GENERAL OFFICE MEMORANDUM 18-141

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: JOHN K. SPILLANE
Chief Deputy District Attorney

SUBJECT: CHAPTERED LEGISLATION

DATE: NOVEMBER 1, 2018

At the conclusion of the recent legislative session, the Governor signed into law over twenty new pieces of legislation that will affect the operations of the Office. Most of the new laws will take effect on January 1, 2019. Some of the new laws will not go into effect until 2020.

Two of the laws went into effect immediately:

- Mental Health Diversion (Assembly Bill (AB) 1810). Senate Bill (SB) 215 modifies several of the provisions of AB 1810, but the provisions of SB 215 do not go into effect until January 1, 2019;

- Post-Conviction Relief (AB 1812).

Some defense attorneys have already begun filing motions prior to the effective date of other new laws. Deputies should object to the premature filing of any motions where the new law does not take effect until January 1, 2019, or later.

Deputies who have expertise in the relevant subjects are in the process of analyzing the effects of the new laws on office policy. Office memoranda providing additional direction will be forthcoming.

Significant laws that do not go into effect until January 1, 2019 or later include:

- SB 1437 (Accomplice Liability for Felony Murder). This law is scheduled to take effect January 1, 2019. However, there may be a Constitutional challenge to this law filed in court. Deputies who are asked to litigate a petition should research whether a stay has not been issued.

  On Thursday, November 1, 2018 from noon to 1:30 p.m., CDAA will be presenting a Webinar entitled, "The Death of the Felony Murder Rule?" Tuition is free. Deputies may register for the Webinar using this link:

https://cdaa.informz.net/informzdataservice/onlineversion/ind/bWFpbGluZ2luc3RhbmNlaWQ9ODA0ODAxNiZzdWJzY3JpYmVyaWQ9MTA3MDE4OTYxMw==

- SB 1391 (Eliminating the Transfer of Juveniles Age 14 and 15 to Adult Court). A letter brief filed by the Santa Clara District Attorney's Office alleging a Constitutional violation is attached. Deputies who are handling a case in which it might be appropriate to pursue a transfer to adult court of a juvenile age 14 or 15 should research whether a stay has been granted on SB 1391 and consult with his or her supervisor.

- SB 10 (Elimination of Monetary Bail). This law is not scheduled to take effect until October 1, 2019. However, signatures are being gathered for a referendum for the 2020 election. The deadline to gather signatures is November 26, 2018. If enough signatures are gathered, the implementation of the legislation will be stayed until the election is certified in November or December of 2020.

  SB 1054 has already modified certain provisions of SB 10. Additional amendments are anticipated. Direction will be provided closer to the time that the legislation goes into effect.

- SB 923 (Eyewitness Identification). This legislation requires all law enforcement agencies and prosecutorial entities to adopt regulations for conducting photo and live lineups with eyewitnesses to ensure reliable and accurate suspect identifications. The regulations must comply with specified requirements, such as double-blind procedures, sequential presentation, and separating witnesses during a lineup. It becomes operative on January 1, 2020.

Deputies should also be aware the Governor has vetoed AB 1511, which had been proposed as urgency legislation to reenact Penal Code section 12022.6, the excessive-taking enhancement. Please refer to General Office Memorandum 18-055 for further information regarding the effect of the repeal of Penal Code § 12022.6 on pending or newly filed cases.

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Attachment

Susan S. Miller
Clerk of the Court
Court of Appeal of the State of California
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

RE: C.S. v. Superior Court
Sixth Appellate District, Case No. H045665
Santa Clara County Superior Court, Case No. JV38951, 213156

Dear Ms. Miller

This letter is written on behalf of the Santa Clara County District Attorney's Office (SCDA). The SCDA is a Real Party in Interest in this proceeding. The writ petition in the instant case is currently being handled by the Attorney General's Office. However, since the Attorney General may not raise the issue of the constitutionality of SB 1391 in responding to this Court's question regarding the effect of Senate Bill 1391 on the pending writ, we are seeking permission to file a supplemental letter brief as an amicus curiae. Should permission be granted, our Amicus curiae supplemental letter brief begins immediately below.

I. Senate Bill 1391 Should Not Have Any Impact in the Instant Case Because It is an Unconstitutional Amendment of Proposition 57

The provision of Senate Bill 1391 (hereinafter "SB 1391") that eliminated a court's ability to transfer jurisdiction over a 15-year old killer to adult criminal court violates the California Constitution because it is not consistent with Proposition 57 and does not further the intent of Proposition 57.

"Although the legislative power under our state Constitution is vested in the Legislature, 'the people reserve to themselves the powers of initiative and referendum.' (Cal. Const., art. IV, § 1.)" (*Legislature* v. *Eu* (1991) 54 Cal.3d 492, 500–501.) To protect the powers of initiative and referendum, the California

Constitution provides that "[t]he Legislature may amend or repeal an initiative statute by another statute that becomes effective ***only when approved by the electors unless the initiative statute permits amendment*** or repeal without the electors' approval." (Cal. Const., art. II, § 10(c), emphasis added.) This "constitutional limitation on the Legislature's power to amend initiative statutes" protects "the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent.'" (*People* v. *Kelly* (2010) 47 Cal.4th 1008, 1025.)

"The power vested in the electorate to decide whether the Legislature can amend an initiative statute "'is absolute and includes the power to enable legislative amendment ***subject to conditions attached by the voters***.'"" (*Shaw* v. *People ex rel. Chiang* (2009) 175 Cal.App.4th 577, 597, emphasis in original.) "[A]mendments which may conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislative[ ] enact[ment]...." (*Proposition 103 Enforcement Project* v. *Quackenbush* (1998) 64 Cal.App.4th 1473, 1486.)

On November 8 of 2016, the electorate of California passed Proposition 57, an initiative measure entitled the "The Public Safety and Rehabilitation Act of 2016." Proposition 57 eliminated the ability of prosecutors to directly file against minors in adult criminal court. Proposition 57 accomplished this goal by amending Welfare and Institutions Code section 707 so that the power to decide whether minors should be prosecuted in adult criminal court was given solely to judges.[1] However, section 4.2 of the initiative expressly authorized prosecutors to make motions to transfer a minor who was 14 or 15 at the time the minor was alleged to have committed one of several listed offenses, including the offenses with which the petitioner in the instant case has been charged and convicted: murder and assault by any means of force

[1] The change enacted by Proposition 57 was allowed even though the prosecution's ability to direct file in adult criminal court had been put into effect by Proposition 21 ("The Gang Violence and Juvenile Crime Prevention Act") – an initiative measure – because, inter alia, section 39 of Proposition 21 allowed amendment of its provisions by, inter alia, "a statute that becomes effective only when approved by the voters." (Prop 21, § 39.)

likely to produce great bodily injury. (See Prop 57, § 4.2; Welf & Inst. Code, § 707(a)(1) & 707(b).)

Section 5 of Proposition 57 stated: "This act shall be broadly construed to accomplish its purposes. The provisions of Sections 4.1 and 4.2 of this act may be amended ***so long as such amendments are consistent with and further the intent of this act*** by a statute that is passed by a majority vote of the members of each house of the Legislature and signed by the Governor." (Emphasis added.) Thus, any amendment to Proposition 57 is only authorized if the amendment is "consistent with and further[s] the intent of Proposition 57."

As enacted by Proposition 57, subdivision (a)(1) of Welfare and Institutions Code section 707, in pertinent part, currently provides:

> "In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any felony criminal statute, ***or of an offense listed in subdivision (b) when he or she was 14 or 15 years of age, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction***." (Welf. & Inst. Code, § 707(a)(1), emphasis added.)

Subdivision (b) of Welfare and Institutions Code section 707, in pertinent part, currently[2] provides: "Subdivision (a) shall be applicable in any case in which a minor is alleged to be a person described in Section 602 by reason of the violation of one of the following offenses ***when he or she was 14 or 15 years of age***: ¶ (1) Murder. ¶ (14) Assault by any means of force likely to produce great bodily injury. ¶ (21) A violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code, which also would constitute a felony violation of subdivision (b) of Section 186.22 of the Penal Code . . .". (Welf. & Inst. Code, § 707(b), emphasis added.)

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[2] The changes to Welfare and Institutions Code section 707 enacted by SB 1391 do not go into effect until January 1, 2019 as SB 1391 was not an urgency measure. (See *People* v. *Henderson* (1980) 107 Cal.App.3d 475, 488 ["Under the California Constitution, a statute enacted at a regular session of the Legislature generally becomes effective on January 1 of the year following its enactment except where the statute is passed as an urgency measure and becomes effective sooner."].)

Notwithstanding Proposition 57's express inclusion of judicial authority to permit a prosecution of a minor in criminal court, SB 1391 completely eliminated the ability to prosecute any 14 or 15-year old in criminal court *regardless* of how violent or serious the offense and regardless of a judicial determination that such prosecution is appropriate – unless the minor is "apprehended" after the "end of juvenile court jurisdiction." (New Welf. & Inst. Code, § 707(a).)[3]

SB 1391 cannot rationally be viewed as being consistent with Proposition 57 since SB 1391 ***took out*** the very ability to prosecute 14 and 15-year old minors that was ***put into*** the new version of Welfare and Institutions Code section 707(a) enacted by Proposition 57. (Cf., *People* v. *Kelly* (2010) 47 Cal.4th 1008, 1026–1027 ["for purposes of article II, section 10, subdivision (c), an amendment includes a legislative act that changes an existing initiative statute by taking away from it"].) In interpreting the intent behind a voter initiative, it is improper to read out of the enacted statute words that were expressly included. (See *Delaney* v. *Superior Court* (1990) 50 Cal.3d 785, 798–799 [rejecting an interpretation of a constitutional provision that would read out of the statute expressly included language].)

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[3] Specifically, under SB 1391, Welfare and Institutions Code section 707, in pertinent part, will state: "(a)(1) In any case in which a minor is alleged to be a person described in Section 602 by reason of the violation, when he or she was 16 years of age or older, of any offense listed in subdivision (b) or any other felony criminal statute, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile court to a court of criminal jurisdiction. . . .

(2) In any case in which an individual is alleged to be a person described in Section 602 by reason of the violation, when he or she was 14 or 15 years of age, of any offense listed in subdivision (b), ***but was not apprehended prior to the end of juvenile court jurisdiction***, the district attorney or other appropriate prosecuting officer may make a motion to transfer the individual from juvenile court to a court of criminal jurisdiction." (Emphasis added.)

Unfortunately, the statute does not identify when juvenile court jurisdiction "ends." (*Compare* Welf. & Inst. Code, § 602 [stating that "[e]xcept as provided in Section 707, any person who is under 18 years of age when he or she violates any law . . . is within the jurisdiction of the juvenile court . . ."] *with* Welf. & Inst. Code, § 1769(d)(2) ["A person who at the time of adjudication of a crime or crimes would, in criminal court, have faced an aggregate sentence of seven years or more, shall be discharged upon the expiration of a two-year period of control, or when the person attains 25 years of age, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800) of Chapter 1 of Division 2.5."] and Welf. & Inst. Code, § 607 (g)(2) ["A person who, at the time of adjudication of a crime or crimes, would, in criminal court, have faced an aggregate sentence of seven years or more, shall be discharged upon the expiration of a two-year period of control, or when the person attains 25 years of age, whichever occurs later, unless an order for further detention has been made by the committing court pursuant to Article 6 (commencing with Section 1800) of Chapter 1 of Division 2.5."].)

"The goal in interpreting a statute enacted by voter initiative is to determine and effectuate voter intent. (*Williams* v. *Superior Court* (2001) 92 Cal.App.4th 612, 622 [citing to numerous cases].) "To determine intent, we first look to the words of the statute, giving them their usual and ordinary meaning." (*Id*. at pp. 622-623; accord *Committee for Responsible School Expansion* v. *Hermosa Beach City School* Dist. (2006) 142 Cal.App.4th 1178, 1186 ["To interpret both constitutional and statutory provisions, we first look to their plain language."].)

In looking at the words of the statute enacted by Proposition 57, it is obvious the voters *did not intend to eliminate* prosecution in criminal court of 14 and 15-year old minors who commit one of the heinous crimes listed in subdivision (b) of section 707 (except in very limited circumstances) because the people who voted for Proposition 57 *did not eliminate it*. In this regard, there is no ambiguity. (See *Murphy* v. *Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 ["If the statutory language is clear and unambiguous our inquiry ends."].)

"In discerning the purposes of an initiative so as to determine whether a legislative amendment furthers its purpose and thus is valid, [courts] are guided by, but not limited to, the general statement of purpose found in the initiative." (*Proposition 103 Enforcement Project* v. *Charles Quackenbush* (1998) 64 Cal.App.4th 1473, 1490–1491; accord *Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374.) There were multiple intents identified in Proposition 57, reflecting a balancing of, among other things, the interest in public safety versus the interest in rehabilitation of juveniles.

These intents were identified as the following:

"1. Protect and enhance public safety.

2. Save money by reducing wasteful spending on prisons.

3. Prevent federal courts from indiscriminately releasing prisoners.

4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.

5. ***Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court***." (Proposition 57, sec. 2, emphasis added.)

The ballot argument in favor of Proposition 57 repeatedly emphasized that while minors should be rehabilitated, judges would be given the discretion to decide whether minors should be prosecuted as adults. (See Ballot Pamphlet, "Argument in Favor of Proposition 57 at p. 58 ["Prop. 57 is straightforward—here's what it does: . . . *Requires judges instead of prosecutors to decide whether minors should be prosecuted as adults*, emphasizing rehabilitation for minors in the juvenile system."; "Further evidence shows that minors who remain under juvenile court supervision are less likely to commit new crimes. Prop 57 focuses on evidence-based rehabilitation and *allows a juvenile court judge to decide whether or not a minor should be prosecuted as an adult*."], emphasis added.)

Moreover, the Legislative Analyst recognized the explicit ability to prosecute 14 and 15 year-old minors in adult court: "the measure ***specifies*** that prosecutors can only seek transfer hearings for youths accused of (1) committing certain significant crimes listed in state law (such as murder, robbery, and certain sex offenses) when they were age 14 or 15 or (2) committing a felony when they were 16 or 17." (Ballot Pamphlet, Legislative Analysis of Proposition 57 at p. 55, emphasis added.)

The existence of the exception allowing 14 and 15-year old perpetrators of murder, robbery, and violent sex offenses undoubtedly played a role in the voter's acceptance of the changes enacted by Proposition 57. If the persons who voted for Proposition 57 thought that it could be amended to preclude *any* 14 and 15-year old murderer from being treated like an adult (unless they were arrested after the end of juvenile court jurisdiction), they would have viewed the initiative in a very different light. And if voters had intended for Proposition 57 to eliminate the ability to prosecute such persons in criminal court, they would not have approved language doing the EXACT OPPOSITE. (See Proposition 103 Enforcement Project v. Charles Quackenbush (1998) 64 Cal.App.4th 1473, 1490 [a legislative amendment to a voter proposition "may only be upheld if, by any reasonable construction, it could be said to further purposes of that Proposition", emphasis added; accord *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354, 1371].)

It is true that section 3 of SB 1391 states "The Legislature finds and declares that this act is consistent with and furthers the intent of Proposition 57 as enacted at the November 8, 2016, statewide general election." (*Id*; see also *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1119 ["Under long-established principles, a statute, once enacted, is presumed to be constitutional until it has been judicially determined to be unconstitutional."].)

However, this does not mean courts are bound to accept the legislative declaration that a subsequently-enacted statute is consistent with an initiative. To the contrary, courts are required to independently assess whether a statute is inconsistent with a voter initiative and must prohibit the legislature from enacting laws that are outside the scope of its authority to promulgate. (See *Amwest Surety Ins. Co.* v. *Wilson* (1995) 11 Cal.4th 1243, 1265; *Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374; *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354, 1371; see also *People v. Kelly* (2010) 47 Cal.4th 1008, 1025 ["courts have a duty to ""jealously guard"" the people's initiative power, and hence to ""apply a liberal construction to this power wherever it is challenged in order that the right"" to resort to the initiative process ""be not improperly annulled"" by a legislative body."].)

Moreover, when an initiative has multiple purposes, courts "must give effect to an initiative's *specific language*, as well as its major and fundamental purposes." (*Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1374, emphasis added; see also *Amwest Surety Ins. Co.* v. *Wilson* (1995) 11 Cal.4th 1243, 1259, 1260 [identifying initiative's "major purposes"; argument that initiative had "a narrower scope than would follow from its broad language" rejected "'in view of the particular language'" used]; *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354, 1370 [citing initiative's "fundamental purpose"; amendment must not "violate[ ] a specific primary mandate" or "do violence to specific provisions" of the initiative].)

If provisions of a statutory amendment are consistent with some of the primary intents of the initiative but inconsistent with others, they will still be found

unconstitutional. (See *Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366, 1379; *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354, 1370 [legislation furthering one purpose of an initiative, but violating another of the initiative's "primary mandate[s]" could not reasonably be found to further initiative's purposes].)

To paraphrase *Gardner* v. *Schwarzenegger* (2009) 178 Cal.App.4th 1366: "[E]ven if these provisions of Senate Bill [1391] could be deemed to further Proposition [57's juvenile rehabilitation] purpose[4], they would still be unconstitutional because they are inconsistent with the proposition's other primary purposes [to "Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court" and "Protect and enhance public safety"]. (*Gardner* at pp. 1378-1379.)

And to paraphrase *Foundation for Taxpayer & Consumer Rights* v. *Garamendi* (2005) 132 Cal.App.4th 1354: "The Legislature cannot simply in the guise of amending Proposition [57] undercut and undermine a fundamental purpose of Proposition [57], even while professing that the amendment 'furthers' Proposition [57]. The power of the Legislature may be 'practically absolute,' but that power must yield when the limitation of the Legislatures authority clearly inhibits its action. (*Amwest*, *supra*, 11 Cal.4th at p. 1255, 48 Cal.Rptr.2d 12, 906 P.2d 1112.) Since Sen. Bill [1391] flies in the face of [at least two of] the initiative's purposes, it exceeds the Legislature's authority." (*Foundation for Taxpayer & Consumer Rights* at p. 1371.)

The authority of judges to determine whether minors such as the petitioner in this case may be prosecuted in adult criminal court enshrined by Proposition 57 is inconsistent with and cannot operate concurrently with SB 1391's elimination of judicial discretion to authorize such prosecution in adult criminal court. (Cf., *People* v. *Park* (2013) 56 Cal.4th 782, 798 ["the provisions of a voter initiative may be said

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[4] This is not to say the People agree that elimination of a court's ability to authorize the prosecution of a 14 or 15-year old minor furthers the purpose of juvenile rehabilitation. Under the new version of section 707 enacted by SB 1391 and depending on how "the end of juvenile court jurisdiction" is interpreted, a person who is arrested a short time before the end of juvenile court jurisdiction will likely receive no rehabilitation.

to impliedly repeal an existing statute when "'the two acts are so inconsistent that there is no possibility of concurrent operation,'"'].)

The general idea behind Proposition 57 was not to keep *all* juveniles out of the juvenile court system. But even assuming it was, it does no good for the defendant to argue that the *general* idea behind Proposition 57 was to allow minors to be handled in juvenile court because that general idea was subject to the important caveat that minors (including 14 and 15-year old minors who committed various designated serious crimes) could be handled in adult criminal court if such prosecution was authorized by a judge.

If the people voted in an initiative that made abortion unlawful except when necessary to save the mother's life or in cases of rape or incest, and the legislature then passed a statute eliminating the exception, would this Court have any hesitation in finding the statute inconsistent with the initiative – notwithstanding the general thrust of the initiative was to reduce abortions? Or if people voted in an initiative giving the defendant the right to a dismissal for a violation of the right to trial within 60 days absent a good cause showing, and the legislature then passed a law eliminating the exception for good cause, would this Court have any hesitation in finding the statute inconsistent with the initiative – notwithstanding the general thrust of the initiative was to effectuate the speedy trial right? Of course not! A similar obvious inconsistency exists between SB 1391 and Proposition 57 – as the former takes away authority expressly given to the court by the latter.

B. Conclusion

Because passage of SB 1381 was an unconstitutional act by the legislature in contravention of subdivision (c) of section 10 of Article II of the California Constitution, it is invalid and cannot be applied to prevent a juvenile court from permitting the prosecution of a 14 or 15-year old who commits an offense listed in Welfare and Institutions Code section 707(b) in criminal court. Accordingly, we respectfully submit that SB 1381 should not have any impact on the issues raised by the petitioner.

Dated: October 10, 2018

Respectfully submitted,

JEFFREY F. ROSEN
DISTRICT ATTORNEY

By: _____
Jeff H. Rubin
Deputy District Attorney