaining to trial and to jury selection. Cal Rules of Ct 4.200(a). Before this meeting, the court may require attorneys for both sides to submit in writing a set of proposed questions for the court to ask prospective jurors either orally or by questionnaire. Cal Rules of Ct 4.200(b).

Questionnaires can streamline voir dire in complex cases by eliminating the need to spend time obtaining basic demographic information and by disclosing attitudes that may point to the existence of a bias. In addition, the questionnaires provide a written record so that counsel does not have to worry about writing down or remembering the information contained in them. Questionnaires are particularly helpful when counsel wishes to know information concerning jurors that might be embarrassing if brought out in open court. Unless otherwise ordered by the court, these questionnaires may ask only questions related to juror identification, qualification, and ability to serve, and may not be used to assist in the courtroom voir dire process. CCP §205(a)-(b).

Submitting a list of key "sensitive" questions to the trial judge for the court's voir dire is often a prudent strategy because jurors perceive the trial judge as neutral, not an advocate. Jurors may be more willing to open up to the judge, particularly if the judge explains that questions calling for sensitive information need not be answered in open court.

If counsel is trying a death penalty case, then the questions in §29.2A should be inserted at the end of the questionnaire. The Judicial Council has drafted a juror questionnaire for criminal cases, Judicial Council Form MC-002. See §29.3. Use of the Judicial Council form questionnaire is not mandatory.

Cross-Reference: Jury selection is discussed in California Criminal Law Procedure and Practice, chap 29 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/29 Jury Selection/§29.2A C. Sample Jury Questionnaire: Capital Case

§29.2A C. Sample Jury Questionnaire: Capital Case

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

VIEWS ON THE DEATH PENALTY AND THE PENALTY OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE

The court is asking the following questions regarding your feelings about the death penalty because one of the possible sentences for a person convicted of the charges the prosecution has filed is the death penalty. Therefore, the court must know whether you could be fair to both the prosecution and the defense on the issue of punishment if you reach that issue. By asking these questions, the court is not suggesting that you will ever need to decide this question because the court does not know whether you will find the defendant guilty of anything at all. In other words, the only way the issue of punishment will be decided by the jury is if it should find the defendant guilty of first degree murder beyond a reasonable doubt and the alleged special circumstance(s) true beyond a reasonable doubt. By asking about your views on penalty now, the court is not suggesting that the jury in this case will find the defendant guilty.

64. WILL ASKING QUESTIONS CONCERNING YOUR VIEWS ABOUT THE DEATH PENALTY AND THE PENALTY OF LIFE IN PRISON WITHOUT POSSIBILITY OF PAROLE SUGGEST TO YOU THAT THE DEFENDANT MUST BE GUILTY? YES [ ] NO [ ]

65. DO YOU UNDERSTAND THAT THE ONLY TASK JURORS ARE ASKED TO PERFORM DURING THE FIRST PHASE OF TRIAL IS TO DECIDE WHETHER THE PROSECUTION HAS PROVEN FIRST-DEGREE MURDER AND THE SPECIAL CIRCUMSTANCE(S) BEYOND A REASONABLE DOUBT? YES [ ] NO [ ]

66. DO YOU UNDERSTAND THAT IF THERE IS A PENALTY TRIAL, THE ONLY TWO POSSIBLE SENTENCES WILL BE THE DEATH PENALTY AND LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE? YES [ ] NO [ ]

67. WHAT ARE YOUR FEELINGS REGARDING THE DEATH PENALTY?

_____

68. WHAT ARE YOUR FEELINGS REGARDING LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE?

_____

69. HOW WOULD YOU RATE YOUR ATTITUDE TOWARDS THE DEATH PENALTY? STRONGLY OPPOSE [ ] OPPOSE [ ] WEAKLY OPPOSE [ ]

WEAKLY SUPPORT [ ] SUPPORT [ ] STRONGLY SUPPORT [ ]

70. DO YOU FEEL THE DEATH SENTENCE IS IMPOSED:

TOO OFTEN [ ] TOO SELDOM [ ] ABOUT RIGHT [ ]

WHY DO YOU FEEL THIS WAY? _____

71. BRIEFLY DESCRIBE ANY ARTICLE, BOOK, OR NEWS PROGRAMS THAT INFLUENCED YOUR FEELINGS ABOUT THE DEATH PENALTY:_____

72. HAVE YOU EVER BEEN INVOLVED IN ANY WAY, SUCH AS CIRCULATING A PETITION, IN THE SUPPORT OF THE DEATH PENALTY? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

73. HAVE YOU EVER BEEN INVOLVED IN ANY WAY, SUCH AS CIRCULATING A PETITION, IN OPPOSITION TO THE DEATH PENALTY? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN: _____

74. OVER THE PAST 5 YEARS, HAVE YOUR VIEWS ON THE DEATH PENALTY CHANGED? YES [ ] NO [ ]

IF YES, PLEASE DESCRIBE THOSE CHANGES:_____

75. ARE YOU AWARE THAT SEVERAL PEOPLE HAVE BEEN EXECUTED IN CALIFORNIA? YES [ ] NO [ ]

WHAT WAS YOUR REACTION TO WHAT YOU SAW, HEARD OR READ?

_____

76. DOES IT TAKE TOO LONG IN CALIFORNIA TO EXECUTE A DEFENDANT ELIGIBLE FOR THE DEATH PENALTY? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN YOUR ANSWER._____

77. WHAT PURPOSE, IF ANY, DO YOU FEEL THE DEATH PENALTY SERVES?

_____

78. DO YOU HAVE ANY MORAL, RELIGIOUS, OR PHILOSOPHICAL OPPOSITION TO THE DEATH PENALTY SO STRONG THAT YOU WOULD BE UNABLE TO IMPOSE THE DEATH PENALTY REGARDLESS OF THE FACTS? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN: _____

79. DO YOU HAVE ANY MORAL, RELIGIOUS, OR PHILOSOPHICAL BELIEFS IN FAVOR OF THE DEATH PENALTY SO STRONG THAT YOU WOULD BE UNABLE TO IMPOSE LIFE WITHOUT POSSIBILITY OF PAROLE REGARDLESS OF THE FACTS? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

80. IF YOU ARE IN FAVOR OF THE DEATH PENALTY, WOULD YOUR OPINION SUBSTANTIALLY IMPAIR YOUR ABILITY TO PERFORM AS A JUROR SUCH THAT YOU WOULD ONLY VOTE FOR THE DEATH PENALTY, REGARDLESS OF THE EVIDENCE? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

81. IF YOU OPPOSE THE DEATH PENALTY, WOULD YOUR VIEW SUBSTANTIALLY IMPAIR YOUR ABILITY TO PERFORM YOUR DUTY AS A JUROR SUCH THAT YOU WOULD ONLY VOTE FOR LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE, REGARDLESS OF THE EVIDENCE? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

PENALTY PHASE EVIDENCE

The trial of a defendant charged with first degree murder that may result in the death penalty is different from all other trials. At the first trial, after hearing the evidence presented and arguments of counsel, the jury must decide whether (1) the defendant is guilty of first degree murder and (2) a special circumstance is true. If the defendant is found guilty of first degree murder and if the special circumstance is found to be true, there will be a second trial during which additional evidence will be presented concerning what penalty is appropriate.

The jury will determine the penalty by considering factors in aggravation and mitigation. Evidence in aggravation may include the circumstances of the offense charged, prior felony convictions, and other prior criminal conduct of the defendant.

Evidence in mitigation may include the defendant's upbringing, mental condition, education, age, drug/alcohol use, the circumstances of the offense, the defendant's role in the offense, and other factors.

There is a wide spectrum of possible evidence that you may be asked to consider if this case should have a penalty phase. We cannot, of course, tell you now what the evidence would be, nor can you be expected to tell us the weight, if any, you might give particular evidence. Only after that evidence is presented will the jury be asked to recommend the sentence. In that situation:

82. ARE YOU WILLING TO WEIGH AND CONSIDER ALL THE EVIDENCE OF THE AGGRAVATING AND MITIGATING FACTORS THAT WILL BE PRESENTED TO YOU BEFORE DECIDING WHAT THE APPROPRIATE PUNISHMENT SHOULD BE? YES [ ] NO [ ]

IF NO, PLEASE EXPLAIN:_____

83. DO YOU HAVE SUCH A STRONG OPINION AGAINST THE DEATH PENALTY THAT IF THE PEOPLE PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT IS GUILTY OF FIRST DEGREE MURDER, YOU WOULD REFUSE TO VOTE FOR A VERDICT OF GUILTY OF FIRST DEGREE MURDER IN ORDER TO AVOID HAVING YOU AND YOUR FELLOW JURORS REACH THE DEATH PENALTY QUESTION? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

84. DO YOU HAVE SUCH A STRONG OPINION AGAINST THE DEATH PENALTY THAT IF THE PEOPLE PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT IS GUILTY OF MURDER IN THE FIRST DEGREE AND PROVE BEYOND A REASONABLE DOUBT THE TRUTHFULNESS OF THE ALLEGED SPECIAL CIRCUMSTANCES, YOU WOULD REFUSE TO

VOTE FOR A VERDICT THAT THE SPECIAL CIRCUMSTANCES ARE TRUE IN ORDER TO AVOID HAVING YOU AND YOUR FELLOW JURORS REACH THE DEATH PENALTY QUESTION? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

85. DO YOU HAVE SUCH A STRONG OPINION AGAINST THE DEATH PENALTY THAT REGARDLESS OF WHATEVER EVIDENCE MIGHT BE PRESENTED DURING A PENALTY PHASE OF THE TRIAL, SHOULD WE GET THERE, YOU WOULD AUTOMATICALLY AND ABSOLUTELY REFUSE TO CONSIDER OR VOTE FOR A VERDICT OF DEATH IN A CASE INVOLVING THESE CHARGES AND SPECIAL CIRCUMSTANCES?

YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

86. DO YOU HAVE SUCH A STRONG OPINION IN FAVOR OF THE DEATH PENALTY THAT REGARDLESS OF WHATEVER EVIDENCE MIGHT BE PRESENTED DURING A PENALTY PHASE OF THE TRIAL, SHOULD WE GET THERE, YOU WOULD AUTOMATICALLY VOTE FOR A VERDICT OF DEATH IN A CASE INVOLVING THESE CHARGES AND SPECIAL CIRCUMSTANCES? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

87. IF THE JURY FINDS THE DEFENDANT GUILTY OF FIRST DEGREE MURDER AND IF THE JURY ALSO FINDS THE SPECIAL CIRCUMSTANCE TRUE, WILL YOU LISTEN TO AND CONSIDER ALL THE EVIDENCE PRESENTED BY THE PEOPLE AND THE DEFENDANT AT THE PENALTY PHASE OF THE TRIAL BEFORE YOU REACH A DECISION ON WHAT THE PENALTY SHOULD BE? YES [ ] NO [ ]

IF NO, PLEASE EXPLAIN:_____

88. WOULD YOU AUTOMATICALLY VOTE FOR THE DEATH PENALTY NO MATTER WHAT EVIDENCE IS PRESENTED AT THE PENALTY PHASE OF THE TRIAL? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

89. WOULD YOU AUTOMATICALLY VOTE FOR LIFE IN PRISON WITHOUT PAROLE NO MATTER WHAT EVIDENCE IS PRESENTED AT THE TRIAL? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

90. IS THERE ANYTHING ELSE THAT YOU FEEL THE COURT SHOULD KNOW ABOUT YOUR FEELINGS ON THE DEATH PENALTY, LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE, AND/OR YOUR QUALIFICATIONS AS A JUROR? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

91. AS A RESULT OF YOUR HAVING BEEN ASKED TO FILL OUT THIS QUESTIONNAIRE, DO YOU HAVE AN OPINION ABOUT THIS CASE?

YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN:_____

92. NOW THAT YOU HAVE ANSWERED ALL THE QUESTIONS, ARE YOU WILLING TO SERVE AS A JUROR ON THIS CASE? YES [ ] NO [ ]

PLEASE EXPLAIN:_____

93. IS THERE ANY REASON YOU WOULD NOT BE A FAIR JUROR IN THIS CASE? YES [ ] NO [ ]

IF YES, PLEASE EXPLAIN: _____

Comment: If counsel is trying a death penalty case, these questions should be inserted at the end of the questionnaire. These questions probe a potential juror's view on capital punishment and a sentence of life without the possibility of parole. Failure by defense counsel to ask such questions will likely create an appellate or habeas corpus issue.

Tactically, it is important for counsel to have sufficient time to review the questionnaires before courtroom voir dire commences. If defense counsel has retained a jury consultant, they should have an agreed-upon format or checklist to review in writing each potential juror before in-court voir dire starts. Such a plan will save time and also facilitate counsel stipulating to some jurors being excused for cause. If possible, the jury consultant that analyzed the questionnaires should also be present in court during voir dire to assist counsel in objectively analyzing body language and the content of the potential jurors' responses.

Cross-Reference: Jury selection is discussed in California Criminal Law Procedure and Practice, chap 29 (Cal CEB

Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/29 Jury Selection/§29.3 D. Juror Questionnaire for Criminal Cases (Judicial Council Form MC-002)

§29.3 D. Juror Questionnaire for Criminal Cases (Judicial Council Form MC-002)



JUROR QUESTIONNAIRE FOR CRIMINAL CASES

Form MC-002 (Optional Form)

Code of Civil Procedure Section 205(c)–(d)

Sec. 1. Statutory Authority

This Juror Questionnaire has been drafted under the authority of Code of Civil Procedure section 205(c)–(d) and is intended to expedite jury selection. It is not intended to alter statutes or rules governing the authority of the court or the role of counsel during voir dire.

Sec. 2. Use Notes for Courts

A. General

This Juror Questionnaire is an **optional form** and is **NOT** intended to constitute the complete examination of prospective jurors. **The utility and appropriateness of this questionnaire to a particular case is at the discretion of the judge.** Particular kinds of cases may require that this questionnaire be altered or augmented with the participation of counsel.

B. Pre-Voir Dire Conference

Rule of Court 4.200 requires that the court confer with counsel about voir dire before a jury panel is called. At this conference, the court may establish (1) guidelines for the use of the Juror Questionnaire, (2) any supplemental questions to be propounded to the panel by questionnaire, (3) the extent of the court's oral inquiry of the panel, and (4) the extent of oral questioning by counsel. Arrangements for duplication of completed questionnaires should be confirmed.

C. Introduction of Questionnaire to Prospective Jurors

It is suggested that the Juror Questionnaire be used after the court has given its customary introductory remarks and any additional instructions that the court deems appropriate. The court also may wish to tell the panel members that a questionnaire will be used, to encourage complete answers, and to remind them that their answers will be given under penalty of perjury. In introducing the questionnaire, the court should instruct prospective jurors how to proceed if they have difficulty reading or filling out the form.

It is not recommended that the court direct the jury commissioner to give the Juror Questionnaire to prospective jurors in the jury assembly room. This procedure ordinarily will mean that jurors are not given complete instructions about the type of case they will hear or the identity of participants and witnesses. In addition, jurors who fill out the form before appearing in the trial court may not clearly understand that their answers are given under penalty of perjury. For these reasons, and to avoid the need to have jurors fill out supplemental questionnaires once they have been sent to the trial court, it is strongly recommended that the Juror Questionnaire be used in the trial court setting.

Print

JUROR QUESTIONNAIRE FOR CRIMINAL CASES

Introduction and Instructions

Thank you for coming to court as a potential juror. Before the case can start, a jury must be selected. The judge and the parties need to know information about you and people you know in order to select jurors who can be fair to both sides.

Everyone has attitudes and opinions that are shaped by their life experiences. Sometimes these experiences can make it difficult to look at a certain issue in an unbiased and unemotional way. As a juror, you must return a verdict based on the law and on the facts proved in court. The judge will give you instructions on the law and on how you should go about deciding the case. You must listen to and follow the judge's instructions.

The questions on this form are designed to help the court and the lawyers learn something about your background and your views on issues that may be related to this case. The questions are asked not to invade your privacy, but to make sure that you can be a fair and impartial juror.

In portions of this form, you will see the term "person with whom you share a significant personal relationship." That term means a former spouse, domestic partner, life partner, or anyone with whom you have an influential or intimate relationship that you would characterize as important.

As you answer the questions that follow, please keep in mind that there are no "right" or "wrong" answers. The only right answer is one that reflects how you honestly feel. Please make sure your answers are as complete as possible. Complete answers are far more helpful and may help shorten the time it takes to select a jury. If you have trouble reading, understanding, or filling out this form, please let the court staff know. If a question does not apply to you please write in "N/A" for "not applicable" rather than leave the question blank.

The information you provide will become part of the court record in this case and will be a public document that is accessible to anyone. Some of the questions may require information that is personal and sensitive to you, and you may be reluctant to talk about this information with the other prospective jurors and the public present. If this is so, write "private" next to the question and the court **may** then give you an opportunity to share your information on the record with only the judge, counsel, the defendant, and the court reporter present. The answers you provide will, under most circumstances, be included as part of the public record but you may not have to share the information in open court.

PLEASE PUT THE LAST FOUR DIGITS OF YOUR JUROR IDENTIFICATION NUMBER FOUND ON YOUR JUROR BADGE ON THE TOP OF EACH PAGE.

Print

REMEMBER THAT YOU ARE ANSWERING THESE QUESTIONS UNDER PENALTY OF PERJURY. YOUR ANSWERS MUST BE TRUE AND COMPLETE. THANK YOU FOR YOUR HELP IN SELECTING A FAIR JURY.

Print

Juror ID number _____

Case number _____

JUROR QUESTIONNAIRE FOR CRIMINAL CASES

General Questions

PLEASE PRINT ALL ANSWERS LEGIBLY

1.1 AGE: _____

1.2 THIS (THESE) CRIME(S) ALLEGEDLY TOOK PLACE _____
INSERT LOCATION OF CRIME(S)

DO YOU RESIDE IN THE VICINITY OF THIS LOCATION OR DO YOU FREQUENT THIS LOCATION?

☐ YES ☐ NO

IF YES, PLEASE EXPLAIN:

_____

_____

_____

1.3 DESCRIBE ANY DIFFICULTIES (VISION, HEARING, OR MEDICAL PROBLEMS) THAT MAY AFFECT YOUR JURY SERVICE:

_____

_____

_____

_____

1.4 IF YOU HAVE ANY ETHICAL, RELIGIOUS, POLITICAL, OR OTHER BELIEFS THAT MAY PREVENT YOU FROM SERVING AS A JUROR, EXPLAIN:

_____

_____

_____

_____

Print

Juror ID number _____

Case number _____

1.5 WHAT IS THE HIGHEST LEVEL OF EDUCATION YOU COMPLETED?

☐ GRADE SCHOOL OR LESS

☐ SOME HIGH SCHOOL

☐ HIGH SCHOOL GRADUATE

☐ OTHER *(PLEASE EXPLAIN):*

_____

_____

_____

☐ SOME COLLEGE

(MAJOR): _____

☐ COLLEGE GRADUATE

(MAJOR): _____

☐ POSTGRADUATE STUDY

(MAJOR): _____

☐ TECHNICAL, VOCATIONAL, OR BUSINESS SCHOOL

(MAJOR): _____

1.6 IF YOU PLAN TO ATTEND OR ARE CURRENTLY ATTENDING SCHOOL, DESCRIBE:

_____

_____

_____

1.7 IF YOU, YOUR SPOUSE, ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE HAVE TAKEN ANY COURSES OR HAD ANY TRAINING IN LAW OR A RELATED SUBJECT, DESCRIBE:

_____

_____

_____

1.8 EDUCATIONAL BACKGROUND OF ANY OTHER ADULT WHO LIVES IN YOUR HOME, INCLUDING ANY DEGREES OR CERTIFICATES EARNED:

_____

_____

_____

_____

1.9 YOUR PRESENT EMPLOYMENT STATUS (CHECK ALL THAT APPLY):

☐ EMPLOYED FULL-TIME ☐ RETIRED ☐ UNEMPLOYED, LOOKING FOR WORK

☐ EMPLOYED PART-TIME ☐ STUDENT ☐ UNEMPLOYED, NOT LOOKING FOR WORK

☐ HOMEMAKER

1.10 YOUR CURRENT OR MOST RECENT OCCUPATION (AND FOR HOW LONG):

_____

_____

Print

Juror ID number _____

Case number _____

1.11 NAME OF YOUR CURRENT OR MOST RECENT EMPLOYER OR, IF A STUDENT, YOUR SCHOOL:

_____

_____

1.12 WHAT ARE YOUR SPECIFIC JOB DUTIES AND RESPONSIBILITIES?

_____

_____

_____

_____

1.13 DOES YOUR JOB INVOLVE SUPERVISING OTHER PEOPLE? ☐ YES ☐ NO

IF YES, APPROXIMATELY HOW MANY? _____

1.14 ARE YOU INVOLVED IN THE HIRING AND FIRING OF OTHER EMPLOYEES?

☐ YES ☐ NO

1.15 ARE YOU INVOLVED IN EVALUATING THE JOB PERFORMANCE OF OTHER EMPLOYEES?

☐ YES ☐ NO

1.16 ALL OTHER EMPLOYMENT YOU HAVE HAD IN THE PAST 10 YEARS (AND FOR HOW LONG):

_____

_____

_____

_____

1.17 THE PRESENT EMPLOYMENT STATUS OF YOUR SPOUSE OR ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP (CHECK ALL THAT APPLY):

☐ EMPLOYED FULL-TIME ☐ RETIRED ☐ UNEMPLOYED, LOOKING FOR WORK

☐ EMPLOYED PART-TIME ☐ STUDENT ☐ UNEMPLOYED, NOT LOOKING FOR WORK

☐ HOMEMAKER

1.18 THE CURRENT OR MOST RECENT OCCUPATION OF YOUR SPOUSE OR ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP (AND FOR HOW LONG):

_____

_____

1.19 THE NAME OF THE CURRENT OR MOST RECENT EMPLOYER OF YOUR SPOUSE OR ANY OTHER PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP OR, IF A STUDENT, HIS OR HER SCHOOL:

_____

_____

Print

Juror ID number _____

Case number _____

1.20 WHAT ARE THE SPECIFIC JOB DUTIES AND RESPONSIBILITIES OF YOUR SPOUSE OR ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP?

_____

_____

_____

_____

1.21 IF YOU, YOUR SPOUSE, A PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE ARE CURRENTLY WORKING OR HAVE EVER WORKED IN LAW ENFORCEMENT, PLEASE LIST THE AGENCY, POSITION, AND THE PERSON'S RELATIONSHIP TO YOU:

_____

_____

_____

_____

1.22 IF YOU HAVE CHILDREN, PLEASE LIST (INCLUDING ANY CHILDREN WHO DO NOT CURRENTLY LIVE WITH YOU):

SEX	AGE	DOES CHILD LIVE WITH YOU?	EDUCATION	OCCUPATION

1.23 IF YOU, YOUR SPOUSE, OR A PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP HAS EVER SERVED IN THE MILITARY, PLEASE LIST FOR EACH THE BRANCH OF SERVICE AND DATES OF SERVICE:

_____

_____

_____

1.24 IF YOU, YOUR SPOUSE, OR A PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP EVER HAD INVOLVEMENT WITH THE MILITARY POLICE OR THE MILITARY JUSTICE SYSTEM, PLEASE DESCRIBE:

_____

_____

_____

1.25 SOCIAL, CIVIC, PROFESSIONAL, TRADE, OR OTHER ORGANIZATIONS WITH WHICH YOU ARE AFFILIATED:

_____

_____

Print

1.26 DESCRIBE ANY OFFICES YOU HAVE HELD IN ORGANIZATIONS LISTED ABOVE:

_____

_____

1.27 DO YOU KNOW ANYONE ON THIS JURY PANEL? ☐ YES ☐ NO

1.28 IF YOU PERSONALLY KNOW ANY JUDGES OR ATTORNEYS OR COURT PERSONNEL, WHAT ARE THEIR NAMES AND RELATIONSHIPS TO YOU?

_____

_____

_____

1.29 HAVE YOU PREVIOUSLY SERVED ON A CRIMINAL OR CIVIL TRIAL JURY?

☐ YES ☐ NO

ON HOW MANY CASES DID YOU SERVE? _____

APPROXIMATE YEAR(S)? _____

WHERE DID YOU SERVE ON A JURY? _____

WERE YOU A JUROR OR AN ALTERNATE? _____

WHAT KINDS OF CASES DID YOU HEAR WHILE SERVING ON A JURY?

_____

_____

WAS THERE ANYTHING ABOUT YOUR JURY SERVICE THAT WOULD MAKE YOU QUESTION YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE? IF SO, PLEASE EXPLAIN:

_____

_____

_____

_____

1.30 HAVE YOU EVER SERVED ON A GRAND JURY PANEL? ☐ YES ☐ NO

CRIMINAL OR CIVIL GRAND JURY? _____

APPROXIMATE YEAR(S)? _____

WHERE DID YOU SERVE ON A GRAND JURY? _____

HOW LONG DID YOU SERVE ON A GRAND JURY? _____

WHAT KIND OF MATTER DID YOU HEAR WHILE SERVING ON A GRAND JURY?

_____

_____

WAS THERE ANYTHING ABOUT YOUR JURY SERVICE THAT WOULD MAKE YOU QUESTION YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE? IF SO, PLEASE EXPLAIN:

_____

_____

_____

Print

Juror ID number _____

Case number _____

1.31 HAVE YOU, YOUR SPOUSE, ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE EVER BEEN A VICTIM OF A CRIME?

☐ YES ☐ NO

IF YES, WHO? _____

WHAT CRIME(S)? _____

WHEN? _____

WHAT HAPPENED? _____

_____

_____

WAS ANYONE ARRESTED? ☐ YES ☐ NO

WAS THERE A TRIAL? ☐ YES ☐ NO

IF YES, DID YOU ATTEND THE TRIAL? ☐ YES ☐ NO

DID THE PERSON WHO IS THE SUBJECT OF THIS QUESTION TESTIFY? ☐ YES ☐ NO

DID THE POLICE INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION?

☐ YES ☐ NO

DID ANYONE WORKING FOR THE DEFENDANT INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION?

☐ YES ☐ NO

AS A RESULT OF THAT EXPERIENCE IS THERE ANYTHING THAT WOULD MAKE YOU QUESTION YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE? IF SO, PLEASE EXPLAIN:

_____

_____

_____

_____

1.32 HAVE YOU, YOUR SPOUSE, ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE EVER BEEN A WITNESS TO A CRIME?

☐ YES ☐ NO

IF YES, WHO? _____

WHAT CRIME(S)? _____

WHEN? _____

WHAT HAPPENED? _____

_____

_____

WAS ANYONE ARRESTED? ☐ YES ☐ NO

WAS THERE A TRIAL? ☐ YES ☐ NO

IF YES, DID YOU ATTEND THE TRIAL? ☐ YES ☐ NO

DID THE PERSON WHO IS THE SUBJECT OF THIS QUESTION TESTIFY? ☐ YES ☐ NO

Print

Juror ID number _____

Case number _____

DID THE POLICE INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION?

☐ YES ☐ NO

DID ANYONE WORKING FOR THE DEFENDANT INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION?

☐ YES ☐ NO

AS A RESULT OF THAT EXPERIENCE IS THERE ANYTHING THAT WOULD MAKE YOU QUESTION YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE? IF SO, PLEASE EXPLAIN:

_____

_____

_____

_____

1.33 **HAVE YOU, YOUR SPOUSE, ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE EVER HAD ANY CONTACT WITH LAW ENFORCEMENT, INCLUDING, BUT NOT LIMITED TO, BEING: (A) STOPPED BY THE POLICE? (B) ACCUSED OF MISCONDUCT, WHETHER OR NOT IT WAS A CRIME? (C) INVESTIGATED AS A SUSPECT IN A CRIMINAL CASE? (D) CHARGED WITH A CRIME? (E) A CRIMINAL DEFENDANT?**

☐ YES ☐ NO

IF YES, WHO? _____

WHAT CRIME(S)? _____

WHEN? _____

WHAT HAPPENED? _____

_____

_____

WAS ANYONE ARRESTED? ☐ YES ☐ NO

WAS THERE A TRIAL? ☐ YES ☐ NO

IF YES, DID YOU ATTEND THE TRIAL? ☐ YES ☐ NO

DID THE PERSON WHO IS THE SUBJECT OF THIS QUESTION TESTIFY? ☐ YES ☐ NO

DID THE POLICE INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION?

☐ YES ☐ NO

DID ANYONE WORKING FOR THE DEFENDANT INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION?

☐ YES ☐ NO

AS A RESULT OF THAT EXPERIENCE IS THERE ANYTHING THAT WOULD MAKE YOU QUESTION YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE? IF SO, PLEASE EXPLAIN:

_____

_____

_____

_____

Print

Juror ID number _____

Case number _____

1.34 HAVE YOU EVER BEEN TO COURT FOR ANY OTHER REASON? EXPLAIN:

_____

_____

_____

1.35 THE FOLLOWING IS A PRINCIPLE OF LAW THAT APPLIES TO ALL CRIMINAL CASES:

A defendant in a criminal action is presumed to be innocent. This presumption requires that the People prove each element of a crime [and special allegation] beyond a reasonable doubt. Whenever the judge tells you the People must prove something, the judge means they must prove it beyond a reasonable doubt [unless the judge specifically tells you otherwise].

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/they) not guilty. (CALCRIM No. 130)

DO YOU UNDERSTAND THIS PRINCIPLE OF LAW?

☐ YES ☐ NO

DO YOU AGREE WITH THIS PRINCIPLE OF LAW?

☐ YES ☐ NO

WILL YOU FOLLOW THIS PRINCIPLE OF LAW?

☐ YES ☐ NO

IF YOU ANSWERED NO TO ANY QUESTION, PLEASE EXPLAIN:

_____

_____

_____

1.36 IN GENERAL, WHAT ARE YOUR OPINIONS, IF ANY, ABOUT LAW ENFORCEMENT OFFICERS?

_____

_____

_____

1.37 HAVE YOU, YOUR SPOUSE, ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE EVER HAD A PARTICULARLY PLEASANT OR UNPLEASANT EXPERIENCE WITH LAW ENFORCEMENT OR THE DISTRICT ATTORNEY'S OFFICE?

☐ YES ☐ NO

IF YES, PLEASE EXPLAIN:

_____

Print

Juror ID number _____

Case number _____

1.38 WOULD THE FACT THAT A WITNESS IS A MEMBER OF LAW ENFORCEMENT CAUSE YOU TO AUTOMATICALLY BELIEVE OR DISBELIEVE HIS OR HER TESTIMONY?

☐ YES ☐ NO

IF YES, PLEASE EXPLAIN:

_____

_____

_____

Print

Juror ID number _____

Case number _____

JUROR QUESTIONNAIRE FOR CRIMINAL CASES

Capital Case Supplement

By asking the following questions regarding your feelings or opinions about capital punishment, the court is not suggesting in any way that you will ever need to decide this question. The court does not know in advance what the evidence in this case will be or whether you will find a defendant guilty or not guilty of any charge at all. The court is asking the following questions because *if* a defendant is found guilty of murder in the first degree as well as what we call "special circumstances" that have been charged, the possible sentences to be decided in a separate penalty trial are the sentence of death or the sentence of life imprisonment without the possibility of parole. A defendant may also be acquitted or found guilty of lesser charges, which means there never will be a penalty trial. Since we do not know in advance what your decisions may be, the court must know whether you could be fair to all sides on the issue of punishment if and only if a penalty trial is necessary.

To clarify, you will only make a sentence decision between life without the possibility of parole and death in a separate penalty trial if you find a defendant guilty of murder in the first degree beyond a reasonable doubt and you find a "special circumstance" (to be defined for you later) true.

If the penalty trial is necessary you will first hear evidence and arguments from counsel. The law also provides very specific guidelines as to what a jury can consider in deciding the sentence in this separate penalty trial. These guidelines are called "aggravating factors" and "mitigating factors" and are explained in *Judicial Council of California Criminal Jury Instructions* number 763:*

> In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence.
>
> An aggravating circumstance or factor is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself, that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.
>
> A mitigating circumstance or factor is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.

Print

* Note to users: *California Jury Instructions, Criminal (CALJIC)* and *Judicial Council of California Criminal Jury Instructions (CALCRIM)* are not intended to be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Trying to mix the two sets of instructions into a unified whole may result in omissions or confusion that could compromise clarity and accuracy. For more information concerning the use of *CALCRIM* and *CALJIC* together, check the *CALCRIM* user forum at the following address: *http://serranus.courtinfo.ca.gov/reference/crim_jury_instructions/forum.htm.*

Print

Juror ID number _____

Case number _____

2.1 WHICH DO YOU THINK IS THE MORE SEVERE PUNISHMENT?

☐ THE DEATH PENALTY OR ☐ LIFE IN PRISON WITHOUT PAROLE

WHY?

_____

_____

_____

_____

2.2 WHICH WOULD YOU SAY ACCURATELY STATES YOUR GENERAL BELIEF REGARDING THE DEATH PENALTY?

☐ STRONGLY IN FAVOR

☐ MODERATELY IN FAVOR

☐ NEUTRAL

☐ MODERATELY OPPOSED

☐ STRONGLY OPPOSED

PLEASE EXPLAIN IN MORE DETAIL YOUR BELIEFS ABOUT THE SENTENCE OF DEATH:

_____

_____

_____

_____

2.3 WHICH WOULD YOU SAY ACCURATELY STATES YOUR GENERAL BELIEF REGARDING LIFE WITHOUT THE POSSIBILITY OF PAROLE?

☐ STRONGLY IN FAVOR

☐ MODERATELY IN FAVOR

☐ NEUTRAL

☐ MODERATELY OPPOSED

☐ STRONGLY OPPOSED

PLEASE EXPLAIN IN MORE DETAIL YOUR BELIEFS ABOUT THE SENTENCE OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE:

_____

_____

_____

_____

2.4 WHAT PURPOSES, IF ANY, DO YOU BELIEVE THAT LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE SERVES?

_____

_____

_____

_____

Print

Juror ID number _____

Case number _____

2.5 WHAT PURPOSES, IF ANY, DO YOU BELIEVE THE DEATH PENALTY SERVES?

_____

_____

_____

_____

2.6 DO YOU BELIEVE THE DEATH PENALTY IS IMPOSED:

☐ TOO OFTEN ☐ ENOUGH

☐ NOT ENOUGH ☐ RANDOMLY

☐ DO NOT KNOW

2.7 HAVE YOUR VIEWS ABOUT THE DEATH PENALTY CHANGED SUBSTANTIALLY IN EITHER INTENSITY OR NATURE IN THE LAST FEW YEARS?

☐ YES ☐ NO

IF YES, HOW HAVE YOUR VIEWS ABOUT THE DEATH PENALTY CHANGED?

_____

_____

_____

_____

2.8 CAN YOU SET ASIDE ANY OPINIONS YOU MAY HAVE ABOUT THE DEATH PENALTY, AND MAKE A DECISION IN THIS CASE BASED ON THE EVIDENCE AND THE LAW AS IT IS GIVEN BY THE JUDGE?

☐ YES ☐ NO

IF NO, WHY NOT?

_____

_____

_____

_____

2.9 DO YOU HAVE ANY RELIGIOUS OR PERSONAL BELIEFS THAT MAY INFLUENCE YOU IN YOUR DETERMINATION OF WHETHER TO VOTE TO IMPOSE EITHER THE PENALTY OF DEATH OR LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE?

☐ YES ☐ NO

IF YES, PLEASE EXPLAIN:

_____

_____

_____

_____

Print

Juror ID number _____

Case number _____

2.10 ARE YOU A MEMBER OF, OR HAVE YOU CONTRIBUTED TO OR OTHERWISE SUPPORTED A CHURCH, RELIGIOUS ORGANIZATION, POLITICAL OR SOCIAL ADVOCACY GROUP, OR ANY OTHER ORGANIZATION THAT TAKES A POSITION FOR OR AGAINST THE IMPOSITION OF THE PENALTY OF DEATH?

☐ YES ☐ NO

a. IF YES, WHAT GROUP(S)?

_____

_____

_____

_____

b. WHAT IS THE GROUP'S POSITION?

_____

_____

_____

_____

c. DO YOU FEEL OBLIGATED TO ACCEPT THIS POSITION?

☐ YES ☐ NO

IF YES, PLEASE EXPLAIN WHY:

_____

_____

_____

_____

2.11 EVEN IF YOU BELIEVED THE PROSECUTOR HAD PROVED GUILT BEYOND A REASONABLE DOUBT, WOULD YOU, BECAUSE OF ANY VIEW S YOU MAY HAVE REGARDING THE DEATH PENALTY, REFUSE TO FIND THE DEFENDANT(S) GUILTY OR FIND A SPECIAL CIRCUMSTANCE TO BE TRUE IN ORDER TO AVOID HAVING TO DECIDE WHETHER TO IMPOSE THE DEATH PENALTY?

☐ YES ☐ NO

2.12 IF YOU FIND THE DEFENDANT(S) GUILTY OF THE CRIME, WOULD YOU AUTOMATICALLY IN ALL CASES VOTE FOR A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE REGARDLESS OF THE EVIDENCE CONCERNING AGGRAVATING AND MITIGATING FACTORS?

☐ YES ☐ NO

2.13 IF YOU FIND THE DEFENDANT(S) GUILTY OF THE CRIME, WOULD YOU AUTOMATICALLY IN ALL CASES VOTE FOR A SENTENCE OF DEATH REGARDLESS OF THE EVIDENCE CONCERNING AGGRAVATING AND MITIGATING FACTORS?

☐ YES ☐ NO

Print

Juror ID number _____

Case number _____

JUROR QUESTIONNAIRE FOR CRIMINAL CASES

Verification

I, _____ , DECLARE UNDER PENALTY OF PERJURY UNDER
(PRINT NAME)
THE LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING RESPONSES I HAVE GIVEN ON THIS JUROR QUESTIONNAIRE, AND ON ANY ATTACHED SHEETS, ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

_____ ▶ _____

(DATE and PLACE) **(SIGNATURE)**

Comment: The Judicial Council has approved the use of this optional juror questionnaire for criminal cases. Use of

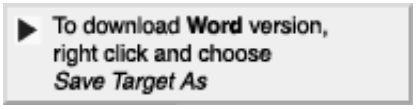
this questionnaire is at the discretion of the trial judge. The form may be supplemented, altered, or accompanied by additional questions appropriate to a particular case as the court sees fit, after consulting with the attorneys in the case, or as mandated by local court rule. See CCP §205(c)-(d). After completion of the court's initial examination (whether oral or by questionnaire or both), the court must permit counsel to conduct additional questioning as permitted by CCP §223. Cal Rules of Ct 4.201.

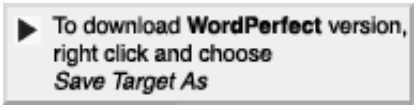
Cross-Reference: Jury selection is discussed in California Criminal Law Procedure and Practice, chap 29 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/29 Jury Selection/§29.4 E. Sample Questions (No Questionnaire): Sexual Molestation of Boys

§29.4 E. Sample Questions (No Questionnaire): Sexual Molestation of Boys





29.4-1 Judge's voir dire questions

1. Have you, or has someone close to you, been the victim of any form of physical abuse or verbal abuse when you were 16 years of age or younger?
2. Have you, or has someone close to you, been the victim of:

   Sexual abuse or molestation when the victim was under 16?

   Witnessing sexual abuse or molestation when the victim was under 16?
3. While 16 years of age or older, have you, or has someone you know, been the victim of any sexual assault (date rape, stranger rape, spousal rape, any act where you were forced to commit a sexual act, or any situation where you received a drug or alcohol that induced you to commit a sexual act you later regretted)?
4. Do you think that a 10-year-old child can falsely accuse a man of sexual molestation? If so,

   How often does this happen?

   What are the main reasons why this occurs?
5. Have you, or has someone close to you, had a negative experience with a psychologist or urologist?
6. Have you, or has someone close to you, suffered from erectile dysfunction or impotence?

29.4-2 Attorney voir dire: Profiling

1. Have you, or has someone close to you, witnessed or experienced domestic violence?
2. Have you, or has someone close to you, received counseling for:

   Physical child abuse,

   Sexual child abuse,

   Sexual assault received at age 16 or older, or

   Domestic violence?
3. Have you, or has someone close to you, suffered from diabetes or hypoglycemia? If so, please explain:

   How severe the diabetes or hypoglycemia was;

   What symptoms you, or the person close to you, experienced;

   What you know about the care for persons with diabetes or hypoglycemia.
4. Have you ever given a financial contribution to a children's hospital or a similar type of medical institution for children?
5. Do you volunteer at a children's hospital, or at a similar type of medical institution for children?
6. Have you ever given a financial contribution to a police, prosecution, crime victims' group, or similar organization? If so, please explain.
7. Does anyone volunteer at any victim's rights organization, sexual assault victims' organization, battered woman's shelter, etc?
8. Are police officers more believable than civilian witnesses? Why?

29.4-3 Attorney voir dire: Deselection

1. Do you think that if the police and prosecution have put significant effort in bringing Mr. Doe to trial that he is probably guilty? Why or why not? Please explain.
2. Do you think that if the police believe a child's claim of sexual molestation that you—as a juror—should too? Why or why not?

3. Do any of you have the power to hire and fire at your job?

    If so, have you ever fired anyone?

    Why did you do it?

4. Have you written a letter to the editor, your legislative representative, or a similar letter?

    If so, why did you do it?

    Did you receive a response?

    If so, were you satisfied with the outcome?

29.4-4 Attorney voir dire: Legal questions

1. Mr. X is presumed innocent under the law. How do you feel about the presumption of innocence? Would you change that law?
2. Why is it so easy to believe that someone is guilty once he or she has been accused of a crime?
3. Do you think that police sometimes arrest the wrong suspect?

    How often does this happen?

    Why does this happen?

4. Is there pressure on police to make arrests? Why or why not?
5. Are there occasions when police officers may lie under oath in order to get a conviction?

    How often does this happen?

    Why does it happen?

6. Mr. X has the constitutional right not to testify, and that decision cannot be held against him in any way. He may choose to testify or not to testify. Only he makes that decision.

    Would it bother anyone if my client does not take the stand to testify? Why?

    What are some reasons why a person accused of a crime might not testify in his jury trial?

        Speech problem

        Nervous

        Not an effective communicator

        Hiding a criminal record

        Hiding gang membership

    There are many reasons. Judge X will instruct you that you cannot speculate as to why Mr. X elects not to testify. Can you follow that instruction as a juror?

    Would you be able to follow the court's instruction that you cannot hold a defendant's decision not to testify in this trial against him?

7. Assume you are the defense attorney in this serious case. Pretend there is a prospective juror—exactly like you—that has truthfully answered all questions asked. What additional information about yourself would you think the defense attorney in this case would like to know that hasn't yet been asked?

Comment: This form contains sample questions from a sexual abuse trial in which the author was defense counsel. Trial attorneys in over 99 percent of criminal jury trials will not utilize a written questionnaire. Questionnaires are routinely used in capital cases but rarely in other criminal cases. Consequently, it is incumbent on trial counsel to have a list of questions to ask the jurors. Logical, case-related questions will show the venire that you are a prepared, organized, and effective advocate for your client. Your preparation will foster disclosure from the prospective jurors.

As discussed in California Criminal Law Procedure and Practice, chap 29 (Cal CEB Annual), the author advocates a two-pronged voir dire protocol. First, submit during pretrial motions a list of "sensitive" questions that you request the trial judge to ask. Experience has shown that jurors will disclose more in sensitive circumstances when questioned by the judge, who is perceived as a "neutral party," rather than when questioned by the defense attorney, who is perceived as a "hired gun."

In particularly sensitive, high-profile cases, the author advocates the use of "hot-button voir dire." See Crim Law §29.47. In hot-button voir dire, after the trial court finishes the general voir dire, the judge tells the jury that a list of

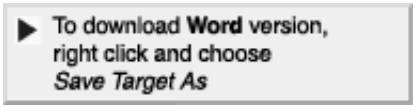
questions (the hot-button questions) will be read but that they are not to answer or raise their hands. Once the list of questions is read and completed, the venire is excused for a long break and the persons who would have answered affirmatively to the hot-button questions are asked to remain outside of the courtroom. The bailiff obtains their juror numbers and, one at a time, they enter the courtroom and voir dire commences—with only one's client, counsel, the judge, and court staff present. The juror answers the question, then leaves, and the next one comes in. Often these jurors are excused at this point. Jurors appreciate this process because they realize how important voir dire is, and they are pleased that they have not been embarrassed.

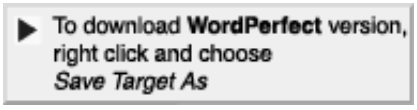
Cross-Reference: Jury selection is discussed in California Criminal Law Procedure and Practice, chap 29 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/29 Jury Selection/§29.5 F. Sample Questions (No Questionnaire): Rape of Woman by Former Boyfriend

§29.5 F. Sample Questions (No Questionnaire): Rape of Woman by Former Boyfriend





29.5-1 Judge's voir dire questions

1. Have you, or has someone you know, been the victim of:

   Date rape,

   Stranger rape,

   Spousal rape, or

   Any other form of rape?

2. Have you, or has someone you know, been the victim of:

   Sexual abuse or molestation when the victim was under 16 years of age?

   Witnessing sexual abuse or molestation when the victim was under 16 years of age?

3. While 16 years of age or older, have you, or has someone you know, been the victim of any sexual assault?

4. Do you think that women sometimes falsely accuse men of rape? If so,

   How often does this happen?

   What are the main reasons why this occurs?

5. Have you, or has someone close to you, had a negative experience with a psychologist?

6. Have you, or has someone close to you, had a negative experience with a perinatologist or an ob-gyn?

29.5-2 Attorney voir dire: Emotional baggage questions

1. Have you, or has someone close to you, witnessed or experienced:

   Physical child abuse,

   Sexual child abuse, or

   Domestic violence?

2. Have you, or has someone close to you, received counseling for:

   Physical child abuse,

   Sexual child abuse,

   Sexual assault received at age 16 or older, or

   Domestic violence?

3. Have you, or has someone close to you, ever been accused of any crime relating to:

   Stalking,

   Rape,

   Any other sex crime,

   Kidnapping, or

   Domestic violence?

29.5-3 Attorney voir dire: Profiling questions

1. What factors do you think predispose a man to be a rapist?

   He has raped before?

He was molested as a child?

He has fantasies regarding rape?

He engages in sadomasochism?

He is a drug addict?

2. How often do women falsely claim they have been raped?

3. What are the main reasons why a woman would falsely claim she was raped?

29.5-4 Attorney voir dire: Standard bias questions

1. Have you ever given a financial contribution to a police, prosecution, crime victims' group, or similar organization? If so, please explain.

2. Does anyone volunteer at any victim's rights organization, sexual assault victims' organization, battered woman's shelter, etc?

3. Are police officers more believable than civilian witnesses? Why?

29.5-5 Attorney voir dire: Deselection questions

1. Do you think that if the police and prosecution have put significant effort in bringing Mr. X to trial that he is probably guilty? Why or why not? Please explain.

2. Do you think that if the police believe a rape victim that you—as a juror—should too? Why or why not?

3. Do any of you have the power to hire and fire at your job?

If so, have you ever fired anyone?

Why did you do it?

4. Have you written a letter to the editor, your legislative representative, and/or similar letter?

If so, why did you do it?

Did you receive a response?

If so, were you satisfied with the outcome?

Comment: This form contains sample questions from a rape trial in which the author was defense counsel. The use of sample questions is discussed in the Comment to §29.4.

Cross-Reference: Jury selection is discussed in California Criminal Law Procedure and Practice, chap 29 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/29 Jury Selection/§29.6 G. Sample Questions (No Questionnaire): Murder of Infirm Family Member

§29.6 G. Sample Questions (No Questionnaire): Murder of Infirm Family Member

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29.6-1 Judge's voir dire questions

1. Have you, or has someone close to you, been the victim of any of the following:

   Carjacking,

   Auto theft,

   Robbery,

   Caretaker abuse involving theft,

   Caretaker abuse involving any form of violence,

   Any assault, or

   Any other violent crime?

2. Have you, or has someone close to you, had:

   Total knee replacement surgery; or

   Other knee surgery?

   If so, please explain.

3. Have you cared for someone who had one or more of the following conditions: heart disease, kidney disease, or arthritic conditions affecting movement, or any condition affecting balance and walking? If so, please explain.

4. Have you, or has someone close to you, had their life adversely affected owing to the abuse of:

   Alcohol,

   Prescribed medications, or

   Illegal drugs?

   If so, please explain.

5. Have you, or has someone close to you, observed someone become violent while under the influence of alcohol or drugs? If so, please explain.

6. Have you, or has someone close to you, taken Lovenox or other blood thinners? If so, please explain.

7. Have you, or has someone close to you, had a negative experience with an African-American person? If so, please explain. If your response would make you uncomfortable, please tell me, and we can arrange for the disclosure to be given in private. Thank you.

8. If you are selected as a juror, you will view photographs of a dead person from an autopsy and at the place where he was found dead. You will see photos of organs, parts of organs, tissues, and part of a skull. Please raise your hand if you think you will have trouble viewing such evidence and otherwise participating as a juror in this case. Please explain your concerns.

29.6-2 Attorney voir dire

1. Have you suffered from any of the following: heart attack, high blood pressure, heart disease, or kidney disease? If so, please explain.

2. Has someone close to you died from heart attack, high blood pressure, heart disease, or kidney disease? If so, please explain.

3. Have you, or has someone close to you, had a negative experience with:

   A cardiologist,

   A pathologist, or

An orthopedic surgeon?

If so, please explain.

4. Have you, or has someone close to you:

Had a transplant of a kidney or other organ?

Been on an organ transplant list?

5. Do you know anyone who has died before he or she could obtain a needed organ transplant? If so, please explain.

Comment: This form contains sample questions from a murder trial in which the author was defense counsel. The use of sample questions is discussed in the Comment to §29.4.

Cross-Reference: Jury selection is discussed in California Criminal Law Procedure and Practice, chap 29 (Cal CEB Annual).

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Preparation and Presentation of Case and Argument

Trial Checklist §30.1

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Source: Criminal Law/California Criminal Law Forms Manual/30 Preparation and Presentation of Case and Argument/ §30.1 Trial Checklist

§30.1 Trial Checklist

TRIAL CHECKLIST

Name of defendant:_____

Case number:_____

Name of opposing counsel:_____

Phone:_____

Fax:_____

Address:_____

_____

_____

Trial court: _____

Trial date:_____

INVESTIGATION TO BE HANDLED BY INVESTIGATOR

Subject of investigation	*Witness names, items desired, etc.*	*Assigned*	*Completed*
Witnesses to crime to be interviewed			
Witnesses to similar bad acts to be interviewed			
Photos or videos to be taken			
Demonstrative evidence to be prepared (e.g., charts)			

YOUR INVESTIGATION

Subject of investigation	*Witness names, items desired, etc.*	*Assigned*	*Completed*
Visiting crime scene			
Witnesses to crime to be interviewed			
Witnesses to similar bad acts to be interviewed			

PREPARATION FOR TRIAL

- Review all discovery.
- Make any pretrial motions that were not made but that need to be made before trial.
- Request investigation.
- Request subpoenas (duces tecum) for witnesses.

- Send for priors, if relevant.
- Order transcripts of prior testimony, if relevant.
- Request, order, or subpoena duces tecum, as appropriate, relevant medical, psychological, or other records.
- Contact probation or parole officers if the defendant is on probation or parole.
- Prepare a list of types of expert witnesses you need to find.
- Prepare a list of prior testimony you may need to obtain to impeach, or to be used in place of a witness.
- Prepare any requests for judicial notice of evidence you wish to submit.
- If defendant is a noncitizen, the prosecutor should consider contacting immigration authorities.
- Prepare information on the possibility of immunity for a witness, including a codefendant, or for the defendant.
- If there is a confession, obtain a copy, and interview those who heard it.
- Obtain copies of any relevant pretrial orders, rulings, or stipulations in the case.
- Determine whether you will ask any jury voir dire questions, submit questions to be asked by the judge, or submit a written jury questionnaire to be given to jurors. Prepare appropriate voir dire questions.
- Determine what facts must be proved to support a conviction of each charge. Review relevant CALCRIM instructions to help in this determination. (This review may lead the prosecutor to consider amending the complaint or information.)
- Determine what facts must be proved to support any affirmative defenses, if relevant.
- Prepare a written witness list to be given to the judge at the beginning of the case.
- Write an outline of points to be made in your opening statement.
- Write an outline of anticipated testimony for each witness you will present. Leave a line next to each fact to be proved so you can check them off, either as you question the witness or after you finish questioning the witness but before you have excused him or her. Attach to the outline any police reports or investigation reports concerning that witness's testimony. (You may wish to highlight areas of importance to your questioning.)
- Write an outline for each opposing witness you anticipate will be called, listing facts or issues you wish to bring out on cross-examination. Next to each item list any impeaching evidence relative to that point, *e.g.,* a prior statement to the police or to an investigator. Attach the impeaching evidence. (You may wish to highlight areas of importance to your questioning.)
- Write an outline of the main points you wish to make in your closing statement(s).
- Prepare a list of requested CALCRIM jury instructions. Prepare any original instructions you wish to submit.
- Have your investigator or assistant gather and store all real evidence. Right before trial, have each exhibit marked with the exhibit letters or numbers you have assigned them. (Check to see if there is a practice concerning which side is assigned letters and which is assigned numbers for the exhibits. The usual practice is for the defense to be assigned letters, and the prosecution to be assigned numbers.)
- Arrange for any demonstrative evidence to be in working order, to have the courtroom reviewed to make sure any appropriate props or electrical plugs are present, and, when necessary, for a trained technician to be available to demonstrate the evidence.
- If you are using a computer at trial, arrange for any necessary equipment, software, plugs, etc., to be in place and working ahead of time.
- If you wish to submit a transcript of an audiotape, have it prepared.

WITNESS AND SUBPOENA (DUCES TECUM) CHECKLIST

Witness's name	*Bringing documents*	*Subpoenaed*	*Date subpoena served*	*Date subpoenaed to appear*	*Manner of service of subpoena*

NOTE: If the trial date is changed, be sure to notify witnesses in advance, and to request that new subpoenas be issued.

LEGAL MEMORANDA

[*List evidentiary issues you should research before trial. If a written memorandum is desirable, note that. Prepare any stipulations or requests for judicial notice. Prepare offers of proof that may be needed.*]

THEME OF CASE

[*Select a theme, e.g., cover-up, vendetta, conspiracy, mistake based on race or sex.*]

STIPULATIONS AND JUDICIAL NOTICE

[*List evidence you may try to have admitted by stipulation or judicial notice.*]

IN LIMINE MOTIONS

[*List in limine motions you will make.*]

[*List in limine motions your opponent may make.*]

WITNESS LIST IN ORDER OF APPEARANCE

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

TABLE OF EXHIBITS, IN ORDER OF INTRODUCTION

Exhibit Description	*Exhibit Letter/ Number*	*Witness Who Will Introduce Exhibit*	*Offered*	*Admitted*	*New Letter/ Number at Trial*

OPENING STATEMENT

[*List main points you will make.*]

[*Indicate how you will incorporate your theme into your opening statement.*]

CASE-IN-CHIEF

Facts That Must Be Proved	*Witnesses Who Will Testify to Fact*	*Evidence to Support Fact*	*Witness Notified*	*Witness/Item Subpoenaed*

CROSS-EXAMINATION

Witness	*Facts to Be Brought Out on Cross*	*Impeaching Documents*

REBUTTAL

Witness	*Facts to Be Brought Out on Rebuttal*	*Impeaching Documents*

CLOSING ARGUMENT (FIRST FOR D.A.; ONLY ONE FOR DEFENSE)

[*List main points.*]

_____

_____

_____

_____

_____

_____

_____

_____

CLOSING ARGUMENT (SECOND FOR D.A.)

[*List main points.*]

_____

_____

_____

_____

_____

_____

_____

_____

JURY INSTRUCTIONS

[*List CALCRIM instructions you want the judge to give, and attach any original instructions you wish to submit. List any particular instructions you think your opponent will request that you wish to oppose.*]

_____

_____

_____

_____

_____

_____

_____

_____

Comment: This checklist may be used to track the preparation of the case.

Cross-Reference: Trial is discussed in California Criminal Law Procedure and Practice, chap 30 (Cal CEB Annual). Jury instructions are discussed in Crim Law, chap 32.

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31

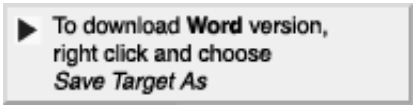
Selected Trial Motions

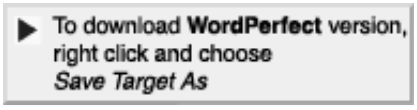
A. Motion In Limine to Exclude Evidence §31.1
B. Application for Order for Temporary Removal of Prisoner and for His or Her Production as Witness §31.2
C. Request for Judicial Notice at Trial §31.3
D. Order Concerning Defendant During Trial §31.4

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Source: Criminal Law/California Criminal Law Forms Manual/31 Selected Trial Motions/§31.1 A. Motion In Limine to Exclude Evidence

§31.1 A. Motion In Limine to Exclude Evidence





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO _ _[*THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA/THE DEFENDANT, AND DEFENSE COUNSEL*]**_ _:**

The _ _[*defendant/People*]**_ _ in the above-entitled action move that the Court issue an order before voir dire examination to instruct _ _**[*name of witness*]**_ _ not to give, and _ _**[*the prosecutor/defense counsel*]**_ _ not to elicit, testimony concerning _ _**[*specify subject of excluded testimony, e.g., prior convictions of the defendant*]**_ _ because _ _**[*state why the evidence should be excluded*]**_ _.**

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]**_ _**

Comment: Motions in limine must specify the evidence to be admitted or excluded, and the grounds. See Evid C §§402-405. It is common for in limine motions to be made in chambers before trial begins. Rulings on motions made before trial, however, are not binding on the trial court, unless a statutory exception applies, *e.g.,* Pen C §1538.5. See *People v Rodrigues* (1994) 8 C4th 1060, 1174, 36 CR2d 235. Any objection must be renewed at the time the evidence is offered during trial or the objection is waived, with several exceptions. *People v Morris* (1991) 53 C3d 152, 188, 279 CR 720, disapproved on other grounds in *People v Stansbury* (1995) 9 C4th 824, 830 n1, 38 CR2d 394. The exceptions are:

- A stipulation by the defense and prosecution that no further objection is required to preserve the objection (*People v Morris, supra*);
- An objection that is specifically directed to an identifiable body of evidence and advanced when the court can see that evidence in context (*People v Morris, supra*); and
- An objection concerning evidence that might impinge on the defendant's constitutional or statutory rights, *e.g.,* an involuntary statement (see *People v Cahill* (1994) 22 CA4th 296, 303 n3, 28 CR2d 1).

Cross-Reference: Motions in limine are discussed in California Criminal Law Procedure and Practice §§31.8-31.22 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/31 Selected Trial Motions/§31.2 B. Application for Order for Temporary Removal of Prisoner and for His or Her Production as Witness

§31.2 B. Application for Order for Temporary Removal of Prisoner and for His or Her Production as Witness

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

APPLICATION FOR ORDER FOR TEMPORARY REMOVAL OF PRISONER AND FOR _ _[*HIS/HER*]_ _ PRODUCTION AS WITNESS

_ _[*Name of counsel*]_ _ declares:

That at all times herein mentioned, _ _[*he/she*]_ _ has been and is now an attorney licensed to practice law in the state of California and counsel of the above-named defendant; that _ _[*he/she*]_ _ is informed and believes and on such information and belief alleges that the following criminal action is now pending against the above-named defendant in the County of _ _[*name*]_ _: _ _[*title and number of case*]_ _ that the presence of the prisoner named in this declaration is necessary and material in said action; that the sentence of said prisoner will not expire before the trial and hearing of the said criminal action;

That the name of the prisoner for whom an order for temporary removal is sought, the place where the prisoner is confined, the place where the prisoner is to be produced as a witness, and the date and time the prisoner is to be produced as a witness are as follows:

1. Prisoner's Name:_____

2. Confined at:_____

3. Place, date, and time prisoner is to be produced as witness:

_____
_____
_____

WHEREFORE, declarant prays that the above-entitled Court make an order that the said prisoner be temporarily removed from the above-mentioned penal institution and be produced as a witness at the place on the date and time above mentioned.

I declare under penalty of perjury that the foregoing is true and correct.

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF _ _ _ _ _ _**

THE PEOPLE OF THE STATE	**)**	**Dept. No. _ _ _ _ _ _**
OF CALIFORNIA,	**)**	**No.**
Plaintiff	**)**	**[PROPOSED] ORDER FOR**
	)	**TEMPORARY REMOVAL OF**

vs) **PRISONER**
)
_ _[*Name*]_ _,)
Defendant.)
_____)

ORDER FOR TEMPORARY REMOVAL OF PRISONER AND FOR _ _[*HIS/HER*]_ _ PRODUCTION AS WITNESS

TO THE SHERIFF OF THE COUNTY OF _ _ _ _ _ _, STATE OF CALIFORNIA:

It appearing to this court from the declaration of _____, counsel for the above-named defendant, that there is now pending against the above-named defendant a criminal action wherein the prisoner hereinafter named is a necessary and material witness; that the testimony of said prisoner is material and necessary thereto; that the prisoner is presently confined in _ _[*name of prison*]_ _; that the sentence of said prisoner will not expire before the trial and hearing of the said criminal action; and good cause appearing therefor,

IT IS HEREBY ORDERED that the said prisoner be temporarily removed from said penal institution and produced as a witness as follows:

1. Prisoner's name:_____

2. Confined at:_____

3. Place, date, and time prisoner is to be produced as witness:
_____
_____
_____

IT IS FURTHER ORDERED that the Sheriff of the County of _ _ _ _ _ _, State of California, proceed to the penal institution hereinabove named and temporarily remove the said prisoner therefrom and produce _ _[*him/her*]_ _ as a witness in said criminal action as aforesaid and safely keep the prisoner, and when said prisoner shall no longer be required as a witness as aforesaid, that the said Sheriff return the said prisoner to the above-named penal institution.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

ATTEST: _ _[*name*]_ _
County Clerk
By _____
Deputy County Clerk

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF _ _ _ _ _ _

THE PEOPLE OF THE STATE OF CALIFORNIA TO _ _[*prison warden*]_ _**:**

An order having been made this day by me, which order is hereinabove set forth and made a part hereof, that the prisoner _ _[*name*]_ _ **be produced as a witness in said criminal action as in said order provided; YOU ARE COMMANDED to deliver him into the custody of** _ _[*name of Sheriff*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

ATTEST: _ _[*name*]_ _
County Clerk
By __[*Signature*]__
Deputy County Clerk

Comment: A defendant in a criminal case is entitled under the Sixth Amendment to compel the attendance of witnesses. When a necessary witness is incarcerated, defense counsel must obtain an order for the prisoner's temporary removal. This is an ex parte application, and may be presented to the judge for his or her signature. You will need an order for the sheriff and another order for the custodian of the prisoner.

Because it may take the sheriff's department several days, or even weeks, to arrange to transport the prisoner, it is important to make the application in time for the witness to be produced. It is a good idea to call the sheriff's office beforehand to make sure that enough time is allowed to ensure the witness's attendance.

Cross-Reference: On witness problems generally, see California Criminal Law Procedure and Practice §30.6 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/31 Selected Trial Motions/§31.3 C. Request for Judicial Notice at Trial

§31.3 C. Request for Judicial Notice at Trial

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO _ _[*THE DEFENDANT, AND DEFENSE COUNSEL/THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA*]_ _**:**

The _ _[*People request/defendant requests*]_ _ **that the Court take judicial notice under** _ _[*specify relevant Evidence Code section*]_ _ **that** _ _[*state matter to be judicially noticed*]_ _**.**

This request for judicial notice is based on this notice of motion; the accompanying supporting memorandum; _ _[*list accompanying materials constituting sufficient information to enable court to judicially notice the matter;*]_ _ _ _[*and on*]_ _ **all the pleadings, papers, and records in this action** _ _[**;** *and on such evidence and argument as may be presented at the hearing on this request*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

ARGUMENT

_ _[*State grounds for the judicial notice. See Evid C §§451-453. Note that some grounds are permissive, other mandatory*]_ _**.**

CONCLUSION

It is requested that the Court take judicial notice of _ _[*state matter to be judicially noticed*]_ _ **under Evidence Code section** _ _[*451/452/453*]_ _**.**

Date: _ _ _ _ _ _

Respectfully submitted,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: The trial court is required to take notice of the matters in Evid C §451. Judicial notice is permissible but not mandatory of the matters in Evid C §452, with one exception. If counsel requests notice of an item in §452, gives each adverse party "sufficient notice" of the request, and furnishes the court with sufficient information to allow the court to take judicial notice of the matter, the court is required to take judicial notice of that item. Evid C §453. Any relevant material, *e.g.,* a statute you want the judge to judicially notice, should be attached as an exhibit.

Cross-Reference: For further discussion of judicial notice, see Effective Introduction of Evidence in California, chap 31 (2d ed Cal CEB 2000).

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Source: Criminal Law/California Criminal Law Forms Manual/31 Selected Trial Motions/§31.4 D. Order Concerning Defendant During Trial

§31.4 D. Order Concerning Defendant During Trial

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[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER FOR**
_ _[*Name*]_ _,	_ _[*SPECIFY ACCOMMODATION, E.G., SHOWER AND BREAKFAST EVERY DAY DURING TRIAL*]_ _
Defendant.	
_ _[*booking number*]_ _	

TO _ _[*NAME OF HEAD OF LAW ENFORCEMENT AGENCY WITH CUSTODY OF DEFENDANT DURING TRIAL*]_ _**, THE DISTRICT ATTORNEY, AND ALL INTERESTED PARTIES:**

IT IS HEREBY ORDERED that _ _[*name of defendant*]_ _ **be permitted to** _ _[*specify accommodation, e.g., take a shower and breakfast in the morning before being taken to court for jury trial, commencing on* _ _[*day of month*]_ _*, and continuing each and every day of her jury trial through the announcement of the verdict or order terminating bail*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: It is common at the beginning of trial for defense counsel to make oral motions concerning the defendant, and to provide a written order for the judge's signature. The signed order is then served on law enforcement. Common provisions include, *e.g.,* haircut, daily showers, phone calls, medical treatment, and civilian clothing during trial.

Cross-Reference: See California Criminal Law Procedure and Practice §31.44 (Cal CEB Annual).

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32

Jury Instructions

A. Request for Jury Instructions §32.1
B. Objections to Instructions §32.2

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Source: Criminal Law/California Criminal Law Forms Manual/32 Jury Instructions/§32.1 A. Request for Jury Instructions

§32.1 A. Request for Jury Instructions

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TO THE ABOVE-ENTITLED COURT, AND TO _ _[*THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA/THE DEFENDANT AND DEFENSE COUNSEL*]_ _**:**

INDEX OF PROPOSED INSTRUCTIONS

_ _[*List CALCRIM instructions by number, followed by special jury instructions numbered consecutively. For each instruction provide a checklist for the court to use to indicate whether the instruction was: (a) given as proposed; (b) given as modified; (c) refused; or (d) withdrawn.*]_ _

_ _[*The People request/Defendant, _ _[name]_ _, requests*]_ _ **the following instructions:**

CALCRIM No. _ _[*as appropriate, specify: number, year, new/revised, modified***]_ _.**

_ _[*Continue to list each requested CALCRIM instruction on a separate page.*]_ _

_ _[*Special instruction _ _[give numbers, e.g., No. 1, or Nos. 1 through 4*]_ _**,** *attached.*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: Requests for instructions and proposed jury instructions must be delivered to the court before the commencement of argument. Pen C §1093.5.

The court will usually inform counsel at what point during trial the jury instruction conference will be held. On the request of counsel, the court is required to decide before argument what instructions will be refused, given, or modified. Pen C §1093.5. The court should endorse each instruction as given, modified (showing the modification), or refused (with a statement as to why it was refused). Pen C §1127; see Cal Rules of Ct 2.1055(b)(3).

Any party may present proposed instructions to the court in writing. Pen C §1127; see Cal Rules of Ct 2.1055(b)(1), 2.103-2.106 (format for proposed jury instructions). Each instruction should be on a separate sheet, contain the instruction number and title of the instruction at the top of the first page of the instruction, and be prepared without any blank lines or unused bracketed portions so that it can be read directly to the jury. Cal Rules of Ct 2.1055(c). Instructions should be bound loosely. Cal Rules of Ct 2.1055(b)(4).

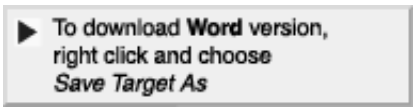
The Judicial Council of California Criminal Jury Instructions (CALCRIM) are the "approved" jury instructions for use in criminal trials (Cal Rules of Ct 2.1055(a)(1)(A)) and need no accompanying citations. Cal Rules of Ct 2.1055(d). However, any "special" instruction must cite authorities that support it at the bottom of the page. Cal Rules of Ct 2.1055(d). A special instruction is any nonapproved, or approved but substantially modified, instruction. Cal Rules of Ct 2.1055(a)(1)(B). Use of the CALCRIM instructions is "strongly encouraged." Cal Rules of Ct 2.1050(e). The Judicial Council of California adopted the CALCRIM instructions as the approved instructions on August 26, 2005 (to be effective January 1, 2006), while at the same time withdrawing its previous endorsement of CALJIC instructions. See the Criminal Jury Instructions Resource Center page on the Judicial Council of California website, http://www.courtinfo.ca.gov.

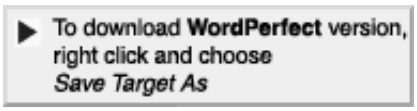
Cross-Reference: See discussion in California Criminal Law Procedure and Practice, chap 32 (Cal CEB Annual). Checklists of commonly requested CALCRIM instructions are in Crim Law §§32.5-32.6.

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Source: Criminal Law/California Criminal Law Forms Manual/32 Jury Instructions/§32.2 B. Objections to Instructions

§32.2 B. Objections to Instructions





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TO THE ABOVE-ENTITLED COURT, AND TO _ _[*THE DISTRICT ATTORNEY OF _ _ _ _ _ COUNTY, STATE OF CALIFORNIA/THE DEFENDANT AND DEFENSE COUNSEL*]_ _**:**

_ _[*The People object/Defendant,* _ _[*name*]_ _*, objects*]_ _ **to the following instructions:**

_ _[*Specify instructions*]_ _**.**

_ _[*Give bases for objections*]_ _**.**

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: A given instruction may be objectionable on one or more grounds. See the list of possible objections in California Criminal Law Procedure and Practice §32.29 (Cal CEB Annual). If there is more than one basis for objection, each basis should be stated separately.

Cross-Reference: See discussion of grounds for objecting to instructions in Crim Law §§32.29-32.34.

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33

Jury Deliberations and Verdict

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Prejudgment Motions

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Pronouncing Judgment

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Misdemeanor Sentencing

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Work Furlough and Other Alternative Sentences

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40

Victim Restitution

Antonio R. Sarabia II

A. Notice of Appearance and Victim's Requests for Notice Prior to Pretrial Disposition, Notice of Sentencing, Right to Be Heard, and Defendant's Asset List §40.1
B. Defendant's Statement of Assets (Judicial Council Form CR-115) §40.1A
C. Order for Restitution and Abstract of Judgment (Judicial Council Form CR-110/JV-790) §40.2
D. Memorandum in Support of Restitution §40.2A
E. Declaration of Attorney in Support of Restitution Order for Attorney Fees Incurred by Victim §40.3
F. Memorandum in Support of Prompt Restitution §40.3A
G. Form Interrogatories—Crime Victim Restitution (Judicial Council Form CR-200) §40.4
H. Supplemental Restitution Order §40.5
I. Information Regarding Income Deduction Order (Pen. Code, §1202.42) (Judicial Council Form CR-118) §40.6
J. Order for Income Deduction (Pen. Code, §1202.42) (Judicial Council Form CR-119) §40.7
K. Order to Probation Department in Regard to Collection of Restitution Payments §40.8
L. Request for Victim Services and Restitution Collection (CDCR-1707) §40.9

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Source: Criminal Law/California Criminal Law Forms Manual/40 Victim Restitution/§40.1 A. Notice of Appearance and Victim's Requests for Notice Prior to Pretrial Disposition, Notice of Sentencing, Right to Be Heard, and Defendant's Asset List

§40.1 A. Notice of Appearance and Victim's Requests for Notice Prior to Pretrial Disposition, Notice of Sentencing, Right to Be Heard, and Defendant's Asset List

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE COURT, PROSECUTOR, AND DEFENSE COUNSEL:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, _ _[*name of firm*]_ _ will appear on behalf of Victim _ _[*name of victim*]_ _ at the hearing scheduled for sentencing of _ _[*name of defendant*]_ _. Please enter this firm's appearance as counsel for Victim _ _[*name of victim*]_ _. This firm represents Victim _ _[*name of victim*]_ _ in all sentencing and restitution matters.

Pursuant to Article I, Section 28(b)(6) of the California Constitution, Victim _ _[*name of victim*]_ _ wishes to be advised prior to any pre-trial disposition.

Pursuant to Article I, Section 28(b)(8) of the California Constitution and Penal Code §1191.1, Victim _ _[*name of victim*]_ _ wishes to be heard at sentencing.

Penal Code §1202.4(f)(7) requires the defendant to file a statement of assets on Judicial Council Form CR-115 no later than the date of sentencing, _ _[*date*]_ _. The Victim is entitled to a copy of this statement. Penal Code §§1202.4(f)(11), 1214(b). Victim _ _[*name of victim*]_ _ requests that _ _[*his/her*]_ _ copy be delivered to _ _[*his/her*]_ _ counsel.

Crime victims have the right to be heard at sentencing and must be consulted about victim restitution. Cal Const art I, §28(b)(8); Penal Code §§1191.1, 1202.4(f)(1).

> **Crime victims have a state constitutional right to restitution. (Cal. Const., art. I, §28, subd. (b)(13).) Victims are statutorily entitled to notice "of all sentencing proceedings"; they "have the right to appear … at the sentencing proceeding and to reasonably express … their views concerning the crime, the person responsible, and the need for restitution." (Pen. Code, §1191.1.) If the trial court makes an order concerning restitution without notice to a victim, the victim, if aggrieved, is entitled to move to vacate the order; if the trial court denies the motion, the victim is entitled to a writ of mandate. (*Melissa J. v. Superior Court* (1987) 190 Cal. App. 3d 476, 479, [237 Cal. Rptr. 5].)**

***People v Green* (2004) 125 CA4th 360, 378, 22 CR3d 736.**

Counsel are respectfully requested:

1. To serve this firm with all pleadings pertaining to sentencing and restitution;

2. To provide written notice of any Court appearance at which restitution may be discussed formally or informally;

3. Pursuant to Rules of Professional Conduct 5-300(B), not to communicate with the Court about restitution unless this firm is present or has been notified in advance;

4. To provide advance written notice prior to any pretrial disposition (Cal Const art I, §28(b)(6)); and

[*If a felony case:*]

5. To provide written notice, in time for the victim to be heard, prior to release of the defendant on bail

(Cal Const art I, §28(b)(3)).

[*Continue*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of victim*]_ _

Comment: This form is for use by counsel for a victim. The form formally notifies the court, the prosecution, and the defense of the representation of the victim. In addition, the form is a reminder of the victim's rights with respect to sentencing and restitution issues, including the right to be heard and the right not to have relevant proceedings occur in his or her absence. *Melissa J. v Superior Court* (1987) 190 CA3d 476, 478, 237 CR 5. The rights of victims to notice and appearance are constitutional rights. Cal Const art I, §28(b)(7), (8). The form also reminds the prosecution and the court of the deadline for the submission of the Defendant's Statement of Assets (Judicial Council Form CR-115) (see §40.1A) and that the victim is entitled to a copy.

Cross-Reference: For further discussion of restitution, see California Criminal Law Procedure and Practice, chap 40 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/40 Victim Restitution/§40.1A B. Defendant's Statement of Assets (Judicial Council Form CR-115)

§40.1A B. Defendant's Statement of Assets (Judicial Council Form CR-115)



NAME OF VICTIM ON WHOSE BEHALF RESTITUTION IS ORDERED:	FOR COURT USE ONLY
NAME OF COURT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PEOPLE OF THE STATE OF CALIFORNIA VS. DEFENDANT:	
DEFENDANT'S STATEMENT OF ASSETS	CASE NUMBER:

It is a misdemeanor to make any willful misstatement of material fact in completing this form (Pen. Code, § 1202.4(f)(4).)

(Attach additional sheets if the space provided below for any item is not sufficient.)

PERSONAL INFORMATION

1. a. Name:
   b. AKA:
   c. Date of birth:
   d. Social security number:
   e. Marital status:
   f. Driver license number:
      State of issuance:
   g. Home address:
   h. Home telephone no.:
   i. Employer's telephone no.:

EMPLOYMENT

2. What are your sources of income and occupation? *(Provide job title and name of division or office in which you work.)*

3. a. Name and address of your business or employer *(include address of your payroll or human resources department, if different)*:

   b. If not employed, names and addresses of all sources of income *(specify)*:

4. How often are you paid (for example, daily, weekly, biweekly, monthly)? *(specify)*:
5. What is your gross pay each pay period? $
6. What is your take-home pay each pay period? $
7. If your spouse earns any income, give the name of your spouse, the name and address of the business or employer, job title, and division or office *(specify)*:

8. Other sources of income *(specify)*:

CASH, BANK DEPOSITS

9. How much money do you have in cash? $
10. How much other money do you have in banks, savings and loans, credit unions, and other financial institutions either in your own name or jointly *(list)*:

	Name and address of financial institution	Account number	Individual or joint?	Balance
a.				$
b.				$
c.				$

PROPERTY

11. List all automobiles, other vehicles, and boats owned in your name or jointly:

	Make and year	Value	Legal owner if different from registered owner	Amount owed
a.		$		$
b.		$		$
c.		$		$

(Continued on reverse)

American LegalNet, Inc.
www.USCourtForms.com

Print

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT:	CASE NUMBER:

12. List all real estate owned in your name or jointly:

	Address of real estate	Fair market value	Amount owed
a.		$	$
b.		$	$

OTHER PERSONAL PROPERTY (*Do not list household furniture and furnishings, appliances, or clothing.*)

13. List anything of value not listed above owned in your name or jointly *(continue on attached sheet if necessary)*:

	Description	Value	Address where property is located
a.		$	
b.		$	
c.		$	

ASSETS

14. List all other assets, including stocks, bonds, mutual funds, and other securities *(specify)*:

15. Is anyone holding assets for you? ☐ Yes. ☐ No. If yes, describe the assets and give the name and address of the person or entity holding each asset *(specify)*:

16. Except for attorney fees in this matter and ordinary and routine household expenses, have you disposed of or transferred any assets since your arrest on this matter? ☐ Yes. ☐ No.
If yes, give the name and address of each person or entity who received any asset and describe each asset *(specify)*:

DEBTS

17. Loans *(give details)*:

18. Taxes *(give details)*:

19. Support arrearages *(attach copies of orders and statements)*:

20. Credit cards *(give creditor's name and address and the account number)*:

21. Other debts *(specify)*:

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE)

I, *(name)*: , a certified interpreter, having been duly sworn, truly translated this form to the defendant in the *(specify language)*: language. The defendant indicated that he/she understood the contents of the form and he/she completed the form.
Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE)

Comment: The defendant is required to disclose all assets using this form no later than the date of sentencing. Pen

C §1202.4(f)(5), (7)-(8). Its use is mandatory. It is a misdemeanor for the defendant to make any willful misstatement of material fact in completing this form. Pen C §1202.4(f)(5). Unreasonable failure to file the form may be considered in sentencing. Pen C §1202.4(f)(9).

Cross-Reference: For discussion of the defendant's obligation to disclose assets, see California Criminal Law Procedure and Practice §40.23 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/40 Victim Restitution/§40.2 C. Order for Restitution and Abstract of Judgment (Judicial Council Form CR-110/JV-790)

§40.2 C. Order for Restitution and Abstract of Judgment (Judicial Council Form CR-110/JV-790)



ATTORNEY OR PERSON WITHOUT ATTORNEY *(Name, State Bar number, and address)*:

☐ Recording requested by and return to:

TELEPHONE NO.: FAX NO. *(Optional)*:

E-MAIL ADDRESS *(Optional)*:

☐ ATTORNEY FOR ☐ JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

FOR RECORDER'S USE ONLY

CASE NUMBER:

CASE NAME:

FOR COURT USE ONLY

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT

(Penal Code, §§ 1202.4(f), 1203.1(*l*), 1214; Welfare and Institutions Code, § 730.6(h) and (i))

ORDER FOR RESTITUTION

1. a. ☐ On *(date)*: defendant *(name)*: was convicted of a crime that entitles the victim to restitution.
   b. ☐ On *(date)*: child *(name)*: was found to be a person described in Welfare and Institutions Code section 602, which entitles the victim to restitution. ☐ Wardship is terminated.
   c. ☐ Parents or guardians jointly and severally liable *(name each)*:
   d. ☐ Co-offenders found jointly and severally liable *(name each)*:

2. Evidence was presented that the victim named below suffered losses as a result of defendant's/child's conduct. Defendant/child was informed of his or her right to a judicial determination of the amount of restitution and
   a. ☐ a hearing was conducted.
   b. ☐ stipulated to the amount of restitution to be ordered.
   c. ☐ waived a hearing.

3. **THE COURT ORDERS** defendant/child to pay restitution to
   a. ☐ the victim *(name)*: in the amount of: $
   b. ☐ the State Victim Compensation Board, to reimburse payments to the victim from the Restitution Fund, in the amount of: $
   c. ☐ plus interest at 10 percent per year from the date of ☐ loss **or** ☐ sentencing
   d. ☐ plus attorney fees and collection costs in the sum of $
   e. ☐ plus an administrative fee at 10 percent of the restitution owed (Pen. Code, § 1203.1(*l*))

4. The amount of restitution includes
   a. ☐ value of property stolen or damaged
   b. ☐ medical expenses
   c. ☐ lost wages or profits
      (1) ☐ incurred by victim due to injury
      (2) ☐ of victim's parent(s) or guardian(s) (if victim is a child) incurred while caring for the injured child
      (3) ☐ incurred by victim due to time spent as a witness or in assisting police or prosecution
      (4) ☐ of victim's parent(s) or guardian(s) (if victim is a child) due to time spent as a witness or in assisting police or prosecution
   d. ☐ noneconomic losses (felony violations of Pen. Code, § 288 only)
   e. ☐ other *(specify)*:

Date:

JUDICIAL OFFICER

VICTIM TO RECEIVE CERTIFIED COPY FOR FILING WITH COUNTY RECORDER

Form Approved for Optional Use
Judicial Council of California
CR-110/JV-790 [Rev. January 1, 2008]

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT

CEB

Penal Code, §§ 1202.4(f), 1203.1(*l*), 1214
Welfare and Institutions Code, § 730.6(h), (i), (q)
Civil Code, § 1714.1
Code of Civil Procedure, § 674(a)(7)
www.courtinfo.ca.gov

Print

CASE NAME:	CASE NUMBER:

NOTICE TO VICTIMS

PENAL CODE SECTION 1214 PROVIDES THAT ONCE A DOLLAR AMOUNT OF RESTITUTION HAS BEEN ORDERED, THE ORDER IS THEN ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT. ALTHOUGH THE CLERK OF THE COURT IS NOT ALLOWED TO GIVE LEGAL ADVICE, YOU ARE ENTITLED TO ALL RESOURCES AVAILABLE UNDER THE LAW TO OBTAIN OTHER INFORMATION TO ASSIST IN ENFORCING THE ORDER.

THIS ORDER DOES NOT EXPIRE UNDER PENAL CODE SECTION 1214(d).

THE VICTIM SHALL FILE A SATISFACTION OF JUDGMENT WITH THE COURT WHENEVER AN ORDER TO PAY RESTITUTION IS SATISFIED, PURSUANT TO PENAL CODE SECTION 1214(d).

APPLICATION FOR ABSTRACT OF JUDGMENT

5. The ☐ judgment creditor ☐ assignee of record ☐ other *(specify):* applies for an abstract of judgment and represents the following:
   a. Judgment debtor's

Name and last known address

b. ☐ Driver's license no. [last 4 digits] and state:		☐ Unknown
c. ☐ Social security no. [last 4 digits]:		☐ Unknown
d. ☐ Date of birth:		☐ Unknown

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF APPLICANT OR ATTORNEY)

☐ ON INFORMATION AND BELIEF

ABSTRACT OF JUDGMENT

[SEAL]

6. I certify that the following is a true and correct judgment entered in this action.
7. Judgment creditor *(name):*
   ☐ whose address or whose attorney's address appears on this form above the court's name.
8. Judgment debtor *(full name as it appears in judgment):*
9. Judgment entered on *(date):*
10. Total amount of judgment as entered or last renewed: $
11. ☐ A stay of enforcement was ordered on _____ and is effective until_____.
    ☐ A stay of enforcement was not ordered.

This abstract of judgment issued on *(date):*

Clerk, by _____, Deputy

NOTICE TO COUNTY RECORDER

THIS ORDER IS ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT, PURSUANT TO PENAL CODE SECTION 1202.4(l) AND (m), PENAL CODE SECTION 1214, AND WELFARE AND INSTITUTIONS CODE SECTION 730.6(i) AND (r), AND FUNCTIONS AS AN ABSTRACT OF JUDGMENT.

Comment: The amount of restitution is typically determined at sentencing. This Judicial Council form may be used

by a person claiming restitution for a loss resulting from criminal activity or by an attorney representing such a person. Its use is not mandatory. A certified copy of the signed order and abstract of judgment may be filed with the county recorder. To be effective, it must be filed in each county in which the defendant has property. The order is enforceable as a civil judgment. See Pen C §§1202.4(m), 1214.

The defendant is entitled to a judicial determination of the amount of restitution.

Cross-Reference: For further discussion of restitution, see California Criminal Law Procedure and Practice, chap 40 (Cal CEB Annual).

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§40.2A D. Memorandum in Support of Restitution

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

Article I, Section 28(b) of the California Constitution provides:

> **It is the unequivocal intention of the People of the State of California that 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.**

At this hearing, victim _ _[*name of victim*]_ _ asks the Court to grant _ _[*his/her*]_ _ constitutional right to victim restitution.

Burdens of Victim and Defendant at Restitution Hearing and Presentation of Evidence

The victim must present evidence showing that there were losses and that the losses were caused by the crime committed by the defendant. *People v Rivera* (1989) 212 CA3d 1153, 1161, 261 CR 93. The amount of restitution must be proved by a preponderance of the evidence. *People v Keichler* (2005) 129 CA4th 1039, 1045, 29 CR3d 120. Once the victim makes a prima facie showing of economic losses, the burden shifts to the defendant to disprove the losses. *People v Gemelli* (2008) 161 CA4th 1539, 1543, 74 CR3d 901.

Restitution may be awarded based on sworn statements. *People v Cain* (2000) 82 CA4th 81, 85, 97 CR2d 836. Although victims may prove the amount of restitution to which they are entitled by declaration, "the defendant does not have a state or a federal constitutional right to cross-examine" the declarant. 82 CA4th at 87. There are several benefits to the rule that the defendant does not have a constitutional right to cross-examine a victim's declarants. First, most victims, and especially the victim in this case, have spent enough time on the stand reliving the nightmares. This rule spares them more public anguish. Second, judicial economy: This rule reduces the time that busy criminal courts must spend on restitution; a court may rely on declarations without the obligation of entertaining extended cross examination.

This rule does not deprive defendants of their rights. Having been served with declarations, a defendant is on notice and can marshal his or her own evidence by way of declaration or live testimony. A defendant has no obligation to submit any evidence. If a defendant fails to do so, it does not carry its burden. The defendant has the burden of proving inaccuracies in a victim's proof. *People v Fulton* (2003) 109 CA4th 876, 886, 135 CR2d 466. Without such proof by a defendant, a victim's evidence prevails. This rule extends to recovery of attorney fees incurred in a civil case. Once fees incurred in a civil case have been proved by a victim, the burden of proving which fees the victim cannot receive as restitution falls upon the defendant. 109 CA4th at 886.

[*Add if probation has been ordered*]

Because Probation Has Been Ordered, the Court Has Very Broad Discretion in Ordering Restitution

When restitution is ordered under Pen C §1202.4 or another statutory provision that specifically authorizes restitution, the trial court's discretion is limited by the terms of the applicable statute. When restitution is ordered as a condition of probation under Pen C §1203.1(a)(3), the court's discretion is circumscribed only by the purposes of probation, such as rehabilitation. See *People v Rugamas* (2001) 93 CA4th 518, 521, 113 CR2d 271. This means the Court has extremely broad discretion. When probation is ordered, restitution need not be narrowly tailored to the loss caused by the precise crime of which the defendant was convicted. "California courts have long interpreted the trial courts' discretion to encompass the ordering of restitution as a condition of probation even when the loss was not necessarily caused by the criminal conduct underlying the conviction." *People v Woods* (2008) 161 CA4th 1045, 1050, 74 CR3d 786 (citations and quotations omitted). See, *e.g., In re I.M.* (2005) 125 CA4th 1195, 1208, 23 CR3d 375 (restitution for losses caused by crime different from crime of which defendant was convicted, even though defendant did not participate in crime that caused

losses); *People v Miller* (1967) 256 CA2d 348, 64 CR 20 (restitution ordered even though losses were not caused by crime of which defendant was convicted; recipients of restitution included people who were not victims).

[*Continue*]

Victim Is Entitled to Restitution for Counseling and Medical Expenses

Penal Code §1202.4(f)(3)(B)-(C) provides that victims are entitled to restitution for their medical expenses and mental health counseling expenses.

The role of the Court in approving medical and counseling expenses is a narrow one. It is only required to have "a factual and rational basis for the amount ordered." *People v Carbajal* (1995) 10 C4th 1114, 1125, 43 CR2d 681. A court is not supposed to be a gatekeeper that analyzes which is the most appropriate treatment and then approves that treatment. This narrow role can be seen most clearly in *People v Keichler* (2005) 129 CA4th 1039, 1043, 29 CR3d 120, in which the two victims of assault were Hmong (an ethnic group from Laos):

> **Moua submitted a signed statement requesting restitution in the amount of $1,824.30 to cover his out-of-pocket expenses for a traditional Hmong spirit calling ceremony.... Moua went through three of these spirit calling ceremonies. These ceremonies require, among other things, the sacrifice of animals. As a result, Moua claimed his family had to kill a pig, two cows, and several chickens. Moua claimed the costs for the cows, pig, and supplies was $1,524.30 and attached receipts substantiating these amounts.**

On appeal, the restitution order was affirmed. 129 CA4th at 1046. Under *Keichler*, a court should allow restitution for any treatment that the victim finds effective.

Victims are entitled to recover their future medical expenses, not just past expenses. *People v Phelps* (1996) 41 CA4th 946, 951, 48 CR2d 855. As the supreme court stated (*People v Giordano* (2007) 42 C4th 644, 658, 68 CR3d 51 (citations and quotations omitted)):

> **Also, "[m]edical expenses" or "[m]ental health counseling expenses" may be incurred after a restitution hearing is held. As the Court of Appeal reasoned in *People v. Phelps* (1996) 41 Cal.App.4th 946, 950, when determining that medical expenses paid after a sentencing hearing may be included in a restitution order, "[n]othing in the language of the Constitution suggests an intent to limit the right to restitution for financial losses occurring within a particular time frame, or restitution to expenses incurred before sentencing." Construing the word "loss" broadly, the Court of Appeal found "that it refers to a victim's injuries, requiring restitution for all expenses necessary to treat those injuries, regardless of when they arise." (*Ibid.*) We agree.**

Victim _ _[*name of victim*]_ _ has filed a declaration that is evidence of _ _[*his/her*]_ _ losses. Penal Code §1202.4(f) provides that victims are entitled to restitution for "economic loss as a result of the defendant's conduct." All of the losses fit this bill.

Victim Is Entitled to Restitution for Lost Wages

Victims are entitled to recover wages lost as a result of the conduct for which the defendant was convicted. Pen C §1202.4(f)(3)(E). Victims are also entitled to recover wages lost due "to time spent as a witness or in assisting the police or prosecution" (*People v Ryan* (1988) 203 CA3d 189, 197 n5, 249 CR 750) or due to attendance at court proceedings (*People v Moore* (2009) 177 CA4th 1229, 1231, 99 CR3d 555). Victims are entitled to future lost wages as well. *People v Millard* (2009) 175 CA4th 7, 30, 95 CR3d 751.

Victim Is Entitled to Restitution for Attorney Fees

Penal Code §1202.4(f)(3)(H) allows recovery by victims (as part of restitution) of their "actual and reasonable" attorney fees. Victim _ _[*name of victim*]_ _ seeks _ _[*his/her*]_ _ attorney fees. The attorney fees incurred by the Victim should be considered in the context of the victim restitution jurisprudence about fees incurred by victims. Payment of a victim's attorney fees is authorized by Pen C §1202.4(f)(3), as part of a victim's losses. In analyzing Pen C §1202.4(f)(3), the Court of Appeal held that in §1202.4(f)(3), "the word 'loss' must be construed broadly and liberally to uphold the voters' intent." *People v Keichler* (2005) 129 CA4th 1039, 1046, 29 CR3d 120 (citation and quotations omitted). With this principle in mind, *Keichler* allowed fees for nontraditional medical treatment. Under the guidance of *Keichler*, a court considering a victim's attorney fees should be liberal when deciding whether the fees were reasonable.

California civil cases on recovery of attorney fees identify the elements a court may consider when reviewing a request for fees: "Factors to be weighed in determining reasonableness of application for attorneys' fees are (1) hours spent by attorneys, (2) hourly rate of compensation, (3) risk borne by attorneys, and (4) quality of attorneys' work. Additional factors may be the public service element, and motivation to represent consumers and enforce laws." *State v Meyer* (1985) 174 CA3d 1061, 1073, 220 CR 884 (citations and quotations omitted). See *PLCM Group v Drexler* (2000) 22 C4th 1084, 1096, 95 CR2d 198. Factors 1, 2, and 4 are addressed in the Attorney Declaration.

With respect to the reasonableness of the hourly rate, the Victim presents substantial evidence of the prevailing hourly rate in the community for comparable work. This is the keystone for determining whether an hourly rate is reasonable: "The reasonable hourly [attorney fee] rate is that prevailing in the community for similar work." 22 C4th at 1095. The evidence presented establishes that the hourly rate charged the Victim is reasonable. The Victim offers in camera review of the attorney bills and fee agreements by the Court.

The third factor, risk, is useful in this case. When an attorney is engaged by clients, such as the Victim, who cannot afford a retainer, the risk of nonpayment is real. The greater the risk a firm bears, the more generous a court should be in awarding fees. One risk that a victim's counsel bears is that the defendant may not pay the fees despite being ordered to do so. Another risk is that of partial payment. Counsel for victims who are not wealthy is only paid after a noticed hearing. At that hearing, opposing counsel may challenge the proposed fees. This creates a substantial risk of partial payment.

Another factor is the delay in payment. Most attorneys are paid within a month or so of services. Many criminal defense attorneys are paid in advance by substantial retainers. But restitution counsel is paid only after a noticed hearing, a court order at or after that hearing, and finally, further down the line, compliance with that order—all of which may be a long time from when the services were provided. "Court-awarded fees normally are received long after the legal services are rendered.... In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable." *Graham v Daimler Chrysler Corp.* (2004) 34 C4th 553, 583, 21 CR3d 331 (citation and quotations omitted).

_ _[*Explain delay in instant case, e.g.:*]_ _

In this case, some of the services for which compensation is sought were provided over a year ago. See Attorney Dec. §2.

Another factor identified by *State v Meyer* was the "public service element." It is a public service to represent victims in recovery of their losses. Victim restitution cases serve several significant public interests, including making a crime victim whole, deterring crime by raising its cost, and rehabilitating defendants by making them aware of the extent of the harm they have caused.

***State v Meyer* also mentioned "enforcement of laws" as a factor to consider when analyzing requests for fees. Because victim restitution is both enshrined as a constitutional right and established in a network of Penal Code provisions, this factor is also a plus for the request for attorney fees.**

A small part of the fees sought are for legal staff time. "[N]ecessary support services for attorneys, e.g., secretarial and paralegal services, are includable within an award of attorney fees." *Salton Bay Marina v Imperial Irrigation Dist.* (1985) 172 CA3d 914, 951, 218 CR 839 (inverse condemnation case).

The Court has the discretion to reduce the requested fees. It is worth considering what message reduction would send to counsel and victims. With respect to highly qualified counsel, the message might be, "Do not take cases of abuse victims; stick with corporate clients." With respect to victims, the message would be, "While you have a right to restitution, that right is not as good as the right well-heeled defendants have to hire the best counsel, even when they are guilty." The Victim believes the best policy is the one that encourages fine quality legal representation of victims—lawyers who are as good as the lawyers representing those who preyed upon the victims.

The Victim also asks the Court to issue orders that _ _[*he/she*]_ _ recover, as restitution, attorney fees to be incurred in enforcing _ _[*his/her*]_ _ restitution orders, such as obtaining writs of execution. Proposed Supplemental Restitution Orders, Exhibit ___. Victims are entitled to fees for these purposes. Pen C §1202.4(f)(3)(H) (costs of collection). When a statute provides for recovery of attorney fees in an action, fees expended in enforcing the judgment are also to be awarded. *Downen's, Inc. v City of Hawaiian Gardens Redev.*

Agency **(2001) 86 CA4th 856, 862, 103 CR2d 644.**

Although the Victim has not incurred any fees in these additional categories at this time, these orders will:

(a) Allow the Court Clerk to tax the costs of enforcement without the need for an additional hearing;

(b) Encourage the Defendant to honor the restitution obligations; and

(c) Provide important guidance to the Judge in any new civil case to preserve assets, without the need to return to this Court.

The Victim is reasonably entitled to these orders. These orders achieve judicial economy.

The Amount of Restitution Is Not Reduced by Insurance

A victim's recovery is not reduced by any insurance benefits the victim has received from his or her own insurance. *People v Birkett* (1999) 21 C4th 226, 247 n20, 87 CR2d 205; Pen C §1202.4(f)(2). Any health insurance received by the Victim does not reduce _ _[*his/her*]_ _ restitution award.

Conclusion

The purposes of victim restitution include not only helping victims, but also rehabilitating the defendant: "Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused." *People v Rugamas* (2001) 93 CA4th 518, 522, 113 CR2d 271 (quotations and citation omitted).

If less than full restitution is ordered, the Victim requests that the Court comply with Penal Code §1202.4(f), which requires that the Court order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record.

The Victim believes the time has come to help _ _[*him/her*]_ _ and the Defendant by granting the orders requested.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of victim*]_ _

Comment: This form is for use by counsel for victims. It sets forth the authorities for the parties' burdens of proof, recovery of several common types of losses, and recovery of the victim's attorney fees. Counsel for the victim will also need to prepare an evidentiary declaration for the victim. The form also reminds the court of its broad discretion to order restitution in cases in which probation is ordered. The related attorney declaration with evidence for fees is in §40.3.

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Source: Criminal Law/California Criminal Law Forms Manual/40 Victim Restitution/§40.3 E. Declaration of Attorney in Support of Restitution Order for Attorney Fees Incurred by Victim

§40.3 E. Declaration of Attorney in Support of Restitution Order for Attorney Fees Incurred by Victim

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I _ _ _ _ _ _, state the following:

1. The facts set forth below are personally known to me, except for those matters stated to be on information and belief. Regarding those matters, I believe them to be true. If called on to testify to these facts under oath, I could and would do so.

2. I am a member of the State Bar of California. I represent Victim _ _[*name of victim*]**_ _ in this case.**

3. Attached as Exhibit _ _[*e.g., A*]**_ _ to this declaration is my professional biography.**

4. The legal services provided were in connection with the recovery of victim restitution. The relevant legal community for determining attorney fees is _ _[*name*]**_ _ County in which this firm is located. Because there are few, if any, other law firms in _ _**[*name*]**_ _ County that perform victim restitution legal services, to determine the prevailing rate in the community the closest legal services are those provided in connection with _ _**[*describe, e.g., criminal defense* or *business litigation*]**_ _. I know the prevailing attorney fee rate in _ _**[*name*]**_ _ County for _**[*describe, e.g., criminal defense* or *business litigation*]**_ _ because _ _**[specify *explanation*]**_ _. The prevailing attorney fee rate in _ _**[*name*]**_ _ County for _ _**[*describe, e.g., criminal defense* or *business litigation*]**_ _ attorneys is between $_ _**[*amount*]**_ _ and $_ _**[*amount*]**_ _. The prevailing hourly rate in _ _**[*name*]**_ _ County for _ _**[*describe, e.g., criminal defense* or *business litigation*]**_ _ legal assistants is between $_ _**[*amount*]**_ _ and $_ _**[*amount*]**_ _. The hourly rate of the service providers in my firm for which this client was charged is:**

Attorney _ _[*name*]**_ _: $_ _**[*amount*]**_ _**

Legal Assistant _ _[*name*]**_ _: $_ _**[*amount*]**_ _**

5. Attached as Exhibit _ _[*e.g., B*]**_ _ are true and correct copies of the monthly invoices (Invoices) sent to Victim in this case. I am the duly authorized custodian of the Invoices. The Invoices were prepared in the ordinary course of business by the accounting staff of my law firm shortly after the end of the month in which the services were rendered. The fee portion of each Invoice is prepared by adding the time spent by each professional (during the month) on the client matter, and multiplying that by the applicable hourly rate to arrive at a dollar amount of fees. The expense portion of each Invoice is prepared by adding all expenses incurred on behalf of that client that month. The Invoice total is the dollar amount of fees plus the expenses. The amounts shown on the Invoices are for services and costs actually incurred by Victim in connection with obtaining restitution in this case. The legal services rendered were reasonably, actually, and necessarily performed in _ _**[*date*]**_ _ in connection with this case. These services were provided through my law corporation, _ _**[*name*]**_ _. Victim has been billed for these fees as shown on the Invoices, without discount or other reduction. Victim has paid the Invoices as they have become due.**

6. The total of the Invoices is $_ _[*amount*]**_ _.**

7. Based on my experience in general and my experience in this case in particular, I estimate that I will invoice Victim at a minimum an additional $_ _[*amount*]**_ _ for today's appearance.**

8. The total legal fees and costs incurred by Victim to date are $_ _[*amount*]**_ _.**

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and

correct. This affidavit was signed on _ _[*date*]_ _, at _ _ _ _ _ _, California.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of victim*]_ _

Comment: This form may be used an a declaration supporting the amount of attorney fees requested as restitution. Economic losses eligible for restitution include attorney fees incurred by the victim:

- To establish the victim's right to restitution (Pen C §1202.4(f)(3)(H));
- To preserve the defendant's assets so that they may be available to pay restitution (*People v Lyon* (1996) 49 CA4th 1521, 1525, 57 CR2d 415);
- To collect on a restitution order in a civil action (Pen C §1202.4(f)(3)(H); *Downen's, Inc. v City of Hawaiian Gardens Redev. Agency* (2001) 86 CA4th 856, 103 CR2d 644); and
- To pursue a civil action against the defendant based on the same facts as the crime (*People v Fulton* (2003) 109 CA4th 876, 135 CR2d 466; *People v Maheshwari* (2003) 107 CA4th 1406, 132 CR2d 903).

To recover attorney fees in a case, an attorney must prove the reasonable hourly rate. A reasonable hourly rate for attorney fees is one that "prevail[s] in the community for similar work." *PLCM Group v Drexler* (2000) 22 C4th 1084, 1095, 95 CR2d 198. Paragraph 4 of this form satisfies the requirement that the attorney establish the prevailing rate in the community.

Cross-Reference: For further discussion of the types of losses for which restitution may be ordered, see California Criminal Law Procedure and Practice §40.3 (Cal CEB Annual).

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§40.3A F. Memorandum in Support of Prompt Restitution

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California Victims Have a Constitutional Due Process Right to Prompt Restitution

The "Victims' Bill of Rights Act of 2008: Marsy's Law" was enacted by California voters and amended Article I, Section 28(a)(6) of the California Constitution to provide:

> **Victims of crime are entitled to finality in their criminal cases. Lengthy appeals and other post-judgment proceedings that challenge criminal convictions, frequent and difficult parole hearings that threaten to release criminal offenders, and the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong the suffering of crime victims for many years after the crimes themselves have been perpetrated. This prolonged suffering of crime victims and their families must come to an end.**

Article I, Section 28(b) of the California Constitution provides:

> **In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights:**
>
> **. …**
>
> **(9) To a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings.**
>
> **. …**
>
> **(13) To restitution.**

Article I, Section 28(b) of the California Constitution gives victims a due process right to restitution and the right to "a speedy trial and a prompt and final conclusion of the case and any related post-judgment proceedings." To determine how these rights work in conjunction, it is helpful to consider speedy trial jurisprudence as applied to defendants because "[t]he test of a state constitutional speedy trial violation and a state constitutional due process violation converge." *People v Contreras* (2009) 177 CA4th 1296, 1305, 99 CR3d 759.

The due process right and the right to a speedy trial are the rights to avoid harm caused by inappropriate delay. With respect to defendants, cases have identified three specific delay-related kinds of harm: (a) prolonged imprisonment; (b) the anxiety of prolonged legal proceedings; and (c) the loss of evidence caused by the delay. *People v Lowe* (2007) 40 C4th 937, 943, 56 CR3d 209. The second category applies to victims: the right to be free of the anxiety of prolonged legal proceedings. This victim of _ _[*crime*]_ _, which occurred more than _ _[*number*]_ _ years ago, continues to suffer not only tremendous anxiety, but an inability to get the treatment _ _[*he/she*]_ _ needs.

In analyzing a due process claim, a court balances harm against the reason for delay:

> **[R]egardless of whether defendant's claim is based on a due process analysis or a right to a speedy trial not defined by statute, the test is the same, i.e., any prejudice to the defendant resulting from the delay must be weighed against justification for the delay.**

***People v Contreras* (2009) 177 CA4th 1296, 1305, 99 CR3d 759 (quotations and citation omitted).**

How much harm is required for a due process violation is closely linked to the reason for the delay:

> **Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice**

would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.

***People v Nelson* (2008) 43 C4th 1242, 1255, 78 CR3d 69.**

With respect to a victim, the delay could be caused by either party, the People or the defendant. In this case, the delay in restitution, and the harm to the victim caused by the delay, has been created largely by the defendant.

_ _[*Explain delay in instant case, e.g.:*]_ _

Defendant has intentionally fought restitution at every step. The Court file contains numerous pleadings from the defendant opposing not only restitution, but even opposing the provision of a Statement of Assets to the victim. This is the "purposeful delay" identified by *Nelson*. The showing of substantial anxiety and harm suffered by the victim establishes that further delay of restitution would be a violation of the victim's due process rights.

Restitution Should Not Be Stayed Pending Appeal

Defendant has appealed _ _[*his/her*]_ _ conviction. While an appeal stays the execution of judgment in death sentence cases, it "does not stay the execution of the judgment or order granting probation in any other case." Pen C §1243. The appeal has no effect on whether or when restitution should be ordered. To the contrary, failure to grant restitution threatens the sentence. "[V]ictim restitution is mandatory and a sentence without such an award is invalid. The trial court does not have discretion over issuance of the award itself." *People v Rowland* (1997) 51 CA4th 1745, 1751, 60 CR2d 351. While appeal is not an impediment to restitution, restitution is necessary for the sentence to be valid.

In *In re Fishman* (1952) 109 CA2d 634, 241 P2d 603, one ground for the defendant's appeal of a denial of a stay was that the defendant did not want to pay a fine pending his appeal. In *Fishman*, the Court rejected financial grounds as a basis for granting a stay. Similarly, defendant's preference to keep money in _ _[*his/her*]_ _ pocket rather than pay restitution is not a sufficient ground not to award restitution pending appeal.

Restitution Hearing Is Appropriate

Defendant is on probation and restitution is a condition of his probation. The California Supreme Court has provided guidance as to whether conditions of probation should continue while an appeal is pending:

> **Unless the court provides otherwise *the release of a defendant granted probation on bail while his appeal is pending does not suspend operation of any condition of probation other than the provision for confinement*.**
>
> **It may be entirely appropriate to suspend the most onerous condition, that of physical confinement pending appeal.... The defendant has, nonetheless, been convicted of a criminal offense. Requiring that he or she comply with other conditions of probation during the pendency of the appeal is, in most cases, an appropriate means by which to protect the public against further criminal conduct.**

***In re Bakke* (1986) 42 C3d 84, 88, 227 CR 663 (emphasis added).**

Under *Bakke,* all conditions of defendant's probation, including payment of restitution, continue during appeal. It is noteworthy that while the appeal was pending in *Bakke*, probation revocation hearings were held and payment of restitution was ordered. 42 C3d at 86. *Bakke* establishes that further hearings on restitution, because restitution is a condition of defendant's probation, are appropriate and within the power of the Court.

Comment: This form is for use by counsel for victims. It sets forth the authorities for the victim's right to prompt restitution. Counsel for the victim will also need to prepare an evidentiary declaration for the victim that shows the harm suffered by the victim due to the delay in payment of restitution.

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Source: Criminal Law/California Criminal Law Forms Manual/40 Victim Restitution/§40.4 G. Form Interrogatories--Crime Victim Restitution (Judicial Council Form CR-200)

§40.4 G. Form Interrogatories—Crime Victim Restitution (Judicial Council Form CR-200)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):*
ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
SHORT TITLE OF CASE:	
FORM INTERROGATORIES—CRIME VICTIM RESTITUTION **Asking Party:** **Answering Party:** **Set No.:**	CASE NUMBER:

Sec. 1. Instructions to All Parties

(a) Interrogatories are written questions prepared by a party to the action that are sent to any other party in the action to be answered under oath. The interrogatories below are form interrogatories approved for use by victims in criminal cases to assist them in recovering unpaid restitution.

(b) For time limitations, requirements for service on other parties, and other details, see Code of Civil Procedure section 2030.

(c) These form interrogatories do not change existing law relating to interrogatories, nor do they affect an answering party's right to assert any privilege or make any objection.

Sec. 2. Instructions to the Asking Party

(a) These interrogatories are designed for optional use by crime victims to assist them in recovering unpaid restitution as provided in Code of Civil Procedure section 2033.720.

(b) Check the box next to each interrogatory that you want the answering party to answer. Take care to choose those interrogatories that are applicable to the case.

(c) Additional interrogatories may be attached.

Sec. 3. Instructions to the Answering Party

(a) You must answer or provide an appropriate response to each interrogatory checked by the asking party.

(b) As a judgment debtor you must disclose assets up to an amount clearly sufficient to satisfy the judgment.

(c) As a general rule, within 30 days after you are served with these interrogatories, you must serve your responses on the asking party and serve copies of your responses on all other parties to the action who have appeared in court. See Code of Civil Procedure sections 2030.260-2030.270 for details.

(d) Each answer must be as complete and straightforward as the information reasonably available to you, including the information possessed by your attorneys or agents, permits. If an interrogatory cannot be answered completely, answer it to the extent possible.

(e) If you do not have enough personal knowledge to fully answer an interrogatory, say so, but make a reasonable and good-faith effort to get the information by asking other persons or organizations, unless the information is equally available to the asking party.

(f) Whenever an interrogatory may be answered by referring to a document, the document may be attached as an exhibit to the response and referred to in the response. If the document has more than one page, refer to the page and section where the answer to the interrogatory can be found.

(g) Whenever an address and telephone number for the same person are requested in more than one interrogatory, you need only provide them in the first interrogatory asking for that information.

(h) If you are asserting a privilege or making an objection to an interrogatory, you must specifically assert the privilege or state the objection in your written response.

(i) Your answers to these interrogatories must be verified, dated, and signed. You may wish to use the following form at the end of your answers:

I declare under penalty of perjury under the laws of the State of California that the foregoing answers are true and correct.

_____ _____

(DATE) *(SIGNATURE)*

Sec. 4. Definitions

Words in **BOLDFACE CAPITALS** in these interrogatories are defined as follows:

(a) **PERSON** includes a natural person, firm, association, organization, partnership, business, trust, corporation, or public entity.

(b) **ADDRESS** means the street address, including city, state, and zip code.

(c) **ASSET** or **PROPERTY** includes any interest in real estate or personal property. It includes any interest in a pension, profit-sharing, or retirement plan.

(d) **SUPPORT** means any benefit or economic contribution to the living expenses of another person, including gifts.

Form Approved for Optional Use
Judicial Council of California
CR-200 [Rev. January 1, 2006]

Code of Civil Procedure,
§§ 2030.010-2030.410, 2033.710

Sec. 5. Interrogatories

The following interrogatories have been approved by the Judicial Council under Code of Civil Procedure section 2033.720:

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8.0 Bank Accounts and Cash
9.0 Property
10.0 Other Assets
11.0 Other Income
12.0 Liabilities and Debts

1.0 Identity of Persons Answering These Interrogatories

☐ 1.1 State the name, **ADDRESS**, telephone number, and relationship to you of each **PERSON** who prepared or assisted in the preparation of the response to these interrogatories. *(Do not identify anyone who simply typed or simply reproduced the responses.)*

2.0 General Background Information—Individual

☐ 2.1 State:
(a) your full name;
(b) every name you have used in the past;
(c) the dates you used each name.

☐ 2.2 State the date and place of your birth.

☐ 2.3 State:
(a) your present residence **ADDRESS** and telephone number;
(b) whether you live in a private home, apartment, or other type of residence;
(c) if you live in a private home, who owns it;
(d) if you live in an apartment, the name and **ADDRESS** of your landlord, the monthly rent, and the name of the **PERSON** who pays the rent;
(e) your residence **ADDRESSES** for the past five years;
(f) the dates you lived at each **ADDRESS**.

☐ 2.4 State:
(a) the name, **ADDRESS**, and telephone number of each school or other academic or vocational institution you have attended, beginning with high school;
(b) the dates you attended;
(c) the highest grade level you have completed;
(d) the degrees you received;
(e) the dates the degrees were received.

☐ 2.5 Do you have a driver's license or identification card? If so, state:
(a) the state or other issuing entity;
(b) the license or identification card number, type of license, and expiration date.

☐ 2.6 State any and all social security numbers that you have.

☐ 2.7 Are you married? If so, state:
(a) your spouse's full name;
(b) any maiden name;
(c) the date of your marriage;
(d) your spouse's current **ADDRESS**.

☐ 2.8 Have you ever filed for bankruptcy? If so, state:
(a) the disposition;
(b) the court;
(c) the year.

☐ 2.9 Have you filed income tax returns during the last three years? If so, state:
(a) the dates filed;
(b) a date and place where the records can be inspected;
(c) whether you are attaching the income tax records to your answers to these interrogatories.

3.0 Current Income

☐ 3.1 List all income you received during the past 12 months, its source, the basis for its computation, and the total amount received from each source.

4.0 Employment Information

☐ 4.1 State:
(a) the name, **ADDRESS**, and telephone number of your present employer;
(b) your current title, the nature of your work, and dates of employment;
(c) whether you work part-time or full-time;
(d) the frequency of payment (weekly, biweekly, or monthly);
(e) gross pay;
(f) net pay;
(g) whether you receive additional compensation for overtime pay;
(h) the average amount of overtime you work per week;
(i) the form of payment of salary *(check, cash, or other; if other, please explain);*
(j) the name and **ADDRESS** of each bookkeeper, payroll clerk, or other person having records of salaries or other sums of money paid to you by your present employer.

☐ 4.2 Are you self-employed or an independent contractor? If so, state:
(a) the address and telephone numbers of the persons or businesses for whom you have performed work or services during the last 12 months;
(b) the nature of the work or services performed and the dates they were provided;
(c) whether you billed each service or the work performed at a flat rate, an hourly rate, or a job rate, and the amount of payment you received;
(d) the name and **ADDRESS** of each bookkeeper, payroll clerk, or other person having records of salaries or other sums of money paid to you during the last three years for your work.

5.0 Employment History

☐ 5.1 State the employer's name and **ADDRESS**, dates of employment, job title, and nature of the work for each job you have had in the last five years. If you were self-employed in the last five years, state your business **ADDRESS**, dates of self-employment, title, and nature of the work.

6.0 Support Received From Others

☐ 6.1 Have you received any financial **SUPPORT** in the last three years? If so, state:
(a) the name, age, **ADDRESS**, and relationship to you of each **PERSON** from whom you have received **SUPPORT**;
(b) the dates you received the **SUPPORT** and the amount you received.

7.0 General Background Information—Business

☐ 7.1 Are you in any partnerships? If so, state for each:
(a) the current partnership name;
(b) all other names used by the partnership in the last five years and the dates each was used;
(c) whether you are a limited partnership and, if so, in what jurisdiction it operates;
(d) the name and **ADDRESS** of each general partner;
(e) the **ADDRESS** of the principal place of business.

☐ 7.2 Have you done any business under a fictitious name during the last five years? If so, state:
(a) the current and any former fictitious business names;
(b) the dates each was used;
(c) the **ADDRESS** of the principal place of business.

8.0 Bank Accounts and Cash

☐ 8.1 Do you have, in your own name or jointly with another **PERSON**, any bank accounts, commercial savings accounts, credit union accounts, or safe deposit boxes? If so, state for each:
(a) the institution's name and **ADDRESS** where the account or the safe deposit box is located;
(b) the amount of the balance of any account and the contents of any safe deposit box;
(c) the source of the money in any account or safe deposit box;
(d) the date you last made a deposit;
(e) the type and the amount of your last deposit;
(f) the amount of cash that you currently possess.

☐ 8.2 Does your spouse have, in his or her own name or jointly with another **PERSON**, any bank accounts, commercial savings accounts, credit union accounts, or safe deposit boxes? If so, state for each:
(a) the institution's name and **ADDRESS** where the account or the safe deposit box is located;
(b) the source of the money in your spouse's bank account or safe deposit box.

9.0 Property

☐ 9.1 Do you or your spouse own or have any interest in **PROPERTY** in California or elsewhere? If so, state:
(a) the **ADDRESS** of any real estate, land, buildings, apartments, or condominiums in which you hold an interest;
(b) the date acquired and the current value of any real estate, land, buildings, apartments, or condominiums in which you hold an interest.

☐ 9.2 Do you or your spouse own or have any interest in stocks, bonds, or other securities or IRA, Keogh, or deferred compensation accounts? If so, state the source, value, and location of each.

☐ 9.3 Are you or your spouse entitled to any money from any federal, state, city, county, or governmental department or agency? If so, state the agency, the date you received or will receive the money, and the amount.

☐ 9.4 Have you or your spouse inherited any money or property in the last two years? If so, state the nature and value of the money or property and the date you received it.

☐ 9.5 Do you or your spouse have vehicles? If so, state for each:
(a) the model, make, year, and owner's name;
(b) whether you own it;
(c) if it is encumbered, state to whom and to the amount.

☐ 9.6 Do you have any pending civil actions? If so, state for each:
(a) the parties' names, the court, and the case number;
(b) the nature of the claim.

☐ 9.7 During the last three years have you received any judgments or insurance settlements? If so, state for each:
(a) the source or the judgment or insurance settlement;
(b) the amount of the judgment or insurance settlement.

☐ 9.8 Have you or your spouse applied for loans from any banks, credit unions, financial companies, or other lending institutions in the last three years? If so, state for each:
(a) if the loan was approved;
(b) the amount of the loan;
(c) what you or your spouse did with the proceeds.

☐ 9.9 Do you own any of the following items? If so, describe each item, the item's location, its approximate value, and any joint owner:
(a) office equipment;
(b) farm equipment;
(c) gemstones or jewelry;
(d) camera or video equipment;
(e) antiques;
(f) precious metals (gold or silver);
(g) musical instruments;
(h) weapons;
(i) motorcycles;
(j) motor homes;
(k) boats;
(l) airplanes;
(m) furs;
(n) watches;
(o) stamp or coin collections;
(p) china;
(q) original works of art;
(r) crystal.

10.0 Other Assets

☐ 10.1 Does any **PERSON**, company, or institution owe you money? If so, state for each:
(a) the name, **ADDRESS**, and telephone number of the person or institution;
(b) the amount of the debt;
(c) the basis of the debt;
(d) the date the debt is due to be paid.

☐ 10.2 Do you have any pending court proceedings in a California court where you have posted cash bail to guarantee your appearance? If so, state:
(a) the name of the court and date of posting;
(b) the amount of cash bail posted;
(c) the date to appear.

☐ 10.3 Are you the beneficiary of any trusts, or do you have any ownership interest in any partnerships, corporations, or companies? If so, state:
(a) the name and **ADDRESS** of each trustee, partnership, corporation, or company;
(b) the date each entity or trust was established;
(c) the **ASSETS** of each trust or entity.

11.0 Other Income

☐ 11.1 During the last three years have you received cash or other property not identified in the above interrogatories? If so, state:
(a) the nature and value of the cash or property;
(b) the source of the cash or property;
(c) the current location of the cash or property.

12.0 Liabilities and Debts

☐ 12.1 Are there any other judgments of record against you? If so, state for each:
(a) the date entered;
(b) the location of the court and the names of the parties;
(c) the case number;
(d) the amount of the judgment;
(e) whether you have made any payments;
(f) the amount and source of the payments;
(g) the amount still due.

☐ 12.2 What are your average monthly expenses, and how are they met?

☐ 12.3 Are there any liens, levies, or garnishments against your assets or wages? If so, please explain each in detail.

☐ 12.4 Have you paid any fines or fees in the criminal case in which the asking party is the victim?

Comment: The use of this form is optional. These interrogatories may be used by a victim who has not received full

payment of a restitution order to discover the assets of a defendant. See CCP §2033.720(a). The victim may propound the interrogatories once a year. The defendant subject to the restitution order must respond with current information about his or her assets and liabilities, including property in which the defendant claims a future interest. CCP §2033.720(b).

Cross-Reference: For further discussion of the defendant's obligation to disclose assets, see California Criminal Law Procedure and Practice §40.23 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/40 Victim Restitution/§40.5 H. Supplemental Restitution Order

§40.5 H. Supplemental Restitution Order

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No. _ _ _ _ _ _**
Plaintiff	)	**[PROPOSED]**
	)	**SUPPLEMENTAL**
vs	)	**RESTITUTION ORDER**
	)	
_ _[*Name(s)*]_ _,	)	**(Penal Code §§1202.4(f), 1214)**
Defendant(s)	)	**Dep't:** _ _[*number*]_ _
_____	)	**Judge:**

This order supplements the Order for Restitution and Abstract of Judgment, Form CR-110, entered against Defendant _____ for victim A ("Victim").

It is ordered that:

(1) The restitution to be paid to Victim includes all attorney fees incurred by Victim: (a) in judgment enforcement proceedings under the Code of Civil Procedure; (b) in any civil action to recover economic losses incurred by Victim as a result of Defendant's conduct in this case; and (c) in any civil action to preserve Defendant's assets to pay restitution.

(2) All restitution payments shall be delivered to _____.

(3) Upon presentation of the Order for Restitution, the civil clerk is directed to issue a civil case number and to issue any and all orders and writs authorized by CCP §§695.010-709.030, including, but not limited to, writs of execution, examination of judgment debtor, possession of personal property, possession of real property, sale of real property and/or personal property for enforcement of this Order.

(4) Defendant is not to transfer any assets (including those in which he/she has a community property interest) in any manner that violates Civil Code §3439.04 as to the Victim.

(5) The Order for Restitution and Abstract of Judgment, Form CR-110, does not expire.

(6) Defendant is to complete Form CR-115, Defendant's Statement of Assets, file the original with the Court, and serve it on the Victim by _ _[*date*]_ _.

(7) Until restitution is paid in full, Defendant must provide an updated Form CR-115 to Victim every 12 months.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

CLERK'S CERTIFICATE

The foregoing is a full, true, and correct copy of the original on file in this office.

Clerk of the Superior Court

Date: _ _ _ _ _ _ __[*Signature*]__
Deputy

Comment: This supplemental order fills gaps in the Judicial Council restitution order, CR-110/JV-790. Use of the supplemental order reduces the likelihood that the victim will have to go back to court for additional orders.

Cross-Reference: Judicial Council Form CR-110/JV-790, Order for Restitution and Abstract of Judgment, is reproduced in §40.2. For further discussion of restitution, see California Criminal Law Procedure and Practice, chap 40 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/40 Victim Restitution/§40.6 I. Information Regarding Income Deduction Order (Pen. Code, §1202.42) (Judicial Council Form CR-118)

§40.6 I. Information Regarding Income Deduction Order (Pen. Code, §1202.42) (Judicial Council Form CR-118)



SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	FOR COURT USE ONLY
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
INFORMATION REGARDING INCOME DEDUCTION ORDER (Pen. Code, § 1202.42)	CASE NUMBER:

1. The court has found that you have the ability to pay restitution and has ordered you to pay restitution in the amount of
   a. $ plus percent interest from the date of the order and fees of $ to all victims
   b. ☐ as listed in the probation report, dated *(specify):*
   c. ☐ listed in the sentencing minute order, dated *(specify):*

   Payment must be made as ordered at the hearing.

2. The court has entered an income deduction order for your employer to deduct: $ from your pay each pay period.
   a. The order applies to current and subsequent employers and all periods of employment.
   b. A copy of the income deduction order will be served on each of your employers and payers.
   c. Enforcement of the income deduction order may only be contested on the ground of mistake of fact regarding the amount owed or a showing of good cause for nonpayment.
   d. You are required to notify the Clerk of the Court *within 7 days* of a change in your address, a change in any of your employers, or a change in the address in any of your employers.
   e. **This income deduction order will be enforced under Penal Code section 1202.42(b) only if you fail to pay the restitution as ordered at the hearing.**
   f. Upon receipt of notice that you have failed to pay the restitution ordered at the hearing:
      (1) The court or its agent will request that you provide evidence that timely payments have been made or provide information establishing good cause for the failure. *If you fail to provide the evidence or fail to establish good cause within 5 days of the request*, you will receive notice that the order will be enforced, and the court will serve the income deduction order on each of your employers.
      (2) *Within 15 days* of being informed that the stay will be lifted, you may apply for a hearing to contest enforcement of the income deduction order on the ground of mistake of fact regarding the amount of restitution owed or on the ground that you have good cause for the nonpayment. Upon the timely request for a hearing, the income deduction order will not be enforced until the hearing is held and a determination is made on whether the enforcement of the income deduction order is proper.

Form Approved for Optional Use
Judicial Council of California
CR-118 [New January 1, 2005]

Penal Code, § 1202.42
www.courtinfo.ca.gov

American LegalNet, Inc.
www.USCourtForms.com

Comment: Under Pen C §1202.42, the court must enter an income deduction order for garnishment of the defendant's wages if it finds at the restitution hearing that the defendant has the ability to pay restitution. This form

provides notice to the defendant of the effect of that order. The income deduction order will not be enforced unless the agency responsible for collecting restitution (usually the probation department) determines that the defendant has, without good cause, failed to comply with the restitution order. Pen C §1202.42(b). On request, the defendant is entitled to a hearing on enforcement of the income deduction order. Pen C §1202.42(f). If the stay is lifted, the defendant's employer will be required to deduct the amount of restitution specified in the order from the defendant's wages. Pen C §1202.42(f).

Cross-Reference: Judicial Council Form CR-119, Order for Income Deduction (Pen. Code, §1202.42), is reproduced in §40.7. An order to the probation department to set in motion the procedure for lifting the stay is reproduced in §40.8. For further discussion of restitution, see California Criminal Law Procedure and Practice, chap 40 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/40 Victim Restitution/§40.7 J. Order for Income Deduction (Pen Code, §1202.42) (Judicial Council Form CR-119)

§40.7 J. Order for Income Deduction (Pen Code, §1202.42) (Judicial Council Form CR-119)



SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
ORDER FOR INCOME DEDUCTION **(Pen. Code, § 1202.42)**	CASE NUMBER:

To: Employer:

Address:

Phone:

1. The court has found that the defendant has the ability to pay restitution under Penal Code section 1202.42 and has ordered that he or she pay restitution of $ plus 10% interest.
2. You are ordered to withhold a portion of the earnings of the defendant in this action *(name):* , (last 4 digits of social security number *(specify):*), each pay period.
3. You are ordered to deduct: $ from the above named employee's pay each period and forward funds to the
   - ☐ Clerk of the above entitled court
   - ☐ Other *(specify):*
4. This order will terminate upon payment in full or further order of this court.

Date:

_____

CLERK'S CERTIFICATE

The foregoing is a full, true, and correct copy of the original on file in this office.

SEAL

CLERK OF THE SUPERIOR COURT

Date: By _____, Deputy

Form Approved for Optional Use
Judicial Council of California
CR-119 [New January 1, 2005]

Penal Code, § 1202.42
www.courtinfo.ca.gov

American LegalNet, Inc.
www.USCourtForms.com

Print

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

Notice to Employer re: Order for Income Deduction (Pen. Code, § 1202.42)

1. You are required to deduct the amount specified in the *Order for Income Deduction* from the employee's income and to pay that amount to the clerk of the above entitled court or its agent.
2. The order is to be implemented no later than the first payment date that occurs more than 14 days after the date of service of the order.
3. *Within two days after each payment date,* forward the amount deducted and a statement about whether the amount totally or partially satisfies the periodic amount specified in the income deduction order.
4. If you fail to deduct the proper amount from the employee's income, you are liable for the amount you should have deducted, plus costs, interest, and reasonable attorney fees.
5. You may collect up to five dollars ($5) against the employee's income to reimburse you for administrative costs for the first deduction and up to one dollar ($1) for each deduction thereafter.
6. This order and notice are binding until further notice by the court or until you no longer provide income to the employee.
7. When you no longer provide income to the employee, you must notify the clerk of the above entitled court and provide the employee's last known address and the name and address of the employee's new employer, if known. If you violate this provision, you are subject to a civil penalty not to exceed two hundred fifty dollars ($250) for the first violation or five hundred dollars ($500) for any subsequent violation.
8. You must not discharge, refuse to employ, or take disciplinary action against the employee because of an income deduction order. If you violate this provision, you are subject to a civil penalty not to exceed two hundred fifty dollars ($250) for the first violation or five hundred dollars ($500) for any subsequent violation.
9. If you receive income deduction orders for two or more employees sent by the same court, you may combine the amounts that are to be paid in a single payment, but you must identify the portion of the payment that is attributable to each employee.
10. If you receive two or more income deduction orders against the same employee, you must contact the above entitled court for further instructions.

Comment: See Comment in §40.6.

Cross-Reference: Judicial Council Form CR-118, Information Regarding Income Deduction Order (Pen. Code, §1202.42), is reproduced in §40.6. An order to the probation department to set in motion the procedure for lifting the stay is reproduced in §40.8. For further discussion of restitution, see California Criminal Law Procedure and Practice, chap 40 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/40 Victim Restitution/§40.8 K. Order to Probation Department in Regard to Collection of Restitution Payments

§40.8 K. Order to Probation Department in Regard to Collection of Restitution Payments

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[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No. _ _ _ _ _ _**
Plaintiff	)	**[PROPOSED] ORDER TO PROBATION DEPARTMENT**
vs	)	**IN REGARD TO COLLECTION OF RESTITUTION PAYMENTS**
_ _[*Name(s)*]_ _,	)	
Defendant(s)	)	**Dep't:** _ _[*number*]_ _
_____	)	**Judge:**

To _____ County Probation Department

THE COURT ORDERS:

If the Probation Department receives information that Defendant _____ ("Defendant") has not made his/her monthly victim restitution payments as ordered, the Probation Department will request Defendant to provide evidence indicating that timely payments have been made or provide information establishing good cause for the failure. If Defendant fails to provide the Probation Department with the evidence or fails to establish good cause within five days of the request, the Probation Department will immediately inform the Defendant that the stay of the income deduction order will be lifted. At the same time, the Probation Department will immediately inform the Clerk of the Court in writing that the income deduction order must be served pursuant to Penal Code §1202.42(f) following a 15-day period, because the Defendant failed to make restitution payments as ordered. The Defendant may apply for a hearing to contest the lifting of the stay.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the _ _[*title of court*]_ _

Comment: See Comment in §40.6.

Cross-Reference: Judicial Council Form CR-118, Information Regarding Income Deduction Order (Pen. Code, §1202.42), is reproduced in §40.6. Judicial Council Form CR-119, Order for Income Deduction (Pen. Code, §1202.42), is reproduced in §40.7. For further discussion of restitution, see California Criminal Law Procedure and Practice, chap 40 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/40 Victim Restitution/§40.9 L. Request for Victim Services and Restitution Collection (CDCR-1707)

§40.9 L. Request for Victim Services and Restitution Collection (CDCR-1707)



STATE OF CALIFORNIA
REQUEST FOR VICTIM SERVICES
CDCR 1707 (Rev. 04/08 Internet)

DEPARTMENT OF CORRECTIONS AND REHABILITATION

California Department of Corrections and Rehabilitation (CDCR)
Office of Victim and Survivor Rights and Services (OVSRS)
P.O. Box 942883, Sacramento, CA 94283-0001
Toll Free Number (877) 256-6877 Fax Number (916) 445-3737
http://www.cdcr.ca.gov/victim_services/index.html
DO NOT MAIL COMPLETED FORM TO A PRISON

Check one: ☐ New/Revised Request for Victim Services ☐ Change of address only (complete sections A, E, and F)

SECTION A. APPLICANT INFORMATION

Check one: ☐ Victim (direct victim of inmate) ☐ Witness ☐ Concerned Citizen
☐ Family member of victim (next of kin), indicate relationship:_____

Print Applicant Name: *Circle Mr./Mrs./Ms.*_____
(FIRST) (MIDDLE) (LAST)

Home Address:_____
(STREET) (CITY) (COUNTY) (STATE) (ZIP CODE)

Mailing Address *(If Different)*:_____
(STREET or P.O. BOX) (CITY) (STATE) (ZIP CODE)

Telephone: (_____)_____ (_____)_____ (_____)_____ _____
(DAYTIME) (EVENING) (CELL) (EMAIL)

NOTE: *It is your responsibility to keep the OVSRS informed of any changes to your personal information.*

SECTION B. NOTIFICATION OF INMATE STATUS IN PRISON

I request the following notification service(s) about the status of the inmate in prison:

☐ Notification of **release, escape,** or **death** of an inmate

☐ Notification of **inmate's criminal appeal** (Note: *Checking this box will allow us to share your information with the California Attorney General's Office.)*

For victims/next of kin only:
☐ Notification of **parole hearing** (applies only to inmates sentenced to a prison term that includes a life sentence)
May we share your contact information with the district attorney's office where the trial was held? ☐ *Yes* ☐ *No*

SECTION C. CONDITIONS OF PAROLE FOR INMATE

NOTE: ***Requests for special conditions of parole are considered but not guaranteed.***

I request the following conditions when the inmate is released on parole:

☐ Parolee not be allowed to contact me while he/she is on parole

☐ Parolee not be allowed to live in the same county that I live in

For victims/witnesses only:
☐ Parolee not be allowed to live within 35 miles of my home address (available only for specific types of crimes - see instructions)

NOTE: *If you would like to provide additional information explaining your request, attach a separate sheet of paper.*

SECTION D. RESTITUTION

☐ There is a restitution court order in the amount of $_____ payable to *(name):* _____.

NOTE: *To be determined (TBD) orders must be finalized by the county before CDCR can collect restitution.*

SECTION E. INMATE IDENTIFICATION

Please provide as much of the following information about the inmate as possible:

Inmate's Full Name *(Print)*: _____ Date of Birth:___/___/___
(FIRST) (MIDDLE) (LAST) MO DAY YEAR

CDC Number (Prison Number): _____ Date Sentenced to State Prison:___/___/___
MO DAY YEAR

Court Case Number:_____ County of Commitment:_____

SECTION F. APPLICANT SIGNATURE

Signature of Applicant:_____ Date:_____

Comment: This California Department of Corrections and Rehabilitation form is to be used by a victim after a restitution order has been obtained, when the defendant is in prison. This form allows a victim to update his or her

address with the California Department of Corrections and Rehabilitation, an important step to ensure that payments are sent to the right address. The form, which has a very useful toll-free number, may be found at http://www.cdcr.ca.gov/victim_services/docs/victim_form.pdf. The California Department of Corrections and Rehabilitation recommends calling the toll-free number before sending the form.

Make certain to provide all of the data requested on the form, because missing data may prevent the request from being honored. The form is confidential and will be used only by the Office of Victim & Survivor Rights and Services. Data related to a restitution request will be transferred to the Board of Control for disbursement of restitution collected by California Department of Corrections and Rehabilitation (toll-free phone number: 877-256-OVSS (6877)).

The completed form should be mailed to:

Office of Victim and Survivor Rights and Services
P.O. Box 942883
Sacramento, CA 94283-0001

Cross-Reference: For further discussion of restitution, see California Criminal Law Procedure and Practice, chap 40 (Cal CEB Annual).

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41

Trial Counsel's Duties After Judgment

A. Notice of Appeal—Felony (Defendant) (Criminal) (Judicial Council Form CR-120) §41.1
B. Notice of Appeal (Misdemeanor) (Judicial Council Form CR-132) §41.2
C. Application for Appointment of Counsel on Appeal (Felony) §41.3
D. Request for Court-Appointed Lawyer in Misdemeanor Appeal (Judicial Council Form CR-133) §41.3A
E. Notice Regarding Record of Oral Proceedings (Misdemeanor) (Judicial Council Form CR-134) §41.4
F. Statement of Points to Be Raised on Appeal and Designation of Additional Record (Pen C §1240.1) §41.5
G. Proposed Statement on Appeal (Misdemeanor) (Judicial Council Form CR-135) §41.5A
H. Defense Motion to Reduce Felony to Misdemeanor After Probation Granted (Pen C §17(b)(3)) §41.6
I. Application to Dismiss After Probation Successfully Completed (Pen C §1203.4) §41.7
J. Application to Dismiss Misdemeanor After Probation Not Granted and Sentence Served (Pen C §1203.4a) §41.8
K. Petition to Seal and Destroy Records and for Declaration of Factual Innocence (Pen C §851.8) §41.9
L. Motion in Trial Court for Bail Pending Appeal and for Stay of Execution of Judgment (Felony Case) §41.10
M. Prosecution Motion to Revoke Bail on Appeal §41.11
N. Motion to Dismiss Nonviolent Drug Possession Offense (Pen C §1210.1(d)) §41.12

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.1 A. Notice of Appeal--Felony (Defendant) (Criminal) (Judicial Council Form CR-120)

§41.1 A. Notice of Appeal—Felony (Defendant) (Criminal) (Judicial Council Form CR-120)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
PEOPLE OF THE STATE OF CALIFORNIA VS. DEFENDANT: Date of birth: _____ Cal. Dept. of Corrections and Rehabilitation No. (if any): _____	
NOTICE OF APPEAL—FELONY (DEFENDANT) **(Pen. Code, §§ 1237, 1237.5, 1538.5(m); Cal. Rules of Court, rule 8.304)**	CASE NUMBER(S):

NOTICE

- **You must file this form in the SUPERIOR COURT WITHIN 60 DAYS after the court rendered the judgment or made the order you are appealing.**
- **IMPORTANT:** If your appeal challenges the validity of a guilty plea, a no-contest plea, or an admission of a probation violation, you must also complete the Request for Certificate of Probable Cause on page 2 of this form. (Pen. Code, § 1237.5.)

1. Defendant appeals from a judgment rendered or an order made by the superior court.

   NAME of defendant:

   DATE of the order or judgment:

2. ***Complete either item a. or item b. Do not complete both.***

   a. If this appeal is after entry of a plea of guilty or no contest or an admission of a probation violation, check all that apply:

   (1) ☐ This appeal is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea. (Cal. Rules of Court, rule 8.304(b).)

   (2) ☐ This appeal is based on the denial of a motion to suppress evidence under Penal Code section 1538.5.

   (3) ☐ This appeal challenges the validity of the plea or admission. *(You must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature.)*

   (4) ☐ Other basis for this appeal *(you must complete the Request for Certificate of Probable Cause on page 2 of this form and submit it to the court for its signature) (specify):*

   b. For all other appeals, check one:

   (1) ☐ This appeal is after a jury or court trial. (Pen. Code, § 1237(a).)

   (2) ☐ This appeal is after a contested violation of probation. (Pen. Code, § 1237(b).)

   (3) ☐ Other *(specify)*:

3. ☐ Defendant requests that the court appoint an attorney for this appeal. Defendant ☐ was ☐ was not represented by an appointed attorney in the superior court.

4. Defendant's mailing address is: ☐ same as in attorney box above.
   ☐ as follows:

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DEFENDANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
CR-120 [Rev. January 1, 2010]

NOTICE OF APPEAL—FELONY (DEFENDANT)
(Criminal)

CEB

Penal Code, §§ 1237, 1538.5(m);
Cal. Rules of Court, rule 8.304
www.courtinfo.ca.gov

Print

CR-120

PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT:	CASE NUMBER(S):

REQUEST FOR CERTIFICATE OF PROBABLE CAUSE

I request a certificate of probable cause. The reasonable constitutional, jurisdictional, or other grounds going to the legality of the guilty plea, no-contest plea, or probation violation admission proceeding are *(specify)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DEFENDANT OR ATTORNEY)

COURT ORDER

This Request for Certificate of Probable Cause is *(check one)*: ☐ granted ☐ denied.

Date:

JUDGE

Comment: When trial counsel believes there are arguably meritorious grounds for appeal from a felony conviction,

trial counsel must file a notice of appeal and any statement (on plea of guilty or no contest or revocation of probation following admission of violation) required by Pen C §1237.5 in the superior court no later than 60 days after entry of the judgment. Cal Rules of Ct 8.308(a). The court of appeal may not grant relief from default for a tardy notice of appeal. Cal Rules of Ct 8.60(d).

This form may be used, or counsel may draft a notice of appeal.

If counsel does not expect to represent the defendant on appeal, the client's name, not the attorney's name, should appear in the upper left corner. Counsel's signature as executing the statement is not an appearance as counsel in the appeal. Pen C §1240.1(b). See Cal Rules of Ct 8.304(a)(3).

The back of the form, which is a request for a certificate of probable cause, must be completed when an appeal after a guilty or no contest plea requires issuance of such a certificate. Pen C §1237.5; Cal Rules of Ct 8.304(b). For discussion of guilty plea appeals and the need for a certificate of probable cause, see California Criminal Law Procedure and Practice §§44.5-44.13 (Cal CEB Annual); Appeals and Writs in Criminal Cases §§1.11-1.14, 2.8 (3d ed Cal CEB 2007).

Trial counsel must also assist an indigent defendant in obtaining appointed counsel on appeal. If this form is used, counsel or the defendant may request appointment of counsel by checking the appropriate box on the first page. If the defendant was represented by retained counsel at trial, the request for appointment of counsel should include evidence that the defendant is indigent. Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210), reproduced in §3.4, may be used for this purpose.

For an attorney-drafted request for appointment of counsel, see §41.3.

Cross-Reference: For discussion of the notice of appeal, see Crim Law §§41.5, 44.5-44.7; Appeals & Writs §§2.6-2.8. For discussion of felony appeals in general, see Crim Law, chap 44; Appeals & Writs, chaps 1-6.

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.2 B. Notice of Appeal (Misdemeanor) (Judicial Council Form CR-132)

§41.2 B. Notice of Appeal (Misdemeanor) (Judicial Council Form CR-132)



CR-132 Notice of Appeal (Misdemeanor)

Clerk stamps date here when form is filed.

Instructions

- This form is only for appealing in a **misdemeanor case.** You can get other forms for appealing in a civil or infraction case at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.*
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms.*
- You must file this form **no later than 30 days after the trial court issued the judgment or order you are appealing** (see rule 8.853(b) of the California Rules of Court for very limited exceptions). **If your notice of appeal is late, the court will not take your appeal.**
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:
The People of the State of California
v.

The clerk will fill in the number below:

Appellate Division Case Number:

1 Your Information

a. Appellant (the party who is filing this appeal):

Name: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

b. Appellant's lawyer *(skip this if the appellant is filling out this form)*:

The lawyer filling out this form *(check (1) or (2))*:

(1) ☐ was the appellant's lawyer in the trial court. (2) ☐ is the appellant's lawyer for this appeal.

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

Print

Trial Court Case Name:_____ | Trial Court Case Number:

2 Judgment or Order You Are Appealing

I am/My client is appealing *(check one):*

a. ☐ the final judgment of conviction in this case (Penal Code section 1466(2)(A)).
The trial court issued (rendered) this judgment on *(fill in the date):*_____

b. ☐ an order that denied a motion to suppress evidence in this case (Penal Code section 1538.5(j)).
The trial court issued this order on *(fill in the date):*_____

c. ☐ an order made after judgment in this case that affects an important right of mine/my client (for example, an order after a probation violation) (Penal Code section 1466(2)(B)).
The trial court issued this order on *(fill in the date):*_____

d. ☐ other action *(describe the action you are appealing and give the date the trial court took the action):*

_____
_____
_____
_____

3 Record of the Oral Proceedings

(See form CR-131-INFO for information about the record of the oral proceedings.)

(Check a or b):

a. ☐ I have attached a completed *Notice Regarding Record of Oral Proceedings (Misdemeanor)* (form CR-134).

b. ☐ I have **not** attached a *Notice Regarding Record of Oral Proceedings (Misdemeanor)* (form CR-134). I understand that I must file this notice in the trial court within either: (1) 20 days after I file this notice of appeal; or, if it is later, (2)10 days after the court decides whether to appoint a lawyer for me (if I file a request for a court-appointed lawyer within 20 days after I file my notice of appeal). I also understand that if I do not file the notice on time, the court will not be able to consider what was said in the trial court in deciding whether an error was made in the trial court proceedings.

4 Court-Appointed Lawyer

a. I/My client ☐ was ☐ was not represented by the public defender or another court-appointed lawyer in the trial court.

b. I am/My client is *(check (1) or (2)):*

(1) ☐ asking the court to appoint a lawyer to represent me/my client in this appeal. I have completed *Request for Court-Appointed Lawyer in Misdemeanor Appeal* (form CR-133), and attached it to this notice of appeal.

(2) ☐ **not** asking the court to appoint a lawyer to represent me/my client in this appeal.

REMINDER—Except in the very limited circumstances listed in rule 8.853(b), you must file this form no later than 30 days after the trial court issued the judgment or order you are appealing in your case. If your notice of appeal is late, the court will not take your appeal.

Date:_____

_____ ▶ _____

Type or print your name | *Signature of appellant or attorney*

Comment: In a misdemeanor case, trial counsel must file a notice of appeal in the trial court within 30 days after

rendition of the judgment or the making of the order appealed from. If a defendant is committed before final judgment for narcotics addiction or insanity, the notice of appeal must be filed within 30 days after the commitment. Cal Rules of Ct 8.853(a). The use of Notice of Appeal (Misdemeanor) (Judicial Council Form CR-132) is optional. If the defendant is indigent, trial counsel should also request the court to appoint counsel for the defendant. See the application for appointment of counsel on appeal in §41.3A. The application should be attached to the notice of appeal.

The only misdemeanor trial court orders that are appealable are orders concerning suppression of evidence and orders entered after the final judgment that impinge on the "substantial rights" of the defendant. Advisory Committee Comment to Cal Rules of Ct 8.852. See Pen C §§1538.5(j), 1446.

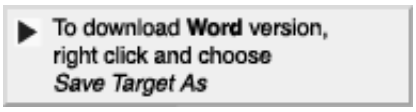
An appellant may abandon a misdemeanor appeal at any time by filing a notice of abandonment in the appellate division. Cal Rules of Ct 8.855. Optional form Abandonment of Appeal (Misdemeanor) (Judicial Council Form CR-137) may be used for this purpose.

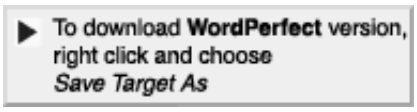
Cross-Reference: For discussion of the notice of appeal, see California Criminal Law Procedure and Practice §§41.1-41.5, 43.2, 43.8, 44.2, 44.5-44.7 (Cal CEB Annual); Appeals and Writs in Criminal Cases §2.9 (3d ed Cal CEB 2007). For discussion of misdemeanor appeals in general, see Crim Law, chap 43; Appeals & Writs §§1.16-1.18.

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.3 C. Application for Appointment of Counsel on Appeal (Felony)

§41.3 C. Application for Appointment of Counsel on Appeal (Felony)





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT

_ _[*Name of defendant*]_ _ **applies for appointment of counsel on appeal as provided in Penal Code section 1240.1(b), and in support of this motion respectfully submits a declaration of current financial condition which is attached hereto.**

Date: _ _ _ _ _ _ __[*Signature of defendant or attorney*]__
_ _[*Typed name*]_ _
_ _[*Title of attorney if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

FINANCIAL DECLARATION

[*Option 1*]

I declare that I have no means of retaining an attorney to represent me, and that I have no income or assets except as follows: _ _[*State any assets and their value and/or source of income and amount*]_ _**.**

[*Option 2*]

I, _ _[*name of declarant*]_ _**,** _ _[*was appointed to represent the defendant at trial/am an Assistant Public Defender, and as such was assigned to represent the defendant at trial*]_ _**. Defendant is currently in the custody of** _ _[*specify official having custody of defendant*]_ _**, having been ordered to serve a term of approximately** _ _[*state sentence*]_ _**, and I know of no significant assets belonging to the defendant in the possession of custodial officials which would materially affect** _ _[*his/her*]_ _ **indigent status.**

[*Continue*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: This application should be filed in the trial court, preferably with the notice of appeal. See Pen C §1240.1(b). Check local rules to ascertain whether particular forms are required or preferred. If trial counsel will not represent the defendant on appeal, the defendant's name and address should be used in the caption.

The defendant's financial declaration may be made on Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210), reproduced in §3.4.

This form may also be used in a juvenile appeal. See Welf & I C §800(f).

Cross-Reference: For discussion of the right to counsel on appeal, see Crim Law §44.3.

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.3A D. Request for Court-Appointed Lawyer in Misdemeanor Appeal (Judicial Council Form CR-133)

§41.3A D. Request for Court-Appointed Lawyer in Misdemeanor Appeal (Judicial Council Form CR-133)



CR-133 Request for Court-Appointed Lawyer in Misdemeanor Appeal

Clerk stamps date here when form is filed.

Instructions

- This form is only for requesting that the court appoint a lawyer to represent a person who is appealing in a **misdemeanor** case.
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- The court is required to appoint a lawyer to represent you on appeal only if you cannot afford to hire a lawyer and
  - your punishment includes going to jail or paying a fine of more than $500 (including penalty and other assessments), or
  - you are likely to suffer other significant harm as a result of being convicted.
- This form can be filed at the same time as your notice of appeal.
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:
The People of the State of California
v.

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Appellant (the party who is filing this appeal):

Name: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

b. Appellant's lawyer in the trial court *(skip this if the appellant is filling out this form)*:

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

Print

Trial Court Case Name:_____ | Trial Court Case Number:

Information About Your Case

2 Were you/was your client represented by the public defender or another court-appointed lawyer in the trial court? *(Check a or b.)*

a. ☐ Yes

b. ☐ No *(Complete and attach* Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense *(form MC-210) showing that you/your client cannot afford to hire a lawyer. You can get form MC-210 at any courthouse or county law library or online at* www.courtinfo.ca.gov/forms.*)*

3 Describe the punishment the trial court gave you/your client in this case *(check all that apply and fill in any required information):*

a. ☐ Jail time

b. ☐ A fine (including penalty and other assessments) *(fill in the amount of the fine):* $_____

c. ☐ Restitution *(fill in the amount of the restitution):* $_____

d. ☐ Probation *(fill in the amount of time on probation):* _____

e. ☐ Other punishment *(describe any other punishment that the trial court gave you/your client in this case):*

_____

_____

_____

4 Describe any significant harm that you are/your client is likely to suffer because of this conviction:

_____

_____

_____

_____

_____

Date:_____

_____ ▶ _____

Type or print your name | *Signature of appellant or attorney*

Comment: If defense trial counsel has reason to believe that the defendant is indigent and will file an appeal,

counsel must prepare and file in the trial court an application to the appellate division for appointment of counsel. Cal Rules of Ct 8.851(b)(1). The use of Request for Court-Appointed Lawyer in Misdemeanor Appeal (Judicial Council Form CR-133) is optional. The completed request should be attached to the notice of appeal.

If the defendant was represented by appointed counsel in the trial court, the application must include trial counsel's declaration to that effect. If the defendant was not represented by appointed counsel in the trial court, the application must include a declaration of indigency in the form required by the Judicial Council. Cal Rules of Ct 8.851(b)(2). See Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (Judicial Council Form MC-210), reproduced in §3.4.

If trial counsel will not represent the defendant on appeal, the defendant's name and address should be used in the caption.

On application, the appellate division must appoint appellate counsel for a defendant convicted of a misdemeanor who is subject to incarceration or a fine of more than $500 (including penalty and other assessments) or who is likely to suffer significant adverse collateral consequences as a result of the conviction and who was represented by appointed counsel in the trial court or establishes indigency. Cal Rules of Ct 8.851(a)(1). On application, the appellate division may appoint counsel for any other indigent defendant convicted of a misdemeanor. Cal Rules of Ct 8.851(a)(2).

Cross-Reference: For discussion of the right to counsel on appeal, see Crim Law §43.9.

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.4 E. Notice Regarding Record of Oral Proceedings (Misdemeanor) (Judicial Council Form CR-134)

§41.4 E. Notice Regarding Record of Oral Proceedings (Misdemeanor) (Judicial Council Form CR-134)



CR-134 Notice Regarding Record of Oral Proceedings (Misdemeanor)

Clerk stamps date here when form is filed.

Instructions

- This form is only for giving the court notice about the record of the oral proceedings in an appeal of a **misdemeanor** case.
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131 INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- This form can be filed with your notice of appeal. If it is not filed with your notice of appeal, this form must be filed within either:
  (1) 20 days after you file your notice of appeal, or, if it is later
  (2) 10 days after the court decides whether to grant your request for a court-appointed lawyer (if you file a request within 20 days after you file your notice of appeal).

  If you do not file this form on time, the court will not be able to consider what was said in the trial court in deciding whether a legal error was made in the trial court proceedings.
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial court where you filed your notice of appeal. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:
The People of the State of California
v. _____

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Appellant (the party who is filing this appeal):

Name: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

b. Appellant's lawyer *(skip this if the appellant is filling out this form)*:

The lawyer filling out this form *(check (1) or (2))*:

(1) ☐ was the appellant's lawyer in the trial court.

(2) ☐ is the appellant's lawyer for this appeal.

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

Print

Trial Court Case Name:_____ | Trial Court Case Number:

Information About Your Appeal

(2) On *(fill in the date):*_____ I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

Your Choices (Election) about the Record of the Oral Proceedings

You do not have to provide the appellate division with a record of what was said in the trial court (this is called a record of the "oral proceedings"). But if you do not, the appellate division will not be able to consider what was said during those proceedings in deciding whether a legal error was made in the trial court proceedings.

(3) I elect (choose)/My client elects to proceed *(check a or b):*

a. ☐ WITHOUT a record of the oral proceedings in the trial court *(skip item (4); sign and date this form).* I understand that if I proceed without a record of the oral proceedings, the appellate division will not be able to consider what was said during those proceedings in deciding whether a legal error was made.

*(Write initials here):*_____

b. ☐ WITH a record of the oral proceedings in the trial court *(complete item (4) below).* I understand that if I elect (choose) to proceed WITH a record of the oral proceeding in the trial court, I have to choose the record I want to use and take the actions described below to make sure this record is provided to the appellate division. I understand that if I do not take the actions described below and the appellate division does not receive this record, I am not likely to succeed in my appeal.

*(Write initials here):*_____

(4) I want to use the following record of what was said in the trial court proceedings in my case *(check and complete **only one**—a, b, c, or d):*

a. ☐ **Reporter's Transcript.** *This option is available only if there was a court reporter in the trial court who made a record of what was said in court. Check with the trial court to see if there was a court reporter in your case before choosing this option. (Check and complete (1) or (2)):*

(1) ☐ I will pay the trial court clerk's office for this transcript myself when I receive the court reporter's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that this transcript be prepared at no cost to me because I cannot afford to pay this cost.

(a) ☐ I was represented by the public defender or another court-appointed lawyer at my trial.

(b) ☐ I was not represented by the public defender or another court-appointed lawyer at my trial, but I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courtinfo.ca.gov/forms. *The court will review this form to decide if you are eligible for a free reporter's transcript.)*

OR

Print

Trial Court Case Name:_____ | Trial Court Case Number:

4 *(continued)*

b. ☐ **Transcript From Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. (Check and complete (1) or (2)):*

(1) ☐ I will pay the trial court clerk's office for this transcript myself. I understand that if I do not pay for this transcript, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that this transcript be provided at no cost to me because I cannot afford to pay this cost.

(a) ☐ I was represented by the public defender or another court-appointed lawyer at trial.

(b) ☐ I was not represented by the public defender or another court-appointed lawyer at my trial, but I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courtinfo.ca.gov/forms. *The court will review this form to decide whether you are eligible for a free transcript.)*

OR

c. ☐ **Copy of Official Electronic Recording.** *This option is available only if an official electronic recording was made of what was said in the trial court, the court has a local rule for the appellate division permitting the use of the official electronic recording itself as the record of the proceedings, and you and the respondent (the prosecuting agency) have agreed (stipulated) that you want to use the official electronic recording itself as the record of what was said in your case. Check with the trial court to see if an official electronic recording was made in your case before choosing this option. You must attach a copy of the agreement (stipulation) between you and the respondent to this notice. (Check and complete (1) or (2)).*

(1) ☐ I will pay the trial court clerk's office for this official electronic recording myself. I understand that if I do not pay for this recording, it will not be prepared and provided to the appellate division.

(2) ☐ I am asking that this official electronic recording be provided at no cost to me because I cannot afford to pay this cost.

(a) ☐ I was represented by the public defender or another court-appointed lawyer at my trial.

(b) ☐ I was not represented by the public defender or another court-appointed lawyer at my trial, but I have completed and attached *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form MC-210). *(You can get form MC-210 at any courthouse or county law library or online at* www.courtinfo.ca.gov/forms. *The court will review this form to decide whether you are eligible for a free copy of the official electronic recording.)*

OR

Print

Trial Court Case Name:_____ | Trial Court Case Number:

4 *(continued)*

d. ☐ **Statement on Appeal.** *A statement on appeal is a summary of the trial court proceedings approved by the trial court. See form CR-131-INFO for information about preparing a proposed statement. (Check and complete (1) or (2)):*

(1) ☐ I have attached my proposed statement on appeal. (*If you are not represented by a lawyer in this appeal, you must use* Proposed Statement on Appeal (Misdemeanor) *(form CR-135) to prepare and file this proposed statement. You can get form CR-135 at any courthouse or county law library or online at* www.courtinfo.ca.gov/forms.)

(2) ☐ I have NOT attached my proposed statement on appeal. I understand that I must file this proposed statement in the trial court within 20 days of the date I file this notice and that if I do not file the proposed statement on time, the court may dismiss my appeal.

Date:_____

_____ ▶ _____

Type or print your name | *Signature of appellant or attorney*

Comment: In a misdemeanor appeal, the normal record includes a record of the written documents from the trial

court proceedings in the form of either a clerk's transcript (see Cal Rules of Ct 8.861, 8.867) or, if permitted by local rule, the original trial court file (see Cal Rules of Ct 8.863). Cal Rules of Ct 8.860(a)(1). If an appellant wants to raise any issue that requires consideration of the oral proceedings in the trial court, the record on appeal must include a record of the oral proceedings in the form of one of the following (Cal Rules of Ct 8.860(a)(2)):

- A reporter's transcript (see Cal Rules of Ct 8.865-8.867) or a transcript prepared from an official electronic recording (see Cal Rules of Ct 8.868);
- An official electronic recording of the proceedings under Rule 8.868, if the court has a local rule for the appellate division permitting that form of the record; or
- A statement on appeal (see Cal Rules of Ct 8.869).

The appellant must notify the trial court about whether he or she elects to proceed with or without a record of the oral proceedings in the trial court and, if the appellant elects to proceed with a record of the oral proceedings, the form of that record. Cal Rules of Ct 8.864(a). This notification may be filed using Notice Regarding Record of Oral Proceedings (Misdemeanor) (Judicial Council Form CR-134). Cal Rules of Ct 8.864; Advisory Committee Comment to Cal Rules of Ct 8.864. If no notice for appointment of counsel is filed, the notice concerning the record of oral proceedings must be filed no later than 20 days after the notice of appeal is filed; if an application for appointment of counsel is filed before that period expires, the notice concerning the record of oral proceedings must be filed either 10 days after the court appoints counsel to represent the defendant on appeal or denies the application for appointment of counsel or 20 days after the notice of appeal is filed, whichever is later. Cal Rules of Ct 8.864(b). On the application for appointment of counsel, see §41.3A.

The rules mandate the contents of the clerk's transcript (Cal Rules of Ct 8.861) and the reporter's transcript (Cal Rules of Ct 8.865). However, the parties may stipulate in writing that any part of the record is not necessary to properly proceed with the appeal. Once that stipulation is filed in the trial court, the unnecessary portion of the record must not be sent to the appellate division. Cal Rules of Ct 8.860(b).

Cross-Reference: For further discussion of the record in misdemeanor appeals, see California Criminal Law Procedure and Practice §§43.12-43.20 (Cal CEB Annual); Appeals and Writs in Criminal Cases §§3.15-3.20 (3d ed Cal CEB 2007).

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.5 F. Statement of Points to Be Raised on Appeal and Designation of Additional Record (Pen C §1240.1)

§41.5 F. Statement of Points to Be Raised on Appeal and Designation of Additional Record (Pen C §1240.1)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

I, _ _[*name*]_ _, _ _[*was appointed to represent the _ _[defendant/minor]_ _ at trial/am an Assistant Public Defender, and as such was assigned to represent the _ _[defendant/minor]_ _ at trial*]_ _ in the above-captioned matter and make this statement in compliance with the requirements of Penal Code section 1240.1.

DESIGNATION OF ISSUES

Although I have not examined the written transcript of the proceedings, the following issues appear to be among the arguably meritorious grounds of appeal:

_ _[*State potential issues.*]_ _

DESIGNATION OF ADDITIONAL RECORD ON APPEAL

In addition to the record on appeal required by California Rules of Court 8.320, I believe the following items are reasonably necessary to adequate appellate review, in light of the issues presented on appeal as set forth below.

_ _[*State additional record not part of the normal record on appeal under Cal Rules of Ct 8.320.*]_ _

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: Counsel representing an indigent client in any noncapital criminal, juvenile, or civil commitment case is required to file this statement with the notice of appeal. Pen C §1240.1(b).

Failure to assign an error or designate a particular item for the record will not, however, foreclose any argument in the court of appeal or prevent the defendant or appellate counsel from augmenting the record on appeal. Pen C §1240.1(d).

If counsel will not be representing the client on appeal, the client's name, not counsel's, should appear in the upper left corner of the first page. Counsel's signature as executing the statement is not an appearance as counsel in the appeal. Pen C §1240.1(b).

Cross-Reference: On appeals generally, see California Criminal Law Procedure and Practice, chaps 43-44 (Cal CEB Annual); Appeals and Writs in Criminal Cases, chaps 1-6 (3d ed Cal CEB 2007).

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.5A G. Proposed Statement on Appeal (Misdemeanor) (Judicial Council Form CR-135)

§41.5A G. Proposed Statement on Appeal (Misdemeanor) (Judicial Council Form CR-135)



CR-135 Proposed Statement on Appeal (Misdemeanor)

Clerk stamps date here when form is filed.

Instructions

- This form is only for preparing a proposed statement on appeal in a **misdemeanor case.**
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at *www.courtinfo.ca.gov/forms*.
- This form can be attached to your *Notice Regarding Record of Oral Proceedings (Misdemeanor)* (form CR-134). If it is not attached to that notice, this form must be filed **no later than 20 days after you file that notice. If you have chosen to prepare a statement on appeal and do not file this form on time, the court may dismiss your appeal.**
- Fill out this form and make a copy of the completed form for your records and for each of the other parties.
- Serve a copy of the completed form on each of the other parties and keep proof of this service. You can get information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at *www.courtinfo.ca.gov/selfhelp/lowcost/getready.htm#serving.*
- Take or mail the original completed form and proof of service on the other parties to the clerk's office for the same court that issued the judgment or order you are appealing. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:
The People of the State of California
v.

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

a. Appellant (the party who is filing this appeal):

Name: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

b. Appellant's lawyer *(skip this if the appellant is filling out this form):*

The lawyer filling out this form *(check (1) or (2)):*

(1) ☐ was the appellant's lawyer in the trial court. (2) ☐ is the appellant's lawyer for this appeal.

Name: _____ State Bar number: _____

Street address: _____
Street *City* *State* *Zip*

Mailing address *(if different)*: _____
Street *City* *State* *Zip*

Phone: ( ) _____ E-mail *(optional)*: _____

Fax *(optional)*: ( ) _____

Print

Trial Court Case Name:_____

Trial Court Case Number:

Information About Your Appeal

(2) On *(fill in the date):* _____, I/my client filed a notice of appeal in the trial court case identified in the box on page 1 of this form.

(3) On *(fill in the date):* _____, I/my client filed a *Notice Regarding Record of Oral Proceedings*, choosing to use a statement on appeal as the record of what was said in this case.

Proposed Statement

(4) The Charges Against Me/My Client

a. The charges against me/my client were *(list all of the charges indicated on the complaint or citation filed with the court by the prosecutor):* _____

_____

_____

_____

_____

b. I/My client *(check (1), (2), or (3)):*

(1) ☐ pleaded not guilty to all the charges.

(2) ☐ pleaded guilty to only the following charges: _____

_____

(3) ☐ pleaded guilty to all of these charges.

(5) Summary of Any Motions

a. Were any motions (requests for the trial court to issue an order) filed in this case?

☐ Yes *(fill out b)* ☐ No *(skip to* (6) *)*.

b. *In the spaces below, please describe any motions (requests for orders) that were made in the trial court. Write a complete and accurate summary of what was said at any hearings on these motions and indicate how the trial court ruled on these motions.*

(1) *Describe the first motion:* _____

_____

_____

The motion was filed by the ☐ prosecutor. ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing:

_____

_____

_____

_____

_____

Print

Trial Court Case Name: _____ | Trial Court Case Number:

5 b. (continued)

The trial court ☐ granted this motion. ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

_____

_____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing it. At the top of each page, write "CR-135, item 5b(1)."*

(2) *Describe the second motion:* _____

_____

_____

The motion was filed by the ☐ prosecutor. ☐ defendant.

There ☐ was ☐ was not a hearing on this motion.

If there was a hearing on this motion, write a complete and accurate summary of what was said at this hearing: _____

_____

_____

_____

_____

The trial court ☐ granted this motion. ☐ did not grant this motion.

☐ Other *(describe any other action the trial court took concerning this motion):* _____

_____

_____

☐ *Check here if you need more space to describe this motion and attach a separate page or pages describing it. At the top of each page, write "CR-135, item 5b(2)."*

☐ *Check here if any other motions were filed, and attach a separate page or pages describing each motion, identifying who made the motion and whether there was a hearing on the motion, summarizing what was said at the hearing on the motion, and indicating whether the trial court granted or denied the motion. At the top of each page, write "CR-135, item 5b(3)."*

Print

Trial Court Case Name:_____ | Trial Court Case Number:

6 Summary of Testimony

a. Was there a trial in your case?

No ☐ *(skip items b, c, and d and go to item 7)*

Yes ☐ *(check (1) or (2) and complete items b, c, and d)*

(1) ☐ Jury trial

(2) ☐ Trial by judge only

b. Did you/your client testify at the trial?

☐ No

☐ Yes *(write a complete and accurate summary of the testimony you/your client gave. Include only what you actually said; do not comment on or give your opinion about what you said):*

_____

_____

_____

_____

☐ *Check here if you need more space to summarize your/your client's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-135, item 6b."*

c. Did an officer from the police department, sheriff's office, or other government agency that charged you/your client testify at the trial? *(check one):*

☐ No

☐ Yes *(complete (1) and (2)):*

(1) The name of the officer who testified is *(fill in the officer's name):*_____

(2) This officer testified that *(write a complete and accurate summary of the officer's testimony. Include only what the officer actually said; do not comment on or give your opinion about what the officer said):*

_____

_____

_____

_____

☐ *Check here if you need more space to summarize the officer's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-135, item 6c."*

d. Were there any other witnesses at the trial?

☐ No

☐ Yes *(fill out (1)–(4)):*

(1) The witness's name is *(fill in the witness's name):*_____

(2) This witness ☐ was ☐ was not an officer from the police department, sheriff's office, or other government agency that charged me/my client.

(3) This witness testified on behalf of ☐ me/my client. ☐ the prosecution.

6 d. (continued)

(4) This witness testified that *(write a complete and accurate summary of the witness's testimony. Include only what the witness actually said; do not comment on or give your opinion about what the witness said):*

_____

_____

_____

_____

☐ *Check here if you need more space to summarize this witness's testimony and attach a separate page or pages summarizing this testimony. At the top of each page, write "CR-135, item 6d."*

☐ *Check here if any other witnesses testified at the trial. Attach a separate page or pages identifying each witness, whether the witness testified on your/your client's behalf or the prosecution's behalf, and summarizing what that witness said in his or her testimony. At the top of each page, write "CR-135, item 6e"*

7 The Trial Court's Findings

a. ☐ I/My client was found guilty of the following offenses *(list all of the offenses for which you were/your client was found guilty):* _____

_____

_____

_____

b. ☐ I/My client was found not guilty of the following offenses *(list all of the offenses for which you were/your client was found not guilty):* _____

_____

_____

_____

8 The Sentence

The trial court ordered the following punishment for me/my client in this case *(check all that apply and fill in any required information):*

a. ☐ Jail time *(fill in the amount of time you are/your client is required to spend in jail):* _____

_____

b. ☐ A fine (including penalty and other assessments) *(fill in the amount of the fine):* $_____

c. ☐ Restitution *(fill in the amount of the restitution):* $_____

d. ☐ Probation *(fill in the amount of time you are/your client is required to be on probation):* _____

_____

e. ☐ Other punishment *(describe any other punishment that the trial court imposed in this case):*

_____

_____

_____

Print

Trial Court Case Name:_____

Trial Court Case Number:

9 Reasons for Your Appeal

Remember, in an appeal, the appellate division can only review a case for whether certain kinds of legal errors were made in the trial court proceedings (read form CR–131-INFO to learn about these legal errors):

- *There was not "substantial evidence" supporting the judgment, order, or other decision you are appealing*
- *A "prejudicial error" was made during the trial court proceedings.*

The appellate division:

- *Cannot retry your case or take new evidence*
- *Cannot consider whether witnesses were telling the truth or lying*
- *Cannot consider whether there was more or stronger evidence supporting your position than there was supporting the trial court's decision*

(Check all that apply and describe in detail the legal error or errors you believe were made that are the reason for this appeal.)

a. ☐ There was not substantial evidence that supported the judgment, order, or other decision I am/my client is appealing in this case. *(Explain why you think the judgment, order, or other decision was not supported by substantial evidence):*

_____
_____
_____
_____
_____

b. ☐ The following error or errors about either the law or court procedure was/were made that caused substantial harm to me/my client. *(Describe each error and how you were/your client was harmed by that error):*

(1) *Describe the error:* _____
_____
_____
_____

Describe how this error harmed you/your client: _____
_____
_____
_____

Print

Trial Court Case Name:_____ | Trial Court Case Number:

9 b. (continued)

(2) *Describe the error:* _____

Describe how this error harmed you/your client: _____

(3) *Describe the error:* _____

Describe how this error harmed you/your client: _____

☐ *Check here if you need more space to describe these or other errors, and attach a separate page or pages describing the errors. At the top of each page, write "CR-135, item 9."*

REMINDER: You must serve and file this form no later than 20 days after you file your notice regarding the oral proceedings. If you do not file this form on time, the court may dismiss your appeal.

Date:_____

_____ ▶ _____

Type or print name | *Signature of appellant or attorney*

Comment: The use of Proposed Statement on Appeal (Misdemeanor) (Judicial Council Form CR-135) is optional for

appellants represented by counsel and mandatory for unrepresented appellants. Cal Rules of Ct 8.869(b)(2). The statement may be attached to and filed with the notice regarding record of oral proceedings. See §41.4. If not filed with that notice, the statement must be filed within 20 days of the date that notice was filed. Cal Rules of Ct 8.869(b)(1).

Cross-Reference: For further discussion of the record in misdemeanor appeals, see California Criminal Law Procedure and Practice §§43.12-43.20 (Cal CEB Annual); Appeals and Writs in Criminal Cases §§3.15-3.20 (3d ed Cal CEB 2007).

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.6 H. Defense Motion to Reduce Felony to Misdemeanor After Probation Granted (Pen C §17(b)(3))

§41.6 H. Defense Motion to Reduce Felony to Misdemeanor After Probation Granted (Pen C §17(b)(3))

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY AND THE PROBATION OFFICER OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE, that on _ _[*date*]_ _, in Department _ _[*number*]_ _, at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant will move the Court to declare the offense in this case to be a misdemeanor.

The ground for this motion is that declaring this offense to be a misdemeanor is in the interest of justice.

This motion is based on the attached declaration of defendant, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

WHEREFORE, the defendant respectfully requests this Court to grant this motion, and to notify the California Department of Justice, under Penal Code section 13151.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

MEMORANDUM IN SUPPORT OF MOTION TO DECLARE THIS OFFENSE TO BE A MISDEMEANOR

AUTHORITY TO DECLARE AN OFFENSE TO BE A MISDEMEANOR

Penal Code section 17(b) provides:

> **When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:…**
>
> **(3) When the court grants probation to a defendant without imposition of sentence and… on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.**

The offense in this case, violation of _ _[*code section*]_ _, is an alternate felony/misdemeanor, so it fits within the ambit of Penal Code section 17(b).

In *People v Superior Court (Alvarez)* (1997) 14 C4th 968, 978, 60 CR2d 93, the California Supreme Court addressed the criteria to be applied in exercising discretion to grant a misdemeanor reduction under Penal Code section 17(b). Among relevant factors are the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his or her character traits as evidenced by trial behavior and demeanor. When it is appropriate, the court should consider general sentencing objectives, such as those set forth in California Rules of Court 4.410.

The supreme court indicated that the trial court must focus on the individual defendant as well as the public interest:

(1) "[A] determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest 'exceeds the bounds of reason.'" 14 C4th at 978.

(2) The court should weigh "the various sentencing considerations commensurate with the individual circumstances." 14 C4th at 979.

(3) "[T]he record should reflect a thoughtful and conscientious assessment of all relevant factors including the defendant's criminal history." 14 C4th at 979.

(4) The sentencing court must focus "'on considerations that are pertinent to the specific defendant being sentenced'…." 14 C4th at 980.

_ _[*Tell what facts concerning defendant's case fit within the above standards, and argue in favor of reducing the offense to a misdemeanor.*]_ _

THE DEPARTMENT OF JUSTICE MUST BE NOTIFIED IF THIS MOTION IS GRANTED

Penal Code section 13151 states that, when the Court orders any action subsequent to the initial disposition of a case, the Court shall report this to the California Department of Justice. The report is necessary to ensure that defendant obtains full benefit if the Court grants this motion.

CONCLUSION

For the above reasons, defendant asks this Court to reduce _ _[*describe offense*]_ _ **from a felony to a misdemeanor.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF DEFENDANT IN SUPPORT OF MOTION TO DECLARE THIS OFFENSE TO BE A MISDEMEANOR

[*This declaration assumes defendant is seeking reduction under Pen C §17(b)(3).*]

I, _ _[*name*]_ _**, declare:**

1. I am the defendant in this action.

2. On _ _[*date*]_ _**, I was convicted** _ _[*by a plea of guilty or no contest/by a jury or court verdict after trial*]_ _ **of violation of** _ _[*specify code section and offense*]_ _**.**

3. On _ _[*date*]_ _ **the Court suspended imposition of sentence and granted probation.**

4. Probation expired on _ _[*date*]_ _**. I have successfully completed all of the terms of probation. I am not now serving a sentence for, and am not on probation for, and am not charged with the commission of any other offense.**

_ _[*5. If there are any particularly compelling reasons why this relief should be granted, they can be listed here. For example, if defendant wishes to join the military, or enroll in professional school, or was young and immature at the time of the offense, or has led a particularly upstanding life since conviction.*]_ _

[*Add if appropriate*]

I am not a party to any civil lawsuit, or facing deportation proceedings, or currently applying for any license. I am not making this motion to gain unfair advantage in any matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

[*A proposed order should begin on a new page. Even if filed as part of the motion, it should have a separate caption. But see Los Angeles Ct R 6.5(b) (proposed order must be separate document); discussion in Crim Law §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
vs	**[PROPOSED] ORDER**
_ _[*Name*]_ _,	**DECLARING OFFENSE TO BE A**
Defendant.	**MISDEMEANOR**

This Court _ _[*held a hearing on this matter on* _ _[*date*]_ _*/has determined that no hearing on this motion is required*]_ _**. The Court has also reviewed (1) defendant's motion to declare the offense in this case to be a misdemeanor and (2) the records on file in this case, and given the District Attorney and the probation department the opportunity to provide information to the Court.**

The Court finds that the defendant is eligible for the relief sought, and that this relief is in the interest of justice.

The Court therefore declares the offense in this case, _ _[*describe offense, e.g., violation of Pen C §487(a)*]_ _**, to be a misdemeanor under Penal Code section 17(b)(3).**

The Court directs the clerk to notify the California Department of Justice of this action, under Penal Code section 13151.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: Penal Code §17(b)(3) expressly states that this relief can be sought by the defendant or by the probation officer.

This form is intended for use when probation has expired. The form can be adapted for cases in which the motion is made before probation has expired. This can also be done in connection with a petition for early termination of probation.

When the motion is made by defense counsel, it is recommended that the district attorney and probation officer be served at least 15 calendar days in advance of the hearing. The statute does not prescribe any procedure to be followed, so the 15-day period is recommended by analogy to Pen C §1203.4(e) (dismissal of case after successful completion of probation). By analogy to Pen C §1203.4(d), in cases of indigency, this motion may be accompanied by a petition for waiver of filing fees.

Cross-Reference: See Crim Law §41.14.

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.7 I. Application to Dismiss After Probation Successfully Completed (Pen C §1203.4)

§41.7 I. Application to Dismiss After Probation Successfully Completed (Pen C §1203.4)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, THE DISTRICT ATTORNEY, AND TO THE PROBATION OFFICER OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _ of the above-entitled Court, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move the Court to (1) _ _[*vacate the verdict of conviction/withdraw the guilty or no contest plea*]_ _, (2) dismiss the complaint or information in this case, and (3) notify the California Department of Justice of this action, under Penal Code section 13151.

This application is based on the grounds that the defendant has successfully completed the terms of probation, is not serving a sentence, is not on probation, and is not charged with any new offense.

This application is based on the attached declaration, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

WHEREFORE, defendant respectfully requests this Court to grant the application and notify the California Department of Justice of this action.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

MEMORANDUM IN SUPPORT OF APPLICATION TO _ _[*WITHDRAW PLEA/SET ASIDE THE VERDICT*]_ _ AND TO DISMISS THE _ _[*COMPLAINT/INFORMATION*]_ _

THE STANDARDS FOR GRANTING RELIEF UNDER PENAL CODE SECTION 1203.4 IN CASES SUCH AS THIS ARE WELL SETTLED

The standards for deciding whether to grant section 1203.4 relief flow directly from the language of Penal Code section 1203.4(a):

> **In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation… the defendant shall,… if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant.…**

Defendant, _ _[*name*]_ _, has met the conditions of section 1203.4. See the attached declaration of defendant. In such cases, the Court must grant relief. (See *People v Hawley* (1991) 228 CA3d 247, 278 CR 389.)

THE ORDER GRANTING RELIEF MUST ADVISE DEFENDANT OF CERTAIN LIMITATIONS

Penal Code section 1203.4(a) provides that

> **The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery.**

THE DEPARTMENT OF JUSTICE MUST BE NOTIFIED IF THIS APPLICATION IS GRANTED

Penal Code section 13151 states that when the Court orders any action subsequent to the initial disposition of a case, the Court shall report this to the California Department of Justice. The report is necessary to ensure that defendant obtains the full benefit of the Court's order granting this application.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF DEFENDANT IN SUPPORT OF APPLICATION TO _ _[*WITHDRAW PLEA/VACATE THE VERDICT*]_ _ **AND DISMISS THE** _ _[*COMPLAINT/INFORMATION*]_ _

I, _ _[*name*]_ _**, declare:**

1. I am the defendant in this action.

2. On _ _[*date*]_ _**,** _ _[*I was convicted by* _ _[*a jury/the court*]_ _ *of/I pled guilty or no contest to*]_ _ **violation of** _ _[*specify code section and offense*]_ _**.**

3. On _ _[*date*]_ _ **the Court granted probation.**

4. I have fulfilled the conditions of probation for the entire period of probation.

5. I am not now serving a sentence for any offense, am not on probation, and am not charged with any offense.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff**	**Dept.** _ _[*number*]_ _ **No.** _ _[*case number*]_ _ **[PROPOSED] ORDER** _ _[*PERMITTING DEFENDANT TO WITHDRAW PLEA/VACATING THE VERDICT*]_ _ **AND DISMISSING THE** _ _[*COMPLAINT/INFORMATION*]_ _
vs	
_ _[*Name*]_ _**,** **Defendant.**	

This Court held a hearing on this matter on _ _[*date*]_ _. The Court has also reviewed (1) defendant's application _ _[*to be permitted to withdraw the plea/to vacate the verdict*]_ _ and to dismiss the _ _[*complaint/information*]_ _, and (2) the records on file in this case. The Court gave the District Attorney and the probation department notice of the hearing and the opportunity to appear and provide information on this matter.

The Court finds that the defendant is eligible for the relief sought under Penal Code section 1203.4.

The Court hereby _ _[*permits the defendant to withdraw the previously entered plea of _ _[guilty/nolo contendere*]_ _. *A plea of not guilty is hereby entered./vacates the verdict of guilty*.]_ _

The Court dismisses the _ _[*complaint/information*]_ _ in this case.

This order does not relieve the defendant of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery.

The Court directs the clerk to notify the California Department of Justice of this action, under Penal Code section 13151.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: Penal Code §1203.4 expressly provides that this application and change of plea may be made by defendant personally, by defendant's attorney, or by the probation officer. Defense counsel should keep in mind that dismissal after completion of probation is not automatic, and calendar the date on which the client will be eligible to file the application.

Many counties have a form for this procedure; check with the clerk's office. The court may not require a supporting memorandum.

This form is intended for cases where defendant has obeyed all laws and successfully completed the full period of probation. In such cases, the court must grant relief. In other cases, such as where probation has been terminated early, or application is being made for other reasons, the court must exercise discretion in granting the petition. Appropriate changes should be made to the petition and the supporting memorandum as necessary.

The application must be served on the district attorney at least 15 calendar days before the hearing. Pen C §1203.4(e). The probation department should also be served. Proof of service should be filed with the court.

Defendants convicted of the offenses listed in Pen C §1203.4(b)-(c) are not able to obtain relief under §1203.4.

A minor who is convicted of a misdemeanor in adult court and is eligible for relief under §1203.4 or §1203.4a may also request that the records relating to the arrest and conviction be sealed. Pen C §1203.45. This application may be made in conjunction with a request for dismissal under §1203.4 or §1203.4a or separately. This situation rarely arises.

Cross-Reference: See Crim Law §41.15.

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.8 J. Application to Dismiss Misdemeanor After Probation Not Granted and Sentence Served (Pen C §1203.4a)

§41.8 J. Application to Dismiss Misdemeanor After Probation Not Granted and Sentence Served (Pen C §1203.4a)

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, THE DISTRICT ATTORNEY, AND TO THE PROBATION OFFICER OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move that the Court (1) _ _[*vacate the verdict of conviction/withdraw the guilty or no contest plea*]_ _, (2) dismiss the accusatory pleading in this case, and (3) notify the California Department of Justice of this action, under Penal Code section 13151.

This application is based on the grounds that the defendant, _ _[*name*]_ _, has fully complied with the sentence of the Court, is not serving a sentence, is not on probation, is not charged with any new offense, and has, since the pronouncement of judgment, lived an honest and upright life, conforming to and obeying the laws of the land.

This application is based on the attached supporting memorandum, the attached declaration, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

WHEREFORE, Defendant respectfully requests this Court to grant the application and notify the California Department of Justice of this action.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

MEMORANDUM IN SUPPORT OF APPLICATION TO _ _[*WITHDRAW PLEA/SET ASIDE THE VERDICT*]_ _ AND TO DISMISS THE ACCUSATORY PLEADING

THE STANDARD FOR GRANTING A PENAL CODE SECTION 1203.4a PETITION SHOULD BE SIMILAR TO THAT FOR GRANTING A PENAL CODE SECTION 1203.4 PETITION ON SUCCESSFUL COMPLETION OF PROBATION

Penal Code section 1203.4a(a) provides that:

> **Every defendant convicted of a misdemeanor and not granted probation shall, at any time after the lapse of one year from the date of pronouncement of judgment, if he or she has fully complied with and performed the sentence of the court, is not then serving a sentence for any offense and is not under charge of commission of any crime and has, since the pronouncement of judgment, lived an honest and upright life and has conformed to and obeyed the laws of the land, be permitted by the court to withdraw his or her plea of guilty or nolo contendere and enter a plea of not guilty; or if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusatory pleading against the defendant….**

Penal Code section 1203.4 provides almost identical relief to those granted probation. Under Penal Code section 1203.4, if the defendant has successfully completed probation and has had a clean criminal record since that offense, the Court _ _[*permits withdrawal of the plea/vacated the verdict*]_ _ and dismisses the accusatory pleading. If the requirements are met, relief is mandatory. (*People v Hawley* (1991) 228 CA3d 247, 278 CR 389.)

Defendant seeking relief under Penal Code section 1203.4a cannot rely on successful completion of probation for an objective standard of qualifications. Perhaps for that reason, Penal Code section 1203.4a contains, in addition to a requirement of fulfilling the sentence and conforming to the laws, the somewhat ambiguous requirement of having "lived an honest and upright life" since judgment. The cases do not discuss standards for Penal Code section 1203.4a relief.

It is respectfully suggested that the standard for relief should be, if not the same, at least very similar to, the standard under Penal Code section 1203.4. The reason is that Penal Code section 1203.4 applies to felons as well as misdemeanants. It seems logical that the standard for a similar relief for misdemeanants denied probation should not be stricter than the standard for felons granted probation.

Defendant has met all the requirements of Penal Code section 1203.4a. Relief is in the interests of justice because _ _[*explain why this relief should be granted*; *cross-refer to the defendant's declaration to support your factual assertions*]_ _.

THE DEPARTMENT OF JUSTICE MUST BE NOTIFIED IF THIS APPLICATION IS GRANTED

Penal Code section 13151 states that, when the Court orders any action subsequent to the initial disposition of a case, the Court shall report it to the California Department of Justice. The report is necessary to ensure that the defendant obtains the full benefit of the Court's order granting the application.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF DEFENDANT IN SUPPORT OF APPLICATION TO _ _[*WITHDRAW PLEA/VACATE THE VERDICT*]_ _ AND DISMISS THE ACCUSATORY PLEADING

I, _ _[*name*]_ _, declare:

1. I am the defendant in this action.

2. On _ _[*date*]_ _, I was convicted _ _[*by a plea of guilty or no contest/by a jury or court verdict after trial*]_ _ of violation of _ _[*specify code section and offense*]_ _, a misdemeanor.

3. On _ _[*date*]_ _, the Court pronounced judgment without granting probation. More than one year has passed since that date.

4. I have fully complied with and performed the sentence of the Court. I am not serving a sentence for any offense and am not under charge of commission of any crime. I have, since the pronouncement of judgment, lived an honest and upright life, and have conformed to and obeyed the laws of the land.

_ _[*5. If there are any particularly compelling reasons why this relief should be granted, they can be listed here. For example, if defendant wishes to join the military, or enroll in professional school, or was young and immature at the time of the offense, or has led a particularly upstanding life since conviction.*]_ _

[*Add if appropriate*]

I am not a party to any civil lawsuit, or facing deportation proceedings, or currently applying for any license.

I am not making this application to gain unfair advantage in any matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

[*A proposed order should begin on a new page. Even if filed as part of the motion, it should have a separate caption. But see Los Angeles Ct R 6.5(b) (proposed order must be separate document); discussion in §18.5.*]

SUPERIOR COURT OF THE _ _ _ _ _ _
JUDICIAL DISTRICT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
	[PROPOSED] ORDER
	_ _[*PERMITTING DEFENDANT TO*
vs	*WITHDRAW PLEA/VACATING THE*
_ _[*Name*]_ _,	*VERDICT*]_ _ **AND DISMISSING**
Defendant.	**THE ACCUSATORY PLEADING**
_____ /	

This Court held a hearing on this matter on _ _[*date*]_ _**. The Court has also reviewed (1) defendant's application** _ _[*to be permitted to withdraw the plea/to vacate the verdict and*]_ _ **to dismiss the accusatory pleading and (2) the records on file in this case. Notice and the opportunity to supply information on this matter were provided to the District Attorney and the probation department.**

The Court finds that the defendant is eligible for the relief sought under Penal Code section 1203.4a, and that granting that relief in this case is in the interest of justice.

The Court hereby _ _[*permits the defendant to withdraw the previously entered plea of* _ _[*guilty/nolo contendere*]_ _*. A plea of not guilty is hereby entered/vacates the verdict of guilty*]_ _**.**

The Court dismisses the accusatory pleading in this case.

The Court directs the clerk to notify the California Department of Justice of this action, under Penal Code section 13151.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: The defendant may make the application and change of plea personally, or it may be made by defense counsel, or the probation officer. Pen C §1203.4a. Like the application to dismiss under Pen C §1203.4, this is a routine application: Dismissal is mandatory if the statutory requirements are met. The court may have a form for making the application, and may not require a supporting memorandum. Defense counsel should calendar the defendant's eligibility date to apply for a Pen C §1203a dismissal when judgment is pronounced.

Service should be made on the district attorney and probation department at least 15 calendar days in advance of the hearing. Section 1203.4a does not provide a procedure, so this recommendation is made by analogy to Pen C §1203.4(e).

Section 1203.4a does not contain the restriction on relief contained in §1203.4 that the "dismissed" conviction must be disclosed in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery.

Misdemeanants convicted of offenses listed in Pen C §1203.4a(b) are not able to obtain relief under §1203.4a.

Many probation departments will, on request, file the petition on the defendant's behalf.

A minor who is convicted of a misdemeanor in adult court and is eligible for relief under §1203.4 or §1203.4a may also request that the records relating to the arrest and conviction be sealed. Pen C §1203.45. This application may be made in conjunction with a request for dismissal under §1203.4 or §1203.4a or separately. This situation rarely arises.

Cross-Reference: For discussion, see Crim Law §41.16.

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.9 K. Petition to Seal and Destroy Records and for Declaration of Factual Innocence (Pen C §851.8)

§41.9 K. Petition to Seal and Destroy Records and for Declaration of Factual Innocence (Pen C §851.8)

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PETITION TO SEAL AND DESTROY ARREST RECORDS UNDER PENAL CODE SECTION 851.8

PETITIONER: Please type or print the following information.

I, _ _[*name*]_ _, hereby petition for a declaration of factual innocence per Penal Code section 851.8 and, subsequently, for the arrest record to be sealed for three years from the date of the arrest and thereafter destroyed.

Information relating to the arrest(s):

Name, Last: _ _ _ _ _ _ First: _ _ _ _ _ _ Middle: _ _ _ _ _ _

Maiden or Alias Name, Last: _ _ _ _ _ _ First: _ _ _ _ _ _ Middle: _ _ _ _ _ _

Street Address: _ _ _ _ _ _ _ _ _ _ _ _ _ _

Phone No.: (___) _ _ _ _ _ _

City, State, Zip Code: _ _ _ _ _ _

Date of Birth: _ _ _ _ _ _

Driver's License No.: _ _ _ _ _ _

Social Security No. (voluntary—for ID only): _ _ _ _ _ _

Date of Arrest: _ _ _ _ _ _

Arresting Agency: _ _ _ _ _ _

Charge: _ _ _ _ _ _

BOX FOR RIGHT THUMBPRINT:

Signature: _ _ _ _ _ _ _ _ _ _ _ _ _ _

Date: _ _ _ _ _ _

TO BE COMPLETED BY LAW ENFORCEMENT AGENCY OR COURT HAVING JURISDICTION OVER THE OFFENSE

Agency or Court Name: _ _ _ _ _ _ _ _ _ _ _ _ _ _

Agency or Case No.: _ _ _ _ _ _

Petitioner's Name: _ _ _ _ _ _ _ _ _ _ _ _ _ _

Date of Birth: _ _ _ _ _ _

CII No.: _ _ _ _ _ _

FBI No.: _ _ _ _ _ _

Arrested or Received: _ _ _ _ _ _

Agency No.: _ _ _ _ _ _

Charge: _ _ _ _ _ _

Disposition: _ _ _ _ _ _

Found Factually Innocent _ _ _ _ _ _ **Denied Petition** _ _ _ _ _ _

Signature of Agency or Court Officer: _ _ _ _ _ _ _ _ _ _ _ _ _ _

Officer's Title: _ _ _ _ _ _

Date: _ _ _ _ _ _

[*The Declaration of Factual Innocence should be on a separate page.*]

DECLARATION OF FACTUAL INNOCENCE UNDER PENAL CODE SECTION 851.8

Declared by _ _[*name of law enforcement agency or court*]_ _

For _ _[*name of petitioner*]_ _

Having jurisdiction in the matter, the above law enforcement agency or court has determined that the above-named petitioner is factually innocent of the arrest indicated below and is hereby exonerated. Hereafter, the arrest shall be deemed not to have occurred, and the petitioner may answer any questions relating to the arrest accordingly.

Arrest Date: _ _ _ _ _ _

Arresting Agency: _ _ _ _ _ _

Agency Number: _ _ _ _ _ _

Charge: _ _ _ _ _ _

Date: _ _ _ _ _ _ _ _[*Signature of agency or court officer*]_ _
_ _[*Typed name*]_ _
_ _[*Title of declarant*]_ _

Comment: Whenever an accusatory pleading was filed but no conviction resulted, the defendant may petition the court that dismissed the action for a finding of factual innocence. The petition may be filed any time after the case is dismissed. Pen C §851.8(c). A hearing is conducted, and the prosecuting attorney may present evidence at the hearing. Pen C §851.8(c). At the time of dismissing the case, a judge may grant §851.8 relief. Pen C §851.8(d)-(e).

When an arrest occurred, but no accusatory pleading was filed, the petition is filed with the law enforcement agency that has jurisdiction over the offense. A copy of the petition must be served on the prosecuting attorney of the county having jurisdiction over the offense. The law enforcement agency may make a determination of factual innocence, upon which the records will be sealed and eventually destroyed. Pen C §851.8(a). The prosecuting attorney must concur in the agency's decision. Pen C §851.8(a). If the agency and the prosecuting attorney do not grant relief, the arrested person can petition the superior court that would have had jurisdiction over the matter. Pen C §851.8(b). A copy of the

petition must be served on the law enforcement agency and the prosecuting attorney within 10 days of the hearing, and the prosecuting attorney and the district attorney on behalf of the law enforcement agency may present evidence at the hearing. Pen C §851.8(b). Time limits and procedures are in Pen C §851.8.

Counsel may find a cover letter desirable, and may wish to include a Declaration of Factual Innocence, either on the Department of Justice form (see Pen C §851.8(g)) or in the form above.

The two-part petition and the Declaration of Factual Innocence provided above, for use in petitions to law enforcement agencies under Pen C §851.8, contain all the substantive information required by the forms the Department of Justice (DOJ) must provide under Pen C §851.8(g). The better practice, however, is to obtain and use the DOJ forms themselves.

The burden of proof is on the petitioner. The petition will be granted only on a showing that "no reasonable cause exists to believe" the petitioner committed the offense. Pen C §851.8(b). See *People v Matthews* (1992) 7 CA4th 1052, 1055, 9 CR2d 348.

Cross-Reference: For discussion of sealing the arrest record of a person found factually innocent, see California Criminal Law Procedure and Practice §41.11 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.10 L. Motion in Trial Court for Bail Pending Appeal and for Stay of Execution of Judgment (Felony Case)

§41.10 L. Motion in Trial Court for Bail Pending Appeal and for Stay of Execution of Judgment (Felony Case)

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TO THE ABOVE-ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF _ _ _ _ _ _ COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, in Department _ _[*number*]_ _ at _ _[*time*]_ _, or as soon thereafter as the matter may be heard, the defendant, _ _[*name*]_ _, will move the Court to exercise its discretion and set bail and stay the execution of judgment pending appeal in this matter, in the interest of justice. This motion will be based on the attached supporting memorandum, _ _[*the attached declarations(s),*]_ _ _ _[*the attached exhibit(s),*]_ _ all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

MEMORANDUM IN SUPPORT OF SETTING BAIL AND STAYING EXECUTION OF JUDGMENT PENDING APPEAL

THE STATUTORY BASIS FOR BAIL PENDING APPEAL IN FELONY CASES

Penal Code section 1272 provides: "After conviction of an offense not punishable with death, a defendant who has made application for probation or who has appealed may be admitted to bail:... ¶3. As a matter of discretion in [felony] cases."

Penal Code section 1272.1 provides:

> **Release on bail pending appeal under subdivision (3) of Section 1272 shall be ordered by the court if the defendant demonstrates all the following:**
>
> **(a) By clear and convincing evidence, the defendant is not likely to flee. Under this subdivision the court shall consider the following criteria:**
>
> **(1) The ties of the defendant to the community, including his or her employment, the duration of his or her residence, the defendant's family attachments and his or her property holdings.**
>
> **(2) The defendant's record of appearance at past court hearings or of flight to avoid prosecution.**
>
> **(3) The severity of the sentence the defendant faces.**
>
> **(b) By clear and convincing evidence, the defendant does not pose a danger to the safety of any other person or to the community.**
>
> **Under this subdivision the court shall consider, among other factors, whether the crime for which the defendant was convicted is a violent felony, as defined in subdivision (c) of Section 667.5.**
>
> **(c) The appeal is not for the purpose of delay and, based upon the record in the case, raises a substantial**

legal question which, if decided in favor of the defendant, is likely to result in reversal.

For purposes of this subdivision, a "substantial legal question" means a close question, one of more substance than would be necessary to a finding that it was not frivolous. In assessing whether a substantial legal question has been raised on appeal by the defendant, the court shall not be required to determine whether it committed error.

[*Discuss each requirement; cross-refer to the defendant's declaration to support factual assertions.*]

[*Add if defendant has been granted probation.*]

THE FACT THAT PROBATION IS GRANTED ARGUES IN FAVOR OF A RELEASE ON BAIL PENDING APPEAL

"Generally speaking [when probation has been granted,] the circumstances will also warrant a release on bail pending appeal." *People v McNiff* (1976) 57 CA3d 201, 205, 127 CR 604. The California Supreme Court has also said, in *In re Podesto* (1976) 15 C3d 921, 935 n9, 127 CR 97:

In light of the strong interest in preventing the vitiation of a defendant's right of appeal, several courts have found an abuse of discretion when trial courts have denied bail on appeal after sentencing the defendant to a term which is equivalent to a misdemeanor sentence [*i.e.,* probation with a jail term]. (See *In re McCaughan* (1956) 142 CA2d 690, 692 [298 P2d 871]; *In re Torres* (1947) 80 CA2d 579, 581 [182 P2d 573]…).

[*Continue*]

A STAY OF EXECUTION PENDING APPEAL SHOULD BE GRANTED

A stay of execution pending appeal should be granted if the defendant is granted bail on appeal because it is required to effectuate the court's order granting bail.

[*Add when defendant has been granted probation, and a stay of probation conditions is sought.*]

Bail pending appeal does not stay nonincarceration aspects of probation, *e.g.,* payment of restitution. If the appeal is successful, the judgment (including the restitution order) will be reversed. To prevent requiring the innocent victim to repay restitution that the defendant was erroneously ordered to pay in such an event, a stay of execution is required. Likewise, the other conditions of probation, *e.g.,* inpatient drug rehabilitation, should be stayed.

THE STATUTORY BASIS FOR A STAY OF EXECUTION OF JUDGMENT PENDING APPEAL WHEN NO BAIL IS SET

Penal Code section 1243 provides:

An appeal to the Supreme Court or to a court of appeal from a judgment of conviction… does not stay the execution of the judgment or order granting probation in any other case unless the trial or appellate court shall so order. The granting or refusal of such an order shall rest in the discretion of the court….

Penal Code sections 1244, 1245 provide, essentially, that if a stay is granted pending appeal, and bail on appeal has not been set, then the defendant shall not be transported to _ _[*prison/jail*]_ _, but shall remain in county jail, or if already transported, shall be returned to county jail.

Even if this Court does not set bail pending appeal, the defense requests that the Court stay execution of the judgment so that the defendant may remain in the county jail pending appeal.

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF DEFENDANT IN SUPPORT OF APPLICATION FOR BAIL PENDING APPEAL

I, _ _[*name of defendant*]_ _**, declare:**

1. My ties to the community are as follows: _ _[*Include employment, duration of residence in the community, family attachments, property holdings, and any other evidence of ties to the community*]**_ _.**

2. My record of appearance at past court hearings is _ _[*describe record, e.g., presence at every required appearance in this case, no failures to appear in other cases, etc.*]**_ _.**

3. _ _[*State the maximum sentence the defendant has received or may receive in this case.*]**_ _**

_ _[*4. State any other factors showing that the defendant is not likely to flee.*]**_ _**

_ _[*4./5.*]**_ _ My appeal in this case is not for the purpose of delay. My counsel informs me, and I believe, that my appeal raises a substantial legal question that, if decided in my favor, is likely to result in reversal.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF COUNSEL IN SUPPORT OF DEFENDANT'S APPLICATION FOR BAIL PENDING APPEAL

I, _ _[*name of attorney*]**_ _, declare:**

1. I _ _[*state role in case, e.g., am the trial counsel in this case, have reviewed the file in this case, etc.*]**_ _.**

2. In my legal opinion, _ _[*considering the record that I know was made in this case, and after reviewing that record,*]**_ _ the appeal to be filed in this case raises a substantial legal question that, if decided in favor of the defendant, is likely to result in a reversal.**

3. The question raised in this case is _ _[*state issue*]**_ _. It is substantial because _ _**[*state briefly why the case is substantial*]**_ _.**

4. If the appeal is decided in favor of the defendant, the reviewing court will likely reverse _ _[*specify either the conviction or particular counts*]**_ _ because _ _**[*state why*; *include the relevant standard for reversal*]**_ _.**

5. I have counseled the defendant on these matters. The defendant is not, to my knowledge, taking this appeal for the purpose of delay.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: At least five calendar days' notice to the prosecution is usually required. See Pen C §§1274, 1272. An application for bail pending appeal should usually be made along with an application for stay of execution of judgment pending appeal.

The defendant usually submits a declaration that covers the factors in Pen C §1272.1(a)-(b), and that states that the appeal is not for purposes of delay (see Pen C §1272.1(c)). Defense counsel usually submits a declaration that covers the factors in Pen C §1272.1(c), including brief case citations that support the main issues to be raised on appeal. It does not need to be a full argument on appeal.

There is a difference between a stay of execution and bail pending appeal. If a stay is granted but bail is not, the defendant remains in county jail, rather than being transported to state prison. See Pen C §1244. If bail is granted but a stay is not, the nonincarceration aspects of the judgment (*e.g.,* payment of restitution) may be executed on. The client

granted probation may wish to have some conditions (*e.g.,* community service or alcohol treatment) executed on, in which case he or she should apply for bail, but only a partial stay of execution of the judgment.

NOTE: Before filing this motion, find out if there is a reason for not requesting bail on appeal, *e.g.,* the defendant is serving a sentence on another case and wants the time served to count on both cases in the event that the judgment is affirmed on appeal.

Cross-Reference: See Crim Law §§41.6-41.7, 44.18.

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Source: Criminal Law/California Criminal Law Forms Manual/41 Trial Counsel's Duties After Judgment/§41.11 M. Prosecution Motion to Revoke Bail on Appeal

§41.11 M. Prosecution Motion to Revoke Bail on Appeal

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND _ _[*APPELLATE/DEFENSE*]_ _ COUNSEL:

PLEASE TAKE NOTICE that on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _, or as soon thereafter as the matter may be heard, the District Attorney will move that the Court issue an order revoking defendant's bail on appeal because _ _[*state grounds for revocation, e.g., the defendant is accused of committing a crime while on bail pending appeal*]_ _. This motion is based on this notice, the attached supporting memorandum, _ _[*the attached declaration(s)*]_ _, _ _[*the attached exhibit(s)*]_ _, all papers filed and records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

BAIL ON APPEAL IS A MATTER OF DISCRETION AND NOT A MATTER OF RIGHT (PENAL CODE SECTION 1272)

After being released on bail, the defendant in this case _ _[*Specify acts of defendant that are grounds for revocation, e.g., the defendant threatened a witness or is charged with a new crime. Cross-refer to supporting documentation, such as the charging document or a declaration.*]_ _.

[*Option 1: Use when a felony is charged.*]

In deciding whether to release a felon pending appeal, another "important consideration is whether there is any danger that, if released, [the defendant] would continue to commit crime." (*In re Scaggs* (1956) 47 C2d 416, 419, 303 P2d 1009; *In re Podesto* (1976) 15 C3d 921, 935, 127 CR 97.)

[*Option 2: Use when a misdemeanor is charged.*]

In deciding whether to release a misdemeanant pending appeal, the Court may consider the public safety. (Pen C §1270(a).)

[*Continue*]

_ _[*Explain why public safety requires that bail be revoked, e.g., Because the defendant has clearly demonstrated that she intends to continue committing crimes, the interests of justice require that the defendant's bail be revoked and that defendant be remanded to custody to begin serving her prison sentence.*]_ _

The prosecution therefore asks the Court to revoke defendant's bail.

Date: _ _ _ _ _ _

Respectfully submitted,

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF _ _[*NAME*]_ _ IN SUPPORT OF MOTION TO REVOKE DEFENDANT'S BAIL

I, _ _[*name*]_ _, hereby declare:

_ _[*Set out the facts that support revocation of bail. Refer to any police report or complaint that is attached as an exhibit.*]_ _

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _

__[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: A defendant convicted of a misdemeanor is entitled to bail on appeal as a matter of right. Pen C §1272(1)-(2). A defendant convicted of a noncapital felony is entitled to bail if he or she demonstrates by clear and convincing evidence that he or she is not likely to flee, he or she does not pose a danger to the safety of any other person or to the community, and that the appeal is not for the purpose of delay and, based on the record in the case, raises a substantial legal question which, if decided in favor of the defendant, is likely to result in reversal. Pen C §1272.1.

Cross-Reference: See discussion of bail on appeal in Crim Law §§41.6-41.7, 43.10 (misdemeanor), 44.18 (felony); Appeals and Writs in Criminal Cases §§2.12 (generally), 2.13 (felony), 2.14 (misdemeanor) (3d ed Cal CEB 2007).

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§41.12 N. Motion to Dismiss Nonviolent Drug Possession Offense (Pen C §1210.1(d))

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[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

To the above-entitled court, and to the District Attorney of _ _[___]_ _ County.

PLEASE TAKE NOTICE that on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _, or as soon thereafter as she may be heard, the defendant will, and hereby does, move this honorable court for an order dismissing the charges against her this case.

GROUNDS FOR THIS MOTION ARE: That the defendant has successfully completed treatment, as defined in Penal Code section 1210, subdivision (c).

THIS MOTION IS BASED ON the following:

(1) This Notice and Motion.

(2) The papers already on file in this case.

(3) The attached treatment-program certificate (Exhibit A), which shows successful program completion.

(4) The attached statement of the probation department (Exhibit B) showing substantial compliance with the probation terms.

(5) Such other proof and evidence as may be taken at the hearing on this motion.

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

SUPPORTING MEMORANDUM

I. Statement of the Facts

On _ _[*date*]_ _, the defendant was convicted of _ _[*state offense.*]_ _. This offense is a nonviolent drug possession offense, as defined in Penal Code section 1210, subdivision (a).

On _ _[*date*]_ _ the defendant was granted probation under the terms of Penal Code section 1210.1, subdivision (a).

On _ _[*date*]_ _ the defendant successfully completed her treatment. _ _[*Add the following, if applicable: On _ _[date]_ _, the defendant successfully completed aftercare treatment.*]_ _ Attached as Exhibit A is a certificate from the program, as proof of that completion.

Exhibit A, the proof of completion, attests that as a result of her successful completion, there is reasonable cause to believe that the defendant will not abuse controlled substances in the future.

The defendant has substantially complied with the terms of her probation. Attached as Exhibit B is a letter from the probation department attesting to that substantial compliance.

II. The Applicable Law

Penal Code section 1210.1, subdivision (e), provides as follows:

> **(1) At any time after completion of drug treatment, and the terms of probation, the court shall conduct a hearing and if the court finds that the defendant successfully completed drug treatment and substantially complied with the conditions of probation, including refraining from use of drugs after the completion of treatment, the conviction on which the probation was based shall be set aside and the court shall dismiss the indictment or information against the defendant. In addition, except as provided in paragraphs (2) and (3), both the arrest and the conviction shall be deemed never to have occurred. The defendant may additionally petition the court for a dismissal of charges at any time after completion of the prescribed course of drug treatment. Except as provided in paragraph (2) or (3), the defendant shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted.**
>
> **(2) Dismissal of an indictment or information pursuant to paragraph (1) does not permit a person to own, possess, or have in his or her custody or control any firearm capable of being concealed on the person or prevent his or her conviction under Section 12021.**
>
> **(3) Except as provided below, after an indictment, complaint, or information is dismissed pursuant to paragraph (1), the defendant may indicate in response to any question concerning his or her prior criminal record that he or she was not arrested or convicted for the offense. Except as provided below, a record pertaining to an arrest or conviction resulting in successful completion of a drug treatment program under this section may not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate.**
>
> **Regardless of his or her successful completion of drug treatment, the arrest and conviction on which the probation was based may be recorded by the Department of Justice and disclosed in response to any peace officer application request or any law enforcement inquiry. Dismissal of an information, complaint, or indictment under this section does not relieve a defendant of the obligation to disclose the arrest and conviction in response to any direct question contained in any questionnaire or application for public office, for a position as a peace officer as defined in Section 830, for licensure by any state or local agency, for contracting with the California State Lottery, or for purposes of serving on a jury.**

The term "successful completion of drug treatment" is defined in Penal Code section 1210, subdivision (c), as follows:

> **(c) The term "successful completion of treatment" means that a defendant who has had drug treatment imposed as a condition of probation has completed the prescribed course of drug treatment as recommended by the treatment provider and approved by the court and, as a result, there is reasonable cause to believe that the defendant will not abuse controlled substances in the future. Completion of treatment shall not require cessation of narcotic replacement therapy.**

Note that Exhibit A, the certificate and proof of program completion does attest that, as a result of the defendant's successful completion of treatment, there is indeed reasonable cause to believe that she will not abuse controlled substances in the future.

The court's attention is also respectfully directed to Penal Code section 13151. That section states that when the court disposes of a case by dismissing it, the court must take two additional steps. First, the court must "assure that a disposition report" be made to the Department of Justice. That report must state the reasons for dismissal in compliance with Penal Code section 13151.1. Second, the court must "also furnish copy of such disposition report to the law enforcement agency having primary jurisdiction to investigate the offense."

III. Conclusion: Application of the Law to the Facts

WHEREFORE, the court should enter its order granting the dismissal and other relief provided for in Penal Code section 1210.1, subdivision (e).

Respectfully submitted,

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF CALIFORNIA
_ _ _ _ _ _ _ COUNTY

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No. _ _ _ _ _ _**
Plaintiff(s),	)	**[PROPOSED] ORDER DISMISSING NONVIOLENT DRUG POSSESSION OFFENSE (Pen C §1210.1(e))**
vs	)	
_ _[*Name(s)*]_ _,	)	
Defendant(s).	)	
_____	)	

The Court has considered the petition of the defendant, including its exhibits, has considered all other papers, documents, and exhibits submitted, has heard from the parties in open court, and is fully advised in the premises.

The Court finds that the defendant successfully completed drug treatment, and has substantially complied with the conditions of probation. Penal Code section 1210.1, subdivision (e)(1).

The Court sets aside the conviction on which the probation was based. Penal Code section 1210.1, subdivision (e)(1).

The Court dismisses the indictment, information, or complaint against the defendant. Penal Code section 1210.1, subdivision (e)(1).

The Court deems the arrest on which the conviction was based never to have occurred, except as provided in the paragraph immediately below. Penal Code section 1210.1, subdivision (e)(1).

Except as provided in the paragraph immediately below, the court also makes the following orders: The Court releases the defendant from all penalties and disabilities resulting from the offense of which she has been convicted. Penal Code section 1210.1, subdivision (e)(1). The defendant may indicate in response to any question concerning her prior criminal record that she was not arrested or convicted for the offense. Penal Code section 1210.1, subdivision (e)(3). A record pertaining to arrest or conviction in this case may not, without the defendant's consent, be used in any way that could result in the denial of any employment, benefit, license, or certificate. Penal Code section 1210.1, subdivision (e)(3).

The Court makes the following exceptions from its orders in the paragraph immediately above. This order does not permit the defendant to own, possess, or have in her custody or control any firearm capable of being concealed on her person, and does not prevent her conviction under Penal Code section 12021. Penal Code section 1210.1, subdivision (e)(2). The arrest and conviction on which the probation was based may be recorded by the Department of Justice and disclosed in response to any peace officer application request or any law enforcement inquiry. The dismissal of the information, indictment, or complaint does not relieve the defendant of the obligation to disclose the arrest and conviction in response to any direct question contained in any questionnaire or application for public office, for a position as a peace officer as defined in Section 830, for licensure by any state or local agency, for contracting with the California State Lottery, or for purposes of serving on a jury. Penal Code section 1210.1, subdivision (e)(3), unnumbered paragraph 2.

The clerk of court is directed to assure that a disposition report of this case is furnished, within 30 days, to the Department of Justice. Penal Code sections 13151 and 13151.1.

The clerk of court is also directed to furnish within 30 days a copy of the disposition report to the law enforcement agency having primary jurisdiction to investigate this offense. Penal Code section 13151.

Date: _ _ _ _ _ _ **__[*Signature*]__**
Judge of the Superior Court

Comment: This form includes a proposed order. If the defendant successfully completes the drug treatment program, the defendant may petition the sentencing court to dismiss all charges against him or her. If the court finds

that the defendant has successfully completed the program and has substantially complied with the conditions of probation, the court *must* set aside and dismiss the indictment or information against the defendant. The arrest will be deemed never to have occurred. Pen C §1210.1(e)(1).

Cross-Reference: For discussion of dismissal of the charges following the successful completion of probation, see Crim Law §41.17.

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42

Writs in California State Courts

A. Petition for Writ of Mandate/Prohibition in Court of Appeal §42.1
B. Petition for Review in California Supreme Court §42.2
C. Petition for Writ of Habeas Corpus (Judicial Council Form MC-275) §42.3
D. Petition for Writ of Habeas Corpus (Attorney-Drafted) §42.4
E. Petition for Writ of Mandate Under Pen C §871.6 in Superior Court §42.5

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Source: Criminal Law/California Criminal Law Forms Manual/42 Writs in California State Courts/§42.1 A. Petition for Writ of Mandate/Prohibition in Court of Appeal

§42.1 A. Petition for Writ of Mandate/Prohibition in Court of Appeal

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[*An original writ petition filed in the court of appeal or the supreme court must have a red cover (Cal Rules of Ct 8.40(b)).*]

No. _ _[*court of appeal number*]**_ _**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA _ _ _ _ _ _ APPELLATE DISTRICT _ _[*DIVISION _ _ _ _ _ _*]**_ _**

_ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _,) **Petitioner,**)	**Superior Court No. _ _**[*case number*]**_ _**
)	
vs)	
)	
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF _ _ _ _ _ _,)	
Respondent;)	
_____)	
PEOPLE OF THE STATE OF CALIFORNIA,)	
Real Party in Interest.)	
_____)	

PETITION FOR WRIT OF _ _[*E.G., MANDATE*]**_ _ _ _**[*AND REQUEST FOR STAY OF PROCEEDINGS PRESENTLY SET FOR _ _*[*DATE*]**_ _**]**_ _ _ _**[*AND EXHIBITS IN SUPPORT THEREOF*]**_ _**

_ _[*EXHIBITS FILED UNDER SEPARATE COVER*]**_ _**

After Denial of Motion to _ _[*specify motion*]**_ _**
_ _[*Under Penal Code section _ _*[*specify section*]**_ _**]**_ _**
By the Honorable _ _[*name of judge*]**_ _**
Judge of the Superior Court
County of _ _ _ _ _ _

_ _[*Name of appellant's counsel*; *State Bar number*]**_ _**
_ _[*Address*]**_ _**
_ _[*City, State*]**_ _**
_ _[*Telephone number*]**_ _**
_ _[*Fax number (optional)*]**_ _**
_ _[*E-mail address (optional)*]**_ _**
_ _[*Attorney for _ _*[*name of client*]**_ _**]**_ _**

TABLE OF CONTENTS

[*The table of contents should begin on a new page. It is customary to number the pages of the front matter of briefs and petitions with small roman numerals.*]

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[*List main parts, e.g., Introduction, Petition, Prayer, with page numbers*]

VERIFICATION..... 5

MEMORANDUM..... 6

_ _[*List argument headings, with page numbers*]_ _

EXHIBITS..... #

_ _[*If exhibits are being filed separately, eliminate this heading.*]_ _

[*Begin the following on a new page.*]

TABLE OF AUTHORITIES CITED

[*The Table of Authorities should begin on a new page. The headings listed here are prescribed by Cal Rules of Ct 8.204(a). Counsel is "encouraged" to use the citation style of the Jessen, California Style Manual (4th ed 2000). See Cal Rules of Ct 8.204(b), Advisory Committee Comment (2006).*]

[*Each page on which an authority is cited should be listed.*]

Cases..... Page

_ _[*List in alphabetical order by name*]_ _

Statutes..... Page

_ _[*List in numerical order by code*]_ _

Constitutional Provisions

_ _[*Federal constitutional provisions are ordinarily cited first, followed by citations to the California Constitution.*]_ _

Court Rules..... #

Other Authorities..... #

[*The petition follows the Table of Authorities and starts on a separate page. A caption is not required when the petition has a cover that includes a caption, but it is standard practice to include a caption on the first page of the petition.*]

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for _ _[name of client*]_ _]_ _
No. _ _[*court of appeal number*]_ _

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT
_ _[*DIVISION _ _ _ _ _ _*]_ _

_ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _,	_ _[*Superior*]_ _
Petitioner,	**Court No.** _ _[*case number*]_ _
vs	
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF _ _ _ _ _ _,	
Respondent;	

_____)
PEOPLE OF THE STATE OF)
CALIFORNIA,)
Real Party in Interest.)
)
_____)

PETITION FOR WRIT OF _ _[*Mandate/Prohibition*]_ _

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA:

[*An "Introduction" or "Summary of Issues Being Raised" may be included here that briefly summarizes the issues being raised and the legal support for your position. If an Introduction is included, label the next part "Petition," and label the "Prayer." Some attorneys further subdivide the petition into parts such as "Procedural Facts" and "Grounds for Issuance of Writ."*]

Petitioner, _ _[*name*]_ _**, respectfully petitions this Court for a writ of** _ _[*prohibition/mandate*]_ _ _ _[*and stay of proceedings*]_ _ **directed to respondent court, and by this verified petition alleges that:**

I

Petitioner is the defendant in the above-entitled action now pending in respondent court. The plaintiff in the above action is named in this petition as the real party in interest.

II

Petitioner was arraigned on _ _[*date*]_ _ **on an accusatory pleading numbered** _ _[*number*]_ _**, alleging violations of** _ _[*specify statute sections*]_ _**.**

A copy of the accusatory pleading is lodged with this Court, made a part of this petition, and labeled Exhibit A.

III

On _ _[*date*]_ _**, in Department** _ _[*number*]_ _ **of respondent court, the Honorable** _ _[*name of judge*]_ _**, presiding, petitioner moved to** _ _[*state action taken*]_ _**.** _ _[*Give any relevant additional facts regarding hearing.*]_ _

The motion was denied. _ _[*A copy of the motion is lodged and labeled Exhibit B.*]_ _ _ _[*A copy of Real Party in Interest's opposition is lodged as Exhibit C.*]_ _

By this petition, an order is sought from this Court _ _[*prohibiting/mandating*]_ _ **respondent court** _ _[*from/to*]_ _ _ _[*state relief requested*]_ _**.**

A copy of the transcript of said proceeding was requested from respondent court. This request was _ _[*granted/denied*]_ _**.** _ _[*A copy of the order granting said transcript is attached as Exhibit* _ _[*state letter next in order*]_ _]_ _ _ _[*A copy of the preliminary hearing transcript is lodged as Exhibit* _ _[*state letter next in order*]_ _]_ _**.**

IV

Petitioner is particularly aggrieved by respondent court's actions, which will result in irreparable damage to petitioner in that _ _[*specify potential harm, e.g., petitioner will be confronted at the trial with illegally seized evidence or petitioner will be forced to proceed to trial absent a valid holding order*]_ _**.**

V

The parties directly affected by the instant proceeding now pending in respondent court are petitioner, by and through counsel; respondent court; and Real Party in Interest, the People of the State of California.

All the proceedings about which this petition is concerned have occurred within the territorial jurisdiction of

respondent court and of this Court.

VI

No other petition for a writ has been made by, or on behalf of, this petitioner relating to this matter. _ _[*If another petition has been filed, give particulars and state why petitioner is justified in filing the present petition.*]**_ _**

VII

Petitioner has no other plain, speedy, or adequate remedy at law. _ _[*State reason(s) why there is no other remedy at law, e.g.: direct appeal does not lie from respondent court's order; the sole remedy is by petition for extraordinary writ*; *appeal is not a speedy or adequate remedy as petitioner, an indigent, may be imprisoned during the pendency of the appeal*; *petitioner's application for extraordinary writ is contemplated by statute.*]**_ _**

VIII

[*Use for writ of prohibition.*]

Respondent court should be restrained from further proceedings for the reason(s) that: _ _[*Specify*]**_ _**

[*Use if seeking review of denial of motion to dismiss a new count alleged in information.*]

The information filed by the district attorney, real party in interest, was and is invalid and ineffectual to confer jurisdiction on respondent court to try petitioner because it charges petitioner with an offense not specified by the committing magistrate or shown by the evidence to have occurred and which did not arise out of the transaction that was the basis for the commitment on count _ _[*state challenged count*]**_ _. As a result of the magistrate's findings and the lack of relationship between the counts, real party should have been precluded from filing the charge, and respondent court acted in excess of its jurisdiction in denying petitioner's motion to set aside the information.**

[*Use if seeking review of denial of motion to dismiss for lack of reasonable/probable cause.*]

Petitioner was held to answer without reasonable and probable cause in that _ _[*specify reasons*]**_ _ and respondent court acted in excess of its jurisdiction in denying petitioner's motion to set aside the information.**

[*Use if seeking review of denial of motion to dismiss on the ground that defendant was illegally committed.*]

Petitioner was illegally committed by the magistrate and denied a substantial right because _ _[*specify reason(s)*]**_ _, and respondent court acted in excess of its jurisdiction in denying petitioner's motion to set aside the information.**

[*Use for writ of mandate.*]

Respondent court should be ordered to grant petitioner's motion because the denial of petitioner's motion to _ _[*specify motion*]**_ _ was error on the part of respondent court and an abuse of its discretion in that _ _**[*state reasons*]**_ _.**

[*Continue*]

WHEREFORE, petitioner prays that:

[*Select following paragraphs as appropriate; number sequentially.*]

[*Use for writ of prohibition.*]

_ _[*1*]**_ _. A peremptory writ of prohibition issue restraining the respondent court, its officers and agents, and all persons acting by and through its orders from taking any further steps or proceedings, including trial, in the above-captioned criminal action against petitioner _ _**[*./; or that*]**_ _**

_ _[_]**_ _. An alternative writ of prohibition issue directing and requiring respondent court to act as set forth above, or in the alternative, to show cause before this Court at a specified time and place why it should not be absolutely and forever restrained from taking any further proceedings against or making any other orders affecting petitioner in the proceedings described until further order of this Court _ _**[*./; and that*]**_ _**

[*Use for writ of mandate.*]

_ _[_]_ _. **A peremptory writ of mandate issue directing and compelling respondent court to vacate its order denying petitioner's motion and to make a new and different order granting petitioner's motion to** _ _[*state request*]_ _ _ _[*./; or that*]_ _

_ _[_]_ _. **An alternative writ of mandate issue directing and requiring respondent court to act in the manner set forth above or, in the alternative, to show cause before this Court at a specified time and place why the relief prayed for should not be granted** _ _[*./; and that*]_ _

[*Use for stay.*]

_ _[_]_ _. **A stay of proceedings issue restraining respondent court from proceeding on this action until all matters before this Court are terminated** _ _[*./; and that*]_ _.

_ _[_]_ _. **Petitioner be granted such other and further relief as may be appropriate and just.**

[*Continue*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of client*]_ _

[*Begin the following on a new page.*]

VERIFICATION

[*The verification should start on a new page. Caption is unnecessary if attached to papers with caption. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

[*Option 1: Use if prepared by petitioner.*]

I am the petitioner in this action. All facts alleged in the above petition, not otherwise supported by citations to the record, exhibits or other documents, are true of my own personal knowledge.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on _ _[*date*]_ _**, at** _ _ _ _ _ _**, California.**

__[*Signature of defendant*]__
_ _[*Typed name*]_ _

[*Option 2: Use if prepared by counsel.*]

_ _[*Attorney's name*]_ _ **declares as follows:**

I am an attorney licensed to practice in all courts of California.

In that capacity I was attorney of record for petitioner in the proceedings underlying the foregoing petition and make this verification on petitioner's behalf for the reason _ _[*specify reasons; e.g., petitioner is absent from the county in which I have my office***;** *the facts contained in the foregoing are within my personal knowledge based on my representation of petitioner*]_ _**.**

I have read the foregoing petition and the exhibits attached thereto or lodged with this Court, and know the contents thereof to be true based upon my representation of the petitioner.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on _ _[*date*]_ _**, at** _ _ _ _ _ _**, California.**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _

Attorney for _ _[*name of client*]_ _

[*Continue*]

[*The memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

MEMORANDUM IN SUPPORT OF WRIT PETITION

[*Provide argument in support of requested writ relief. Use short headings in capital letters for each portion of your argument. They may be underlined. If there is more than one, use standard outline style with roman numerals, letters, and numbers (e.g., I, A, B, 1, 2, 3, II, III, etc.). Some attorneys use major subdivisions, which are not numbered, such as "Summary of Argument," "Summary of Facts," "Argument," and "Conclusion." See also the discussion in the "Petitioner Comment" at the end of this form.*]

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of client*]_ _

[*The exhibits may be attached to the petition or filed separately. If filed separately, they should have a red cover and a caption.*]

TABLE OF EXHIBITS

[*List exhibits by title and index-tab number or letter; see Cal Rules of Ct 8.486(c)(1)(B). Be sure to include all exhibits necessary for the appellate court to grant relief; do not leave out opposition papers relevant to your petition.*]

EXHIBIT	**DESCRIPTION**
A	_ _[*description*]_ _
B	_ _[*description*]_ _
C	_ _[*description*]_ _
etc.	

[*Exhibits must be consecutively paginated.*
See Cal Rules of Ct 8.486(c)(1)(A).]

[*The following declaration is in support of a motion for leave to file documents under seal. It is used when documents were presented below in camera. Normally, it is included in the petition; the documents at issue are often enclosed in a sealed envelope attached to the declaration.*]

DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO FILE DOCUMENT UNDER SEAL

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for* _ _[*name of client*]_ _]_ _
No. _ _[*court of appeal number*]_ _

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _APPELLATE DISTRICT
_ _[*DIVISION* _ _ _ _ _ _]_ _

_ _ _ _ _ _ _ _ _ _,) _ _[*Superior*]_ _
Petitioner,) **Court No.** _ _[*case number*]_ _

)
vs)
THE SUPERIOR COURT OF)
THE STATE OF CALIFORNIA,)
COUNTY OF _ _ _ _ _ _,)
Respondent;)
_____)
PEOPLE OF THE STATE OF)
CALIFORNIA,)
Real Party in Interest)
_____)

I, the undersigned, state:

I am the attorney representing _ _[*petitioner/Real Party*]**_ _ in the above-entitled action. I have read the attached _ _**[*describe document*]**_ _ and request that this Court accept it for lodging under seal.**

[*Describe in general terms, without revealing confidential information, what the document contains and its relevance.*]

I believe it necessary for the document to remain confidential and under seal because it reveals parts of No. _ _[*petitioner's/Real Party's*]**_ _ defense. I believe that disclosure of the contents of the document would constitute a form of prosecutorial discovery not permitted by any statute including Pen C §1054.3, and would lighten the prosecution's burden to prove all the elements of the offense. (*In re Misener* (1985) 38 C3d 543, 213 CR 569; *Prudhomme v Superior* Court (1970) 2 C3d 320, 85 CR 129.)**

Although it has been held in a civil case that a "heavy burden" is imposed on party seeking to submit sealed exhibits (*Champion v Superior Court* (1988) 201 CA3d 777, 247 CR 624), _ _[*petitioner/Real Party*]**_ _ respectfully suggests that the burden for a criminal defendant should be lighter, because questions of a criminal defendant's constitutional rights to a fair trial and due process of law are involved.**

_ _[*Petitioner's/Real Party's*]**_ _ respectfully suggests that the burden for a criminal defendant should be lighter, because questions of a criminal defendant's constitutional rights to a fair trial and due process of law are involved.**

I believe that the procedure to govern the determination of whether to permit the lodging of this document and its continued confidentiality should be the one set forth in *Department of Corrections v Superior Court (Ayala)* (1988) 199 CA3d 1087, 245 CR 293, which provides that a court presented with sealed documents may review them in camera on an ex parte basis "to determine if any specific information constitutes privileged information" and permits the court to "then seal those specific items." 199 CA3d at 1094. Accord, *Keenan v Superior* Court (1982) 31 C3d 424, 430, 180 CR 489 (confidentiality of defense motion for appointment of second attorney); *People v Superior Court (Barrett)* (2000) 80 CA4th 1305, 1320, 96 CR2d 264 (defendant entitled to demonstrate relevancy of subpoenaed California Department of Corrections documents at in camera hearing); *People v Worthy* (1980) 109 CA3d 514, 167 CR 402. See also *Garcia v Superior Court* (2007) 42 C4th 63, 63 CR3d 948 (filing under seal of affidavit in support of *Pitchess* motion).

I believe that the information contained in the document submitted under seal is necessary for a proper determination of the issues, and I respectfully request this Court to permit _ _[*petitioner/Real Party*]**_ _ to lodge the attached declaration under seal.**

I declare under penalty of perjury that the foregoing is true and correct of my own knowledge, except for those matters stated on information and belief, and regarding those matters, I declare that I believe them to be true and correct, and that this declaration was executed on _ _[*date*]**_ _ at _ _**[*city*]**_ _, California.**

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Comment: This form is a standard form for a writ filed in the court of appeal to challenge a pretrial ruling in the trial court. It is written as a defense petition, but may be modified and used by the prosecution, *e.g.,* when seeking review of an order granting severance or discovery (see Pen C §1512).

The cover of the petition must be red. Cal Rules of Ct 8.40(b)(1). The petition should include a table of contents, a

table of authorities, the petition and verification, a supporting memorandum, any exhibits required to support the petition, and proof of service. See Cal Rules of Ct 8.486. Citations should be styled in a form favored by either California Style Manual or The Bluebook: A Uniform System of Citation. Cal Rules of Ct 1.200. The length of the petition and memorandum is governed by Cal Rules of Ct 8.204(c), but the tables, the certificate, the verification, and any supporting documents are excluded from the page limits. Cal Rules of Ct 8.486(a)(6). In addition, when the defendant is an entity, it must comply with Cal Rules of Ct 8.208 concerning serving and filing a certificate of interested entities or persons. Cal Rules of Ct 8.488.

For discussion of writ petitions, see Crim Law, chap 42; Appeals and Writs in Criminal Cases, chaps 7-8 (generally), §§7.17-7.27, 7.35 (pretrial writs) (3d ed Cal CEB 2007).

Where to file. If the challenged action occurred in a misdemeanor or infraction case, file the writ petition in the appellate division of the superior court. See Cal Const art VI, §10. If the challenged action occurred in a felony case after the defendant was held to answer, file the writ petition in the court of appeal. See Cal Const art VI, §10. If the challenged order was made in a felony case by a superior court judge acting as a magistrate (*e.g.,* presiding over the preliminary hearing), find out what the local practice is. Both the superior court and the court of appeal have jurisdiction in such cases.

Verification. The petition must be verified. See Cal Rules of Ct 8.486(a)(4). The verification is inserted in the writ petition after the formal part of the petition. When facts are within the attorney's knowledge or when a party is unable to verify the petition, the attorney may verify it, but must set forth the reason that the verification was not made by the party. CCP §446. An adequate reason is that the petition is based on procedural facts that are more within the knowledge of the attorney than the petitioner. However, the verification should not be made on information and belief.

Exhibits. Documents submitted as exhibits in support of the petition should be attached to the end of the petition, or submitted in a separate volume. The exhibits must be consecutively paginated and the index tabbed. A table of contents must preface the exhibits, listing each document by title and index-tab number or letter. Cal Rules of Ct 8.486(c)(1). Failure to file adequate exhibits is one of the most common reasons for denial of the petition.

Local rules of reviewing court. Counsel should pay close attention to local rules for the reviewing court. For example, 5th App Dist Local R 3 has a checklist of requirements for writs, which, if not met, may result in a summary denial of the petition. One requirement is that all petitions for extraordinary writs, other than habeas, be accompanied by a properly completed face sheet: the Appellate Court Writ Petition Information Sheet. This form is available from the clerk of the court. 5th App Dist Local R 3. This sheet should be the first page, after the cover, before the petition itself.

Reply brief. Within 10 days after a preliminary opposition is filed, the petitioner may serve and file a reply. Cal Rules of Ct 8.487(a)(3). Unless the court orders otherwise, the petitioner may serve and file a reply within 15 days after the return or opposition is filed. Cal Rules of Ct 8.487(b)(3). The reply should not raise new issues, but should only address the opposition.

Response to petition. There are two general types of response to a writ petition: preliminary opposition and the return. Within 10 days after the petition is filed, the respondent or any real party in interest, separately or jointly, may serve and file a preliminary opposition. The preliminary opposition must contain a memorandum in opposition and a statement of any material fact not included in the petition. Cal Rules of Ct 8.487(a). If an alternative writ issues, the opposing party has the opportunity to file a return to the petition. Cal Rules of Ct 8.487(b). Unless another date is specified by the court, the return must be filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance. Cal Rules of Ct 8.487(b)(2). The return should be served on the petitioner and on all other parties, as is required for the petition. See Cal Rules of Ct 8.486(e). See also CCP §465. The return consists of an answer, a demurrer, or both. See Cal Rules of Ct 8.487(b). An answer may consist of admissions, denials, and affirmative defenses. CCP §431.30. The return must deny contested allegations and should affirmatively allege those points necessary to apprise the court of factual and/or legal reasons for denying the petition. When a peremptory writ is requested in the first instance, a complete response in the nature of a return should be filed, not just preliminary opposition.

Authority for writ review. Statutes that provide for writ review include:

- Pen C §871.5(f). Defense review of grant of prosecution's Pen C §871.5 motion by way of Pen C §§995-999a (see §999a below).
- Pen C §871.6. Review by either party of date set for preliminary hearing if beyond the time specified in Pen C

§859b, or if the date is continued without good cause when good cause is required (petition for writ of mandate or prohibition filed in the superior court).

- Pen C §999a. Review of denial of Pen C §995 motion (petition for writ of prohibition).
- Pen C §1238(d). Prosecution review of grant of probation (petition for writ of mandate or prohibition).
- Pen C §1511. Review to compel setting of trial date within Pen C §1049.5 limits or review of grant of continuance (petition for writ of mandate or prohibition filed in court of appeal).
- Pen C §1512. Prosecution review of orders granting severance or discovery (petition for writ of mandate or prohibition).
- Pen C §1538.5(i). Defense review of superior court search and seizure ruling (petition for writ of mandate or prohibition).
- Pen C §1538.5(o). Prosecution's review of superior court search and seizure ruling (petition for writ of mandate or prohibition).
- CCP §170.3(d). Review of denial of CCP §§170.1, 170.6 motions (petition for writ of mandate filed in court of appeal).
- Govt C §6259(c). Review of grant or denial of petition to compel disclosure of public records.
- Health & S C §11488.4(h). Prosecution review of grant of motion to return property seized under forfeiture statutes (petition for writ of mandate or prohibition).
- Cal Rules of Ct 5.772(j). Review of Welf & I C §707 order finding minor unfit to be tried in juvenile court.

Case law also permits review in other situations. See discussion in Appeals & Writs §7.7.

Cross-Reference: For further discussion of writs, see Crim Law, chap 42; Appeals & Writs, chaps 7-8; and California Civil Writ Practice (4th ed Cal CEB 2008). For a full discussion of the petition along with suggested parts of the complete form, see Appeals & Writs §§8.17-8.41.

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Source: Criminal Law/California Criminal Law Forms Manual/42 Writs in California State Courts/§42.2 B. Petition for Review in California Supreme Court

§42.2 B. Petition for Review in California Supreme Court

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

[*Format of cover, which must be white.*]

No. _ _[*court of appeal number*]_ _

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _,)	**S** _ _[*Supreme Court No.*]_ _
Petitioner,)	
)	
vs)	
)	
THE)	
_ _[*MUNICIPAL/SUPERIOR*]_ _)	
COURT OF THE STATE OF)	
CALIFORNIA, COUNTY OF)	
_ _ _ _ _ _,)	
Respondent;)	
)	
_____)	
PEOPLE OF THE STATE OF)	
CALIFORNIA,)	
Real Party in Interest.)	
_____)	

PETITION FOR REVIEW

After Decision by Court of Appeal
_ _ _ _ _ _ Appellate District
_ _[*Division _ _ _ _ _ _*]_ _

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Attorney for _ _[name of client*]_ _]_ _

[*Begin the following on a new page.*]

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ISSUE(S) PRESENTED FOR REVIEW..... #

[*List issues and page numbers.*]

REASONS REVIEW SHOULD BE GRANTED..... #

STATEMENT OF THE CASE..... #

STATEMENT OF FACTS..... #

ARGUMENT..... #

[*List all arguments and page numbers, e.g.:*]

1. ..... #

A. ..... #

CONCLUSION..... #

EXHIBIT..... #

[*Begin the following on a new page.*]

TABLE OF AUTHORITIES

[*Cases: List cases in alphabetical order by name, giving citation for each under name; with page number(s) on which citations are found to the right of the citation.*]

_ _[*Statutes: List in order with page number(s) on which citation is found.*]_ _

_ _[*Constitutional provisions: List in order with page number(s) on which citation is found.*]_ _

_ _[*Court rules: List in order with page number(s) on which citation is found.*]_ _

_ _[*Other Authorities: List in order with page number(s) on which citation is found.*]_ _

[*Begin the following on a new page.*]

No. _ _[*court of appeal number*]_ _

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _ _, **Petitioner,** **vs** **THE** _ _[*MUNICIPAL/SUPERIOR*]_ _ **COURT OF THE STATE OF CALIFORNIA, COUNTY OF** **_ _ _ _ _ _,** **Respondent;** **_____** **PEOPLE OF THE STATE OF CALIFORNIA,** **Real Party in Interest.** **_____**	**S** _ _[*Supreme Court No.*]_ _

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE, _ _[*NAME*]_ _**, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:**

_ _[*Name*]_ _**, defendant and petitioner, hereby petitions this Court for review of the** _ _[*published/partially published/unpublished*]_ _ _ _[*opinion/order*]_ _ **of the Court of Appeal,** _ _ _ _ _ _ **Appellate District, Division** _ _ _ _ _ _**, filed on** _ _[*date*]_ _**, affirming** _ _[*specify order or judgment*]_ _**. A copy of the** _ _[*opinion/order*]_ _ **of**

the Court of Appeal is attached hereto as Exhibit A _ _[*and a copy of the order of partial publication is attached hereto as Exhibit B*]_ _. _ _[*A petition for rehearing was denied on* _ _[*date*]_ _.]_ _

[*Begin the following on a new page.*]

ISSUE(S) PRESENTED FOR REVIEW

_ _[*Specify issues presented for review, in numbered paragraphs if more than one issue is presented.*]_ _

REASONS REVIEW SHOULD BE GRANTED

_ _[*Specify reasons that review should be granted, showing how the issues meet the requirements for review under Cal Rules of Ct 8.500(b).*]_ _

STATEMENT OF THE CASE

_ _[*Only a brief history of the case is required in a petition for review. If the opinion gives the procedural information necessary to give the court a clear understanding of the relevant trial court and court of appeal proceedings, the opinion may be relied on, as in the following example.*]_ _

The relevant procedural history is set forth in the Court of Appeal's opinion, attached as Exhibit A.

STATEMENT OF FACTS

_ _[*As a policy matter, the supreme court will accept the court of appeal's statement of facts unless the petitioner has called the lower court's attention to any claimed error in a petition for rehearing. Cal Rules of Ct 8.500(c)(2). If the opinion gives a satisfactory survey of the facts, it may be relied on, as in the following example.*]_ _

The relevant facts are set forth in the Court of Appeal's opinion attached as Exhibit A.

[*Begin the following on a new page.*]

ARGUMENT

_ _[*Number each separate legal argument serially with Roman numerals. Each legal argument should have a separate heading. The headings should be concise and describe the subject matter covered, although the headings need not be technical assignments of error. There should be a separate argument in support of review for each issue. Subheadings may be used to organize the argument.*]_ _

[*Begin the following on a new page.*]

CONCLUSION

For the reasons stated herein, petitioner requests this court to grant review to determine the issues presented above.

Date: _ _ _ _ _

Respectfully submitted,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of client*]_ _

Comment: **Petition for review.** Covers of petitions for review must be white. Cal Rules of Ct 8.40(b). The petition may not exceed 8400 words (30 pages, if typewritten), exclusive of the court of appeal opinion, tables, and required certificate of counsel on word count. Cal Rules of Ct 8.504(d). See Cal Rules of Ct 8.204 for format requirements. Citations should be styled in a form favored by either California Style Manual or The Bluebook: A Uniform System of Citation. Cal Rules of Ct 1.200. A copy of the opinion of the court of appeal that shows its date of filing, preceded by a face sheet labeled Exhibit A, is inserted after the conclusion and before the proof of service in the original petition and each copy filed in the supreme court. See Cal Rules of Ct 8.504(b)(4).

The petition for review must be filed within 10 calendar days after the decision of the court of appeal becomes final as to that court. Cal Rules of Ct 8.500(e). See Cal Rules of Ct 8.264(b) (finality of court of appeal opinions). The original and 13 copies must be filed with the supreme court (Cal Rules of Ct 8.44(a)(1)), and a copy served on the court of appeal clerk and the superior court clerk (Cal Rules of Ct 8.500(f)(2)).

Answer. An answer to a petition for review is not required, but may be filed. The answer may request the court to consider additional issues if review is granted for any issues raised in the petition. Cal Rules of Ct 8.500(a)(2). The same rules for format and service apply to the answer as to the petition, except that the cover must be blue. Cal Rules of Ct 8.40(b). Any answer must be filed within 20 calendar days after the filing of the petition. Cal Rules of Ct 8.500(e)(4).

Reply. The petitioner may file a reply to the answer. Cal Rules of Ct 8.500(a). Any reply to the answer must be served and filed within 10 days after the answer is filed. Cal Rules of Ct 8.500(e)(5). The cover of a reply must be white. Cal Rules of Ct 8.40(b). The reply may not exceed 4200 words (15 pages, if typewritten) exclusive of the court of appeal opinion, tables, and required certificate of counsel on word count. Cal Rules of Ct 8.504(d). The original and 13 copies must be filed with the supreme court. Cal Rules of Ct 8.44(a)(1). For additional format requirements, see Cal Rules of Ct 1.200, 8.204, 8.504(a).

Cross-Reference: For further discussion of petitions for review in the supreme court, see California Criminal Law Procedure and Practice §§44.69-44.76 (Cal CEB Annual); Appeals and Writs in Criminal Cases §8.6 (original filing) (3d ed Cal CEB 2007).

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Source: Criminal Law/California Criminal Law Forms Manual/42 Writs in California State Courts/§42.3 C. Petition for Writ of Habeas Corpus (Judicial Council Form MC-275)

§42.3 C. Petition for Writ of Habeas Corpus (Judicial Council Form MC-275)



Name: _____

Address: _____

_____

_____

CDC or ID Number: _____

_____

_____

(Court)

_____

Petitioner

vs.

_____

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. _____

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- **If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.**
- **If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.**

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal and you are *not* represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Form Approved for Optional Use
Judicial Council of California
MC-275 [Rev. January 1, 2010]

CEB

Penal Code, § 1473 at seq.;
Cal. Rules of Court, rule 8.380
www.courtinfo.ca.gov

This petition concerns:

- ☐ A conviction
- ☐ Parole
- ☐ A sentence
- ☐ Credits
- ☐ Jail or prison conditions
- ☐ Prison discipline
- ☐ Other *(specify)*: _____

1. Your name: _____
2. Where are you incarcerated? _____
3. Why are you in custody? ☐ Criminal conviction ☐ Civil commitment

   Answer items a through i to the best of your ability.

   a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

   _____

   _____

   b. Penal or other code sections: _____

   c. Name and location of sentencing or committing court: _____

   _____

   d. Case number: _____

   e. Date convicted or committed: _____

   f. Date sentenced: _____

   g. Length of sentence: _____

   h. When do you expect to be released? _____

   i. Were you represented by counsel in the trial court? ☐ Yes ☐ No *If yes, state the attorney's name and address:*

   _____

   _____

4. What was the LAST plea you entered? *(Check one)*:

   ☐ Not guilty ☐ Guilty ☐ Nolo contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

   ☐ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement." *(If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)*

a. Supporting facts:
Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, *who* did exactly *what* to violate your rights at what time *(when)* or place *(where)*. *(If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

b. Supporting cases, rules, or other authority (optional):
(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

7. **Ground 2 or Ground** _____ *(if applicable):*

a. Supporting facts:

b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes ☐ No If yes, give the following information:
   a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"):

   b. Result: _____ c. Date of decision: _____
   d. Case number or citation of opinion, if known: _____
   e. Issues raised: (1) _____
      (2) _____
      (3) _____
   f. Were you represented by counsel on appeal? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court? ☐ Yes ☐ No If yes, give the following information:
   a. Result: _____ b. Date of decision: _____
   c. Case number or citation of opinion, if known: _____
   d. Issues raised: (1) _____
      (2) _____
      (3) _____
10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

11. Administrative review:
   a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:

   b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No
      Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes If yes, continue with number 13. ☐ No If no, skip to number 15.

13. a. (1) Name of court: _____

(2) Nature of proceeding (for example, "habeas corpus petition"): _____

(3) Issues raised: (a) _____

(b) _____

(4) Result *(attach order or explain why unavailable):* _____

(5) Date of decision: _____

b. (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Issues raised: (a) _____

(b) _____

(4) Result *(attach order or explain why unavailable):* _____

(5) Date of decision: _____

c. *For additional prior petitions, applications, or motions, provide the same information on a separate page.*

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

_____

_____

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

_____

_____

16. Are you presently represented by counsel? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

_____

_____

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes ☐ No If yes, explain:

_____

_____

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

_____

_____

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

▶ _____

(SIGNATURE OF PETITIONER)

Comment: Under Cal Rules of Ct 8.380(a), use of the Judicial Council habeas form is mandatory for petitioners who

are not represented by attorneys, but optional for attorneys. Although an attorney is not required to use the Judicial Council form, an attorney-drafted petition must contain the information requested in that form. See Cal Rules of Ct 8.384(a)(1).

Cross-Reference: For discussion of petitions for writs of habeas corpus, see California Criminal Law Procedure and Practice §§42.22-42.34 (Cal CEB Annual); Appeals and Writs in Criminal Cases, chaps 9-10 (generally), §10.4 (contents of petition), §§10.33-10.35 (forms) (3d ed Cal CEB 2007).

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Source: Criminal Law/California Criminal Law Forms Manual/42 Writs in California State Courts/§42.4 D. Petition for Writ of Habeas Corpus (Attorney-Drafted)

§42.4 D. Petition for Writ of Habeas Corpus (Attorney-Drafted)

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[*This is the first page of the petition. If filed in the court of appeal or the supreme court, the petition should have a red cover, and should include a table of contents and table of authorities. For form, see Petition for Writ of Mandate/Prohibition in the Court of Appeal, §42.1. Although the caption does not have to be repeated inside if petition has a cover, many attorneys repeat the top half of the caption on the first page of the petition, as illustrated. The superior court rules do not require covers or tables, but many attorneys recommend including tables because it makes the petition easier to review. Covers and tables are required in the court of appeal and supreme court.*]

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for _ _[name of client*]_ _]_ _
No. _ _[*court of appeal number*]_ _

IN THE _ _[*SUPERIOR COURT /COURT OF APPEAL/SUPREME COURT*]_ _ OF THE STATE OF CALIFORNIA

[*Add name of county if filed in superior court, or appellate district and division, if applicable if filed in the court of appeal.*]

In the Matter of	)	_ _[*Superior Court/Court of*
_ _ _ _ _ _ _ _ _ _,	)	*Appeal/Supreme Court*]_ _ **No.**
	)	_ _[*case number*]_ _
On Habeas Corpus.	)	
	)	

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner _ _[*name*]_ _, by and through his attorney, _ _[*name*]_ _, respectfully petitions this court for a writ of habeas corpus, and by this verified petition sets forth the following facts and causes for the issuance of said writ:

I

Petitioner is unlawfully restrained of his liberty and imprisoned by _ _[*name of warden*]_ _ at the _ _[*name of prison*]_ _ at _ _[*location of prison*]_ _, California.

II

Petitioner is imprisoned pursuant to the judgment of conviction and sentencing order rendered on _ _[*date*]_ _, by the _ _ _ _ County Superior Court, in case number _ _ _ _. The judgment was rendered after a jury trial on petitioner's plea of not guilty.

[*State facts of conviction and imprisonment. Paragraphs III and IV are examples.*]

III

On May 15, 2004, a jury found petitioner guilty of one count of possession of cocaine for sale, in violation of California Health and Safety Code section 11351, and one count of possession of cocaine base for sale, in violation of California Health and Safety Code section 11351.5. The trial court found that petitioner had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b).

IV

On May 25, 2004, petitioner was sentenced to a fixed term of five years in state prison. Petitioner filed a timely notice of appeal on June 1, 2004, resulting in petitioner's direct appeal, case no. _ _ _ _.

V

Petitioner's imprisonment is unlawful because:

Ground 1:

[*State legal basis of first claim.*]

_ _[*E.g., Petitioner was deprived of his right under the Sixth Amendment to the Constitution of the United States and article I, section 15, of the California Constitution to the effective assistance of counsel before trial, and was thereby prejudiced. Trial counsel was ineffective in that he failed to* _ _[*e.g., file a motion to suppress evidence pursuant to Penal Code section 1538.5/request that the out-of-court statement made to police by a nontestifying codefendant be redacted to omit all references to petitioner's existence*]_ _. *It is reasonably probable that a result more favorable to petitioner would have occurred if trial counsel had* _ _[*e.g., filed a motion to suppress the evidence/requested redaction*]_ _ *because*_ _[*e.g., the only evidence linking petitioner to the charged crime was obtained during a warrantless search of defendant's home that was not justified by any exception to the warrant requirement/without the references to petitioner in the unredacted statement by the codefendant, the evidence against petitioner was insufficient to sustain the conviction*]_ _.]_ _

The facts supporting the above ground for relief are as follows:

[*State factual basis of claim. To avoid summary denial, the petitioner's factual allegations must, if proved, be sufficient to entitle the petitioner to relief. All factual allegations should be supported by evidence, to the extent it is available. Documentary evidence and declarations supporting the claims should be attached to the petition as exhibits, and factual allegations should refer to the exhibits. If necessary evidence is unavailable, include a declaration summarizing what you expect it to show, and explaining why the evidence is unavailable and what steps you have taken to obtain it. If an evidentiary hearing will be necessary to determine the truth of the allegations in the petition, set forth the facts you expect to establish in the evidentiary hearing.*]

Ground 2:

[*State legal basis of second claim. All known grounds for relief should be included in the petition. There is no limit on the number of grounds for relief a petitioner may allege, but a later petition alleging as a ground for relief a claim that could have been included in the original petition will likely be deemed procedurally barred.*]

The facts supporting the above ground for relief are as follows:

[*State factual basis of claim.*]

VI

Petitioner has no plain, speedy, or adequate remedy at law. Petitioner has appealed the judgment of conviction in case number _ _ _ _, pending in the Court of Appeal, _ _ _ _ Appellate District. Appellant's _ _[*opening brief/reply brief*]_ _ _ _[*was filed/is due*]_ _ **on** _ _[*date*]_ _**. The issues presented in this habeas corpus petition cannot be fairly considered on direct appeal, because facts necessary to a determination of the issues are outside the record on appeal and cannot be obtained by augmentation of the record.**

VII

[*Option 1: Use if this is the first time the grounds set forth in the petition have been presented to any court:*]

The ground(s) set forth in Paragraph V as the basis for this petition _ _[*has/have*]_ _ **not been previously presented by petitioner to this court or any other court, and no previous petition for habeas corpus has been filed on behalf of petitioner in this court or in any other court.**

[*Option 2: Use if filing a new petition in a higher court to obtain California's version of review after denial in the lower*

court:]

The ground(s) set forth in Paragraph V as the basis for this petition _ _[*has/have*]**_ _ been previously presented to the _ _**[*Superior Court/Court of Appeal*]**_ _ in Case No. _ _ _ _. The petition was denied _ _**[*e.g., on the merits/for lack of diligence*]**_ _ on _ _**[*date*]**_ _.**

[*If the petitioner has previously filed a habeas corpus petition asserting the same ground(s) for relief, and (1) the new petition is filed in a court that has already denied the earlier petition, or (2) there has been any substantial delay between the earlier petition and the present petition, the petitioner must establish that the claim has not been procedurally defaulted or that any procedural default is excusable. Evidence (in the form of declarations or documents) that, if uncontroverted, would establish the absence of or an excuse for procedural default must accompany the petition. If procedural default is a possible issue, add to the preceding paragraph:*]

It is appropriate for this court to consider petitioner's claims on their merits because _ _[*e.g., they are based on new evidence that was previously unavailable to petitioner through the exercise of due diligence/petitioner, through no fault of _ _*[*his/her*]*_ _ own, did not receive notice of the denial of _ _*[*his/her*]*_ _ original petition until _ _*[*date*]*_ _. The instant petition is being filed within _ _ _ _ days of petitioner's discovery that the previous petition was denied.*]**_ _**

VIII

[*If petitioner is requesting the court of appeal or supreme court to exercise its original habeas corpus jurisdiction, add the following:*]

This petition is being filed, in the first instance, in this court, pursuant to its original habeas corpus jurisdiction, because _ _[*e.g., petitioner's direct appeal is currently pending before this court/the issue presented is a matter of statewide importance that requires resolution by this court, and irreparable harm will result unless the matter is resolved promptly*]**_ _.**

IX

[*If petitioner is seeking consolidation with a pending appeal, add:*]

Petitioner moves that this petition be heard and decided concurrently with his direct appeal in No. _ _ _ _.

X

Petitioner hereby incorporates by reference the accompanying memorandum, and the declarations contained in the appendices attached hereto. Petitioner's claims in this petition will be based on the petition, the accompanying memorandum, the attached declarations, and all records, documents, and pleadings on file with this court and any further material to be developed at any future hearing that may be ordered.

XI

[*Ordinarily, the exhibits to the petition should include any portions of the trial record that the petitioner wants made part of the record of the habeas corpus proceeding. If the petition is being filed in a reviewing court in which a related appeal is pending, petitioner can ask the court to take judicial notice of the appellate record.*]

Petitioner hereby requests that this court take judicial notice of the record on appeal and the briefs filed and lodged with this court in case number _ _ _ _, currently pending in this court (Evidence Code sections 452, 459). Reproducing the record for use in connection with this petition would entail unnecessary expense since this court and counsel for respondent already have a copy of the record and all pleadings.

WHEREFORE, petitioner respectfully requests that this court:

[*Select following paragraphs as appropriate; number sequentially.*]

_ _[*1.*]_ _ **Consolidate this habeas corpus proceeding with Case No. _ _ _ _;**

_ _[#]_ _ **Take judicial notice of the record and pleadings in the above-mentioned appeal;**

_ _[#]_ _ **Order respondent to show cause why petitioner is not entitled to the relief sought;**

_ _[#]_ _ **Conduct an evidentiary hearing to answer the factual questions necessary to determine the merits**

of petitioner's claim;

_ _[#]_ _ After full consideration of the issues raised by this petition, grant the petition, vacate the _ _[*date*]_ _ judgment of conviction of the _ _ _ _ County Superior Court in Case No. _ _ _ _; and

_ _[#]_ _ Grant such other and further relief as may seem just under the circumstances.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_____
_ _[*name of attorney*]_ _
Attorney for Petitioner _ _[*name*]_ _

[*The verification should start on a new page. Caption is unnecessary if attached to papers with caption. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

VERIFICATION

_ _[*Name of attorney*]_ _ declares as follows:

I am an attorney admitted to practice law in the state of California. _ _[*E.g., I have been appointed by this court to represent petitioner in his direct appeal to this court and have been authorized by this court, in an order dated _ _[date]_ _, to prepare the accompanying petition for a writ of habeas corpus.*]_ _

I make this verification because petitioner is incarcerated at the California State Prison in _ _ _ _, California, which is outside the county in which my office is located, and because the matters stated in the petition for writ of habeas corpus are more within my knowledge than his.

I have read the foregoing petition for writ of habeas corpus, and declare that the contents of the petition are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _ _[*date*]_ _ at _ _ _ _ _ _, California.

Respectfully submitted,

_____
_ _[*name of attorney*]_ _
Attorney for Petitioner _ _[*name*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption. See §1.9; Crim Law §18.5.*]

[*If requesting consolidation, include a section on consolidation.*]

MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

[*Although not specifically required, it is often a good idea to start with a short statement of the relevant procedural history of the case, especially when it procedural default is a potential issue. Some attorneys use major subdivisions, which are not numbered, such as "Summary of Argument," "Summary of Facts," "Argument," and "Conclusion." See also the Comment that follows this form.*]

ARGUMENT

[*Provide argument in support of requested writ relief. Use short headings in capital letters for each portion of your argument. If there is more than one, use standard outline style with roman numerals, letters, and numbers (e.g., I, A, B, 1, 2, 3, II, III, etc.). Two sample arguments are presented here in skeletal form.*]

[*Example*]

I. THIS HABEAS CORPUS PETITION SHOULD BE CONSOLIDATED WITH PETITIONER'S DIRECT APPEAL.

This habeas corpus petition contests the legality of the judgment of conviction and sentencing order entered _ _[*date*]_ _, in _ _[*name and number of case*]_ _. Petitioner has appealed his conviction to this court and petitioner's direct appeal is pending in case number _ _ _ _. Appellate counsel has filed an opening brief in that case arguing that the trial court erred in _ _[*e.g., admitting the unredacted confession of petitioner's nontestifying codefendant because it implicated petitioner in the charged offense*]_ _. This habeas corpus petition, based on the same procedural facts, _ _[*e.g., alleges that trial counsel was ineffective in failing to object to the admissibility of the codefendant's statement on grounds that it violated petitioner's Sixth Amendment right of confrontation, and in failing to request that it be redacted to omit all reference to petitioner's existence*]_ _.

When a petitioner seeks habeas corpus relief in conjunction with a pending direct appeal, it is appropriate for the reviewing court to consolidate the two proceedings so that all claims may be heard and resolved at one time in a single forum. *In re Baker* (1988) 206 CA3d 493, 496, 253 CR 615; *People v Pope* (1979) 23 C3d 412, 426 n17, 152 CR 732. Consolidation is appropriate here because the issues presented in this petition are related to issues already before the court in the petitioner's direct appeal.

[*Example*]

II. THE JUDGMENT OF CONVICTION MUST BE VACATED BECAUSE PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN THE TRIAL COURT BY HIS ATTORNEY'S FAILURE TO _ _[*E.G., FILE A MOTION TO SUPPRESS/REQUEST REDACTION OF CODEFENDANT'S STATEMENT*]_ _.

A. Petitioner Was Entitled to Effective Assistance of Counsel in the Court Below.

A defendant in a criminal matter is entitled, under the Sixth and Fourteenth Amendments to the United States Constitution and under Article I, section 15, of the California Constitution, to the effective assistance of counsel. (*Strickland v Washington* (1984) 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052; *People v Pope* (1979) 23 C3d 412, 152 CR 732.) To provide effective assistance, counsel must provide representation equivalent to that which would be provided "by a reasonably competent attorney acting as a diligent, conscientious advocate." (*People v Pope, supra,* 23 C3d at 424.) Reasonableness is measured under "prevailing professional norms." (*Strickland v Washington*, *supra,* 466 US at 688.)

To prevail on a claim of ineffective assistance, petitioner must show that that his trial attorney's representation fell below prevailing professional norms, and that he was prejudiced by this failure, *i.e.*, that it is reasonably probable that the result would have been different but for counsel's error. (*Strickland v Washington, supra,* 466 US at 694; *People v Fosselman* (1983) 33 C3d 572, 584, 189 CR 855.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v Washington, supra,* 466 U.S. at 694.)

[*Continue with the facts underlying the claim and the substantive law that supports the assertion that the error petitioner complains of was one that a reasonably competent advocate would not have made. Each claim should be argued under a separate subheading.*]

CONCLUSION

For the reasons stated above, petitioner respectfully requests this court to find that he was deprived of the effective assistance of counsel in the court below, to grant the within petition for writ of habeas corpus, and to issue its order to the respondent to show cause why petitioner should not be released from custody forthwith.

DATED: _ _[*date*]_ _ **Respectfully submitted,**

_____
_ _[*name of attorney*]_ _
Attorney for Petitioner _ _[*name*]_ _

Comment: Covers of an original writ petition, required if filed by an attorney in a reviewing court, must be red. Cal Rules of Ct 8.40(b). Although an attorney is not bound by the format of the Judicial Council habeas form (see §42.3), an attorney-drafted petition must contain the information requested in that form and must comply with the applicable format requirements. See Cal Rules of Ct 8.384(a)(1).

The petition must be verified. Pen C §1474. When facts are within the attorney's knowledge or when the petitioner is unable to verify the petition, the attorney may verify it, but must set forth the reason that the verification was not made

by the petitioner. See CCP §446. An adequate reason is that the petition is based on procedural facts that are more within the knowledge of the attorney than the petitioner. However, the verification should not be made on information and belief.

Informal response. When the petition is filed, the court may request an informal response (Cal Rules of Ct 4.551(b), 8.385(b)(1)), which should be a memorandum directed at deficiencies in the petition that make fuller consideration of the petitioner's claims unnecessary. Its only purpose is to persuade the court not to issue an order to show cause (OSC). See *People v Romero* (1994) 8 C4th 728, 741, 35 CR2d 270 (court of appeal may not grant relief without issuing writ or OSC). The response must be served and filed within 15 days or as the court specifies. Cal Rules of Ct 4.551(b), 8.385(b)(2). If a response is filed, the court must notify the petitioner that a reply may be served and filed within 15 days or as the court specifies. The court may not deny the petition until that time has expired. Cal Rules of Ct 4.551(b), 8.385(b)(3).

Return. If the court issues an order to show cause or a writ, the confining authority may dispute facts in the petition by filing a return (Pen C §1480). In the court of appeal and the supreme court, unless the court orders otherwise, any return must be served and filed within 30 days after the court issues the order to show cause. Cal Rules of Ct 8.386(b)(1). In the superior court, the return should be filed within 30 days after the court issues an order to show cause. Cal Rules of Ct 4.551(d).

Denial or traverse. Once the return is filed, the petitioner has an opportunity to controvert it by filing an additional document, referred to as a denial or a traverse. See *People v Romero* (1994) 8 C4th 728, 739, 35 CR2d 270; Pen C §1484; Cal Rules of Ct 4.551(e), 8.386(d). In the superior court, the denial must be filed within 30 calendar days after service and filing of the return. Cal Rules of Ct 4.551(e). In the court of appeal and the supreme court, unless the court orders otherwise, within 30 days after the respondent files a return, the petitioner may serve and file a traverse. Cal Rules of Ct 8.386(d)(1).

Cross-Reference: For further discussion of the writ of habeas corpus, see Crim Law §§42.22-42.34; Appeals and Writs in Criminal Cases, chaps 9-10 (3d ed Cal CEB 2007); and California Civil Writ Practice (4th ed Cal CEB 2008). A sample writ petition is in Appeals & Writs §10.34.

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Source: Criminal Law/California Criminal Law Forms Manual/42 Writs in California State Courts/§42.5 E. Petition for Writ of Mandate Under Pen C §871.6 in Superior Court

§42.5 E. Petition for Writ of Mandate Under Pen C §871.6 in Superior Court

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for _ _[name of client*]_ _]_ _
No. _ _[*court of appeal number*]_ _

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

_ _ _ _ _ _ _ _ _ _, Petitioner,	_ _[*Superior*]_ _ **Court No.** _ _[*case number*]_ _
vs	
THE SUPERIOR COURT OF THE STATE OF CALIFORNIA COUNTY OF _ _ _ _ _ _, Respondent;	
PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest	

PETITION FOR WRIT OF MANDATE
UNDER PENAL CODE SECTION 871.6

After Grant of People's Motion for Continuance
By the Honorable _ _[*judge's name*]_ _, Judge

PETITION WITH MEMORANDUM TO THE HONORABLE MASTER CALENDAR JUDGE OF THE CRIMINAL DIVISION:

Petitioner petitions this Court for a Writ of Mandate under Section 871.6 of the Penal Code directed to the Respondent and by this verified Petition represents that:

I.

Petitioner is and was at all times mentioned herein, the defendant in the above-entitled proceeding.

II

At all times mentioned herein, Respondent has been and now is unlawfully detaining the Petitioner in violation of Sections 859b and 1050 of the Penal Code without probable cause.

III.

The People of the State of California are named as Real Party in Interest.

IV.

On _ _[*date*]_ _, at the request of the People of California, respondent's preliminary hearing was continued without probable cause and over respondent's objection to a period exceeding the statutory period prescribed in Section 859b of the Penal Code. (See Declaration attached to this Petition and made a part of it by this reference.)

V.

Respondent's action is unreasonable, arbitrary, and a abuse of discretion in that Petitioner is entitled to have his preliminary hearing within 10 court days from the date of Respondent's arraignment, which took place _ _[*arraignment date*]_ _.

VI.

Under the provisions of Section 871.6 of the Penal Code, Petitioner is entitled to immediate appellate review of the magistrate's ruling by way of mandate or prohibition in the Superior Court.

VII.

There is no available remedy to the Petitioner other than extraordinary relief from this court.

VIII.

Petitioner will sustain irreparable damage if the requested relief is not granted.

Furthermore, Petitioner is entitled to writ review by statute.

WHEREFORE, Petitioner prays:

1. That an Alternative Writ of Mandate issue commanding Respondent to set aside its Order of Continuance of the preliminary hearing in the above-entitled case.

2. That other and further relief be granted that the Court deems proper.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of client*]_ _

VERIFICATION

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

MEMORANDUM IN SUPPORT OF PETITION FOR ALTERNATIVE WRIT OF MANDATE

1. PENAL CODE SECTION 871.6 PROVIDES FOR EXTRAORDINARY RELIEF IN THE EVENT OF A CONTINUANCE OF A PRELIMINARY HEARING IN VIOLATION OF PENAL CODE SECTION 859b OR WITHOUT GOOD CAUSE AS PROVIDED IN PENAL CODE SECTION 1050.

Penal Code section 871.6 reads as follows:

> **If in a felony case the magistrate sets the preliminary examination beyond the time specified in Section 859b, in violation of Section 859b, or continues the preliminary hearing without good cause and good cause is required by law for such a continuance, the people or the defendant may file a petition for writ of mandate or**

prohibition in the superior court seeking immediate appellate review of the ruling setting the hearing or granting the continuance. Such a petition shall have precedence over all other cases in the court to which the petition is assigned. If the superior court grants a peremptory writ, it shall issue the writ and a remittitur three court days after its decision becomes final as to the court if this action is necessary to prevent mootness or to prevent frustration of the relief granted, notwithstanding the rights of the parties to seek review in a court of appeal. When the superior court issues the writ and remittitur as provided in this section, the writ shall command the magistrate to proceed with the preliminary hearing without further delay, other than that reasonably necessary for the parties to obtain the attendance of their witnesses.

The court of appeal may stay or recall the issuance of the writ and remittitur. The failure of the court of appeal to stay or recall the issuance of the writ and remittitur shall not deprive the parties of any right they would otherwise have to appellate review or extraordinary relief.

2. GOOD CAUSE FOR DELAY UNDER PENAL CODE SECTION 859b DIFFERS FROM GOOD CAUSE FOR DELAY UNDER PENAL CODE SECTION 1050.

Penal Code section 859b reads as follows:

… If the preliminary hearing is set or continued beyond the 10-court-day period, the defendant shall be released under Section 1318 unless: [¶] (1) The defendant requests the setting of continuance of the preliminary examination beyond the 10-court-day period. [¶] (2) The defendant is charged with a capital offense in a cause where the proof is evident and the presumption great. [¶] (3) A witness necessary for the preliminary examination is unavailable due to the actions of the defendant. [¶] (4) The illness of counsel. [¶] (5) The unexpected engagement of counsel in a jury trial. [¶] (6) Unforeseen conflicts of interest which require appointment of new counsel.

It is clear that good cause for the purposes of continuing a preliminary hearing beyond 10 days from the date of arraignment can be only statutory good cause.

CONCLUSION

For the above-stated reasons, Petitioner respectfully requests that the Writ issue.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of client*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION

I declare that:

[*Describe what happened at the hearing: what the prosecutor asserted as good cause, and what the magistrate ruled.*]

I, the undersigned, declare that the above is true of my own knowledge, except for the matters that are stated in it on information and belief, and regarding those matters I believe it to be true.

Executed on _____, at _____, California.

I declare under penalty of perjury that the above is true and correct.

Date: _ _ _ _ _ _ __[*Attorney's Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*Petitioner*]_ _

Comment: Both the prosecution and defense have the right to seek a writ of mandate or prohibition from the superior court to challenge a trial court order granting a continuance of a preliminary hearing. Pen C §871.6. The purpose of the writ is to require the preliminary hearing to proceed expeditiously, not to obtain a dismissal. This type of writ petition has precedence over all other cases pending in the superior court. If the writ is granted, the superior court

must issue the remittitur within three court days after its decision becomes final. The losing party can then seek relief from the court of appeal. Pen C §871.6.

Cross-Reference: For discussion of this type of writ of mandate, see Crim Law §§19.38-19.40, 20.35.

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43

Misdemeanor Appeals

A. Appellant's Opening Brief §43.1
B. Respondent's Brief §43.2
C. Appellant's Reply Brief §43.3
D. Petition for Rehearing and Application for Certification §43.4

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Source: Criminal Law/California Criminal Law Forms Manual/43 Misdemeanor Appeals/§43.1 A. Appellant's Opening Brief

§43.1 A. Appellant's Opening Brief

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Attorney for* _ _[*name of appellant*]_ _]_ _

APPELLATE DIVISION OF THE SUPERIOR COURT OF CALIFORNIA COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No.** _ _[*Superior Court Appellate Div. case number*]_ _
Plaintiff and Respondent,	)	
vs	)	**(Superior Court No.** _ _[*case number*]_ _**)**
Defendant and Appellant.	)	**APPELLANT'S OPENING BRIEF**

TO THE HONORABLE _ _[*NAME OF JUDGE*]_ _**, PRESIDING JUDGE, AND TO THE OTHER HONORABLE JUDGES OF THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT:**

STATEMENT OF THE CASE

_ _[*Give a brief procedural history of the case*]_ _**.**

STATEMENT OF FACTS

_ _[*Summarize the relevant facts of the case. You must include citations to the parts of the record that support each assertion of fact. Cal Rules of Ct 8.883(a)(1)(B)*]_ _**.**

CONTENTION(S) ON APPEAL

_ _[*Briefly state error being appealed*]_ _**.**

ARGUMENT

_ _[*Set out arguments in capital letters either indented or centered, as is done in pretrial memorandums (see examples elsewhere in this Forms Manual). Citations should be styled in a form favored by either* ***California Style Manual*** *or* ***The Bluebook: A Uniform System of Citation****.* ***Cal Rules of Ct 1.200***]_ _**.**

CONCLUSION

_ _[*State what relief you want and either summarize why, or say "for the above reasons"*]_ _**.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for Appellant

Comment: The brief is basically a memorandum. Superior court appellate division briefs must be bound on the left margin, unless a local rule advises differently. Cal Rules of Ct 8.838(c)(1). The brief must generally comply with format rules of Cal Rules of Ct 8.144(a). Cal Rules of Ct 8.838(a). The brief should summarize each major point under a separate heading or subheading, citing to authority or referencing where the matter appears in the record. Cal Rules of Ct 8.883(a)(1). An appellant's opening brief must detail the nature of the action, the relief sought at trial, and the order or judgment from which the appeal is taken. The appellant must assert the finality of the judgment to be appealed or establish why the order is appealable and summarize significant facts, but only those supported by the record. Cal Rules of Ct 8.883(a)(2).

Quotations or extracts from the record or from any legal authority are no longer limited, but they must be single-spaced and block-indented. No brief may exceed 6800 words, including footnotes, which must be certified by counsel. Counsel may depend on a computerized word count, and the certificate does not add to the word count. Cal Rules of Ct 8.883(b)(1), (3). If the brief is typewritten, it must not exceed 20 pages. Cal Rules of Ct 8.883(b)(2). Counsel may apply for a word or length extension, which the presiding judge may grant on good cause shown, such as a long record or complex or numerous issues that must be briefed. Cal Rules of Ct 8.883(b)(4). If the application is granted, the presiding judge may require tables of contents and of authorities. Cal Rules of Ct 8.883(b)(4).

The brief should be bound on the left margin, unless a local rule requires differently. If bound on the left, the brief may be double-sided. Cal Rules of Ct 8.883(c)(8). Lines of text must be at least one-and-one-half spaced; footnotes must be single-spaced. The pages of the brief must be consecutively numbered. The brief need not be signed. Cal Rules of Ct 8.883(c)(5), (7), (9).

The time limits for filing briefs for misdemeanor appeals differ from those in felony appeals only for appellant's opening brief. In misdemeanor appeals, the appellant's opening brief is due within 30 calendar days after the filing of the record on appeal. The respondent's brief is due 30 calendar days after the filing of the appellant's opening brief. The appellant may file a reply brief within 20 days after the filing of the respondent's brief. Cal Rules of Court 8.882(a).

If the appellant fails to file a timely brief, the clerk will notify the appellant that an opening brief must be filed within 30 days after the notice is mailed or sanctions may be imposed. Available sanctions are replacement of appointed counsel or dismissal of the appeal if the appellant is represented by retained counsel or in pro per. Cal Rules of Ct 8.882(c)(2).

The original, with proof of service, must be filed with the appellate division. Cal Rules of Ct 8.25(a), 8.882(e). A copy must be served on each party (Cal Rules of Ct 8.25(a)), and a copy must be served on the trial court clerk for delivery to the judge who presided at the trial of the case. Cal Rules of Ct 8.882(e). A copy must be served on a public officer or agency when required by statute or rule. Cal Rules of Ct 8.29, 8.882(e).

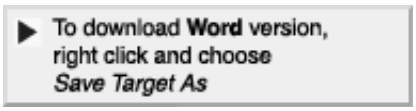
For a discussion of the duties of trial counsel with regard to the notice of appeal and request for appointment of counsel, see §§41.2-41.3.

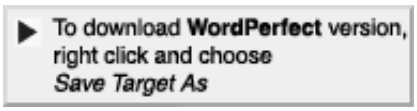
Cross-Reference: For discussion of appellant's opening brief, see California Criminal Law Procedure and Practice §§43.24-43.28 (Cal CEB Annual). For a general discussion of briefs to the appellate division of superior court, see Appeals and Writs in Criminal Cases §§3.43-3.44 (3d ed Cal CEB 2007).

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Source: Criminal Law/California Criminal Law Forms Manual/43 Misdemeanor Appeals/§43.2 B. Respondent's Brief

§43.2 B. Respondent's Brief





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Attorney for* _ _[*name of respondent*]_ _]_ _

APPELLATE DIVISION OF THE SUPERIOR COURT OF CALIFORNIA COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	**No.** _ _[*Superior Court Appellate Dep't case number*]_ _
vs	)	**(Superior Court No.** _ _[*case number*]_ _**)**
Defendant and Appellant.	)	**RESPONDENT'S BRIEF**

TO THE HONORABLE _ _[*NAME OF JUDGE*]_ _**, PRESIDING JUDGE, AND TO THE OTHER JUDGES OF THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT:**

STATEMENT OF THE CASE AND OF FACTS

_ _[*Either give a summary of the procedural posture of the case and summarize the relevant facts, adopt the statement of the case and statement of the facts as submitted by appellant, or adopt the appellant's statements with additions and corrections. Support your statements with reference to line and page. See Cal Rules of Ct 8.883(a)(1)*]_ _**.**

ISSUE(S) ON APPEAL

_ _[*Summarize the issue(s) on appeal in a few sentences. See Cal Rules of Ct 8.883(a)(1)*]_ _**.**

ARGUMENT

_ _[*Each point to be made, with the argument in support thereof, must be presented separately under an appropriate heading with subheadings if desired, showing its nature. Cal Rules of Ct 8.883(a)(1)(A). Citations should be styled in a form favored by either California Style Manual or The Bluebook: A Uniform System of Citation. Cal Rules of Ct 1.200*]_ _**.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for Respondent

Comment: The rules for superior court appellate department briefs are summarized in the Comment to §43.1. The respondent's brief must be filed within 30 calendar days after the filing of the appellant's opening brief. Cal Rules of Ct 8.882(a)(2). If the respondent is the defendant and fails to file a timely brief, the clerk will notify the respondent that a brief must be filed within 30 days after the notice is mailed or, if a brief is not timely filed, the court will decide the appeal on the record, the appellant's opening brief, and the appellant's oral argument, if any. Cal Rules of Ct

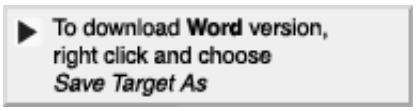
8.882(c)(3).

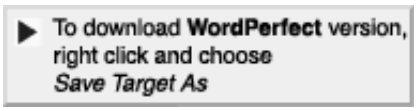
Cross-Reference: For discussion of respondent's brief, see California Criminal Law Procedure and Practice §§43.24-43.27, 43.29 (Cal CEB Annual). For a general discussion of briefs to the appellate division of superior court, see Appeals and Writs in Criminal Cases §§3.43-3.44 (3d ed Cal CEB 2007).

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Source: Criminal Law/California Criminal Law Forms Manual/43 Misdemeanor Appeals/§43.3 C. Appellant's Reply Brief

§43.3 C. Appellant's Reply Brief





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
Attorney for _ _[*name of appellant*]_ _

APPELLATE DIVISION OF THE SUPERIOR COURT OF CALIFORNIA COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**)**	**No.** _ _[*Superior Court Appellate Dep't case number*]_ _
Plaintiff and Respondent,	**)**	
vs	**)**	**(Superior Court No.** _ _[*case number*]_ _**)**
_____	**)**	**APPELLANT'S REPLY BRIEF**
Defendant and Appellant.	**)**	
_____	**)**	

TO THE HONORABLE _ _[*NAME OF JUDGE*]_ _**, PRESIDING JUDGE, AND TO THE OTHER HONORABLE JUDGES OF THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT:**

_ _[*Check local practice for contents and headings of the reply brief. It is commonly done as a standard opposition memorandum beginning with headings, followed by argument. When appropriate, you may want to begin the reply brief with language such as: "Appellant believes that the contentions of respondent People have been adequately answered in her opening brief. However, one issue raised by the People deserves further comment." Then argue the issue on which you wish to comment.*]_ _

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court _ _[*state relief desired*]_ _**.**

Date: _ _ _ _ _ _

Respectfully submitted,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for Appellant

Comment: The rules for superior court appellate department briefs are summarized in the Comment to §43.1. The appellant may file a reply brief within 20 calendar days after the filing of the respondent's brief. Cal Rules of Ct 8.882(a)(3).

Cross-Reference: For discussion of appellant's reply brief, see California Criminal Law Procedure and Practice §43.30 (Cal CEB Annual). For a general discussion of briefs to the appellate division of superior court, see Appeals and Writs in Criminal Cases §§3.43-3.44 (3d ed Cal CEB 2007).

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Source: Criminal Law/California Criminal Law Forms Manual/43 Misdemeanor Appeals/§43.4 D. Petition for Rehearing and Application for Certification

§43.4 D. Petition for Rehearing and Application for Certification

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Attorney for* _ _[*name of appellant/respondent*]_ _]_ _

APPELLATE DIVISION OF THE SUPERIOR COURT OF CALIFORNIA COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No.** _ _[*Superior Court Appellate Dep't case number*]_ _
Plaintiff and [*Respondent/Appellant*]	)	
vs	)	**(Superior Court No.** _ _[*case number*]_ _**)**
_____	)	
Defendant and [*Appellant/Respondent*]	)	**PETITION FOR REHEARING; APPLICATION FOR CERTIFICATION**
_____	)	

TO THE HONORABLE _ _[*NAME OF JUDGE*]_ _**, PRESIDING JUDGE, AND TO THE OTHER HONORABLE JUDGES OF THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT:**

Under the California Rules of Court, _ _[*appellant/respondent*]_ _**,** _ _[*name*]_ _**, petitions this Court for a rehearing of this case. Alternatively,** _ _[*appellant/respondent*]_ _ **requests that this matter be certified for transfer to the Court of Appeal under California Rules of Court 8.1002 and 8.1005(a).**

_ _[*Use the same format of headings followed by argument as in the briefs. See §43.1.*]_ _

For the above reason(s), as well as the reasons advanced in _ _[*appellant's opening brief/respondent's brief*]_ _**, the judgment rendered** _ _[*against/in favor of*]_ _ **the appellant should be vacated by this court** _ _[*give any further orders you think should be made, such as return to the trial court for a resolution of particular issues*]_ _**.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
Attorney for _ _[*appellant/respondent*]_ _

Comment: A rehearing may not be sought on grounds not presented in the original briefs or at argument unless based on subsequent developments that could not have been brought to the court's attention. *People v Payne* (1977) 75 CA3d 601, 605, 142 CR 320.

The appellate division may order a rehearing on petition or on its own motion. Cal Rules of Ct 8.889(a)(1). The court may file an order for rehearing any time before the decision becomes final. If the clerk's office is closed on the day of finality, the order may be filed on the next court day. Cal Rules of Ct 8.889(a)(2). A petition for rehearing, accompanied by proof of service on all adverse parties, must be filed within 15 calendar days after judgment is filed, after a publication order restarts the finality period, or after a modification order changes the judgment. Cal Rules of Court 8.889(b)(1). The contents and format of the petition for rehearing are governed by Cal Rules of Ct 8.883. Cal Rules of Ct 8.889(b)(3). No answer may be filed unless requested by the court. If requested, the answer must be filed within 8

days of the filing of the order, unless the court orders otherwise. Cal Rules of Ct 8.889(b)(2). An order granting a rehearing vacates the decision. Cal Rules of Ct 8.889(d).

Application for certification of case for transfer to court of appeal. Due to time limits, a petition for rehearing may also include an application for certification of the case for transfer to the court of appeal. See Cal Rules of Ct 8.1005(b). The application for certification is due after the record on appeal is filed in the appellate division but before the judgment on appeal becomes final as to that court. Cal Rules of Ct 8.1005(d). The certification must contain a brief statement setting forth any conflict in court decisions, with citation of or reference to decisions creating the conflict, or an important question of law to be settled; it must also state whether there was a judgment on appeal and, if so, its date and disposition. Cal Rules of Ct 8.1005(e). Any other party may serve and file an opposition within 5 calendar days after the filing of the application. Cal Rules of Ct 8.1005(b). No hearing is held on the application. See Cal Rules of Ct 8.1005(b)(4).

Cross-Reference: For further discussion of the petition for rehearing and the application for certification, see California Criminal Law Procedure and Practice §§43.34-43.35 (Cal CEB Annual).

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44

Felony Appeals

A. Motion to Compel Trial Counsel to Provide Client File §44.1
B. Voluntary Dismissal of Appeal §44.2
C. Application for Extension of Time to File Brief; Order §44.3
D. Appellant's Opening Brief §44.4
E. Appellant's Reply Brief §44.5
F. Respondent's Brief in Prosecution Appeal §44.6
G. Petition for Rehearing §44.7

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Source: Criminal Law/California Criminal Law Forms Manual/44 Felony Appeals/§44.1 A. Motion to Compel Trial Counsel to Provide Client File

§44.1 A. Motion to Compel Trial Counsel to Provide Client File

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City/State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for* _ _[*name of appellant*]_ _]_ _

COURT OF APPEAL OF THE STATE OF CALIFORNIA _ _ _ _ _ _ APPELLATE DISTRICT _ _[*DIVISION* _ _ _ _ _ _]_ _

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No.** _ _[*Superior Court Appellate Dep't case number*]_ _
Plaintiff and Respondent,	)	
vs	)	**(**_ _[*Superior*]_ _ **Court** _ _[*number*]_ _**)**
_____	)	
Defendant and Appellant.	)	**APPLICATION FOR ORDER DIRECTING TRIAL COUNSEL TO FURNISH TRIAL FILES TO APPELLANT'S COUNSEL ON APPEAL**
_____	)	

TO THE HONORABLE PRESIDING JUSTICE, _ _[*NAME*]_ _, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA:

Appellant, _ _[*name*]_ _, through _ _[*his/her*]_ _ counsel on appeal, applies for an order directing _ _[*name of trial counsel*]_ _, _ _[*attorney at law/deputy public defender*]_ _, to provide appellant's counsel on appeal, _ _[*name*]_ _, with client papers and property, including but not limited to government agency documents, correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to represent the appellant, which are in trial counsel's actual or constructive possession.

This application is based on the accompanying declaration and the attached supporting memorandum.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Signature of attorney*]_ _
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

MEMORANDUM IN SUPPORT OF APPLICATION FOR ORDER DIRECTING APPELLANT'S TRIAL COUNSEL TO FURNISH TRIAL FILES TO APPELLANT'S COUNSEL ON APPEAL

California Rules of Professional Conduct 3-700(D) provides that:

> **A member whose employment has terminated shall:**
>
> **(1) Subject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not.…**

The foregoing rule codified existing case law that the work product of an attorney who is no longer representing the client belongs to the client. (*Finch v State Bar* (1981) 28 C3d 659, 665, 170 CR 629; *Kallen v Delug* (1984) 157 CA3d 940, 950, 203 CR 879; *Academy of Cal. Optometrists v Superior Court* (1975) 51 CA3d 999, 1005, 124 CR 668; *Weiss v Marcus* (1975) 51 CA3d 590, 599, 124 CR 297.) An attorney who refuses to deliver files to substituted counsel is subject to discipline (*Finch v State Bar, supra*) or a court order directing him or her to deliver the files (*Academy of Cal. Optometrists v Superior Court, supra*). (See also Business and Professions Code section 6068(n), which provides that it is the duty of an attorney to provide copies to a client under time limits and as prescribed by rules of professional conduct.)

This Court should order _ _[*name of trial counsel*]_ _ to provide appellant's counsel on appeal all client papers and property, including but not limited to government agency-generated documents such as investigation reports, correspondence, pleadings, preliminary hearing transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, which are in trial counsel's actual or constructive possession.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Signature of attorney*]_ _
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first-page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

DECLARATION OF _ _[*NAME OF APPELLATE COUNSEL*]_ _ IN SUPPORT OF MOTION FOR TRIAL COUNSEL'S FILES

I, _ _[*name*]_ _, declare:

I represent appellant on appeal. _ _[*Name of trial counsel*]_ _ represented appellant at trial in this action.

_ _[*Describe the items sought and how they meet the definition of client papers in Cal Rules of Prof Cond 3-700(D)(1). State efforts made to obtain these papers before filing the application*]_ _**.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ _ _[*Signature of declarant*]_ _
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

Comment: A criminal defense attorney who has been relieved by successor counsel must provide successor counsel with written materials generated during representation; pleadings, reports, and correspondence; and other information not reduced to writing, if failure to provide them might prejudice the client. State Bar Formal Opinion No. 1992-127.

NOTE: At the time of publication, the State Bar's Special Commission for the Revision of the Rules of Professional Conduct had proposed new or amended rules, including proposed Cal Rules of Prof Cond 1.16, which amends Cal Rules of Prof Cond 3-700. Under proposed Rule 1.16(e)(1), the obligation of counsel with respect to client papers and property is explicitly made subject to any statutory limitation.

Counsel should check with the local court of appeal clerk regarding number of copies and service requirements.

Practice varies depending on whether it is considered an application (see Cal Rules of Ct 8.50) or a motion (see Cal Rules of Ct 8.54). An original and one copy of an application must be filed, while an original and three copies of a motion must be filed. Cal Rules of Ct 8.44(b)(4), (6). It is recommended that the Attorney General and the appellant be served in either event.

The first page of a motion filed in the reviewing court should begin with a caption, as illustrated here. No cover is needed. The captions should follow the format prescribed by Cal Rules of Ct 2.111. Line numbering is not required in the court of appeal. Motions in the reviewing court are governed by Cal Rules of Ct 8.54. A copy must be served on the attorney of record for each party, unless excused for good cause. Cal Rules of Ct 8.50(a). An original and three copies should be filed in the reviewing court. Cal Rules of Ct 8.44(b)(4).

Cross-Reference: For discussion of communicating with trial counsel, see Crim Law §44.17, Appeals and Writs in Criminal Cases §4.4 (3d ed Cal CEB 2007); on appeals generally, see Appeals & Writs, chaps 1-6; Crim Law, chap 44 (felony appeals).

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Source: Criminal Law/California Criminal Law Forms Manual/44 Felony Appeals/§44.2 B. Voluntary Dismissal of Appeal

§44.2 B. Voluntary Dismissal of Appeal

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for* _ _[*name of appellant*]_ _]_ _

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT
_ _[*DIVISION* _ _ _ _ _ _]_ _

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No.** _ _[*Superior Court Appellate Dep't case number*]_ _
Plaintiff and Respondent,	)	
vs	)	**(**_ _[*Superior*]_ _ **Court** _ _[*number*]_ _**)**
_____	)	
Defendant and Appellant.	)	**ABANDONMENT OF APPEAL**
_____	)	

ABANDONMENT OF APPEAL

TO THE HONORABLE PRESIDING JUSTICE, _ _[*NAME*]_ _, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA:

I, _ _[*name of appellant*]_ _, hereby abandon my appeal and move the court to dismiss my appeal.

Date: _ _ _ _ _ _ _ _[*Signature of appellant*]_ _
_ _[*Typed name*]_ _

I am counsel for appellant on appeal. Appellant's request is with my consent. _ _[*In Fifth District cases, the court requires additional language: "Absence of arguable issues is not a substantial basis for this request."*]_ _

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Signature of attorney*]_ _
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of appellant*]_ _

Comment: A voluntary abandonment of appeal may be signed either by appellate counsel or by appellant. Cal Rules of Ct 8.316(a). It is recommended, however, that counsel always have both signatures. If the record has not yet been filed in the reviewing court, the abandonment is filed with the clerk of the superior court. If the record has been filed in the reviewing court, the abandonment is filed in that court. Cal Rules of Ct 8.316(b). The clerk of the court in which the appellant files the abandonment must immediately notify the adverse party of the filing or of the order of dismissal. If the defendant abandons the appeal, the clerk must notify both the district attorney and the Attorney General. If the

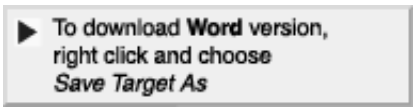
appellant files the abandonment in the superior court, the clerk must immediately notify the reviewing court. Cal Rules of Ct 8.316(c).

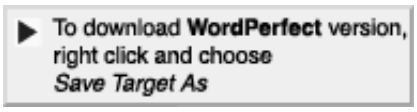
Cross-Reference: For discussion of voluntary abandonment of appeal, see California Criminal Law Procedure and Practice §44.55 (Cal CEB Annual), Appeals and Writs in Criminal Cases §5.20 (3d ed Cal CEB 2007); on felony appeals generally, see Crim Law, chap 44; Appeals & Writs, chaps 1-6.

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Source: Criminal Law/California Criminal Law Forms Manual/44 Felony Appeals/§44.3 C. Application for Extension of Time to File Brief; Order

§44.3 C. Application for Extension of Time to File Brief; Order





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for* _ _[*name of appellant/respondent*]_ _]_ _

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT
_ _[*DIVISION _ _ _ _ _ _*]_ _

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No.** _ _[*Court of Appeal number*]_ _
Plaintiff and _ _[*Respondent/Appellant*]_ _,	)	**(**_ _[*Superior*]_ _ **Court** _ _[*number*]_ _**)**
vs	)	
_____	)	**APPLICATION FOR EXTENSION OF TIME TO FILE BRIEF; ORDER**
Defendant and _ _[*Appellant/Respondent*]_ _.	)	
_____	)	

_ _[*Name*]_ _ **declares:**

1. I am an attorney at law duly admitted to practice my profession before all California courts, and I am the attorney of record for _ _[*appellant/respondent*]_ _**.**

2. _ _[*Appellant's/Respondent's*]_ _ _ _[*e.g., opening brief*]_ _ **in this court is currently due on** _ _[*date*]_ _**. There** _ _[*has/have*]_ _ **been** _ _[*no/one/two*]_ _ **prior extension(s) of time to file** _ _[*e.g., appellant's opening brief*]_ _ **by** _ _[*stipulation/order of the court*]_ _**.**

3. I have proceeded with due diligence in preparing _ _[*e.g., appellant's opening brief*]_ _**. However, I have not been able to file the brief, because** _ _[*e.g., of illness (give details)/complexity of issues (give details)/length of record (give details)/other time-limited matters (give details)*]_ _**.**

4. This application is made in good faith for the reasons stated here and not for the purpose of delay.

5. _ _[*Appellant/Respondent*]_ _ **respectfully requests that the time for filing and serving** _ _[*e.g., the opening brief*]_ _ **be extended to and including** _ _[*date*]_ _**.**

I declare under penalty of perjury and under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _**, at** _ _[*city*]_ _**, California.**

Respectfully submitted,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public office*]_ _
Attorney for _ _[*name of appellant/respondent*]_ _

ORDER

Based on the application of _ _[*appellant/respondent*]_ _ and good cause appearing,

IT IS ORDERED that _ _[*appellant/respondent*]_ _ have an extension of time to and including _ _[*date*]_ _, within which to file _ _[*e.g., an opening brief*]_ _.

Date: _ _ _ _ _ _ __[*Signature of Justice*]__
_ _[*Typed name*]_ _
Presiding Justice

Comment: In the court of appeal, an original and one copy of an application to extend time must be filed and, in addition, one copy for each separately represented or unrepresented party must be provided to the court. Cal Rules of Ct 8.44(b)(7). A copy must be served on the attorney of record for each party, unless excused for good cause. Cal Rules of Ct 8.50(a). The application must be accompanied by addressed, postage-prepaid envelopes for the clerk's use in mailing copies of the order on the application to all parties. Cal Rules of Ct 8.50(c).

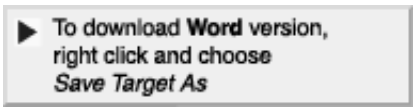
Some courts have additional or more specific requirements for applications for extensions of time to file briefs. See, *e.g.,* 1st App Dist Local R 11 (no party stipulation to extend time in criminal or juvenile matters).

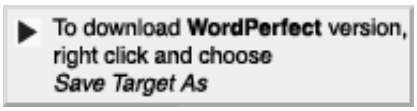
Cross-Reference: For further discussion of an application to extend time for filing the opening brief, see California Criminal Law Procedure and Practice §44.31 (Cal CEB Annual) and Appeals and Writs in Criminal Cases §§3.25 (discussion), 3.51 (form) (3d ed Cal CEB 2007).

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Source: Criminal Law/California Criminal Law Forms Manual/44 Felony Appeals/§44.4 D. Appellant's Opening Brief

§44.4 D. Appellant's Opening Brief





[*Cover format, which must be green. Cal Rules of Ct 8.40(b).*]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT
_ _[*DIVISION _ _ _ _ _ _*]_ _

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No.** _ _[*Superior Court Appellate Dep't case number*]_ _
Plaintiff and Respondent,	)	
	)	**(**_ _[*Superior*]_ _ **Court**
vs	)	_ __[*number*]_ _**)**
_____	)	
Defendant and Appellant.	)	**APPELLANT'S OPENING BRIEF**
_____	)	

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the
Superior Court of the State of California for the
County of _ _ _ _ _ _
Honorable _ _[*name of trial judge*]_ _, **Judge**

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for* _ _[*name of appellant*]_ _]_ _

[*Begin the following on a new page.*]

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STATEMENT OF THE CASE..... #

STATEMENT OF APPEALABILITY..... #

STATEMENT OF FACTS..... #

_ _[*Prosecution Case*]_ _

_ _[*Defense Case*]_ _

ARGUMENT..... #

_ _[*List argument headings, with pages.*]_ _

CONCLUSION..... #

[*Begin the following on a new page.*]

TABLE OF AUTHORITIES CITED

[*Cases: List cases in alphabetical order by name, giving citation for each under name; with page number(s) on which citations are found to the right of the citation.*]

[*Statutes: List in order with page number(s) on which citation is found.*]

[*Constitutional provisions: List in order with page number(s) on which citation is found.*]

[*Court rules: List in order with page number(s) on which citation is found.*]

[*Other Authorities: List in order with page number(s) on which citation is found.*]

[*Begin the following on a new page.*]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT
_ _[*DIVISION _ _ _ _ _ _*]_ _

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No.** _ _[*Superior Court Appellate Dep't case number*]_ _
Plaintiff and Respondent,	)	
	)	**(**_ _[*Superior*]_ _ **Court**
vs	)	_ __[*number*]_ _**)**
_____	)	
Defendant and Appellant.	)	**APPELLANT'S OPENING BRIEF**
	)	
_____	)	

TO THE HONORABLE PRESIDING JUSTICE, _ _[*NAME*]_ _, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA:

STATEMENT OF THE CASE

_ _[*Concisely describe the procedural history of the case, including the charges and any amendments, the pleas, motions, and court rulings relevant to the issues raised on appeal, a brief summary of the course of the trial, the verdict, and the sentence. Cal Rules of Court 8.204(a)(2). Specify date that notice of appeal was filed; indicate that it was timely filed or give details of relief from failure to timely file it. The statement of the case is basically a chronological outline and should contain page references to the clerk's transcript. See Cal Rules of Court 8.204(a); California Criminal Law Procedure and Practice §44.33 (Cal CEB Annual); Appeals and Writs in Criminal Cases §3.31 (3d ed Cal CEB 2007)*]_ _**.**

STATEMENT OF APPEALABILITY

_ _[*This is an appeal from a final judgment that finally disposes of all issues between the parties./The order or other nonfinal judgment is appealable because _ _[state why the order or nonfinal judgment is appealable*]_ _*. See Cal Rules of Ct 8.204(a)*]_ _**.**

STATEMENT OF FACTS

_ _[*The statement of facts should refer only to those matters that are in the record on appeal. Cal Rules of Ct 8.204(a)(2)(C). All factual assertions should be supported by appropriate citations to pages of the reporter's transcript. Cal Rules of Ct 8.204(a). The facts may be subdivided into sections for "Prosecution Case," "Defense Case," "Prosecution Rebuttal," and "Defense Surrebuttal." The facts should be stated in narrative form, rather than simply a witness-by-witness summary of testimony. See Crim Law §§44.33-44.34 and Appeals & Writs §§3.33, 4.41*]_ _**.**

ARGUMENT

_ _[*Number each legal argument separately (most practitioners use outline format, beginning with roman numerals for major arguments). Each point should be supported by argument and citation to authority. Cal Rules of Court 8.204(a). Use citation form favored by either California Style Manual or The Bluebook: A Uniform System of Citation. Cal Rules of Ct 1.200*]_ _.

[*Example*]

I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ADMITTING, OVER OBJECTION, EVIDENCE OF UNCHARGED CRIMES, REQUIRING REVERSAL OF THE JUDGMENT

_ _[*Arguments may be presented in roughly chronological order, placing issues that arise out of pretrial proceedings first and ending with sentencing issues. An alternative approach, which can often be combined with the chronological approach, is to begin with the strongest arguments. A third approach is to cluster related issues together. Often the facts of the case will suggest the best approach*]_ _.

_ _[*Each argument should have a separate heading, with subheadings if desired. The argument typically should start with a brief summary of its factual basis, followed by a general statement of applicable law. Next, emphasize specific facts in conjunction with supporting case law addressing similar facts. Distinguish contrary authority. State why the case must be reversed (or remanded). The opening brief should set forth, for each alleged error, the applicable standard for determining whether the error was prejudicial. Unless the error was clearly prejudicial per se, show by reference to details of the particular case that the error was prejudicial. See Crim Law §§44.35-44.37 and Appeals & Writs §§3.36-3.38, 4.42-4.44*]_ _.

CONCLUSION

_ _[*State the relief requested, in the order presented in the brief. Examples of requests include that the judgment be reversed, or that the judgment be modified to stay imposition of an enhancement for a prior prison term.*]_ _

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Attorney for _ _[name of appellant*]_ _]_ _

Comment: The cover of an appellant's opening brief must be green. Cal Rules of Ct 8.40(b). The original and four copies must be filed with the court of appeal. Cal Rules of Ct 8.44(b)(1). Briefs in reviewing courts should not be on pleading paper. See Cal Rules of Ct 8.40(a). A brief in a noncapital case may not exceed 14,000 words if produced on a computer or 50 pages if typewritten, excluding tables and indexes, unless a longer brief is permitted by the presiding justice for good cause. Cal Rules of Ct 8.204(c).

The opening brief is due within 40 calendar days after the filing of the record in the reviewing court. Cal Rules of Ct 8.212(a)(1).

The record does not have to be filed by appellant; it is filed with the court of appeal by the trial court clerk, and copies sent to appellant's counsel and the Attorney General, as well as the district attorney on request. Cal Rules of Ct 8.336.

Cross-Reference: For further discussion of format requirements, see Crim Law §§44.32-44.34 and Appeals & Writs §§3.26-3.41. For further discussion of briefs in the court of appeal and supreme court, see Appeals & Writs §§3.21-3.42, 4.40-4.44; Crim Law §§44.31-44.45.

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§44.5 E. Appellant's Reply Brief

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[*Cover format, which must be tan. Cal Rules of Ct 8.40(b)(1).*]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT
_ _[*DIVISION _ _ _ _ _ _*]**_ _**

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No. _ _**[*Superior Court Appellate Dep't case number*]**_ _**
Plaintiff and Respondent,	)	
	)	**(_ _**[*Superior*]**_ _ Court**
vs	)	**_ __**[*number*]**_ _)**
_____	)	
Defendant and Appellant.	)	**APPELLANT'S REPLY BRIEF**
	)	
_____	)	

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the
Superior Court of the State of California
County of _ _ _ _ _ _
Honorable _ _[*name of trial judge*]**_ _, Judge**

_ _[*Name of attorney; State Bar number*]**_ _**
_ _[*Address*]**_ _**
_ _[*City, State*]**_ _**
_ _[*Telephone number*]**_ _**
_ _[*Fax number (optional)*]**_ _**
_ _[*E-mail address (optional)*]**_ _**
_ _[*Attorney for _ _*[*name of appellant*]**_ _**]**_ _**

[*Begin the following on a new page.*]

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TABLE OF AUTHORITIES CITED..... ii

ARGUMENT..... #

_ _[*List argument headings, with pages.*]**_ _**

CONCLUSION..... #

[*Begin the following on a new page.*]

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[*Begin the following on a new page.*]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT
_ _[*DIVISION _ _ _ _ _ _*]_ _

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No.** _ _[*Superior Court Appellate Dep't case number*]_ _
Plaintiff and Respondent,	)	
	)	**(**_ _[*Superior*]_ _ **Court**
vs.	)	_ _[*number*]_ _**)**
_____	)	
Defendant and Appellant.	)	**APPELLANT'S REPLY BRIEF**
	)	
_____	)	

TO THE HONORABLE PRESIDING JUSTICE, _ _[*NAME*]_ _, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA:

[*When there is no need to reply to each point raised in the respondent's brief, an introduction can be provided to that effect, as in the following example.*]

INTRODUCTION

In this reply brief, no attempt is made to set forth a response to each of respondent's contentions. Many of respondent's points are fully covered by appellant's opening brief, and the issues thus joined. Only points requiring additional comment will be addressed.

[*Continue*]

ARGUMENT

_ _[*Number each separate legal argument serially with Roman numerals. It is not required that the reply brief retain the same argument headings as in the opening brief, but it is generally advisable to do so to avoid confusion for the reader. The reply brief may address issues raised by the respondent such as a challenge to the factual basis for an argument, an assertion of a procedural bar to a claim of error, an argument that a different standard of review applies, or that prejudice has not been shown. See California Criminal Law Procedure and Practice §44.42 (Cal CEB Annual). Use citation form favored by either California Style Manual or The Bluebook: A Uniform System of Citation. Cal Rules of Ct 1.200*]_ _**.**

[*Begin the following on a new page.*]

CONCLUSION

_ _[*State the relief requested, in the order presented in the brief. Examples of requests include that the judgment be reversed, or that the judgment be modified to stay imposition of an enhancement for a prior prison term*]_ _**.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Signature of attorney*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name of appellant*]_ _

Comment: The cover of an appellant's reply brief must be tan. Cal Rules of Ct 8.40(b)(1). The original and four copies must be filed with the court of appeal. Cal Rules of Ct 8.44(b)(1).

A brief in a noncapital case may not exceed 14,000 words if produced on a computer or 50 pages if typewritten, excluding tables and indexes, unless a longer brief is permitted by the presiding justice for good cause. Cal Rules of Ct 8.204(c).

The reply brief, if any, is to be filed within 20 days after the respondent files its brief. Cal Rules of Ct 8.212(a)(3).

Cross-Reference: For further discussion of format requirements, see Crim Law §§44.32-44.34. For further discussion of appellant's reply brief, see Appeals and Writs in Criminal Cases §3.22 (3d ed Cal CEB 2007); Crim Law §44.42.

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§44.6 F. Respondent's Brief in Prosecution Appeal

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[*Cover format, which must be yellow. Cal Rules of Ct 8.40(b)(1).*]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT
_ _[*DIVISION _ _ _ _ _ _*]**_ _**

PEOPLE OF THE STATE OF CALIFORNIA,	**)**	**No. _ _**[*Superior Court Appellate Dep't case number*]**_ _**
Plaintiff and Respondent,	**)**	
vs	**)**	**(_ _**[*Superior*]**_ _ Court _ __**[*number*]**_ _)**
_____ Defendant and Appellant.	**)**	**RESPONDENT'S BRIEF**
_____	**)**	

RESPONDENT'S BRIEF

Appeal from the Judgment of the
Superior Court of the State of California
County of _ _ _ _ _ _
Honorable _ _[*name of trial judge*]**_ _, Judge**

_ _[*Name of attorney; State Bar number*]**_ _**
_ _[*Address*]**_ _**
_ _[*City, State*]**_ _**
_ _[*Telephone number*]**_ _**
_ _[*Fax number (optional)*]**_ _**
_ _[*E-mail address (optional)*]**_ _**
_ _[*Attorney for _ _*[*name of defendant*]**_ _**]**_ _**

[*Begin the following on a new page.*]

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_ _[*Defense Case*]**_ _**

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_ _[*List argument headings, with pages.*]**_ _**

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[*Begin the following on a new page.*]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT
_ _[*DIVISION _ _ _ _ _ _*]**_ _**

PEOPLE OF THE STATE OF CALIFORNIA,	**)**	**No. _ _**[*Superior Court Appellate Dep't case number*]**_ _**
Plaintiff and Respondent,	**)**	
vs	**)**	**(_ _**[*Superior*]**_ _ Court _ __**[*number*]**_ _)**
_____ Defendant and Appellant.	**)**	**RESPONDENT'S BRIEF**
_____	**)**	

TO THE HONORABLE PRESIDING JUSTICE, _ _[*NAME*]**_ _, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA:**

STATEMENT OF THE CASE

_ _[*Respondent may adopt the appellant's statement in whole or in part, or may present a complete statement of the case. See Cal Rules of Ct 8.204(a). See also California Criminal Law Procedure and Practice §44.41 (Cal CEB Annual).*]**_ _**

[*Begin the following on a new page.*]

STATEMENT OF FACTS

_ _[*Respondent may adopt the appellant's statement in whole or in part, or may present a complete statement of facts. See Cal Rules of Ct 8.204(a). See also Crim Law §44.41*]**_ _.**

ARGUMENT

[*Example*]

I. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION TO SUPPRESS EVIDENCE DUE TO THE TRIAL COURT'S EXPRESS FINDING THAT HE DID NOT CONSENT TO THE SEARCH AND THERE WAS NO OTHER LEGAL JUSTIFICATION FOR A SEARCH OF HIS PERSON

_ _[*Introductory and subhead captions may be used to organize the argument. If respondent is challenging the appellant's assertion of the factual basis for its argument, or if there is a procedural bar to the appellant's claim of error, these points should be stated at the beginning of the argument. Discuss the authority cited in the opening brief, showing any mistaken analysis of case authority or misapplication of authority to the facts of the present case. If applicable, show why the standard of review relied on in the opening brief is incorrect and/or demonstrate why the case*

should not be reversed under whatever standard of review applied. Case authority should be in style favored by either California Style Manual or The Bluebook: A Uniform System of Citation. Cal Rules of Ct 1.200]_ _.

[*Begin the following on a new page.*]

CONCLUSION

[*State the relief requested, e.g.:*]

For the reasons stated herein, respondent requests that the order of the trial court suppressing evidence be affirmed.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Signature of attorney*]_ _
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: The cover of a respondent's brief must be yellow. Cal Rules of Ct 8.40(b)(1). The original and four copies must be filed with the court of appeal. Cal Rules of Ct 8.44(b)(1). A brief in a noncapital case may not exceed 14,000 words if produced on a computer or 50 pages if typewritten, excluding tables and indexes, unless a longer brief is permitted by the presiding justice for good cause. Cal Rules of Ct 8.204(c).

The respondent's brief is to be filed within 30 days after the appellant files its opening brief. Cal Rules of Ct 8.212(a)(2).

Most respondent's briefs are filed by the Attorney General or a district attorney. The format of this form is appropriate regardless of who is the respondent. However, the comments on contents are directed to cases in which the defense is responding to a prosecution appeal.

Cross-Reference: For further discussion of respondents' briefs, see Crim Law §44.41 and Appeals and Writs in Criminal Cases §3.21 (3d ed Cal CEB 2007).

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§44.7 G. Petition for Rehearing

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[*Cover format, which must be orange. Cal Rules of Ct 8.40(b)(1).*]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No.** _ _[*Superior Court Appellate Dep't case number*]_ _
Plaintiff and Respondent,	)	
vs	)	**(**_ _[*Superior*]_ _ **Court**
_____	)	_ __[*number*]_ _**)**
Defendant and Appellant.	)	**PETITION FOR REHEARING**
_____	)	

PETITION FOR REHEARING

Appeal from the Judgment of the
Superior Court of the State of California for the
County of _ _ _ _ _ _
Honorable _ _[*name of trial judge*]_ _**, Judge**

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for* _ _[*name of appellant*]_ _]_ _

[*Begin the following on a new page.*]

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[*Begin the following on a new page.*]

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COURT OF APPEAL OF THE STATE OF CALIFORNIA
_ _ _ _ _ _ APPELLATE DISTRICT
_ _[*DIVISION _ _ _ _ _ _*]_ _

PEOPLE OF THE STATE OF CALIFORNIA,	)	**No. _ _[*Court of Appeal number*]_ _**
Plaintiff and Respondent,	)	**(_ _[*Superior*]_ _ Court**
vs	)	**_ __[*number*]_ _)**
_____	)	**PETITION FOR REHEARING**
Defendant and Appellant.	)	
_____	)	

TO THE HONORABLE PRESIDING JUSTICE, _ _[*NAME*]_ _, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA:

Appellant, _ _[*name*]_ _, hereby petitions this Court for rehearing of its decision filed on _ _[*date*]_ _.

_ _[State reasons for rehearing. In particular, call to the court's attention any material fact omitted from or misstated in the opinion, any legal error (such as a misapprehension of the application of statutory or decisional law relied on), or a new appellate decision published after the filing of its opinion that might alter the result. Discuss why the court's decision is affected by the points raised. See California Criminal Law Procedure and Practice §44.62 (Cal CEB Annual).]_ _

[*Begin the following on a new page.*]

CONCLUSION

For the foregoing reasons, appellant requests that a rehearing be granted.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Signature of attorney*]_ _
_ _[*Typed name*]_ _
Attorney for _ _[*name of defendant*]_ _

Comment: The cover of a petition for rehearing must be orange. Cal Rules of Ct 8.40(b)(1). The original and four copies must be filed with the court of appeal. Cal Rules of Ct 8.44(b)(1).

A petition for rehearing in the court of appeal must be filed within 15 days after the filing of the decision; a publication order restarting the finality period (see Cal Rules of Ct 8.264), if the party has not already filed a petition for rehearing; or a modification order changing the appellate judgment. Cal Rules of Ct 8.268(b)(1). An answer to a petition for rehearing may not be filed unless requested by court order. If requested, any answer must be served and filed within 8 days after the order is filed unless the court orders otherwise. Cal Rules of Ct 8.268(b)(2).

NOTE: A petition for rehearing is a prerequisite to a petition for review based on an argument that the court of appeal omitted or misstated an issue or fact in its opinion. See Cal Rules of Ct 8.300(c)(2).

Cross-Reference: For discussion of petitions for rehearing, see Appeals and Writs in Criminal Cases §§5.39-5.40 (discussion), 5.53 (form) (3d ed Cal CEB 2007); Crim Law §§44.61-44.65.

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Federal Habeas Corpus Review of State Court Convictions

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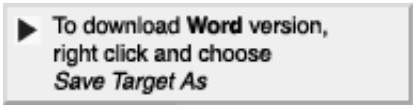
Probation Revocations

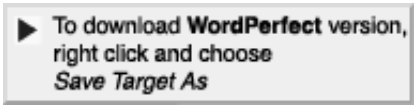
Motion to Revoke Probation §46.1

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Source: Criminal Law/California Criminal Law Forms Manual/46 Probation Revocations/§46.1 Motion to Revoke Probation

§46.1 Motion to Revoke Probation





[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT AND TO THE DEFENDANT:

PLEASE TAKE NOTICE that, on _ _[*date*]_ _, at _ _[*time*]_ _, in Department _ _[*number*]_ _, the Plaintiff will move the Court to:

[*Option 1*]

Revoke the defendant's probation and issue a warrant for the arrest of the defendant forthwith.

[*Option 2*]

Revoke the defendant's probation, remand the defendant, and calendar the matter for further proceedings.

[*Add if appropriate.*]

_ _[*The defendant's probation has previously been revoked.*]_ _

_ _[*This motion is being submitted to allege an additional offense committed in violation of defendant's probation.*]_ _

[*Continue*]

The defendant is _ _[*not in custody/in custody and before the court/in custody but not before the court. A temporary* _ _[*commitment/removal*]_ _ *order is required. Defendant's release date is* _ _[*date*]_ _*, not including possible early release*]_ _**.**

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

DECLARATION

I, _ _[*name*]_ _, declare that:

The defendant, _ _[*name*]_ _, is currently on Superior Court probation.

Subsequent to the defendant's grant of probation, the undersigned was informed by way of the attached police reports, incorporated herein by reference, that the defendant violated _ _[*his/her*]_ _ probation by committing the following crime(s): _ _[*Specify*]_ _.

After a review of the facts contained in those reports, and as a result of the defendant's conduct described therein:

[*Choose the appropriate option(s) from the following.*]

A new case has been filed in the _ _ _ _ _ _ Judicial District, Case No. _ _ _ _ _ _.

The offense was referred to the City Attorney for misdemeanor prosecution because _ _[*specify reasons*]_ _.

A new prosecution was declined because _ _[*specify reasons*]_ _.

The probation revocation request is being filed in lieu of new prosecution in the interests of judicial economy.

[*Continue*]

I respectfully request that, based on the foregoing, the defendant's probation be revoked pending a hearing on defendant's violation(s) of probation.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

Comment: This form assumes that the district attorney is filing the motion for revocation of probation. The probation officer, however, may petition the court for revocation of probation, and the court, on its own motion, may modify, revoke, or terminate probation. Pen C §1203.2(b). Proof of service is required; however, notice to the probationer may be given on the probationer's first court appearance. Pen C §1203.2(b).

Cross-Reference: For further discussion of probation revocations, see Crim Law, chap 46.

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Parole

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48

Mental Competence, Mental Defenses, and Related Issues

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49

Immunity for Testimony

Prosecution Petition to Compel Witness to Testify §49.1

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Source: Criminal Law/California Criminal Law Forms Manual/49 Immunity for Testimony/§49.1 Prosecution Petition to Compel Witness to Testify (Pen C §1324)

§49.1 Prosecution Petition to Compel Witness to Testify (Pen C §1324)

[*The first page of every paper filed in court must begin with a caption, in the format prescribed by Cal Rules of Ct 2.111. See sample first page in §1.12. For discussion of Cal Rules of Ct 2.111, see §§1.4-1.10.*]

TO THE ABOVE-ENTITLED COURT, THE DEFENDANT, AND DEFENSE COUNSEL:

The District Attorney of the County of _ _ _ _ _ _, under Penal Code section 1324, alleges:

That there is now pending in _ _[*name of court*]_ _ a case entitled _ _[*name of case*]_ _ wherein defendant is charged under _ _[*specify code section*]_ _, with the crime of _ _[*specify crime*]_ _;

That _ _[*name of witness sought*]_ _ is a necessary witness for the People and the testimony of this witness is material, competent, and relevant;

That petitioner believes this witness will testify in substance as follows: _ _[*summarize expected evidence*]_ _;

That _ _[*name of witness*]_ _, on being questioned, refuses to answer questions and produce evidence on the ground that _ _[*he/she*]_ _ might be incriminated thereby;

That the use of _ _[*name of witness*]_ _ as a witness is not contrary to the public interest and could not subject _ _[*him/her*]_ _ to criminal prosecution in another jurisdiction;

That there is attached hereto a waiver by _ _[*name of witness*]_ _ of the right to show cause why questions should not be answered or evidence produced.

WHEREFORE, the District Attorney of the County of _ _ _ _ _ _ respectfully requests that, pursuant to the provisions of Penal Code section 1324, an order be issued forthwith by this Honorable Court, requiring _ _[*name of witness*]_ _ to answer such questions and produce such evidence which, but for Penal Code section 1324, _ _[*he/she*]_ _ would be privileged to withhold on the ground that such testimony might be self-incriminating.

Date: _ _ _ _ _ _ **Respectfully submitted,**

_ _[*Name of District Attorney*]_ _
District Attorney

__[*Signature of deputy district attorney*]__
_ _[*Typed name*]_ _
Deputy District Attorney

[*Begin the following on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

WAIVER OF ISSUANCE OF ORDER TO SHOW CAUSE AND HEARING UNDER PENAL CODE §1324

Comes now _ _[*name of witness sought*]_ _, a witness on behalf of the People of the State of California in the above-entitled action, who states as follows:

That the refusal of the undersigned to testify as a witness in the _ _[*type of proceeding and case number*]_ _ is based on the ground of self-incrimination;

That it is fully understood that, in accordance with Penal Code section 1324, the undersigned is entitled to a hearing in the Superior Court with an opportunity to show cause for the Court's consideration in determining whether or not to issue an order compelling the giving of testimony or offering of evidence that may be incriminating; and to have a finding made as to whether in this case it would be clearly contrary to the public

interest or could subject the undersigned to criminal prosecution in another jurisdiction by compelling the giving of testimony containing incriminating matters;

That the undersigned waives the issuance of an order to show cause why the giving of testimony and production of evidence should not be compelled, and to a hearing thereon:

WHEREFORE,

_ _[*Name of witness*]_ _ hereby consents to the issuance of an order by this Court, forthwith, compelling the undersigned to answer such questions and produce such evidence in the case of _ _[*name of case*]_ _ in the _ _[*name of court*]_ _ as may be material, competent, and relevant to the case, and an order by this Court that, on compliance therewith, no testimony or other information compelled under the order, or any information directly or indirectly derived from the testimony or other information, may be used against the undersigned in any criminal case.

Date: _ _ _ _ _ _ _ _[*Signature of witness*]_ _
_ _[*Typed name*]_ _

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

PEOPLE OF THE STATE OF CALIFORNIA,	**Dept. _ _[*number*]_ _**
Plaintiff	**No. _ _[*case number*]_ _**
vs	**[PROPOSED] ORDER REQUIRING WITNESS TO ANSWER**
_ _[*Name*]_ _,	**QUESTIONS UNDER PENAL**
Defendant.	**CODE SECTION 1324**
_____ /	

Petition having been filed by the District Attorney of the County of _ _ _ _ _ _ under Penal Code section 1324, requesting that a necessary witness be required to answer questions and produce evidence in the above-entitled case; said person, as a witness, having duly filed a waiver of the right to a hearing on, and the issuance of, an order to show cause why such an order should not issue; the Court believing that all of the allegations of the petition are true; and the Court finding: that there is no good cause why this order should not be made; that this order is not contrary to the public interest; and, further, that said person, a necessary witness, could not be subjected to a criminal prosecution in another jurisdiction through compliance with this Court's order;

IT IS HEREBY ORDERED that _ _[*name of witness*]_ _ shall answer such questions and produce such evidence by testifying fully, fairly, and in good faith as to _ _[*his/her*]_ _ knowledge of the facts from which the charge arose in the above-entitled case as may be material, competent, and relevant to the case and which otherwise, but for the provisions of Penal Code section 1324, the witness would be privileged to withhold on the ground that answering such questions and producing such evidence might be self-incriminating.

After complying with this order, no testimony or other information compelled under the order, or any other information directly or indirectly derived from the testimony of other information, may be used against the above-named witness in any criminal case.

Date: _ _ _ _ _ _ __[*Signature of Judge*]__
_ _[*Typed name*]_ _
Judge of the Superior Court

Comment: Prosecutors can grant immunity to witnesses in felony cases under Pen C §1324. "Transactional immunity" protects the witness against all later prosecutions relating to matters about which the witness testifies. "Use immunity" protects a witness only against the actual use of the witness's compelled testimony as well as the use of evidence derived therefrom. *People v Kennedy* (2005) 36 C4th 595, 613, 31 CR3d 160. Use immunity provides

sufficient protection to overcome a witness's Fifth Amendment claim of privilege; transactional immunity is not constitutionally required. *People v Cooke* (1993) 16 CA4th 1361, 1366, 20 CR2d 506.

Both a grant of transactional immunity and a grant of use immunity are conditioned on a written request by the prosecutor. *People v Cooke* (1993) 16 CA4th 1361, 1366, 20 CR2d 506. While it has been hypothesized that judicially conferred use immunity may be constitutionally required under some circumstances, that power has not been authoritatively approved by the California Supreme Court. See *People v Stewart* (2004) 33 C4th 425, 468, 15 CR3d 656.

Cross-Reference: For discussion of immunity, including immunity under Pen C §1324, see Crim Law, chap 49.

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Extradition

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Advising Witnesses

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Representing the Noncitizen Criminal Defendant

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53

Effect of a Criminal Conviction on Professional Licenses

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54

Death Penalty Cases

In Chambers Motion for Investigative and Expert Funds Under Pen C §987.9 §54.1

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Source: Criminal Law/California Criminal Law Forms Manual/54 Death Penalty Cases/§54.1 In Chambers Motion for Investigative and Expert Funds Under Pen C §987.9

§54.1 In Chambers Motion for Investigative and Expert Funds Under Pen C §987.9

_ _[*Name of defense attorney*; *State Bar number*]_ _
_ _[*Address*]_ _
_ _[*City, State*]_ _
_ _[*Telephone number*]_ _
_ _[*Fax number (optional)*]_ _
_ _[*E-mail address (optional)*]_ _
_ _[*Attorney for* _ _[*name of defendant*]_ _]_ _

CONFIDENTIAL: CLERK TO SEAL AS PROVIDED IN PENAL CODE SECTION 987.9

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

THE PEOPLE OF THE STATE OF CALIFORNIA,	**Dept.** _ _[*number*]_ _
Plaintiff	**No.** _ _[*case number*]_ _
	IN CHAMBERS MOTION FOR INVESTIGATIVE AND EXPERT FUNDS UNDER PENAL CODE SECTION 987.9 _ _[*If desired, identify other attached papers*]_ _
vs	
_ _[*Name*]_ _,	
Defendant.	_ _[*Add information required by local court rule, e.g., trial date*]_ _
_____ /	

TO THE HONORABLE _ _[*NAME*]_ _, JUDGE OF THE ABOVE-ENTITLED COURT:

PLEASE TAKE NOTICE that defendant, _ _[*name*]_ _, through _ _[*his/her*]_ _ attorney, moves the Court for an order disbursing funds for experts and investigation in the above-entitled case as provided in Penal Code section 987.9.

This motion is based on this notice, the attached supporting memorandum, the declaration of counsel, the pleadings, records, and files of this action, and such oral and documentary evidence as may be presented at the hearing on this motion.

Date: _ _ _ _ _ _

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of defendant*]_ _

[*The supporting memorandum should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; California Criminal Law Procedure and Practice §18.5 (Cal CEB Annual).*]

CONFIDENTIAL: CLERK TO SEAL AS PROVIDED IN PENAL CODE SECTION 987.9

MEMORANDUM IN SUPPORT OF IN CHAMBERS MOTION UNDER PENAL CODE SECTION 987.9

Penal Code section 987.9 states:

> **(a) In the trial of a capital case or a case under subdivision (a) of Section 190.05 the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at**

an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

(b)… At the termination of the proceedings, the attorney shall furnish to the court a complete accounting of all moneys received and disbursed pursuant to this section.

Date: _ _ _ _ _ _ **Respectfully submitted,**

__[*Signature of attorney*]__
_ _[*Typed name*]_ _
_ _[*Title if in public defender office*]_ _
Attorney for _ _[*name of defendant*]_ _

[*Each declaration attached to a motion should start on a new page. Caption is unnecessary if attached to papers with caption and first page caption includes all parts of motion. See §1.9; Crim Law §18.5.*]

CONFIDENTIAL: CLERK TO SEAL AS PROVIDED IN PENAL CODE SECTION 987.9

DECLARATION OF COUNSEL IN SUPPORT OF IN CHAMBERS MOTION FOR INVESTIGATIVE AND EXPERT FUNDS UNDER PENAL CODE §987.9

I, _ _[*name of attorney*]_ _**, declare:**

1. I am the attorney for defendant, _ _[*name*]_ _**, in the above-entitled case. The defendant is indigent.**

2. The above-entitled case is one in which funds may be requested by defense counsel under Penal Code section 987.9, in that the case alleges special circumstances involving _ _[*specify basis of special circumstances*]_ _**.**

3. A review of the reports indicates that defense of this matter will involve extensive investigation, forensic work, and the use of experts.

4. The investigation will require _ _[*state need for investigation*]_ _**.**

5. Counsel is prepared to present orally to the Court in chambers any additional information necessary to enable the Court to rule on this request.

6. Counsel intends to place the money requested in a trust account, expend that money for the necessary costs of the defense, and provide an account of those expenditures to the County, as provided in Penal Code section 987.9, at the conclusion of this case.

7. Counsel intends to hire forensic experts to evaluate the physical evidence and assist counsel _ _[*; it appears that psychiatric evaluation and consultation is also necessary*]_ _**.**

8. The request for funds in this case is based on a considered estimate of funds immediately required for the defense. Counsel will apply to the Court for additional funds as they become necessary.

CONFIDENTIAL: CLERK TO SEAL AS PROVIDED IN PENAL CODE SECTION 987.9

9. It is respectfully requested that at this time the sum of _ _[*dollar amount*]_ _ **be delivered to counsel to be placed in the trust account to be expended for costs necessary to the defense, as provided in the attached proposed order.**

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _ _ _ _ _ _ __[*Signature of declarant*]__
_ _[*Typed name*]_ _
_ _[*Title of declarant if in public office*]_ _

[*Begin the following on a new page.*]

CONFIDENTIAL: CLERK TO SEAL AS PROVIDED IN PENAL CODE SECTION 987.9

[*A proposed order should begin on a new page. See, e.g., Los Angeles Ct R 6.5(b) (proposed order must be separate document). Even if filed as part of the motion, it should have a separate caption. For further discussion, see Comment, §18.5.*]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF _ _ _ _ _ _

THE PEOPLE OF THE STATE OF CALIFORNIA,	**Dept. _ _**[*number*]**_ _**
Plaintiff	**No. _ _**[*case number*]**_ _**
vs	**[PROPOSED] ORDER FOR INVESTIGATIVE AND EXPERT FUNDS UNDER PENAL CODE SECTION 987.9**
_ _[*Name*]**_ _,**	
Defendant.	
_____ /	

TO THE DEFENDANT AND DEFENSE COUNSEL:

Good cause appearing, the defendant, _ _[*name*]**_ _, having established _ _**[*his/her*]**_ _ indigency in this charged capital case,**

IT IS HEREBY ORDERED that the _ _[*appropriate disbursing officer*]**_ _ of _ _ _ _ _ _ County be directed to disburse from the general fund the sum of _ _**[*dollar amount*]**_ _ to the office of _ _**[*name*]**_ _, attorney for defendant, to be placed in _ _**[*his/her*]**_ _ trust account under the provisions of Penal Code section 987.9.**

These funds shall be used for payment of investigators, experts, and other related expenditures in preparation or presentation of the defense in this matter.

The attorney shall, at the termination of the proceedings in this matter, furnish to the Court a complete accounting of all moneys received and disbursed under this Order.

CONFIDENTIAL: CLERK TO SEAL AS PROVIDED IN PENAL CODE SECTION 987.9

This Order and all related declarations and motions made under Penal Code section 987.9 shall be sealed.

Date: _ _ _ _ _ _ **__**[*Signature of Judge*]**__**
_ _[*Typed name*]**_ _**
Judge of the Superior Court

Comment: The header "CONFIDENTIAL: CLERK TO SEAL AS PROVIDED IN PENAL CODE SECTION 987.9" should appear at the top of each page of the papers submitted to the court. The application is submitted to a judge of the court other than the one presiding over the case in question. The application for funds is by an affidavit in which counsel must specify that the funds are reasonably necessary for the preparation or presentation of the defense.

An application for funds may be made by retained as well as by appointed counsel, provided the defendant is indigent. The test of indigency is whether the defendant has the financial means to secure the services requested. *Tran v Superior Court* (2001) 92 CA4th 1149, 1154, 112 CR2d 506.

The ruling on the reasonableness of the request is made at an in chambers hearing. Pen C §987.9(a). While the court should view the motion with liberality, the burden is on the defendant to show that the requested services are reasonably necessary. The ruling will be reviewed for abuse of discretion. *People v Guerra* (2006) 37 C4th 1067, 1085, 40 CR3d 118.

Cross-Reference: See Crim Law §§54.11-54.12.

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Driving Under the Influence Cases

A. Order to Install Ignition Interlock Device (Judicial Council Form ID-100) §55.1
B. Ignition Interlock Installation Verification (Ignition Interlock Device) (Judicial Council Form ID-110) §55.2
C. Proof of Enrollment or Completion—Alcohol or Drug Program (Judicial Council Form MC-400) §55.3

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Source: Criminal Law/California Criminal Law Forms Manual/55 Driving Under the Influence Cases/§55.1 A. Order to Install Ignition Interlock Device (Judicial Council Form ID-100)

§55.1 A. Order to Install Ignition Interlock Device (Judicial Council Form ID-100)

Print

ID-100

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MALING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
NAME OF DEFENDANT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: HOME TELEPHONE NO.: WORK TELEPHONE NO.: DRIVER'S LICENSE NO.:	
ORDER TO INSTALL IGNITION INTERLOCK DEVICE	CASE NUMBER:

Under Vehicle Code section 23575, **the court orders:** a functioning Ignition Interlock Device be installed on the following vehicles owned or operated by defendant:

	Make	Model	Year	Color	License Plate No. and/or VIN
a.					
b.					
c.					

1. This order does not reinstate the defendant's driving privilege.
2. Installation must be no later than *(specify a date no later than 30 days from the date of conviction):*
3. Defendant must present this form to the installer at the time of installation.
4. Defendant must return completed *Ignition Interlock Installation Verification* (form ID-110) to the ☐ court ☐ probation dept. no later than *(specify a date no later than 30 days from the date of conviction):*
5. Defendant must take vehicles to the installer for calibration
   ☐ 60 days ☐ other *(specify frequency):*
   following the date of installation.
6. Defendant must make payments directly to the installer and must adhere to the payment plan for installation of the ignition device.
7. Without a court order, the devices may not be removed prior to *(specify a date no later than three years from the date of conviction)*:
8. ☐ Defendant's employer requires defendant to drive a vehicle owned by the employer within the course and scope of defendant's employment. Defendant must provide the employer with the *Notice to Employers of Ignition Interlock Restriction* (form ID-150) no later than *(specify date):* . Defendant must keep a copy of the *Notice to Employers of Ignition Interlock Restriction* in defendant's possession or keep the original or a copy in the employer's vehicle.
9. Defendant must maintain current insurance and registration on all vehicles owned.
10. Other *(specify)*:

Date: I acknowledge receipt of this order.

(TYPE OR PRINT NAME OF DEFENDANT) (DEFENDANT'S SIGNATURE)

Date:

JUDICIAL OFFICER OF THE SUPERIOR COURT

Form Approved for Optional Use
Judicial Council of California
ID-100 [Rev. July 1, 2008]

ORDER TO INSTALL IGNITION INTERLOCK DEVICE
(Ignition Interlock Device)

CEB
Vehicle Code, §§ 23575, 23576
www.courtinfo.ca.gov

Print

SHORT TITLE:	CASE NUMBER:

WHAT IS A VIOLATION OF THIS ORDER?

1. Failure to have ignition interlock devices installed within 30 days of the date of this order.
2. Failure to return completed *Ignition Interlock Installation Verification* (form ID-110) to the court or probation department (as indicated on the reverse) within the time limit specified in this order.
3. Failure to comply three or more times with any requirement for the maintenance or calibration of the ignition interlock devices.
4. Failure to comply with any court order.
5. Default on any payment plan arranged with the installer or ordered by the court, resulting in failure to comply herewith, absent a showing in court of good cause.
6. If defendant has a valid driver's license, driving any vehicle without an ignition interlock device except as provided below and except for employer-owned vehicles required to be operated within the course and scope of employment. A motor vehicle owned by a business entity that is wholly or partly owned or controlled by defendant is not a motor vehicle owned by an employer subject to the exemption.
7. Failure to maintain current license and registration on any vehicle owned by defendant.
8. Failure to notify any person who rents, leases, or loans a motor vehicle to defendant of the restriction imposed by this order.
9. Requesting or soliciting any person to blow into an ignition interlock device or to start a motor vehicle equipped with the device for the purpose of providing defendant with an operable motor vehicle.
10. Tampering with or circumventing the operation of an ignition interlock device.

Under Vehicle Code section 23575 **only,** it is an affirmative defense to Violation Numbers 7, 8, and 9 if defendant can show that he or she leased, rented, or borrowed a vehicle for emergency use when no other feasible alternative was available, or for a bona fide business purpose when away from defendant's regular place of business.

WHAT WILL HAPPEN IF YOU VIOLATE THIS ORDER?

Under Vehicle Code section 23575, if a defendant fails to provide proof of installation within the ordered time limit, absent a showing of good cause, the court must notify the Department of Motor Vehicles.

YOUR RIGHTS

1. If you are required to install ignition interlock devices under Vehicle Code section 23575, and you have a medical condition that you believe prevents you from breathing with sufficient strength to activate the devices, you have the right to present a physician's statement to the court documenting the condition and to have the court determine whether the medical condition does make use of the devices medically impossible.
2. If your driving privilege has been revoked or suspended under Vehicle Code section 23575, and it is restored before the end of the period ordered herein for installation of the ignition interlock devices, you may petition the court to review whether continued restriction is necessary.

Defendant: Call the ignition interlock device installer within 48 hours of this order and arrange for the installation of the device(s). The court will provide you with a list of manufacturers certified by the Department of Motor Vehicles. Contact a certified manufacturer to locate an installer.

Comment: Use of this Judicial Council form is optional. The court may require installation of an ignition interlock device after a defendant has been convicted of driving under the influence. A court-ordered ignition interlock device restriction may be for a maximum of 3 years from the date of conviction. See Veh C §23575.

Cross-Reference: For discussion of driving under the influence cases, see California Criminal Law Procedure and Practice, chap 55 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/55 Driving Under the Influence Cases/§55.2 B. Ignition Interlock Installation Verification (Ignition Interlock Device) (Judicial Council Form ID-110)

§55.2 B. Ignition Interlock Installation Verification (Ignition Interlock Device) (Judicial Council Form ID-110)



ID-110

SUPERIOR COURT OF CALIFORNIA, COUNTY OF	FOR COURT USE ONLY
STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
NAME OF DEFENDANT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: HOME TELEPHONE NO.: WORK TELEPHONE NO.: DRIVER'S LICENSE NO.:	
DATE OF COURT ORDER:	
IGNITION INTERLOCK INSTALLATION VERIFICATION	CASE NUMBER:

1. Manufacturer:
2. Facility location *(address):*
3. Vehicles:

	Make	Model	Year	Color	License Plate No.	VIN:
a.						
b.						
c.						

4. Serial Nos. of units: a. b. c.
5. Odometer reading: a. b. c.
6. Date of installation: a. b. c.
7. Date of next monitor check: a. b. c.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____ ▶ _____

(TYPE OR PRINT NAME OF INSTALLER) (SIGNATURE OF INSTALLER)

Original sent to *(name of court):*

For installer use only:

Distribution: Court, Manufacturer or Manufacturer's Agent, Defendant, Probation Department

Form Approved for Optional Use
Judicial Council of California
ID-110 [Rev. July 1, 2005]

IGNITION INTERLOCK INSTALLATION VERIFICATION
(Ignition Interlock Device)

Vehicle Code, § 23575
www.courtinfo.ca.gov

Comment: Use of this Judicial Council form is optional. The court may require installation of an ignition interlock device after a defendant has been convicted of driving under the influence. See Veh C §23575.

Cross-Reference: For discussion of driving under the influence cases, see California Criminal Law Procedure and Practice, chap 55 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/55 Driving Under the Influence Cases/§55.3 C. Proof of Enrollment or Completion-- Alcohol or Drug Program (Judicial Council Form MC-400)

§55.3 C. Proof of Enrollment or Completion— Alcohol or Drug Program (Judicial Council Form MC-400)



NAME AND ADDRESS OF COURT:	*FOR COURT USE ONLY*
NAME OF DEFENDANT: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE:	
DATE OF COURT ORDER:	
(check one) ☐ **PROOF OF ENROLLMENT IN ALCOHOL OR DRUG PROGRAM** ☐ **PROOF OF COMPLETION OF ALCOHOL OR DRUG PROGRAM**	CASE NUMBER:

DESCRIPTION OF ALCOHOL OR DRUG PROGRAM

Name of Program:

Address of Program:

Program License Number: Program Telephone Number:

PROOF OF ENROLLMENT

1. Defendant *(name)*: enrolled in the alcohol or drug education program described above on *(specify date of enrollment)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

Date: . . . . . (TYPE OR PRINT NAME) _____ (SIGNATURE OF DEFENDANT)

. . . . . (TYPE OR PRINT NAME) _____ (SIGNATURE OF PROGRAM DIRECTOR OR INSTRUCTOR)

_____ (TITLE)

PROOF OF COMPLETION

2. Defendant *(name)*: successfully completed the alcohol or drug education program described above on *(specify date of completion)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

Date: . . . . . (TYPE OR PRINT NAME) _____ (SIGNATURE OF DEFENDANT)

. . . . . (TYPE OR PRINT NAME) _____ (SIGNATURE OF PROGRAM DIRECTOR OR INSTRUCTOR)

_____ (TITLE)

— INSTRUCTIONS —

YOU NEED TWO OF THESE FORMS:

1. **UPON ENROLLMENT IN A COURT-ORDERED ALCOHOL OR DRUG EDUCATION PROGRAM, FILL OUT THE PROOF OF ENROLLMENT PORTION OF ONE COPY OF THIS FORM AND FURNISH IT TO THE SENTENCING COURT WITHIN THE TIME AND IN THE MANNER SPECIFIED BY THE COURT.**
2. **UPON SUCCESSFUL COMPLETION OF THE PROGRAM, FILL OUT THE PROOF OF COMPLETION PORTION OF A SECOND COPY OF THIS FORM AND FURNISH IT TO THE SENTENCING COURT WITHIN THE TIME AND IN THE MANNER SPECIFIED BY THE COURT.**

FAILURE TO COMPLY WITH THESE REQUIREMENTS MAY RESULT IN THE REVOCATION OF YOUR PROBATION.

SI USTED NO CUMPLE CON ESTOS REQUISITOS, SU INCUMPLIMIENTO PUEDE RESULTAR EN LA REVOCACION DE SU LIBERTAD CONDICIONAL.

Form Approved by the Judicial Council of California
MC-400 [Rev. January 1, 1986]
Form Approved for Optional Use

PROOF OF ENROLLMENT OR COMPLETION ALCOHOL OR DRUG PROGRAM

Veh. Code, § 23205

Comment: Use of this Judicial Council form is optional. Following a conviction for driving under the influence, the court may require participation in a treatment program as a conditional of probation. See Veh C §23655.

Cross-Reference: For discussion of driving under the influence cases, see California Criminal Law Procedure and Practice, chap 55 (Cal CEB Annual).

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Juvenile Delinquency Proceedings

A. Order to Seal Juvenile Records (Judicial Council Form JV-590) §56.1
B. Promise to Appear—Juvenile Delinquency (Juvenile 14 Years or Older) (Judicial Council Form JV-635) §56.2
C. Violation of Law by Child (Judicial Council Form JV-620) §56.3
D. Notice of Hearing—Juvenile Delinquency Proceeding (Judicial Council Form JV-625) §56.4
E. Proof of Service—Juvenile (Judicial Council Form JV-510) §56.5
F. Juvenile Court Transfer Orders (Judicial Council Form JV-550) §56.6
G. Juvenile Fitness Hearing Order (Welf & I C §707) (Judicial Council Form JV-710) §56.7
H. Juvenile Wardship Petition (Judicial Council Form JV-600) §56.8
I. Supplemental Petition for More Restrictive Placement (Attachment) (Welf & I C §387) (Judicial Council Form JV-150) §56.9
J. Notice of Hearing to Modify, Change, or Set Aside Previous Orders—Violation of Probation (Judicial Council Form JV-735) §56.10
K. Petition to Modify Previous Orders—Change of Circumstances (Judicial Council Form JV-740) §56.11
L. Order for Restitution and Abstract of Judgment (Judicial Council Form CR-110/JV-790) §56.12
M. Notice of Appeal—Juvenile (Cal Rules of Ct 8.400) (Judicial Council Form JV-800) §56.13

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.1 A. Order to Seal Juvenile Records (Judicial Council Form JV-590)

§56.1 A. Order to Seal Juvenile Records (Judicial Council Form JV-590)



JV-590

ATTORNEY OR PARTY WTHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
ORDER TO SEAL JUVENILE RECORDS	CASE NUMBER:

1. Name of petitioner *(specify aliases)*: Date of birth:
2. a. Date of hearing: Dept.: Room:
   b. Judicial officer (name):

3. ☐ The court has read and considered the petition and the report of the probation officer.

4. The petition is
   a. ☐ Granted. b. ☐ Denied

THE COURT ORDERS

5. ☐ The sealing of petitioner's juvenile records in the custody of this court and the courts, agencies, and officials named below *(designate county)*:

   ☐ See attachment (A) for additional names.
   All records sealed shall be destroyed according to Welfare and Institutions Code sections 389(c) and 781(d).

6. ☐ Petitioner is relieved from the registration requirements under Penal Code section 290 and the registration information in the custody of the Department of Justice and other agencies and officials listed above shall be destroyed.

7. ☐ The clerk shall send a certified copy of this order to the clerk in each county in which a record is ordered sealed, and a copy to each agency and official listed above.

Date:

▶ _____
JUDICIAL OFFICER OF THE SUPERIOR COURT

[SEAL]

CLERK'S CERTIFICATE

I certify that the foregoing is a true and correct copy of the original on file in my office.

Date: Clerk, by _____, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
JV-590 [Rev. January 1, 2007]

ORDER TO SEAL JUVENILE RECORDS

Penal Code, § 290;
Welfare and Institutions Code, §§ 389(c), 781(d);
Cal. Rules of Court, rules 5.504, 5.650
www.courtinfo.ca.gov

Comment: Minors adjudicated delinquent in juvenile court proceedings have the opportunity to petition the court to have their records sealed unless they were found to have committed certain serious offenses. See Welf & I C §§781,

1772. The use of this form is mandatory.

Cross-Reference: For further discussion of sealing juvenile records, see California Criminal Law Procedure and Practice §§41.13, 56.68 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.2 B. Promise to Appear--Juvenile Delinquency (Juvenile 14 Years or Older) (Judicial Council Form JV-635)

§56.2 B. Promise to Appear—Juvenile Delinquency (Juvenile 14 Years or Older) (Judicial Council Form JV-635)



JV-635

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
CASE NAME:	
PROMISE TO APPEAR—JUVENILE DELINQUENCY **(Juvenile 14 Years or Older)**	
LAW ENFORCEMENT AGENCY: REPORT NUMBER:	

Name of child:

Date of birth of child:

Address of child:

Phone number of child:

Name of parent, legal guardian, or adult relative:

Address of parent, legal guardian, or adult relative *(if different from that of* child*):*

Phone number of parent, legal guardian, or adult relative *(if different from that of* child*):*

1. I have been arrested for one or more of the following felony offenses *(list code violations alleged):*

2. The ☐ police officer ☐ probation officer is releasing me to *(name):*
   who is my ☐ mother ☐ father ☐ legal guardian ☐ relative *(state relationship):*

3. **I PROMISE TO APPEAR**

   on *(date):* at *(time):* in Dept.: Room:

   located at ☐ courthouse address above ☐ other *(specify address):*

4. I understand that if I do not come to court on the date and at the time indicated, the court may order that a warrant be issued for my arrest.

Date:

_____
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF CHILD)

_____
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF ☐ PARENT ☐ LEGAL GUARDIAN ☐ RELATIVE)

Witnessed by:

_____
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF ☐ PROBATION OFFICER
☐ POLICE OFFICER *(agency):*)

Request for Accommodations
Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the proceeding. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Order* (form MC-410). (Civil Code, § 54.8.)

Form Adopted for Mandatory Use
Judicial Council of California
JV-635 [Rev. January 1, 2006]

PROMISE TO APPEAR—JUVENILE DELINQUENCY
(Juvenile 14 Years or Older)

Welfare and Institutions Code, § 629
www.courtinfo.ca.gov

• ORIGINAL—Transmitted to court • Copy to youth • Copy to parent, guardian, or relative • Copy to probation

Comment: The use of this form is mandatory. A minor age 14 or older who is taken into custody for a felony offense may not be released by the police officer until the minor has signed a written promise to appear before a probation

officer or the juvenile court. Welf & I C §629. The notice may require the minor to be photographed or fingerprinted on appearance before the probation officer. Welf & I C §626. The police officer may also require a parent, guardian, or relative to sign a promise to appear with the minor. Welf & I C §629.

Cross-Reference: For further discussion of a minor's initial detention, see California Criminal Law Procedure and Practice §§56.10, 56.19-56.24 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.3 C. Violation of Law by Child (Judicial Council Form JV-620)

§56.3 C. Violation of Law by Child (Judicial Council Form JV-620)



CASE NAME:	CASE NUMBER:
—	

VIOLATION OF LAW BY CHILD

The child is a person described by section 602 in that

1. the child was under the age of 18 years at the time of the law violations alleged below, and
2. the child has violated the following laws of the State of California, or of the United States, or any ordinance of a city or county of California.

(State, describe, and number as separate counts each code section and subdivision that the child is alleged to have violated, and as to each count, whether it is a misdemeanor or felony.)

☐ **Petitioner intends to move for an increase of the maximum term of confinement by aggregating the terms of all previously sustained petitions known to petitioner at the time of disposition.**

☐ ***(If a violation of Penal Code section 640.5 is alleged)*** **The child may be required to perform community service and to be supervised by the parent or legal guardian. The parent or legal guardian may be liable for payment of a fine.**

☐ **The parent or legal guardian may be liable for the payment of court-ordered restitution.**

Form Adopted for Mandatory Use
Judicial Council of California
JV-620 [Rev. January 1, 2007]

CEB
Penal Code, § 640.5;
Welfare and Institutions Code, § 600 et seq.;
Cal. Rules of Court, rule 5.504
www.courtinfo.ca.gov

Comment: The use of this form is mandatory. The court may use this form as a finding by the court by titling it "Finding of Violation of Law by Child" and removing the reference to "alleged" violations.

With the exception of death penalty and one-strike sex offenses (see Welf & I C §602(b)), the juvenile court exercises delinquency jurisdiction over a minor who has violated a law of the United States or California, or any city or county ordinance, while under age 18. Welf & I C §602.

Cross-Reference: For further discussion of the jurisdiction of the juvenile court, see California Criminal Law Procedure and Practice §56.3 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.4 D. Notice of Hearing--Juvenile Delinquency Proceeding (Judicial Council Form JV-625)

§56.4 D. Notice of Hearing—Juvenile Delinquency Proceeding (Judicial Council Form JV-625)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
NOTICE OF HEARING—JUVENILE DELINQUENCY PROCEEDING **Welfare and Institutions Code, §§ ☐ 601 ☐ 602**	CASE NUMBER:

NOTICE TO *(name and address):*

- **A hearing has been set for the date and time below. The child and the parent or legal guardian or noticed adult relative are entitled to be represented by an attorney.**
- **The court will appoint an attorney for the child if the child cannot afford an attorney.**

See important notice on page 2.

1. A hearing will be held

on *(date):*	at *(time):*	in Dept.:	Room:

located at ☐ court address above ☐ other *(specify address):*

2. The hearing is for the purpose of
   a. ☐ detention hearing.
   b. ☐ formal reading of petition, advisement of rights, and plea.
   c. ☐ jurisdiction hearing.
   d. ☐ disposition hearing.
   e. ☐ review.
   f. ☐ permanency hearing.
   g. ☐ other *(specify):*

3. **TO THE CHILD:**
   You have the right to be present and to present evidence at the hearing and to be represented by an attorney. The court will appoint an attorney for you if you cannot afford one.
   ☐ You are ordered to be present at the hearing.

4. **TO THE PARENT, LEGAL GUARDIAN, OR ADULT RELATIVE:**
   You have the right to be present at the hearing. You have the right to have an attorney present to represent you at the hearing.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE)

Form Adopted for Mandatory Use
Judicial Council of California
JV-625 [Rev. January 1, 2006]

Welfare and Institutions Code, §§ 630, 630.1, 639, 658, 659, 660, 679, 727.4
www.courtinfo.ca.gov

— NOTICE TO PARENT OR LEGAL GUARDIAN —

1. If your child is ordered to make restitution to the victim, you will be liable to the extent of your ability to pay.
2. You will be liable to the extent of your ability to pay for the following:
   - Fees for an attorney who is appointed to represent your child.
   - Fines and penalty assessments ordered against your child.
3. You may be liable for the costs of support of your child in a county placement or institution.



Request for Accommodations
Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the proceeding. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Order* (form MC-410). (Civil Code, § 54.8.)

Comment: The use of this form is mandatory. A detention hearing is required after a minor is taken into custody.

Welf & I C §632. If a minor was arrested without a warrant for allegedly committing a misdemeanor not involving violence, a threat of violence, or possession or use of weapons, and if the minor is not on probation or parole, a detention hearing must be held as soon as possible, but no later than 48 hours (excluding nonjudicial days) *after the minor was taken into custody.* Welf & I C §632(b). In all other cases, Welf & I C §632 requires that a detention hearing be conducted no later than the next judicial day *following the filing of a petition*. Welf & I C §632(a). If a detention hearing is not held within the time prescribed by Welf & I C §632, the minor must be released from custody. Welf & I C §632(c).

Cross-Reference: For further discussion of juvenile detention hearings, see California Criminal Law Procedure and Practice §§56.19-56.24 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.5 E. Proof of Service--Juvenile (Judicial Council Form JV-510)

§56.5 E. Proof of Service—Juvenile (Judicial Council Form JV-510)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
PROOF OF SERVICE—JUVENILE	CASE NUMBER:

I served a copy of the _____ *(name of document)* on the following persons or entities by personally delivering a copy to the person served, OR by delivering a copy to a competent adult at the usual place of residence or business of the person served and thereafter mailing a copy by first-class mail to the person served at the place where the copy was delivered, OR by placing a copy in a sealed envelope and depositing the envelope directly in the United States mail with postage prepaid or at my place of business for same-day collection and mailing with the United States mail, following our ordinary business practices with which I am readily familiar:

1. ☐ Social worker ☐ Probation officer
   a. Name and address:
   b. Date of service:
   c. Method of service:

   ☐ Attorney
   a. Name and address:
   b. Date of service:
   c. Method of service:

2. ☐ Mother ☐ Father ☐ Legal guardian
   a. Name and address:
   b. Date of service:
   c. Method of service:

   ☐ Attorney
   a. Name and address:
   b. Date of service:
   c. Method of service:

3. ☐ Mother ☐ Father ☐ Legal guardian
   a. Name and address:
   b. Date of service:
   c. Method of service:

   ☐ Attorney
   a. Name and address:
   b. Date of service:
   c. Method of service:

4. ☐ Mother ☐ Father ☐ Legal guardian
   a. Name and address:
   b. Date of service:
   c. Method of service:

   ☐ Attorney
   a. Name and address:
   b. Date of service:
   c. Method of service:

Form Adopted for Optional Use
Judicial Council of California
JV-510 [Rev. July 1, 2010]

CEB

Print

CASE NAME:	CASE NUMBER:

5. ☐ Child *(if 10 years of age or older)*
   a. Name and address:
   b. Date of service:
   c. Method of service:

☐ Attorney
   a. Name and address:
   b. Date of service:
   c. Method of service:

6. ☐ Child *(if 10 years of age or older)*
   a. Name and address:
   b. Date of service:
   c. Method of service:

☐ Attorney
   a. Name and address:
   b. Date of service:
   c. Method of service:

7. ☐ Child's sibling
   a. Name and address:
   b. Date of service:
   c. Method of service:

☐ Attorney
   a. Name and address:
   b. Date of service:
   c. Method of service:

8. ☐ CASA volunteer
   a. Name and address:
   b. Date of service:
   c. Method of service:

☐ Attorney
   a. Name and address:
   b. Date of service:
   c. Method of service:

9. ☐ Tribe/Bureau of Indian Affairs
   a. Name and address:
   b. Date of service:
   c. Method of service:

☐ Attorney
   a. Name and address:
   b. Date of service:
   c. Method of service:

10. ☐ Indian custodian
   a. Name and address:
   b. Date of service:
   c. Method of service:

☐ Attorney
   a. Name and address:
   b. Date of service:
   c. Method of service:

Print

CASE NAME:	CASE NUMBER:

11. ☐ Child's caregiver
    a. Name and address:
    b. Date of service:
    c. Method of service:

☐ Attorney
a. Name and address:
b. Date of service:
c. Method of service:

12. ☐ De facto parent
    a. Name and address:
    b. Date of service:
    c. Method of service:

☐ Attorney
a. Name and address:
b. Date of service:
c. Method of service:

13. ☐ Grandparent
    a. Name and address:
    b. Date of service:
    c. Method of service:

☐ Attorney
a. Name and address:
b. Date of service:
c. Method of service:

14. Other *(specify):*
    a. Name and address:
    b. Date of service:
    c. Method of service:

☐ Attorney
a. Name and address:
b. Date of service:
c. Method of service:

15. Other *(specify):*
    a. Name and address:
    b. Date of service:
    c. Method of service:

☐ Attorney
a. Name and address:
b. Date of service:
c. Method of service:

16. At the time of service I was at least 18 years of age and not a party to this cause. I am a resident of or employed in the county where the mailing occurred. My residence or business address is *(specify):*

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE)

Comment: The use of this form is optional. It may be used as a form of proof of service by mail in a juvenile

delinquency proceeding. See CCP §1013a.

Cross-Reference: For further discussion of juvenile delinquency proceedings, see California Criminal Law Procedure and Practice, chap 56 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.6 F. Juvenile Court Transfer Orders (Judicial Council Form JV-550)

§56.6 F. Juvenile Court Transfer Orders (Judicial Council Form JV-550)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
JUVENILE COURT TRANSFER ORDERS ☐ **§ 300** ☐ **For Disposition** ☐ **Of Dependency** ☐ **§ 601** ☐ **§ 602** ☐ **For Disposition** ☐ **Of Wardship**	CASE NUMBER:

1. Child's name: Date of birth:
2. a. Date of hearing: Dept. Room:
   b. Judicial officer *(name)*:
   c. Persons present:
      ☐ Child ☐ Child's attorney ☐ Mother ☐ Mother's attorney ☐ Father ☐ Father's attorney
      ☐ Guardian ☐ Deputy district attorney ☐ Probation officer/Social worker
      ☐ Deputy county counsel ☐ CASA ☐ Other:
3. The court has read and considered ☐ the report of the social worker ☐ the report of the probation officer ☐ other relevant evidence.
4. **The court finds and orders under Welfare and Institutions Code section ☐ 375 ☐ 750 and ☐ rule 5.610:**
   a. The legal residence of the child is that of ☐ Parents ☐ Mother ☐ Father ☐ Guardian
      ☐ Other with whom the WARD resides with approval of the court *(name and relationship)*:
      (address):
   b. **Transfer of the child's case is in the child's best interests.**
   c. The child currently resides *(specify name and address)*:

      WITH ☐ Parents ☐ Mother ☐ Father ☐ Guardian ☐ Foster home *(name)*:
      ☐ Group home ☐ Residential facility *(name)*:
      ☐ Relative *(name and relationship)*:
      ☐ Other *(name)*:
   d. The child is ☐ detained ☐ placed.
   e. The child's case is ordered transferred to the county of *(specify)*:
   f. (1) ☐ The child shall remain at the present address.
      (2) ☐ The child shall be transported in custody to the receiving county within seven judicial days.
      (3) ☐ Under prior orders of this court.
         (i) The child was detained on *(date)*:
         (ii) ☐ The child was found to be described by section ☐ 300
            ☐ (a) ☐ (b) ☐ (c) ☐ (d) ☐ (e) ☐ (f) ☐ (g) ☐ (h) ☐ (i) ☐ (j)
            on *(date)*:
         (iii) ☐ Dependency was declared on *(date)*:
         (iv) ☐ The child was found to be described by section ☐ 601 ☐ 602 on *(date)*:
         (v) ☐ Wardship was declared on *(date)*:
         (vi) The last hearing was on *(date)*: For:
         (vii) A hearing has been set on *(date)*: For:
   g. ☐ A hearing should be set for ☐ disposition ☐ review ☐ other:
   h. ☐ Other

Date:

JUDICIAL OFFICER OF THE JUVENILE COURT

See important information on reverse.

Print

JV-550

CASE NAME:	CASE NUMBER:
—	

NOTICE

California Rules of Court, rule 5.610 requires that:

(1) A child who is ordered transferred in custody must be delivered to the receiving county within seven court days. All court files and other documents must be delivered with the child;

(2) The court files and other documents for a child whose case is transferred, but who is not transported in custody, must be transmitted to the receiving county within ten court days.

California Rules of Court, rule 5.612 requires that:

(1) For a child who is transported in custody, the receiving court must conduct a transfer-in hearing within two court days after the child is delivered to the receiving county, if the child remains in custody;

(2) For a child who is not detained in custody, the receiving court must conduct a transfer-in hearing within ten court days after the documents are received by the clerk of the receiving county.

Comment: The use of this form is mandatory. It is used when a juvenile's case is transferred to another county

because the original case was not filed in the child's county of residence or because the child has moved. See Cal Rules of Ct 5.610. If the minor is ordered transported to the receiving county in custody, the minor must be delivered to the receiving county within seven court days, and the clerk of the court of the transferring county must prepare a certified copy of the complete case file so that it may be transported with the minor to the receiving court. If the minor is not ordered transported in custody, the clerk of the transferring court must transmit to the clerk of the receiving court a certified copy of the complete case file within 10 court days. Cal Rules of Ct 5.610(h)(2).

On receipt and filing of a certified copy of a transfer order, the receiving court must take jurisdiction of the case and its clerk must immediately place the transferred case on the court calendar for a transfer-in hearing. The transfer-in hearing must take place within 2 court days after the minor reaches the county if he or she is in custody, or within 10 court days if he or she is not in custody. See Cal Rules of Ct 5.612.

Cross-Reference: For further discussion of juvenile delinquency proceedings, see California Criminal Law Procedure and Practice, chap 56 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.7 G. Juvenile Fitness Hearing Order (Welf & I C §707) (Judicial Council Form JV-710)

§56.7 G. Juvenile Fitness Hearing Order (Welf & I C §707) (Judicial Council Form JV-710)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO. *(Optional)*: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
JUVENILE FITNESS HEARING ORDER ☐ **Section 707(a)(1)** ☐ **Section 707(c)** ☐ **Section 707(a)(2)** **(Welfare and Institutions Code, § 707)**	CASE NUMBER:

1. a. Date of hearing: Dept.: Room:

   b. Judicial officer *(name)*:

   c. Persons present: ☐ Youth ☐ Youth's attorney *(name)*:
   ☐ Deputy District Attorney *(name)*:
   ☐ Other:

2. ☐ The court has read and considered: ☐ The petition and report of the probation officer.
   ☐ Other relevant evidence.

3. The court has considered each of the following criteria and has determined that the youth
   a. ☐ is ☐ is not amenable to the care, treatment, and training program through the juvenile court based on the degree of criminal sophistication of the youth for the reasons stated on the record.

   b. ☐ is ☐ is not amenable to the care, treatment, and training program through the juvenile court based on whether the youth can be rehabilitated prior to the expiration of jurisdiction for the reasons stated on the record.

   c. ☐ is ☐ is not amenable to the care, treatment, and training program through the juvenile court based on the youth's previous delinquent history for the reasons stated on the record.

   d. ☐ is ☐ is not amenable to the care, treatment, and training program through the juvenile court based on the results of previous attempts by the court to rehabilitate the youth for the reasons stated on the record.

   e. ☐ is ☐ is not amenable to the care, treatment, and training program through the juvenile court based on the circumstances and gravity of the offense for the reasons stated on the record.

Form Adopted for Mandatory Use
Judicial Council of California
JV-710 [Rev. January 1, 2007]

Welfare and Institutions Code, §§ 207.1, 389(c), 707, 781(d);
Cal. Rules of Court, rules 5.504, 5.650
www.courtinfo.ca.gov

CASE NAME:	CASE NUMBER:

4. **THE COURT FINDS AND ORDERS** *(check one)*

a. ☐ **Welfare and Institutions Code section 707(a)(1)**

☐ The youth was at least 16 years old at the time of the alleged offense.

The court may find the youth fit if the court finds the youth amenable to treatment under one or more of the criteria under item 3. Conversely, the court may find the youth unfit if the court finds the youth is not amenable under one or more of the criteria under item 3 above.

b. ☐ **Welfare and Institutions Code section 707(a)(2)**

(1) ☐ The youth was at least 16 years old at the time of the alleged offense.
(2) ☐ The current alleged offense is a felony.
(3) ☐ The youth was a ward at the time of the current alleged offense.
(4) ☐ The youth is alleged to have previously committed two or more felony offenses when he or she was 14 years of age or older.

If the court finds all four facts true, the youth must be found unfit unless the court has found the youth amenable under all five criteria under item 3 above.

c. ☐ **Welfare and Institutions Code section 707(c)**

(1) ☐ The youth was at least 14 years old at the time of the alleged offense.
(2) ☐ The current alleged offense is an offense listed in Welfare and Institutions Code section 707(b).

If the court finds both facts true, the youth must be found unfit unless the court has found the youth amenable under all five criteria under item 3 above.

5. **THE COURT ALSO FINDS AND ORDERS**

a. ☐ The youth **is a fit** and proper subject to be dealt with under juvenile court law.
The next hearing is on *(date)*: at *(time)*:
for *(specify)*:

b. ☐ The youth **is not a fit** and proper subject to be dealt with under juvenile court law.
(1) ☐ The matter is referred to the District Attorney for prosecution under the general law.
(2) ☐ The petition filed on *(date)*: is dismissed.
(3) ☐ The youth is to be detained in ☐ juvenile hall ☐ county jail (section 207.1).
(4) ☐ Bail is set in the amount of: $
(5) ☐ The youth is released ☐ on own recognizance.
☐ to the custody of:

Date:

JUDICIAL OFFICER

Comment: The use of this form is mandatory. A minor who comes within the requirements of Welf & I C §707 may

be tried in adult criminal court if the juvenile court finds that the minor, aged 14 or above, would not be amenable to treatment as a juvenile. Welf & I C §707. In reaching a decision, the court must examine and evaluate (see Welf & I C §707(a)):

- The degree of criminal sophistication exhibited by the minor;
- Whether the minor can be rehabilitated before juvenile court jurisdiction expires;
- The minor's previous delinquency history;
- The success of previous attempts by the juvenile court to rehabilitate the minor; and
- The circumstances and gravity of the offenses alleged to have been committed by the minor.

If the minor is found unfit, the court must make findings on each of the five criteria and must state on the record why the minor is not amenable to juvenile treatment. If the minor is found fit, the court must make a specific finding of amenability as to each of the five criteria. See Welf & I C §707(a), (c).

Cross-Reference: For further discussion of transfer of a juvenile proceeding to adult court, see California Criminal Law Procedure and Practice §§56.29-56.37 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.8 H. Juvenile Wardship Petition (Judicial Council Form JV-600)

§56.8 H. Juvenile Wardship Petition (Judicial Council Form JV-600)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
JUVENILE WARDSHIP PETITION ☐ **§ 601(a)** ☐ **§ 601(b)** ☐ **§ 602(a)**	CASE NUMBER:

1. Petitioner on information and belief alleges the following:

a. ☐ The child named below comes within the jurisdiction of the juvenile court under the following sections of the Welfare and Institutions Code *(check applicable boxes; see attachments for concise statements of facts):*
☐ 601(a) ☐ 601(b) ☐ 602(a) Violation *(specify code section):*

b. ☐ Under a previous order of this court, dated , the child was declared a ward under Welfare and Institutions Code section ☐ 601(a) ☐ 601(b) ☐ 602(a).

c. Child's name and address:	d. Age:	e. Date of birth:	f. Sex:

g. Name: Address: ☐ mother ☐ father ☐ guardian ☐ unknown If mother or father *(check all that apply):* ☐ legal ☐ biological ☐ presumed ☐ alleged	h. Name: Address: ☐ mother ☐ father ☐ guardian ☐ unknown If mother or father *(check all that apply):* ☐ legal ☐ biological ☐ presumed ☐ alleged
i. Name: Address: ☐ mother ☐ father ☐ guardian ☐ unknown If mother or father *(check all that apply):* ☐ legal ☐ biological ☐ presumed ☐ alleged	j. Other *(state name, address, and relationship to child):* ☐ No known parent or guardian resides within this state. This adult relative lives in this county or is closest to this court.
k. Attorney for child *(if known):* Address: Phone number:	*l.* Child is ☐ not detained ☐ detained. Date and time of detention *(custody):* Current place of detention *(address):*

2. I have asked about Indian ancestry for this child because he or she is either at risk of entering foster care or is in foster care, and have completed and attached the required *Indian Child Inquiry Attachment*, form ICWA-010(A). *(If this is a subsequent filing and there is no new information, the ICWA-010(A) is not required.)*

(See important notice on page 2.)

Form Adopted for Mandatory Use
Judicial Council of California
JV-600 [Rev. January 1, 2008]

Welfare and Institutions Code, § 600 et seq.;
Cal. Rules of Court, rule 5.504
www.courtinfo.ca.gov

CHILD'S NAME:	CASE NUMBER:

3. Petitioner requests that the court find these allegations to be true.

4. ☐ Petitioner requests a hearing to determine whether the child is a fit and proper subject under juvenile court law under Welfare and Institutions Code section ☐ 707(a)(1) ☐ 707(a)(2) ☐ 707(c).

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

(TYPE OR PRINT NAME) (SIGNATURE OF PETITIONER)

☐ Number of pages attached: _____

— NOTICE —

TO PARENTS OR OTHERS LEGALLY RESPONSIBLE FOR THE SUPPORT OF THE CHILD

You and the estate of your child may be jointly and severally liable for the cost of the care, support, and maintenance of your child in any placement or detention facility, the cost of legal services for your child or you by a public defender or other attorney, the cost of supervision of your child by order of the juvenile court, and the cost of any restitution owed to the victim.

~

Comment: The use of this form is mandatory.

Cross-Reference: For further discussion of juvenile delinquency proceedings, see California Criminal Law Procedure and Practice, chap 56 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.9 I. Supplemental Petition for More Restrictive Placement (Attachment) (Welf & I C §387) (Judicial Council Form JV-150)

§56.9 I. Supplemental Petition for More Restrictive Placement (Attachment) (Welf & I C §387) (Judicial Council Form JV-150)



CHILD'S NAME:	CASE NUMBER:

SUPPLEMENTAL PETITION FOR MORE RESTRICTIVE PLACEMENT (ATTACHMENT)

Welfare and Institutions Code, § 387

1. Under a previous order of this court, dated , the child has been in the home of:
   a. ☐ Parent
   b. ☐ Guardian
   c. ☐ Relative
   d. ☐ Other *(specify):*

2. The previous disposition has not been effective in the protection or rehabilitation of the child *(state supporting facts concisely and number them S-1, S-2, S-3, etc.):*

3. The recommended modified disposition is placement in the home of:
   a. ☐ Noncustodial parent
   b. ☐ Relative
   c. ☐ Foster caretaker
   d. ☐ Other

Comment: The use of this form is mandatory. Either the district attorney or the probation officer may request the court to modify its previous disposition and order a more restrictive placement on the ground that the minor has violated

an order of the court. Welf & I C §777.

Cross-Reference: For further discussion of postdisposition juvenile proceedings, see California Criminal Law Procedure and Practice §56.68 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.10 J. Notice of Hearing to Modify, Change, or Set Aside Previous Orders--Violation of Probation (Judicial Council Form JV-735)

§56.10 J. Notice of Hearing to Modify, Change, or Set Aside Previous Orders—Violation of Probation (Judicial Council Form JV-735)



CASE NAME:	CASE NUMBER:

NOTICE OF HEARING TO MODIFY, CHANGE, OR SET ASIDE PREVIOUS ORDERS
VIOLATION OF PROBATION

1. The child is a ☐ probationer or ☐ ward of the court under Welfare and Institutions Code section ☐ 601 ☐ 602, and the child has violated a condition of probation.

(State supporting facts concisely, and number them 1, 2, etc.)

☐ See Attachment 1.

2. The recommended ☐ modification ☐ consequence is:
   a. ☐ Removal from the custody of a ☐ parent ☐ guardian ☐ relative ☐ friend
   b. ☐ Placement in a foster home or relative's home
   c. ☐ Commitment to a private institution
   d. ☐ Commitment to a county institution
   e. ☐ Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice
   f. ☐ To be determined
   g. ☐ Other *(specify)*:

Comment: The use of this form is mandatory. When a minor violates probation, his or her probation officer or the district attorney may request a modification, change, or set-aside of a previous disposition order on this form. See Welf

& I C §777.

Cross-Reference: For further discussion of postdisposition juvenile proceedings, see California Criminal Law Procedure and Practice §56.68 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.11 K. Petition to Modify Previous Orders--Change of Circumstances (Judicial Council Form JV-740)

§56.11 K. Petition to Modify Previous Orders—Change of Circumstances (Judicial Council Form JV-740)



CASE NAME:	CASE NUMBER:

PETITION TO MODIFY PREVIOUS ORDERS—CHANGE OF CIRCUMSTANCES

1. The child is a ward of the court under Welfare and Institutions Code section ☐ 601 ☐ 602.
2. Petitioner is the
   a. ☐ parent
   b. ☐ legal guardian
   c. ☐ adult relative *(state relationship):*
   d. ☐ probation officer
   e. ☐ attorney for the child
   f. ☐ child
   g. ☐ other interested person *(describe interest):*
3. Petitioner alleges the following changes of circumstances or new evidence regarding the child *(describe changes concisely, and number e-1, e-2, etc.):*

   ☐ See Attachment 3 for further grounds.
4. Petitioner requests the following modifications of prior orders:
5. Petitioner requests that the court order a hearing to be held on *(date):* _____ at *(time):* _____ and cause notice to be given to persons prescribed by law.

THE COURT FINDS AND ORDERS

6. Petition to modify previous order filed *(date):* _____
   a. ☐ is denied.
   b. ☐ states a change of circumstances or new evidence.
   c. ☐ is agreed to by all parties and attorneys of record.
7. ☐ It appears that the best interest of the child may be promoted by the proposed modification.
8. ☐ The petition for modification is granted
   a. ☐ as requested in item 4.
   b. ☐ as follows *(state specific modifications):*

   ☐ Continued in Attachment 8b.
9. ☐ The matter is set for hearing

on *(date):*	at *(time):*	in Dept.:	Room:

Date:

_____
JUDICIAL OFFICER

Requests for Accommodations
Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the proceeding. Contact the clerk's office or go to *www.courtinfo.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civil Code, § 54.8.)

Form Adopted for Mandatory Use
Judicial Council of California
JV-740 [Rev. January 1, 2007]

PETITION TO MODIFY PREVIOUS ORDERS—CHANGE OF CIRCUMSTANCES

CEB
Welfare and Institutions Code, § 600 et seq.;
Cal. Rules of Court, rule 5.504
www.courtinfo.ca.gov

Comment: The use of this form is mandatory. It may be used by the minor, the minor's parent or guardian, the district attorney, the probation officer, or another interested person to request a modification of a previous disposition

order based on a change of circumstances. The petition must be verified and, if made by a person other than the child, must state the petitioner's relationship to or interest in the child and set forth in concise language any change of circumstance or new evidence that requires the change. See Welf & I C §778.

Cross-Reference: For further discussion of postdisposition juvenile proceedings, see California Criminal Law Procedure and Practice §56.68 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.12 L. Order for Restitution and Abstract of Judgment (Judicial Council Form CR-110/JV-790)

§56.12 L. Order for Restitution and Abstract of Judgment (Judicial Council Form CR-110/JV-790)



ATTORNEY OR PERSON WITHOUT ATTORNEY *(Name, State Bar number, and address)*:

☐ Recording requested by and return to:

TELEPHONE NO.: FAX NO. *(Optional)*:

E-MAIL ADDRESS *(Optional)*:

☐ ATTORNEY FOR ☐ JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

FOR RECORDER'S USE ONLY

CASE NUMBER:

CASE NAME:

FOR COURT USE ONLY

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT

(Penal Code, §§ 1202.4(f), 1203.1(*l*), 1214; Welfare and Institutions Code, § 730.6(h) and (i))

ORDER FOR RESTITUTION

1. a. ☐ On *(date)*: defendant *(name)*: was convicted of a crime that entitles the victim to restitution.
   b. ☐ On *(date)*: child *(name)*: was found to be a person described in Welfare and Institutions Code section 602, which entitles the victim to restitution. ☐ Wardship is terminated.
   c. ☐ Parents or guardians jointly and severally liable *(name each)*:
   d. ☐ Co-offenders found jointly and severally liable *(name each)*:

2. Evidence was presented that the victim named below suffered losses as a result of defendant's/child's conduct. Defendant/child was informed of his or her right to a judicial determination of the amount of restitution and
   a. ☐ a hearing was conducted.
   b. ☐ stipulated to the amount of restitution to be ordered.
   c. ☐ waived a hearing.

3. **THE COURT ORDERS** defendant/child to pay restitution to
   a. ☐ the victim *(name)*: in the amount of: $
   b. ☐ the State Victim Compensation Board, to reimburse payments to the victim from the Restitution Fund, in the amount of: $
   c. ☐ plus interest at 10 percent per year from the date of ☐ loss **or** ☐ sentencing
   d. ☐ plus attorney fees and collection costs in the sum of $
   e. ☐ plus an administrative fee at 10 percent of the restitution owed (Pen. Code, § 1203.1(*l*))

4. The amount of restitution includes
   a. ☐ value of property stolen or damaged
   b. ☐ medical expenses
   c. ☐ lost wages or profits
      (1) ☐ incurred by victim due to injury
      (2) ☐ of victim's parent(s) or guardian(s) (if victim is a child) incurred while caring for the injured child
      (3) ☐ incurred by victim due to time spent as a witness or in assisting police or prosecution
      (4) ☐ of victim's parent(s) or guardian(s) (if victim is a child) due to time spent as a witness or in assisting police or prosecution
   d. ☐ noneconomic losses (felony violations of Pen. Code, § 288 only)
   e. ☐ other *(specify)*:

Date:

JUDICIAL OFFICER

VICTIM TO RECEIVE CERTIFIED COPY FOR FILING WITH COUNTY RECORDER

Form Approved for Optional Use
Judicial Council of California
CR-110/JV-790 [Rev. January 1, 2008]

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT

CEB

Penal Code, §§ 1202.4(f), 1203.1(*l*), 1214
Welfare and Institutions Code, § 730.6(h), (i), (q)
Civil Code, § 1714.1
Code of Civil Procedure, § 674(a)(7)
www.courtinfo.ca.gov

Print

CASE NAME:	CASE NUMBER:

NOTICE TO VICTIMS

PENAL CODE SECTION 1214 PROVIDES THAT ONCE A DOLLAR AMOUNT OF RESTITUTION HAS BEEN ORDERED, THE ORDER IS THEN ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT. ALTHOUGH THE CLERK OF THE COURT IS NOT ALLOWED TO GIVE LEGAL ADVICE, YOU ARE ENTITLED TO ALL RESOURCES AVAILABLE UNDER THE LAW TO OBTAIN OTHER INFORMATION TO ASSIST IN ENFORCING THE ORDER.

THIS ORDER DOES NOT EXPIRE UNDER PENAL CODE SECTION 1214(d).

THE VICTIM SHALL FILE A SATISFACTION OF JUDGMENT WITH THE COURT WHENEVER AN ORDER TO PAY RESTITUTION IS SATISFIED, PURSUANT TO PENAL CODE SECTION 1214(d).

APPLICATION FOR ABSTRACT OF JUDGMENT

5. The ☐ judgment creditor ☐ assignee of record ☐ other *(specify):* applies for an abstract of judgment and represents the following:
   a. Judgment debtor's

Name and last known address

b. ☐	Driver's license no. [last 4 digits] and state:	☐ Unknown
c. ☐	Social security no. [last 4 digits]:	☐ Unknown
d. ☐	Date of birth:	☐ Unknown

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF APPLICANT OR ATTORNEY)

☐ ON INFORMATION AND BELIEF

ABSTRACT OF JUDGMENT

[SEAL]

6. I certify that the following is a true and correct judgment entered in this action.
7. Judgment creditor *(name):*
   ☐ whose address or whose attorney's address appears on this form above the court's name.
8. Judgment debtor *(full name as it appears in judgment):*
9. Judgment entered on *(date):*
10. Total amount of judgment as entered or last renewed: $
11. ☐ A stay of enforcement was ordered on _____ and is effective until_____.
    ☐ A stay of enforcement was not ordered.

This abstract of judgment issued on *(date):*

Clerk, by _____, Deputy

NOTICE TO COUNTY RECORDER

THIS ORDER IS ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT, PURSUANT TO PENAL CODE SECTION 1202.4(l) AND (m), PENAL CODE SECTION 1214, AND WELFARE AND INSTITUTIONS CODE SECTION 730.6(i) AND (r), AND FUNCTIONS AS AN ABSTRACT OF JUDGMENT.

Comment: The use of this form is optional. The court must order the minor to pay a restitution fine and full

restitution to a victim for economic loss unless it finds compelling and extraordinary reasons not to do so. If the amount of loss cannot be ascertained at the time of disposition, the court may direct the probation officer to determine the amount of loss. If the minor disputes the amount, a hearing should be requested. Welf & I C §730.6(h); see *In re Karen A.* (2004) 115 CA4th 504, 9 CR3d 369. Note that under Welf & I C §730, a juvenile court has discretion to order a minor to pay a victim restitution for economic loss as a condition of probation, even on a charge that has been dismissed. *In re T.C.* (2009) 173 CA4th 837, 844, 93 CR3d 447 (Welf & I C §730.6 constitutes floor, not ceiling, for what may be ordered in restitution).

Cross-Reference: For further discussion of disposition choices in juvenile delinquency proceedings, see California Criminal Law Procedure and Practice §§56.55-56.64 (Cal CEB Annual).

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Source: Criminal Law/California Criminal Law Forms Manual/56 Juvenile Delinquency Proceedings/§56.13 M. Notice of Appeal--Juvenile (Cal Rules of Ct 8.400) (Judicial Council Form JV-800)

§56.13 M. Notice of Appeal—Juvenile (Cal Rules of Ct 8.400) (Judicial Council Form JV-800)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO. : FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
NOTICE OF APPEAL—JUVENILE	CASE NUMBER:

—NOTICE—

- You or your attorney **must** fill in items 1 and 2 and sign this form at the bottom of the page. If possible, to help process your appeal, fill in items 4–6 on the reverse of this form.
- Rule 8.406 says that to appeal from an order or judgment, you must file a written notice of appeal within **60** days after rendition of the judgment or the making of the order being appealed or, in matters heard by a referee, within **60** days after the order of the referee becomes final.

1. I appeal from the findings and orders of the court *(specify date of order or describe order):*

2. This appeal is filed by
   a. Appellant *(name):*
   b. Address: c. Phone number:

   d. Name and address and phone number of person to be contacted *(if different from appellant):*

3. ☐ I request that the court appoint an attorney on appeal. I ☐ was ☐ was not represented by an appointed attorney in the superior court.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF ☐ APPELLANT ☐ ATTORNEY)

4. Items 5 through 7 on the reverse are ☐ completed ☐ not completed.

Form Approved for Optional Use
Judicial Council of California
JV-800 [Rev. July 1, 2010]

Cal. Rules of Court, rule 8.400, 8.401, 8.405, 8.406
www.courtinfo.ca.gov
CEB

Print

JV-800

CASE NAME:	CASE NUMBER:

5. Appellant is the
   a. ☐ child
   b. ☐ mother
   c. ☐ father
   d. ☐ guardian
   e. ☐ de facto parent
   f. ☐ county welfare department
   g. ☐ district attorney
   h. ☐ other *(state relationship to child or interest in the case):*

6. This notice of appeal pertains to the following child or children *(specify number of children included):*_____
   a. Name of child:
      Child's date of birth:
   b. Name of child:
      Child's date of birth:
   c. Name of child:
      Child's date of birth:
   d. Name of child:
      Child's date of birth:
   ☐ Continued in Attachment 5.

7. The order appealed from was made under Welfare and Institutions Code section *(check all that apply):*
   a. ☐ **Section 360** (declaration of dependency) ☐ Removal of custody from parent or guardian ☐ Other orders
      ☐ with review of section 300 jurisdictional findings
      Dates of hearing *(specify):*
   b. ☐ **Section 366.26** (selection and implementation of permanent plan in which a petition for extraordinary writ review that substantively addressed the specific issues to be challenged was timely filed and summarily denied or otherwise not decided on the merits)
      ☐ Termination of parental rights ☐ Appointment of guardian ☐ Planned permanent living arrangement
      Dates of hearing *(specify):*
   c. ☐ **Section 366.28** (order designating a specific placement after termination of parental rights in which a petition for extraordinary writ review that substantively addressed the specific issues to be challenged was timely filed and summarily denied or otherwise not decided on the merits)
      Dates of hearing *(specify):*
   d. ☐ Other appealable orders relating to dependency *(specify):*
      Dates of hearing *(specify):*
   e. ☐ **Section 725** (declaration of wardship and other orders)
      ☐ with review of section 601 jurisdictional findings
      ☐ with review of section 602 jurisdictional findings
      Dates of hearing *(specify):*
   f. ☐ Other appealable orders relating to wardship *(specify):*
      Dates of hearing *(specify):*
   g. ☐ Other *(specify):*

Comment: The use of this form is optional. The notice of appeal is due within 60 days after entry of judgment

appealable order or, in matters heard by a referee, within 60 days after the referee's order becomes final under Cal Rules of Ct 5.540. Cal Rules of Ct 5.590, 8.405(a), 8.406(a). When an application for rehearing of an order of a referee not acting as a temporary judge is denied under Cal Rules of Ct 5.542, a notice of appeal from the referee's order must be filed within 60 days after that order is served under Cal Rules of Ct 5.538(b)(3), or 30 days after entry of the order denying rehearing, whichever is later. Cal Rules of Ct 8.406(a)(3). A cross-appeal must be filed within the time allowed for the filing of the notice of appeal or 20 days after the superior court clerk mails notification of the first appeal, whichever is later. Cal Rules of Ct 8.406(b).

A certificate of probable cause is not required in a juvenile case. *In re Joseph B.* (1983) 34 C3d 952, 196 CR 348; see Pen C §1237.5; Welf & I C §800.

Whether the case is resolved by a contested hearing or an admission, the notice of appeal need only cite the disposition hearing date as the judgment appealed from. A notice of appeal from a jurisdictional hearing is premature as the finding at that hearing is not directly appealable, although the finding may be challenged as part of an appeal from the disposition. See *In re James J.* (1986) 187 CA3d 1339, 232 CR 456.

Counsel's name should not appear in the upper left hand corner of the notice of appeal unless counsel will actually be representing the client on appeal. If counsel is only assisting the client in filing the request and statement, the client's name is given in the upper left corner. Counsel's signature as executing the statement is not an appearance as counsel in the appeal. Pen C §1240.1(b).

If the client is indigent, the notice of appeal should be accompanied by a request for appointment of counsel. The sample form reproduced in §41.3 can be used.

Cross-Reference: For discussion of appeals in juvenile cases, see California Criminal Law Procedure and Practice §56.70 (Cal CEB Annual); Appeals and Writs in Criminal Cases §2.10 (3d ed Cal CEB 2007).

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57

Asset Forfeiture

Claim Opposing Forfeiture (Judicial Council Form MC-200) §57.1

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Source: Criminal Law/California Criminal Law Forms Manual/57 Asset Forfeiture/§57.1 Claim Opposing Forfeiture (Judicial Council Form MC-200)

§57.1 Claim Opposing Forfeiture (Judicial Council Form MC-200)



ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, state bar number, and address):*	*FOR COURT USE ONLY*
— TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
THE PEOPLE OF THE STATE OF CALIFORNIA	
CLAIMANT *(Name):*	
CLAIMED PROPERTY:	
CLAIM OPPOSING FORFEITURE (Health & Saf. Code, § 11488.5) ☐ In response to a judicial petition for forfeiture *(use existing case No.)* ☐ In response to notice of administrative proceedings	CASE NUMBER:

1. Claimant *(name):*
   is an ☐ individual ☐ corporation ☐ other *(specify):*

2. Claimed property *(describe):*

3. Value of claim is ☐ $5,000 or less ☐ $5,001 or more (Health & Saf. Code, § 11488.5(a)(3).)

NOTICE

1. You must file your claim within 30 days after you receive personal or mailed notice that your property may be forfeited. If you do not receive personal or mailed notice, you must file your claim within 30 days after notice is first published in a newspaper.
2. Your claim must be filed in the county where the property was seized. If the property was not seized, file your claim in the county where the property is located. If you have received a notice, you can find the address of the court on that notice.
3. Within 30 days after filing your claim, serve a copy on the District Attorney or Attorney General. The copy must have the court clerk's filing stamp on it.

This notice is urgent. If you do not understand it, you must seek help.

AVISO

1. *Usted debe presentar su demanda dentro de los 30 días siguientes a la fecha en que recibe, personalmente o por correo, el aviso de que sus bienes pueden ser confiscados. Si no recibe dicho aviso, deberá presentar su reclamo dentro de los 30 días siguientes a la fecha en que el aviso está publicado por vez primera en un periódico.*
2. *Su demanda debe presentarse en el condado donde fueron confiscados los bienes. Si los bienes no han sido confiscados, presente su demanda en el condado donde están ubicados los bienes. Si ha recibido el aviso, busque la dirección de la corte en el aviso.*
3. *Dentro de los 30 días siguientes a la fecha en que presentó su demanda, envíe una copia de la notificación judicial a la oficina del Fiscal (District Attorney) o del Procurador General (Attorney General). La copia debe llevar el sello del actuario de la corte encargado de recibir las demandas.*

Esta notificación es urgente. Si usted no la entiende, debe pedir ayuda.

Form Approved for Optional Use
Judicial Council of California
MC-200 [Rev. January 1, 2002]

CLAIM OPPOSING FORFEITURE

Print

CLAIMANT *(Name)*:	CASE NUMBER:
CLAIMED PROPERTY:	

4. Claimant has an interest in the claimed property. Claimant
   a. ☐ is the owner. *For vehicles (cars, boats, planes, etc.) only:* ☐ registered owner ☐ legal owner
   b. ☐ has a security interest or is a lien holder ☐ has a right to possess.
   c. ☐ is the personal representative of the estate of the owner, lessee, or secured party.
   d. ☐ other *(specify):*

5. Claimant's interest in the right to or value of the claimed property is
   a. ☐ all ☐ part *(specify nature, amount, or percentage):*

   b. ☐ unknown.

6. **Claimant requests**
   a. ☐ that the claimed property not be ordered forfeited.
   b. ☐ that claimant's interest in the claimed property not be ordered forfeited.
   c. ☐ costs of suit.
   d. ☐ other *(specify):*

7. ☐ Number of pages attached: _____

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF CLAIMANT)

VERIFICATION

I am the claimant in this proceeding and have read this claim. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: ▶ _____

(SIGNATURE OF CLAIMANT)

Comment: The use of this form is optional. Any person claiming an interest in property seized under Health & S C

§11488 may file a verified claim stating his or her interest in the property. This form may be used to assert the claim.

The claim must be filed with the superior court of the county in which the defendant has been charged with the underlying or related criminal offense or in which the property was seized or, if there was no seizure, in which the property is located. Unless the court extends the time for filing for good cause shown, the claim must be filed either within 30 days of the date on which the claimant received actual notice of the seizure or, if the claimant was not served with notice of the forfeiture, within 30 days of the date of the first publication of the notice of seizure. The claimant must serve an endorsed copy of the claim on the Attorney General or district attorney, as appropriate, within 30 days of the filing of the claim. Health & S C §11488.5(a)(1).

Cross-Reference: For discussion of claims opposing forfeiture, see California Criminal Law Procedure and Practice §§57.13-57.17, 57.23-57.29 (Cal CEB Annual).

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Contempt

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