

# **DIFFICULT WITNESSES**

## **Impeachment & What to Do When a Witness Just Won't Cooperate (5<sup>th</sup> Amendment, Immunity, Contempt & Material Witnesses)**

Presented by:  
DDA Christine Bannon  
DDA Lindsey Carinci  
San Diego County District Attorney's Office

May 2019

# TABLE OF CONTENTS

<b>I. Prior Convictions/Misconduct</b>	
A. Convictions.....	3
B. Misconduct .....	5
C. Juvenile Adjudications .....	5
D. Juvenile Records and <i>Brady</i> Obligation Pre-Prelim .....	7
E. Using Priors/Misconduct in Court.....	8
<b>II. Impeaching with Prior Inconsistent Statements</b>	
A. Applicable Code Sections .....	10
B. How to Properly Impeach a Witness.....	12
C. Using Former Testimony.....	17
<b>III. Impeaching the Defendant</b>	
A. Fourth Amendment Violations.....	20
B. Fifth Amendment/ <i>Miranda</i> Violations.....	21
C. Sixth Amendment/ <i>Massiah</i> Violations .....	21
D. Prior Testimony .....	22
E. Impeachment of Non-Testifying Defendant .....	23
F. Materials That Can Be Used to Impeach the Defendant.....	23
<b>IV. Securing Witnesses for Trial and Material Witness Issues</b>	
A. Applicable Code Sections .....	25
B. Exercising Due Diligence.....	26
C. General Procedure in Securing Material Witness Warrants .....	30
D. Special Issues in DV and Sex Crimes Cases.....	31
<b>V. What to Do When a Witness Invokes the 5<sup>th</sup> Amendment Privilege Against Self-Incrimination</b>	
A. Applicable Code Sections .....	33
B. General Procedure When a Witness Invokes the 5 <sup>th</sup> .....	36
C. Practical Information/Tips.....	44
<b>VI. Granting Immunity</b>	
A. Use vs. Transactional Immunity.....	45
B. Authority to Seek a Grant of Immunity .....	46
C. California's Immunity Statutes, PC §§1324 and 1324.1 .....	49
D. PC §1324 Procedure.....	50
E. Letter Immunity with a Cooperative Witness .....	51
F. Hip-Pocket Immunity .....	52
G. Drafting the Grant of Immunity .....	52

# I. Prior Convictions/Misconduct

## A. CONVICTIONS

1. **Felonies:** EC §788 permits a witness to be impeached by all felony convictions. Courts have discretion to bar proof of the felony if its probative value is outweighed by its prejudicial impact (EC §352). Factors for the court to consider as part of the weighing process are outlined below. (See Section I., E.)
  - a) Using underlying facts of felony conviction is permissible:  
“Evidence of circumstances underlying a conviction is admissible to impeach credibility if the proponent demonstrates that the evidence has “any tendency in reason” to disprove credibility.” (*People v. Dalton* (May 16, 2019) Supreme Court Case# S046848)
    - Subject to Evidence Code §352
  - b) Prior conviction expunged or pardoned: A pardon based on innocence or a certificate of rehabilitation bars use of prior felony conviction for impeachment. (EC §788(a)-(b))
    - For all witnesses except defendants, a dismissal of the accusatory pleading under PC §1203.4 bars use of the felony to impeach. (EC §788(c) - (d); *People v. Field* (1995) 31 Cal.App.4th 1778.)
    - NOTE: A defendant may testify that he or she has been rehabilitated and received relief under PC §1203.4.
  - c) Out of state felony conviction: An out of state felony conviction is allowable IF it meets the *Castro* test (*People v. Castro* (1985) 38 Cal.3d 301, 316 - it’s a felony under the laws of the state in which it occurred and would also have been a felony in California; *Truman v. Thomas* (1980) 27 Cal.3d 285, 296.)
  - d) “Prior” felony conviction: A witness may be impeached by a conviction obtained after the charged offense occurred. (*People v. Hinton* (2006) 37 Cal.4<sup>th</sup> 839, 886-887.)
    - Defendants and/or witnesses, who haven’t been sentenced on one case and are currently in trial for a second offense or called as a witness pending sentencing, can be impeached with first conviction. (*People v. Martinez* (1998) 62 Cal.App.4<sup>th</sup> 1454; *People v. Ward* (1901) 134 Cal. 301.)

- e) Proposition 47: A witness who has suffered a previous felony conviction may be impeached with that conviction until a petition for re-sentencing is granted. A reduction to a misdemeanor does not happen by operation of law. Petition must be filed no later than November 4, 2022, unless good cause shown for later filing. (See Pen. Code, § 1170.18, subd. (j).). Unless and until a petition is filed and granted, the crime is still a felony and can be used as such.
- NOTE: Even if a petition is granted, any (misdemeanor) moral turpitude conduct can still be used as impeachment (See below).

2. **Misdemeanors**: There is no equivalent to Evidence Code §788 that will allow misdemeanor *convictions* to come in for impeachment; however, the underlying conduct involving moral turpitude may be used to impeach. (*People v. Wheeler* (1992) 4 Cal.4<sup>th</sup> 284, 297.)

- *Wheeler* holds that moral turpitude conduct cannot be proved by simply introducing the official record of misdemeanor conviction because the official record only proves there was a conviction, and the record of conviction is hearsay evidence of the underlying facts/conduct sought to be proved.
- *People v. Cadogan* (2009) 173 Cal.App.4<sup>th</sup> 1502. In *Cadogan*, the prosecution was attempting to impeach the defendant on cross by asking if he had been “convicted” of 5 specific misdemeanor offenses. The court held the proper way to impeach was to ask if the defendant had “committed” the moral turpitude conduct related to the misdemeanors and have him admit the conduct pursuant to *Wheeler* rather than ask him if he’d suffered the *convictions*.
  - A technical distinction, BUT: Asking about the “conviction” is to call for hearsay. Since there is no Evidence Code §788 equivalent permitting use of a *misdemeanor* conviction for impeachment, asking about the “conduct” is the proper way to introduce the relevant evidence under *Wheeler*.
  - In footnote 4 of *Cadogan*, however, the court recognized Evidence Code §452.5, subdivision (b)(1) (one of the judicial notice provisions in the code) which states a certified copy of an official record of conviction is admissible under section 1280 to prove the commission of a criminal offense or other act recorded by the record. (See also *People v. Duran* (2002) 97 Cal.App.4<sup>th</sup> 1448.)

## B. MISCONDUCT

**GENERAL RULE:** If a witness's misconduct did not result in a conviction, the court need not label it as a particular crime to determine if it constitutes an act of moral turpitude to be admissible for impeachment.

- *People v. Lepolo* (1997) 55 Cal.App.4<sup>th</sup> 85, 89-90: Defendant, who was being prosecuted for murder, was impeached with evidence that on an earlier occasion he raised a machete at a police officer and subsequently stated that "I wanted to whack his head off." Appellate court found the conduct showed more than one possible crime. "Whether the court admits evidence of past misconduct should be determined solely on the basis that the conduct evinces moral turpitude. The label is not important – the conduct is."
- NOTE: Unless the witness, who is being impeached, is going to admit the conduct you need to be mindful that you don't make this into a mini-trial. The court will be considering how many witnesses you will need to call and how much time it is going to take to present this evidence (EC §352). Try to present this evidence as simply and as efficiently as possible.

## C. JUVENILE ADJUDICATIONS

**GENERAL RULE.** It is error to admit a juvenile adjudication for impeachment. However, it is permissible to impeach a witness with evidence of prior conduct amounting to moral turpitude even if such conduct was the subject of a prior juvenile adjudication. (*People v. Lee* (1994) 28 Cal.App.4<sup>th</sup> 1724, 1738-1740.)

- Evidence Code §452.5 did not change the *Lee* decision.
- *Lee* appears to allow the prior conduct to be proved by introducing evidence of an *admission* to the prior petition if witness denies the conduct as a prior inconsistent statement; however, if there was a prior true finding of the juvenile petition by the *court*, then prior inconsistent statement exception would not apply.
- Subject to Evidence Code §352

### 1. Gathering JV Evidence for Impeachment – UNSEALED

- a) Suggested protocol:
  - (1) Review juvenile DA file.
  - (2) Make copies of the pertinent information you want released. (*Redactions may be necessary if other minors are included in the reports.*)
  - (3) Paginate the copied documents.

- (4) Prepare all necessary paperwork to file a Welfare & Institutions Code §827 petition in juvenile court, which may include a protective order signed by you and defense counsel. The petition should include language outlining why the documents are needed, whether you intend to provide them in discovery, who you expect to testify, a copy of the complaint, etc., and as an attachment, the paginated documents you are requesting be released.
  - (5) Serve all necessary parties to the petition.
  - (6) Appear as directed at any scheduled hearings.
- Either you or the defense attorney can get the *defendant's* juvenile records for information purposes at any time without filing a petition, apart from certain protected records (e.g. defendant's psychological records, sealed records). However, proper redactions must be made if other minors are referenced in the documents. If either party wants to use the documents in court, a WIC §827 petition will need to be filed with the court and granted beforehand.

## 2. **Gathering JV Evidence for Impeachment – SEALED**

- State sealing statutes do NOT relieve us of our due process/*Brady* obligations if a witness's juvenile records *in our possession* contain exculpatory information.
- Depending on what statute (WIC 781, 786, 790) the juvenile records are sealed under will determine how you go about inspecting the records and discovering them.
- Consult with your juvenile division to comply with your office's policy on how to review/get these records in a proper and timely manner.

***\*\*It is important to seek this information early on if it may be relevant in your case. The entire process of from start to finish can take upwards of two months.***

#### **D. JUVENILE RECORDS AND DUE PROCESS/*BRADY* OBLIGATION PRE-PRELIM**

Prosecutors must be aware of and comply with all statutory and constitutional discovery obligations. To that end, please be aware that the following cases may affect the decisions you must make with respect to pre-preliminary hearing discovery.

- *People v. Gutierrez* (2013) 214 Cal.App.4th 343. Defendant was charged with two counts of lewd acts with a child under age 14. (Pen. Code, §288, subd. (a).) He was bound over for trial after a preliminary hearing where an officer testified pursuant to Penal Code § 872 to statements made to him by the victims, defendant's 11-year-old foster children. Following the preliminary hearing, the defense obtained from the juvenile court police reports showing one of the victims had made molest accusations in the past that were determined to be unfounded. Thereafter, the Superior Court granted a non-statutory motion to dismiss the information for denial of a substantial right – failure of the prosecutor to provide exculpatory [impeachment] evidence before the preliminary hearing. The court found it was reasonably probable the outcome of the preliminary hearing would have been different if the exculpatory evidence had been produced. The People appealed and the Court of Appeal affirmed the trial court, holding the defendant had a due process right under the U.S. Constitution and *Brady* to disclosure of the potentially favorable impeachment evidence before his preliminary hearing. A petition for review before the California Supreme Court was denied.
- *Bridgeforth v. Superior Court* (2013) 214 Cal.App.4th 1074. Defendant was charged with murder, attempted murder, shooting at an occupied vehicle and possession of a firearm by a convicted felon, with enhancing allegations for personal use of a firearm. At preliminary hearing, an eyewitness testified he observed defendant shoot the victim (who was in his car), then turn and fire towards the witness. Evidence from defendant's GPS monitor placed him at the scene. Defendant's admissions that he shot the victim for his codeine cough syrup were also introduced. Defendant was bound over for trial. Following the preliminary hearing, defendant brought a non-statutory motion to dismiss for denial of a substantial right – failure of the prosecution to disclose a photograph of the eyewitness' car as it was parked at the scene the day of the murder. The motion was denied. Defendant sought a writ of mandate in the Court of Appeal, claiming failure to disclose the photo violated due process. The Court of Appeal concluded a defendant has a due process right under both the California Constitution and the U.S. Constitution to

disclosure before the preliminary hearing of evidence that is favorable and material, if disclosure would create a reasonable probability of a different outcome at the preliminary hearing. The Court went on to conclude the photograph in question was not favorable to the defendant, and thus failure to disclose it before the preliminary hearing did not violate his constitutional rights. A petition for review and a request for de-publication were filed in the California Supreme Court. Both were denied.

Thus, prosecutors must make every effort to comply with the law by seeking out exculpatory and impeachment evidence from members of the “prosecution team” before the preliminary hearing where that evidence would likely be *material to the outcome of the preliminary hearing*.

- For example, where probable cause is satisfied through the testimony of one witness, whether presented pursuant to Prop. 115 or live testimony, it is important to obtain and disclose any impeachment evidence possessed by the prosecution or known to be possessed by the investigative agency. This includes information that may be obtainable from a rap sheet.
- NOTE: Our statutory obligations under the Criminal Discovery Act (Penal Code sections 1054 et seq.) are not affected by these decisions.

## E. USING PRIORS/MISCONDUCT IN COURT

1. **Motions in Limine**: Move to exclude or admit priors or other impeaching conduct evidence before trial. It will affect your trial strategy and it may have an impact on the defense case as well. You will also want to address it during voir dire if it’s your witness who has a conviction or other impeaching conduct that will come in.
  - *People v. Beagle* (1972) 6 Cal.3d 441 sets forth factors, in addition to the nature of the prior conviction, which the court should weigh when determining whether a *defendant’s* priors should be admitted:
    - (1) Does the prior reflect adversely on defendant’s honesty and veracity? Is it moral turpitude conduct/offense?
    - (2) Is the prior near or remote in time?
      - Length of time elapsed since the conviction
      - Length of sentence served affecting analysis of elapsed time
      - Age of witness at the time of the conviction/conduct
      - Conduct after the conviction
    - (3) Is the prior substantially similar to current charge?
    - (4) Influence of admission on defendant’s decision to testify

- The factors are to be weighed differently when the court is determining whether to admit a *witness's* prior convictions/conduct versus the defendant's. The two most important factors for the court to consider in determining admissibility of a *witness's* prior conviction/conduct are "whether the conviction: 1) reflects on honesty and 2) is near in time." (*People v. Clair* (1992) 2 Cal.4<sup>th</sup> 629.)
- Admissibility still subject to Evidence Code §352 analysis.

2. **Sanitizing Priors:** The court may want to exclude a prior because it is too inflammatory (e.g. child molestation prior offered in petty theft trial). You can offer to sanitize the prior rather than the court simply excluding it.
- Determine how the felony should be referred to, such as, "a felony involving theft" or "a felony involving moral turpitude."
  - You may get some jury inquiries as to what moral turpitude means. The court can always refer them to language in *People v. Jackson* (1985) 174 Cal.App.3d 260, 266 which states a prior conviction of moral turpitude is one that involves dishonesty or "a general readiness to do evil."

3. **Questioning When Impeaching Witness or Defendant**

- Determine when you want to do the questioning.
- Break down the line of questioning to carefully cover each relevant fact.
- The questioning is usually limited to name or nature of the crime, date and place of conviction.
- If witness admits to the conviction on direct, counsel can still only go into the limited questioning above UNLESS the witness tries to mislead the jury or tries to minimize the facts. A cross-examiner can only go into the details of the crime if the witness "opens the door." (*People v. Heckathorne* (1988) 202 Cal.App.3d 458, 461-463; *People v. Shea* (1995) 39 Cal.App.4<sup>th</sup> 1257, 1267.)

4. **Arguments for Closing/Rebuttal**

- Be sure to make witness credibility argument when defendant or defense witness has testified with prior felonies. (CALCRIMS 226 & 316)
- If your witness is the only witness with the criminal record, you may want to address how your witness's testimony has been independently corroborated with other evidence or how the witness's criminal record really has no bearing on the witness's specific testimony.

5. **Crimes of Moral Turpitude (Updated List)**

- See Attachment "A" for an updated list of moral turpitude crimes.

## II. Impeaching with Prior Inconsistent Statements

### A. APPLICABLE CODE SECTIONS

#### 1. Evidence Relating to Witness Credibility is Relevant and Admissible

EC §350: Only *relevant evidence* is admissible.

EC §351: **ALL** relevant evidence is admissible unless otherwise stated.

EC §210: Relevant evidence means evidence, including evidence *relating to the credibility of a witnesses or hearsay declarant*, having tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

EC §785: Credibility of a witness may be *attacked or supported* by *any party*, including the party calling the witness.

#### 2. Prior Inconsistent Statements

EC §769: A witness *need not* be shown his prior statement before being questioned about it.

EC §770: Evidence of a prior inconsistent statement shall be excluded *unless*:

(a) The witness was *examined* and had an *opportunity to explain or deny* the statement; or

(b) The *witness has not been excused* from giving further testimony (witness is subject to recall).

EC §1235: Evidence of a statement made by a witness that is *inconsistent with his testimony* at the hearing is admissible if offered in compliance with Evidence Code §770 foundational requirements. (Note: in this case, the prior inconsistent statement is admitted both to *impeach the credibility* of the witness and for the *truth of the prior statement* since the witness has been examined or there has been an opportunity for the witness to be examined about the substance of the statement. (CALCRIM 318; *People v. Barnett* (1998) 17 Cal.4<sup>th</sup> 1044.)

EC §1294<sup>1</sup>: The following evidence of a prior inconsistent statement of a witness ***properly admitted pursuant to Evidence Code §1235*** in a ***conditional examination, preliminary hearing or trial*** of the same criminal matter is ***not*** made inadmissible by the hearsay rule if the witness is ***unavailable*** and the ***former testimony*** is admitted pursuant to Evidence Code §1291:

(1) A video or audio recorded statement introduced at a conditional exam, preliminary hearing or prior proceeding concerning the same criminal matter.

(2) A ***transcript, containing the statements***, of the conditional exam, preliminary hearing or prior proceeding concerning the same criminal matter.

- **NOTE**: Evidence Code §1294 was specifically enacted to overrule *People v. Williams* (1976) 16 Cal.3d 663, which held that prior inconsistent statements of an unavailable hearsay declarant were admissible pursuant to Evidence Code §1202 to impeach the credibility of the hearsay declarant ***only*** and not for its substantive truth. Evidence Code §1294 allows the prior inconsistent statements which were ***properly admitted at conditional exam or prelim*** to be admitted ***both*** for its truth as well as determining the declarant's credibility.

EC §1202: Evidence of a prior inconsistent statement by a ***hearsay declarant*** is admissible for purposes of ***attacking the credibility*** of the hearsay declarant even though he has not had an opportunity to admit or deny the prior inconsistent statement (Evid. Code, §770). However, the statement is ***not admissible*** for the substantive truth of the prior inconsistent statement since the witness has not been examined regarding the substance of the prior statement. (CALCRIM 319; *People v. Williams* (1976) 16 Cal.3d 663.)

### **3. Former Testimony**

EC §1290: Defines "former testimony."

---

<sup>1</sup> EC § 1294 was amended in July 2018 to add audio recorded statements to existing video recorded statements under subdivision (1) and included conditional exams (as defined by PC 1335 et. seq.) to those proceedings to which section 1294 applies.

EC §1291: Former testimony is *not inadmissible* hearsay if the *declarant is unavailable* (See Evid. Code, §240 defining unavailability) and:

- (1) Offered against the *person who offered it in evidence on his own behalf* on the former occasion (e.g. defense witness who worked in your favor at prelim but is now unavailable for trial); or
- (2) Person against whom the former testimony is offered was a *party to the prior proceeding* and had the *right and opportunity to cross examine* the declarant *with an interest and motive similar* to that which he now has in the current proceeding.
  - Admissibility is subject to same objections as if declarant were testifying live, except:
    - Objections to the form of the question (leading, compound, etc.) which were not made at the time of the original questioning; and
    - Objections based on competency and/or privilege which were not made at the time of the original questioning.

EC §1294: Only those prior inconsistent statements properly offered via Evidence Code §1235 at conditional exam, prelim. or at prior trial in same criminal matter are admissible for their *substantive truth* when using an unavailable witness's prior testimony at trial.

## B. HOW TO PROPERLY IMPEACH A WITNESS

Most often a prelim occurs close on the heels of the crime and before a witness's feet get cold; they move with no forwarding information; become influenced by family, friends, boyfriends, girlfriends or gang members; get deported or otherwise return to Mexico; or die (to name a few common circumstances). Therefore, to secure the best testimony at this critical stage, you must be *fully prepared*. As you will learn, if you possess statements inconsistent with the witness's testimony at prelim and do not properly impeach your witness with their prior inconsistent statements at the prelim, those prior statements will *not* be admitted in at trial for their substantive truth if the witness becomes unavailable at trial.

## 1. Preparing for Prelim Testimony

- Gather all statements made to police.
- Gather all statements made to others (DA investigators, hospital staff, TRO declarations, family/friends/neighbors).
- Be sure that defense counsel has **all** the reports you intend to use at prelim, as well as any necessary disclosure letter outlining the witness's criminal record.
- ***Transcribe recorded interviews of key witnesses in serious cases.***

## 2. Questioning the Witness

### a) Outline your questions!

- Be sure to reference in your notes **every time** a statement is made By the witness. For example:
  - 911 call
  - Statement to first officer on scene
  - Statement to detective
  - Statement to hospital staff
  - Statement to detective during photo lineup
  - Follow up interview w/DA investigator
  - Statement/comments morning of prelim

### b) Start asking questions

- If witness answers truthfully, move on.
- If witness strays from the truth, let them talk to get a feel for them to determine how sideways they'll go.
  - Maybe the witness only made mistake/misstatement
  - Maybe not, let the witness get the whole BS story out
  - Take notes on what areas you will have to go back over to impeach
- Only impeach the inconsistent statements.
- Go over **each and every** prior statement made that is inconsistent with the current testimony. Don't be satisfied with just one or two instances – these will be the only one or two statements admitted in trial for their truth. There is strength/credibility in just how many times and under varying circumstances to different people a witness has made a prior statement before changing it in court.

- c) Ask impeaching questions the right way
- Do NOT start any questions with “do you recall.” You are ***not refreshing recollection*** you are setting up ***impeachment*** with prior inconsistent statements.
  - ASK: On (date) did you tell Officer Jones, “I saw Darnell with a gun in his hand?”
  - Or ASK: On (date) did Officer Jones ask you this question and did you give this answer? Question: Who had the gun? Answer: Darnell.
  - Use this manner of questioning with ***each prior inconsistent statement***.
  - Do not accept waffling responses like “I was drunk when he was asking me those questions,” or, “I had been up all night by the time the police finally talked to me and they wouldn’t let me leave.” **STICK TO YOUR GUNS AND TO YOUR OUTLINE.** Make the witness either ***admit*** making the statement or ***deny*** making the statement.
    - NOTE: If a witness ***admits*** the prior statement and gives some “explanation” for it, it is ***not*** a prior inconsistent statement. Rather, the exercise then becomes one of impeaching the veracity of the current “explanation” for why the witness gave the prior statement.
- d) “I don’t remember” - When the witness *really* doesn’t remember:  
 You cannot impeach a witness with a prior inconsistent statement where the witness ***honestly*** cannot recall the facts. (*People v. Sam* (1969) 71 Cal. 2d 194.)
- When a witness really does not remember something, try to refresh their recollection with the police report or other writing (Evid. Code, §771) or lay the foundation for past recollection recorded or prior identification (Evid. Code, §§1237 and 1238).
- e) “I don’t remember” - When the witness is feigning memory lapse: If a witness gives evasive answers and claims memory lapses, but ***in context*** the witness’s answers amount to an ***implied denial***, there will be sufficient inconsistency to allow impeachment with an earlier statement. (*People v. Green* (1971) 3 Cal.3d 981; See also, *In re Deon D.* (1989) 208 Cal.App.3d 953 [witness testified he was at crime scene, remembered the incident, and talked to prosecutors about it, but refused to answer stating he was “no snitch.” Witness’s refusal to answer certain questions amounted to an implied denial.].)
- *People v. Johnson* (1992) 3 Cal.4<sup>th</sup> 1183. “As long as there is a ***reasonable basis in the record*** for concluding that the witness’s

‘I don’t remember’ statements are evasive and untruthful, admission of his or her prior statements is proper.” This is seen as an “implicit conclusion” on the part of the trial court and a formal finding at trial is not necessary.

- *People v. Gunder* (2007) 151 Cal. App. 4<sup>th</sup> 412. A witness told police about an incident where the defendant accidentally shot himself in the leg. At trial, the witness claimed no memory of the incident, attributing the memory loss to medication. Given all the circumstances the court found the witness’s memory loss was feigned and feigned memory loss is **not** the same as a **refusal** to answer questions. The Confrontation Clause is therefore not implicated because **feigned memory loss is subject to cross examination**, providing a jury with the opportunity to see the witness’s demeanor and assess his credibility, which in turn gives the jury a basis for judging the prior hearsay statement’s credibility.
- *People v. Foalima* (2015) 239 Cal. App. 4<sup>th</sup> 1376. When an accomplice was called to testify under a grant of immunity then proceeded to answer most questions with “I don’t know,” the Court found proper the trial court’s refusal to strike the witness’s testimony because his feigned memory loss was not a refusal to testify. The witness therefore was subject to cross examination regarding the answers he gave even if defense counsel declined to ask any questions beyond, “If I ask you any question are you going to know anything?” to which the witness responded, “No.” Further, it was proper for the prosecution to argue in closing that a reasonable inference from the witness’s testimony was that he was trying to protect his friend and accomplice while avoiding being a “snitch” and that the defendant believed he was “untouchable” knowing that no one would testify against him even if given immunity.
- If you believe the witness is one that is likely to play the “I don’t remember” game, establish the foundation for their convenient and expected (feigned) lapse in memory **before** they suffer from it. Ask “background” questions and generic questions surrounding the event, and probe details of their testimony to elicit the motives/biases or other circumstances that will lay the foundation that they are feigning their lack of memory without letting them know you are setting them up:
  - Witness and defendant are friends, family, neighbors, etc.
  - Witness able to recall lots of details before and after the crime and testifies about it.

- Witness has reason to feign memory loss (fear of retaliation, being labeled a snitch, attitude toward law/courts, stated intent not to testify, relationship with defendant, etc.)
- Event is not one easily forgotten.

f) When a witness refuses to testify: You **cannot** impeach with a prior inconsistent statement where the witness **refuses** to answer ALL questions put to him on direct or cross examination. There is “no statement in the record that is inconsistent, or for that matter consistent, with prior statements.” (*People v. Rios* (1985) 163 Cal.App.3d 852, 864.) “The admission of a prior statement made by a witness who stonewalls at trial and refuses to answer any question on direct or cross-examination denies a defendant the right to confrontation which contemplates a meaningful opportunity to cross-examine the witness.” (*Ibid.*)

- NOTE: If a witness refuses only to answer portions of a direct or cross examination, it will be a case by case analysis whether the court will allow impeachment based on the testimony given or if it constitutes a violation of defendant’s right to confrontation under the Sixth Amendment (whereupon the court will strike all the testimony). When this situation arises, the only remedy is to determine whether the witness’s statement falls under a hearsay exception (i.e. former testimony, excited utterance, etc.) and admit it that way. If not, the witness may be found in contempt and confined until they give their testimony. However, if they continue to refuse and the trial concludes, you may be stuck.
- During direct or cross examination of a witness like this **proceed with caution** when questioning the witness. (See Section V.B.4., specifically the case discussions on *Douglas v. Alabama* (1965) 380 U.S. 415 and *People v. Shipe* (1975) 49 Cal.App.3d 343.)
- You may make a **negative inference argument** as outlined in *People v. Morgain* (2009) 177 Cal.App.4<sup>th</sup> 454 but be extremely careful how you do it. (See Section V.B.4., for a complete discussion.)

3. Admitting Prior Statement(s): After questioning the witness as to **each prior inconsistent statement**, unless the witness ultimately admits the prior statement, don’t forget to **call the witness** who heard or took the statement and go over **each prior statement** with them on the stand so that the evidence (the prior statement) is actually admitted.

## C. USING FORMER TESTIMONY

Things can get a little more complicated where you've preserved the witness's testimony by putting them on at prelim or conditional exam and now, as feared, the witness has become *unavailable for trial*. In just what form, how much, and for what evidentiary purpose can the witness's former testimony, *including any prior inconsistent statements* admitted at the prelim or conditional exam, be admitted at trial? The answer depends on how thorough and precise you were at the earlier examination.

Any evidence offered to attack or support the *credibility* of the *hearsay declarant* is *admissible* if it would have been admissible had the declarant been a witness in the hearing.

### 1. The Interplay of EC §§1202, 1235, 1291 and 1294

**GENERAL RULE:** If a witness *testifies at prelim or conditional exam* and does so *inconsistently* with his or her prior statements, to properly preserve your ability to admit the prior inconsistent statements *for their truth* at trial should the witness become unavailable (Evid. Code, §§ 1235 and 1291) you must:

- 1) Either confront the witness at prelim or conditional exam with *all known prior inconsistent statements* or leave the witness subject to recall (Evid. Code, § 770) and then:
  - 2) Offer the prior inconsistent statements into *evidence* by:
    - (a) *Calling the witness* to whom the statement was made
    - (b) **Playing** the audio or video recording of the prior statement (See *People v. Haynes* and *People v. Martinez*, infra.) and either having the court reporter *transcribe the recording as it's being played* or *offering a transcript w/stipulation* that the transcript of the recording be *part of the prelim transcript* for purposes of Evidence Code §1294(a)(2); or
    - (c) Admitting the audio or video recording of the prior statement into evidence (EC §1294(a)(1)).
- Evidence Code §1202 allows a hearsay declarant's prior inconsistent statements to be admitted to impeach the hearsay declarant's *credibility* even if they were not given an opportunity to explain or deny the prior statement. This means if you called a witness at prelim and *did not* confront them with all prior inconsistent statements that were known to you at the time and that witness becomes unavailable at trial, their prior testimony may be admitted pursuant to EC §1291, but you will *not* be permitted to use EC §1202 to admit the prior inconsistent statements for

their *substantive truth*, but rather, only to *impeach the declarant's credibility*.

- a) Failure Introduce Prior Inconsistent Statements at the Preliminary Hearing: A prior inconsistent statement of a witness who testified at prelim or conditional exam will not be admitted at trial for its substantive truth if the witness becomes unavailable at trial if the inconsistent statement was known to the prosecution at the time of the prior testimony and was not introduced. The prior inconsistent statement may still be admitted at trial, but only to impeach the credibility of the unavailable hearsay declarant.
- *People v. Blacksher* (2011) 52 Cal.4<sup>th</sup> 769 re-examined the long standing “*Beyea* rule” which limited the application of Evidence Code §1202 by holding that only the person against whom the hearsay statement was being offered could use Evidence Code §1202 to admit the hearsay declarant’s prior inconsistent statements to impeach his or her credibility even though the plain language of Evidence Code §1202 held no such limitation. *Beyea* reasoned that to hold otherwise would violate the Confrontation Clause. (*People v. Beyea* (1974) 38 Cal. App. 3d 176.) The Supreme Court in *Blacksher* explained that admitting a prior inconsistent statement at trial for its *truth* when an inconsistent statement was known to the prosecution at the time of prior testimony and the witness was not confronted with the statement is a violation of the Confrontation Clause. However, admitting a prior inconsistent statement to *impeach* the hearsay declarant’s credibility does not as it is not *evidence* being offered against a defendant. Because EC§1202 specifically limits the use of the prior inconsistent statement for impeachment purposes only, it was not necessary for the *Beyea* court to read in the party limitation that it did (noting further that EC§785 permits a witness’s credibility to be attacked or supported by *any party*, including the party calling the witness.)
  - Interestingly, in *People v. Baldwin* (2010) 189 Cal. App. 4th 991, the *defendant’s* prior inconsistent statements to police that he did not participate in a murder were admitted to impeach *his own* credibility when the People introduced defendant’s jailhouse recorded admissions regarding the murder. Though unusual, the court found this was a proper application of EC §1202. The court also suggested fixing the statute.

- b) Audio/Videotaped Statements of Witnesses: An *audio or video recording of a prior inconsistent statement* of a witness who testified at prelim or conditional exam will not be admitted at trial when the witness becomes unavailable unless the recording itself was played at the prelim and transcribed by the court reporter so that the “transcript of the prior proceeding” contains the statement, or the audio or video recording was otherwise admitted into evidence.
- *People v. Haynes* (1999) 72 Cal.App.4<sup>th</sup> 337 examined EC §1294 and the admissibility at trial of the *entire audio recording* of a prior inconsistent statement for its truth made by a witness who testified at prelim but who became unavailable at trial. The court in *Haynes* held that since the recording was *played at prelim* and the defendant, with the same motivation as trial, had an *opportunity to cross-examine* the now unavailable hearsay declarant about the prior inconsistent statements, the Confrontation Clause was satisfied.
  - *People v. Martinez* (2003) 113 Cal.App.4<sup>th</sup> 400 demonstrates the importance of *playing the recording* of a prior inconsistent statement when impeaching a witness at prelim or conditional exam if you wish to play the recording in trial and there is a risk of witness unavailability. In *Martinez*, an uncharged accomplice to a murder gave a voluntary and recorded statement to police regarding the charged defendant being the shooter in a homicide. The uncharged accomplice testified at prelim to the general circumstances surrounding the shooting but denied telling police that the defendant was the shooter. At trial the accomplice invoked his 5<sup>th</sup> Amendment privilege and was deemed *unavailable*. The prior prelim testimony was admitted, *and* the police recorded statement was played at trial. The court found the Confrontation Clause was violated because the accomplice did not testify at trial and he was never subject to cross-examination regarding his *entire* statement as it related to his recorded police interview.

⇒ **BOTTOM LINE: USE IT OR LOSE IT!!!!**

### III. Impeaching the Defendant

“When defendants testify, they must testify truthfully or suffer the consequences.”  
(*U.S. v. Havens* (1980) 446 US 620, 626.)

#### A. FOURTH AMENDMENT VIOLATIONS

**GENERAL RULE:** Evidence seized in violation of the 4th Amendment and suppressed pursuant to PC §1538.5 cannot be introduced by the prosecution in its case-in-chief but *can* be used to impeach defendant’s contrary testimony. (*People v. Moore* (1988) 201 Cal.App.3rd 877, 883-886.)

- *People v. Moore* (1988) 201 Cal.App.3d 877, 885-886: In defendant’s trial for a jewelry store robbery, investigators determined it had been an “inside job.” When defendant was arrested a note was found in his car that referencing the name “Wayne” and detailing the robbery, but the note was suppressed due to illegal search and seizure of his car. When defendant denied knowing anyone named “Wayne” on cross examination, the note was properly admitted to impeach him.
- *U.S. v. Havens* (1980) 446 U.S. 620, 627-628: A defendant’s statements made in response to proper cross-examination reasonably suggested by the defendant’s direct examination are subject to otherwise proper impeachment, albeit by evidence that has been illegally obtained and that is inadmissible in the government’s direct case, or otherwise, as substantive evidence of guilt. (See also, *Walder v. United States* (1954) 347 U.S. 62.)
- Illegally seized evidence cannot be used to impeach defense *witnesses*. (*James v. Illinois* (1990) 493 U.S. 307.) The court’s reasoned that if they expanded the impeachment exception to encompass the testimony of all defense witnesses, it would likely: 1) dissuade some defendants from presenting their best defense, and sometimes any defense at all, through the testimony of others; and 2) significantly weaken the exclusionary rule's deterrent effect on police misconduct.
- There is no *sua sponte* requirement for the court to give a limiting instruction on this unless requested by the defense. (*People v. Simms* (1970) 10 Cal.App.3d 299, 310-311; *People v. Clark* (1987) 193 Cal.App.3d 178, 182-183.)

## B. FIFTH AMENDMENT/*MIRANDA* VIOLATIONS

**GENERAL RULE:** A statement obtained from the defendant in violation of the *Miranda* rule can be used to impeach. (*Harris v. New York* (1971) 401 U.S. 222; *People v. May* (1988) 44 Cal.3d 309.) Such statements are also admissible in rebuttal to the defendant's case. (*People v. Pilster* (2006) 138 Cal.App.4th 1395.)

- **EXCEPTION:** A defendant's statements found to be *involuntary or coerced* cannot be used for any purpose. (*Brown v. Mississippi* (1936) 297 U.S. 278.) The use of such involuntary statements is considered a denial of due process of law under both federal and state Constitutions. (*Lego v. Twomey* (1972) 404 US 477, 483.)
- There is no *sua sponte* requirement for the court to give an instruction limiting the use of the defendant's prior inconsistent statements for purposes of impeachment unless the defense so requests and evidence shows a *Miranda* violation occurred. (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1088-1089; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 63; *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1401.)

## C. SIXTH AMENDMENT/*MASSIAH* VIOLATIONS

**GENERAL RULE:** There is a split of authority in California whether a defendant's voluntary statement, taken in violation of his Sixth Amendment right to counsel, requires suppression of the statement for all purposes, including impeachment.

1. **Majority View:** Yes. A voluntary statement taken in violation of the 6th Amendment can be used for impeachment. (*People v. Brown* (1996) 42 Cal.App.4th 461, 471-473 (4th DCA); *United States v. McManaman* (10th Cir. 1979) 606 F.2d 919; *United States v. Ortega* (9th Cir. 2000) 203 F.3d 675, 681; *United States v. Martin* (Ill. 1997) 974 F.Supp. 677.)
  - This view considers the important policy that if a defendant exercises his right to testify on his own behalf, he must do so truthfully and accurately.
2. **Minority View:** No. A voluntary statement taken in violation of the 6th Amendment must be excluded for all purposes. (*People v. Cribas* (1991) 231 Cal.App.3d 596, 606 (4th DCA); *People v. Harper* (1991) 228 Cal.App.3d 843.)
  - The minority view takes the position that it's not whether the statements are voluntary or involuntary, but whether they were or were not obtained in violation of the Constitution. When dealing

with the Constitutional privilege, balancing other interests is impermissible.

#### **D. PRIOR TESTIMONY**

**GENERAL RULE:** If the defendant testifies at a prior hearing (e.g. motion to suppress, speedy trial motion, parole hearing, probation revocation hearing), that testimony is inadmissible at trial EXCEPT to impeach the defendant's inconsistent testimony. (Evid. Code, §§780 and 1235)

1. **Parole/probation hearing transcript:** Any evidence derived from testimony at a prior hearing is inadmissible in subsequent proceedings on related criminal charges except to impeach when the statements are so clearly inconsistent as to warrant admission of testimony or its fruits in order to reveal to the trier of fact the probability that the witness has committed perjury at either the trial or the revocation hearing. (*People v. Coleman* (1975) 13 Cal.3d 867, 889 [involving testimony from a probation revocation hearing scheduled before the trial].)
2. **PC §1538.5 hearing:** A defendant must testify truthfully at his suppression motion should he elect to do so, and if he chooses to testify truthfully at trial, he runs no risk of being impeached. However, he has no right to commit perjury and is certainly not entitled to a "false aura of veracity." (*People v. Douglas* (1977) 66 Cal.App.3d 998, 1005; *People v. Drews* (1989) 208 Cal.App.3d 1317, 1325-1326.)
3. **PC §1368 hearing:** Statements made by the defendant during a court ordered mental competency examination cannot be used to impeach the defendant at any proceeding other than the competency trial. (*People v. Pokovich* (2006) 39 Cal.4th 1240, 1253.)
  - **EXCEPTION:** If the defense places defendant's mental state in issue at trial (or penalty phase) and presents psychiatric evidence based largely on material from the competency examination, then those reports and other related materials, can be referred to during cross-examination of defense experts. (*People v. Taylor* (2010) 48 Cal.4th 574, 620.)

## E. IMPEACHMENT OF NON-TESTIFYING DEFENDANT

**GENERAL RULE:** A defendant's prior felony conviction is admissible under EC §§ 788 & 1202 to attack the defendant's credibility when out-of-court exculpatory statements made by the defendant are admitted into evidence at the defendant's request even when the defendant does not testify.

- In *People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1446, defendant's co-defendant sought admission of a portion of defendant's statement given to police without objection by the prosecution. Defendant asked for the entire statement to be admitted under EC §356, to which both the co-defendant and prosecution objected. After the statement was admitted in its entirety, the trial court permitted the People to impeach defendant's hearsay statements with his prior felony convictions (though it limited the number and type of priors that could be admitted).
- The People are not required to object to defendant's admission of his own hearsay statement. Making the strategic decision which would enable the People to bring in relevant impeachment material is permissible. (*People v. Little* (2012) 206 Cal.app.4th 1364, 1376.)
- **NOTE:** The *People* may not introduce a defendant's irrelevant exculpatory statement solely to provide an avenue to admit other evidence impeach it. (*People v. Fritz* (2007) 153 Cal.App.4th 949, 956.) The rule also applies to witnesses who do not testify, but whose otherwise admissible hearsay statements are introduced.

## F. MATERIALS THAT CAN BE USED TO IMPEACH DEFENDANT

Below is a list of some areas in which you can explore and gather valuable impeachment evidence to use against your defendant in an effective cross.

- Prior police reports
- Prior probation reports
- Prior convictions (if admissible)
- Statements made to probation officer in preparation for presentence report for instant offense when guilty plea was withdrawn after. (*People v. Pacchioli* (1992) 9 Cal.App.4th 1331.)
- Juvenile defendant's statement to probation officer prepared for fitness hearing pursuant to WIC §707. (*People v. Macias* (1997) 16 Cal.4th 739.)
- Statements made during private psychological exam given to DA during plea negotiations. (*People v. Crow* (1994) 28 Cal.App.4th 440, 452.)
- Medical records
- WIC §827 petitions – statements to CPS workers

- TRO declarations
- Statements made during polygraph examination (EC §§351- 351.1)
- Jail calls
- Jail mail
- Jail visitation log
- Jail classification/incident reports
- Field interviews

➤ ***Remember, your question is not evidence! If defendant denies making a statement, make sure you offer the actual statement into evidence.***

## IV. Securing Witnesses for Trial and Material Witness Issues

"The duty to disclose knowledge of crime rests upon all citizens. It is so vital that one known to be innocent may be detained, in the absence of bail, as a material witness." (*Stein v. New York* (1953) 346 U.S. 156, 184.)

### A. APPLICABLE CODE SECTIONS

- PC1328                      A subpoena may be served by any person . . .The service is made by delivering a copy of the subpoena to the witness personally.
- PC1328d                    A subpoena may be delivered by mail. Service shall be affected when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, by email . . .and ***identifies himself or herself by reference to his or her DOB and his or her driver's license number or DMV ID card.***
- PC1330                    No person is obliged to attend as a witness before a court . . .out of the county where the witness resides . . .unless the distance be ***less than 150 miles*** from his place of residence to the place of trial, or unless the judge of the court in which the offense is triable . . .or upon affidavit of the prosecutor . . .stating that he believes the ***evidence of the witness is material*** and his attendance at . . .trial or hearing is material and necessary, shall endorse on the subpoena an order for the attendance of the witness. (See *Lucas v. Superior Court* (1998) 203 Cal.App.3d. 733.)
- PC1331                    Disobedience to a subpoena, or a refusal to be sworn or to testify as a witness, may be punished by the Court as ***contempt.***
- PC1331.5                   Any person who is subpoenaed to appear . . .may, in lieu of appearance at the time specified in the subpoena, agree with the party at whose request the subpoena was issued to appear at another time or upon such notice as may be agreed upon. ***Any failure to appear pursuant to such agreement may be punished***

*a as contempt.* Facts establishing such agreement and the failure to appear may be shown by affidavit.

PC1332<sup>2</sup>

(a) . . .When the court is satisfied by *proof on oath* that there is good cause to believe that any material witness for the prosecution or defense, whether the witness is an adult or minor, will not appear and testify unless security is required. . .the Court may order the witness to enter in to a written undertaking

(b) . . .If the witness required to enter into an undertaking to appear and testify . . .refuses compliance with the order the court may commit the witness . . .to custody . . .until the witness complies or is legally discharged.

(c) When a person is committed pursuant to this section, he is entitled to an *automatic review of the order* requiring the undertaking and the order committing the person, by a judge having jurisdiction over the offense *other than the one who issued the order*. This review shall be held not later than *two days* from the time of the original order of commitment.

(d) If it is determined that the witness must remain in custody, the witness is entitled to a *review* of that order after *10 days*.

(e) When a witness has entered into an undertaking to appear, upon his failure to do so the undertaking is forfeited in the same manner as undertakings of bail.

PC1334.2

Securing attendance of *out of state material witness*, including taking into immediate custody and held for local officer and punishment for failure to appear. Please review code section.

## B. EXERCISING DUE DILIGENCE

1. **Evidence Code section 240:** If all other elements of EC§1291 are met, former testimony is admissible if a witness is *unavailable*. EC§240 defines an “unavailable witness” as, among other things, a declarant who is “absent from the hearing and the proponent of his or her statement has exercised *reasonable diligence* but has been unable to procure his or her attendance

---

<sup>2</sup> Penal Code sections 879, 881 and 882 deal with material witnesses at prelim and grand jury

by the court's process." (Evid. Code, §240(a)(5).) "Reasonable diligence, often called 'due diligence' in the case law "connotes persevering application, untiring efforts in good earnest, efforts of substantial character." (*People v. Cogswell* (2010) 48 Cal.4th 467, 477.) Appropriate factors to consider include "the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were completely explored." (*People v. Wilson* (2005) 36 Cal.4th 309, 341.) The obligation on the party seeking to introduce the hearsay statement is to show that reasonable efforts have been made to find the witness. "That additional efforts might have been made or other lines of inquiry pursued does not affect [the] conclusion . . . It is enough that the People used reasonable efforts to locate the witness." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1298.)

- a) Witness under subpoena: In most cases, serving a witness with a valid subpoena to appear is enough to establish due diligence. (Cf. *Gaines v. Municipal Court* (1980) 101 Cal.App.3d 556, 561.) Service of a subpoena by mail pursuant to Penal Code § 1328d has been held sufficient, even if the witness is placed "on-call" and subsequently becomes unavailable. (*People v. Perez* (1989) 207 Cal.App.3d 431, 435–437.) When the prosecution knows that the subpoenaed witness will be leaving the country before trial but has good reason to believe he or she will return, the service alone has been found to constitute due diligence. (*People v. Watson* (1989) 213 Cal.App.3d 446, 453.) Further, ***absent knowledge of a "substantial risk that this important witness would flee,"*** the prosecution has no obligation to keep "periodic tabs" on every material witness who has been subpoenaed in a criminal case to ensure against their disappearance. (*People v. Wilson* (2005) 36 Cal.4th 309, 342; *People v. Hovey* (1988) 44 Cal.3d 543, 562.)
  
- b) Witness located out-of-state: The prosecution should comply with the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, Penal Code §§ 1334 *et seq.* In *People v. Cogswell* (2010) 48 Cal.4th 467, after being properly served for trial through the interstate process a sexual assault victim refused to return to California for trial. The Supreme Court determined that due diligence could be established under section 240 even though the prosecution did not invoke the provision in the Uniform Act allowing it to ask the out of state authorities to take the victim into custody and deliver her to California. In the facts of *Cogswell*, the prosecution acted reasonably in not invoking that provision.

- c) Witness whereabouts never discovered: In *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1556–1557, the court found **inadequate** a search for a known criminal that involved no check of the court system or jails for the witness's aliases, no check of neighboring county courts and jails, and no contact with the witness's former probation officers. In *People v. Guitierrez* (1991) 232 Cal.App.3d 1624, 1640, however, a search for a similar witness was deemed **sufficient** when it included his parent's home and last known address, hospitals, jails, and the morgue, as well as a court file revealing a currently outstanding bench warrant for a probation violation. Special emphasis was placed on the warrant, which, the court said, gave the witness “a strong motive to avoid appearing in court.”
- d) Timing: A factor to consider in due diligence is the speed with which the search for a witness is begun. In *People v. Robinson*, the court noted that the “practical realities” of local subpoena procedure should determine whether the subpoena process was “timely commenced.”
- Factors to be considered include “[w]hat efforts are customary; are those customary procedures generally successful in securing witness's attendance; were there exigencies in a particular case which required more, or which justified less, stringent efforts than normally employed?” (*People v. Robinson* (1991) 226 Cal.App.3d 1581, 1585–1586 [disapproved on other grounds by, *People v. Cromer* (2001) 24 Cal.4th 889].)
  - In *People v. Saucedo*, given the timing of dispositive motions in the case the court upheld a finding of witness unavailability based on a search for the witness that began on the first day of trial and continued for one week. (*People v. Saucedo* (1995) 33 Cal.App.4th 1230, 1236–1239 [disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889].) But in *People v. Sanders* the court upheld a finding that the defense had failed to prove due diligence when the efforts to subpoena the witness did not begin “until well into the trial” and counsel knew in advance that the witness might be necessary and was uncooperative. (*People v. Sanders* (1995) 11 Cal.4th 475, 524–525; see also *People v. Avila* (2005) 131 Cal.App.4th 163, 169–170.)
  - If the prosecution is aware that a witness is planning to leave the state, it should subpoena that witness before departure. (*People v. Mendieta* (1986) 185 Cal.App.3d 1032, 1036–1037.)

- e) Witness facing deportation: The requirement of reasonable diligence is not limited to situations in which the prosecution is trying to find a witness who has gone missing. “[N]o less important ‘is the **duty to use reasonable means to prevent a present witness from becoming absent.**’ [Citation.] If the prosecution fails in this latter duty, it does not satisfy the requirement of due diligence. [Citation.]” (*People v. Louis* (1986) 42 Cal.3d 969, 991; accord, *United States v. Tirado–Tirado* (2009) 563 F.3d 117, 124 [“the government's good faith efforts to assure (a witness's) availability at trial should include efforts aimed at keeping the witness in the United States.”]). In other words, the government cannot simply throw up its hands and do nothing when faced with the prospect of one of its witnesses being deported or leaving the country on his own accord. Instead, it must undertake reasonable efforts to preserve the defendant's constitutional right to be confronted with the witnesses against him. (*United States v. Tirado–Tirado*, supra. at pp. 123–126.)
- In *People v. Roldan* (2012) 205 Cal.App.4th 969, the court found that **due diligence was not exercised** when, knowing a material witness was facing deportation, the prosecution informally arranged with ICE officials for the witness to stay in local custody for months until he could testify at preliminary hearing but no longer. The prosecution made no effort to video tape the preliminary hearing pursuant to Penal Code §§1335-45 (thereby allowing the jury to assess the witness’s demeanor while testifying) or to advise the defense of the witness’s pending deportation so that he could record the proceedings. Further, beyond “informally” speaking with unnamed officials at ICE, the prosecution failed to seek any legal remedies to keep the witness in the U.S. such as securing a material witness detention order pursuant to Penal Code §1332. The court acknowledged the prosecution’s efforts may not ultimately have been successful, but **germane to the question of due diligence was the prosecution’s failure to even try.**

**C. GENERAL PROCEDURE IN SECURING MATERIAL WITNESS WARRANTS AND COMMITTING MATERIAL WITNESSES TO CUSTODY**

1. **Penal Code section 1332 is Constitutional:** Article 1, Section 10, of the California Constitution declaring that “[w]itnesses may not be unreasonably detained” is *not violated* by the detention of witnesses found to be material where it is found upon a sworn showing that there is ***good cause to believe that the witness will not attend the trial*** and testify. However, the statute does not confer unfettered discretion to incarcerate a material witness and the procedure to follow is clearly spelled out in the statute. (*In Re Francisco M.* (2001) 86 Cal.App.4th 1061.)
  - In *In Francisco M.*, a special circumstances gang homicide, two minors, 17 and 15, were declared material witnesses in the prosecution and ordered detained with the requirement that they post a security of \$100,000. At the time of the filing of their habeas corpus petitions demanding release, they had been detained for 10 and 8 weeks, respectively, and the trial had continued several more weeks. The Court denied their petitions for release but ordered the trial court to conduct hearings in accordance with the guidelines it was setting. (*Id.* at p. 1065.) Regarding the “written undertaking” and the requirement that a witness refuse to engage a written undertaking before being held in lieu of bail the court said that a formal on-the-record inquiry is not required, “[w]henever a person is remanded to custody in lieu of bail, he is implicitly ordered, should he desire his release, to submit a written undertaking in which he promises to appear or to forfeit the bail amount that must be posted. No express, on-the-record exchange between the court and the witness is required on that point. The witness’s refusal to enter the undertaking, whether from obstinacy or inadequate resources, is implicit from the failure to post the bail.” (*Id.* at p. 1073.) Finally, the court noted that while “a witness’s prior disobedience to a subpoena may be an important factor in determining whether the witness is likely to appear at trial, it is not a pre-requisite to invoking section 1332. Evidence that the witness is avoiding service, or other evidence that he will not appear if served, may supply ‘good cause to believe that the material witness...will not appear and testify unless security is required.’” (*Id.* at p. 1074.)
2. **Securing the material witness warrant:** When you do not yet have the witness in your control (typically they are avoiding you/service) you may seek a warrant by using Penal Code section 1332 (or 1334.2 for out of state material witnesses). The provisions of that statute will allow the witness to be taken into custody and brought before the court where they will then be

entitled to the appointment of counsel and the hearings required. The witness will likely be taken into custody, at least ensuring their attendance for trial – whether they TESTIFY is a separate question addressed in Section V.B.4. of these materials. Simply file a request with P&As that clearly outline the law and procedure together with a DDA Affidavit<sup>3</sup> and DAI Affidavit and Court Order.

➤ See Attachment “B”

#### D. SPECIAL ISSUES IN DOMESTIC VIOLENCE AND SEX CRIMES CASES

1. **Reconciling PC1332 and CCP1219**: Penal Code section 1332 (or 1334.2 for out of state material witnesses) is the mechanism by which a material witness’s *attendance* is secured at trial, which includes a custody option. Code of Civil Procedure section 1219 is the mechanism by which a court may use contempt/custody to gain *compliance from a witness who unlawfully refuses to testify* (or otherwise comply with a valid court order). In other words, sections 1332/1334.2 gets them to the witness stand while CCP §1219 gets them to talk. Section 1332/1334.2 has no limitation in its application to victims of domestic violence or sex crimes; however, CCP §1219(b) does.

- In *People v. Cogswell* (2010) 48 Cal.4th 467, in the context of due diligence to secure an out of state witness, the Supreme Court analyzed whether the People exercised “reasonable” diligence in attempting to secure an out of state sexual assault victim for trial when it chose not to use the “custody and deliver” component of section 1334. As argued by the trial DA, while section 1334 may have allowed for the witness to be taken into custody and delivered to court in San Diego from her home state of Colorado, the witness had made it abundantly clear that she would NOT testify under any circumstances and given CCP §1219(b)’s proscription against incarcerating a sexual assault (or DV) victim who refuses to testify, the section 1334 custody and deliver option would have been pointless and a waste of resources, not to mention a “re-victimization” of the sexual assault victim. The trial court agreed, found the witness unavailable and permitted her preliminary hearing testimony to be admitted pursuant to Evidence Code section 1291. The Court of Appeal disagreed and reversed. The Supreme Court reversed the Court of Appeal holding that the People *could have* invoked section 1334’s

---

<sup>3</sup> Some simply include the DDA’s statement within the statement of facts of the P&As and attach a DAI affidavit. However, I prefer and would suggest a separate affidavit by DDA if relying on DDA assertions as part of the basis for the warrant as the statute requires.

custody and deliver provision but that it was *not required* to do so to establish the sexual assault victim’s unavailability. (*Id.* at p. 476.) The Court relied in part on its decision in *People v. Smith* (2003) 20 Cal.4th 581, where it rejected the defendant’s argument that to get the sexual assault victim in that case to testify the trial court should have threatened to fine her holding, “Trial courts do not have to take extreme actions before making a finding of unavailability.” (*Id.* at p. 624.) The *Cogswell* court went on to state that the custody and deliver provision in section 1334 would have been an action far more extreme than the fine at issue in *Smith*. (*Cogswell* at p. 479.) This same *Cogswell* analysis can be applied to section 1332 in sexual assault and DV cases.

- ⇒ **BOTTOM LINE: WHILE THE LAW PERMITS AND PROSECUTORS OCCASIONALLY DO SEEK WARRANTS FOR BOTH DV AND SEXUAL ASSAULT VICTIMS IN EXTRAORDINARY CIRCUMSTANCES, DO NOT SEEK A DV OR SEXUAL ASSAULT VICTIM’S INCARCERATION AS A MATERIAL WITNESS WITHOUT VERY CAREFUL THOUGHT AND CONSIDERATION**
  
- **See Attachment “C” for general guidance**

## V. What to Do When a Witness Invokes the 5<sup>th</sup> Amendment Privilege Against Self-Incrimination

### A. APPLICABLE CODE SECTIONS

**5<sup>th</sup> Amendment, US Constitution**: “No person shall . . . be compelled in any criminal case to be a witness against himself.”

**California Constitution Art. 1 §15**: “Persons may not . . . be compelled in a criminal cause to be a witness against themselves . . .”

- EC §911: Except as *otherwise provided*, no person has a privilege:  
(a) To refuse to be a *witness*;  
(b) To refuse to *disclose* a matter or produce a writing, object or other thing;  
(c) To *prevent another* from being a witness or disclosing any matter or producing any writing, object or thing.
- EC §940: To the extent the privilege against self-incrimination exists under U.S. or California constitutions, a person can refuse to disclose any matter that *may* tend to incriminate him.
- EC §404: Whenever privilege against self-incrimination is raised, the *person claiming the privilege has the burden* of showing that the proffered evidence might tend to incriminate him. The proffered evidence is inadmissible unless it *clearly appears* to the court that the proffered evidence *cannot possibly* have a tendency to incriminate the person claiming the privilege.
- EC §913: No party may *comment* on, and no *inferences* may be drawn from, the claiming/exercising of a privilege by a witness.
- PC §1324: In any *felony* proceeding . . . if a witness *refuses to answer* a question on grounds they may thereby *incriminate* themselves, the *District Attorney* may request, in *writing*, that the court order the witness to answer the question. The judge shall set a time for hearing and order the witness to appear and show cause why the question should not be answered, and the witness shall comply, unless

doing so would be clearly contrary to public interest or subject the witness to criminal prosecution in another jurisdiction.

After complying and answering as ordered, if the witness would have been privileged to refuse to answer, **no testimony or other evidence** compelled under the order or any **information directly or indirectly derived** from the testimony or information may be used against the witness in any criminal case.

The witness may still be subject to prosecution or penalty for **perjury**, false swearing or **contempt of court**.

Nothing in this section prohibits the District Attorney from requesting an order granting **use immunity** or **transactional immunity** to a witness compelled to give testimony or produce evidence.

PC §1324.1: In any **misdemeanor** proceeding . . .if a person refuses to answer a question or produce evidence of any kind on the ground that he may be incriminated, the person **may agree** in writing with the district attorney . . .to testify **voluntarily** pursuant to this section. Upon written request of such district attorney . . .the court . . .shall approve such written agreement, unless the court finds that to do so would be clearly contrary to the public interest. If after court approval of such agreement . . .that person shall not be prosecuted or subjected to penalty . . .in accordance with such agreement . . .but he may, nevertheless, be prosecuted for any perjury . . .If such person **fails to give any answer . . .in accordance with such agreement**, that person shall be **prosecuted** . . .in the same manner as he would but for this section.

PC §166(a): . . . [A] person guilty of any of the following contempts of court is **guilty of a misdemeanor**:  
(4) Willful disobedience of the terms as written of . . .a court order . . .  
(7) The contumacious and unlawful refusal of a person to be sworn as a witness or, when so sworn, the like refusal to answer a material question.

- CCP §1209(a): The following acts and omissions in respect to a court of justice or proceedings therein, are ***contempts of the authority of the court:***
- (5) Disobedience of any lawful judgment, order, or process of the court.
  - (9) Any other unlawful interference with the process or proceedings of a court.
- CCP §1211(a): When contempt is committed in the immediate view and presence of the court . . .it may be ***punished*** summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he or she be punished as therein prescribed.
- CCP §1218: (a) . . .if it be adjudged that (the witness) is guilty of the contempt, a fine may be imposed on him or her not exceeding \$1,000 . . .or he or she may be imprisoned not exceeding five days, or both.
- CCP §1219: (a) Except as provided in subdivision (b), ***when the contempt consists of the omission to perform an act which is yet in the power of the person to perform, he or she may be imprisoned until he or she has performed it,*** and in that case the act shall be specified in the warrant of commitment.
- (b) Notwithstanding any other law, no court may imprison or otherwise confine or place in custody ***the victim of a sexual assault or domestic violence crime*** for contempt when the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime. (See subsection (c) for listed sexual assault and domestic violence crimes to which subsection (b) applies).

## B. GENERAL PROCEDURE WHEN A WITNESS INVOKES THE 5<sup>th</sup>

1. **Burden:** When a witness objects and refuses to answer a question on the claim of privilege against self incrimination, the *burden is upon the witness* to establish the validity of his claim.
  - If you reasonably anticipate that a witness will be claiming the 5<sup>th</sup>, the proper procedure is to have the witness invoke his/her privilege at a pre-testimonial hearing out of the presence of the jury thus avoiding any potentially prejudicial impact of the witness asserting the privilege before the jury. (*People v. Ford* (1988) 45 Cal.3d 431, 441, fn. 6; See also *People v. Frierson* (1991) 53 Cal.3d 730, 743; *Bowles v. United States* (1970) 439 F.2d 536, 541-542.)
  - A court has a duty to advise a witness of a possible 5<sup>th</sup> Amendment privilege if circumstances of the case raise such a concern. The court may either do so on its own or by appointing counsel for the witness. If the court chooses to advise the witness on its own, it must be careful to remain neutral and not dissuade the witness from giving testimony. (*People v. Schroeder* (1991) 227 Cal.App.3d 784; *People v. Warren* (1984) 161 Cal.App.3d 961; *People v. Seastone* (1969) 3 Cal.App.3d 60.) Conversely, the court does not have a duty to advise a *pro se* defendant of a right against self-incrimination. (*People v. Barnum* (2003) 29 Cal.4th 1210.)
  - The court will hold an EC §404 hearing outside the presence of the jury for which the witness is ordered to appear, and counsel is usually provided.
  - The prosecution may then commence with asking the questions it intends to ask of the witness in trial. The witness must object/claim privilege as to *each question*; the court should rule on each question/claim asserted. However, a “blanket” claim of privilege can be raised when it becomes clear after some questioning that the witness intends to answer no questions at all relating to an event. (*People v. Fonseca* (1995) 36 Cal.App.4th 631, 637; *People v. Cornejo* (1979) 92 Cal.App.3d 637, 659.)
2. **Standard for Determining Whether Privilege Exists:** It must be “perfectly clear” that the answers “cannot possibly” have a tendency to incriminate. (*People v. Cohen* (1959) 173 Cal.App.2d 61; See also *Hoffman v. United States* (1951) 341 U.S. 479, *Prudhomme v. Superior Court* (1970) 2 Cal.3d 320, *Marchetti v. United States* (1968) 390 U.S. 39, 52.)
  - In *Cohen*, notorious LA mobster Mickey Cohen was sued in municipal court on a tort claim arising out of his alleged battery of the plaintiff. The plaintiff called Cohen to testify and began asking him questions about his income and the expense of his lifestyle. On the advice of his

counsel, Cohen repeatedly refused to answer and invoked his privilege against self-incrimination. Cohen's lawyers explained that Cohen's responses could subject him to criminal prosecution, or aid in a criminal prosecution, considering the numerous federal racketeering and tax evasion investigations then underway against Cohen. Adopting the language from *Hoffman v. United States* (1951) 341 U.S. 479, and establishing the **standard in California** for analyzing the appropriateness of a claim of privilege, the court found that "to sustain the privilege, it need only be evident from the **implications of the questions**, in the **setting** in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." And to **deny a claim of privilege**, "the judge must be **perfectly clear**, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] **cannot possibly** have such tendency to incriminate."

- Innocent persons, as well as the guilty, are entitled to invoke the privilege. "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." (*Grunewald v. United States* (1957) 353 U.S. 391, 421.)
- **NOTE:** Even if a witness denies culpability, they may exercise the privilege if the witness has reasonable cause to apprehend danger from their testimony. In *Ohio v. Reiner* (2001) 532 U.S. 17, the defendant in a shaken baby case claimed another person was the guilty party. That person, although denying any wrongdoing, could claim the privilege against self-incrimination because she had access to the child within the same time frame in which the trauma occurred thus furnishing a "link in the chain of evidence needed to prosecute."
- If the offense to which the claim of privilege relates is barred by the statute of limitations, and there is no pending prosecution against the witness, he cannot claim the privilege since the testimony could not be used against him in any criminal case. (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414.)
- Privilege against self-incrimination does not apply if the risk is fear of prosecution by a foreign government. (*People v. Balsys* (1998) 524 U.S. 666.)

**3. Options after Privilege is Established:** If a court determines the assertion of the privilege against self-incrimination is **proper**, the following options are possible:

- (1) Seek **court compelled testimony** pursuant to PC §1324 and have the court order the witness to answer with the understanding that the court will further order that no information directly or indirectly

derived from the testimony can be used against the witness in any criminal prosecution.

(2) Seek a ***voluntary immunity agreement*** between the witness and the prosecution

- Informal “letter immunity”
- Formal cooperation contract

(3) Declare the witness unavailable pursuant to EC §240(a)(1) and admit the witness’s prior testimony pursuant to EC §1291.

- If a witness invokes a valid claim of privilege against self-incrimination, they are thereby “unavailable” pursuant to EC §240(a)(1) and prior testimony is admissible pursuant to EC §1291. (*People v. Malone* (1988) 47 Cal.3d 1, 23-24.) The fact that a witness failed to invoke the privilege at prelim does not bar the witness from invoking the privilege at trial. (*People v. Seijas* (2005) 36 Cal.4th 291.) In *Seijas*, a juvenile witness testified at prelim that he was present and saw the defendant shoot and kill the victim. He admitted at prelim that he originally lied to police when he identified a different person as the defendant’s accomplice. At trial, the juvenile, on the advice of counsel, refused to testify regarding the shooting asserting his privilege against self-incrimination. The court found the privilege was valid and found the juvenile “unavailable” for trial pursuant to EC §240, thus allowing his prelim testimony to be read to the jury pursuant to EC §1291.

**IMPORTANT NOTE:** In the case of a ***recanting*** victim or witness where there arises ***doubt as to the veracity of the prior testimony*** because the ***witness at trial takes the 5<sup>th</sup> based on the witness having testified untruthfully at the prior proceeding***, to deem the witness “unavailable” as a result of the privilege and admit the prior testimony denies the defendant a fair trial and is ***reversible error***. (*People v. Wilson* (2013) 216 Cal.App.4th 342.)

- In *Wilson*, a gang case, the teenaged victim was robbed at gunpoint. He testified at prelim consistent with what he’d reported to police and his parents. However, as trial approached he and his parents began to express fear, feeling the effects of gang intimidation. They hired a lawyer to represent the teenaged victim and help get him out of testifying. At trial, the lawyer met with the judge *ex parte* and claimed the victim would be admitting perjury if he testified because his prelim testimony was “untrue” with respect to: 1) the defendant producing a gun and 2) a robbery having occurred. The court did NOT tell the People the nature of the testimony as asserted by the attorney for the

victim but found a valid 5<sup>th</sup> Amendment claim on behalf of the victim. The victim was thus deemed unavailable by the court as a result of the privilege and his prior testimony was admitted, including his post-prelim claim that some of “the little things” he testified about at the prelim were inaccurate (e.g. he originally said he first reported to his father, when in fact he first reported to his grandfather). The Court of Appeal noted the mishandling of the entire matter at trial by the trial court and reversed the convictions citing *People v. Garner* (1989) 207 Cal.App.3d 935, holding the defendant was denied the right to a fair trial when the jury was left with a false impression of the victim’s veracity by the admission of the prior testimony when the trial court was aware that the victim was now claiming his entire testimony to be untrue.

- The *Wilson* case is a must-read to understand why it is never appropriate to allow an ex parte hearing serve as the EC§ 404 hearing to determine whether the witness has met his or her burden to establish a valid 5<sup>th</sup> Amendment claim as defense counsel often seek – citing attorney client privilege – and as some courts are therefore willing to grant.

4. **Duration of the privilege and waiver:** Privilege expires when time to file an appeal has passed. Waiver of privilege is as to *that* proceeding only, not future proceedings. (*People v. Fonseca* (1995) 36 Cal.App.4th 631.)
  - In *Fonseca*, the defendant and his co-defendant were charged with drug trafficking. Co-defendant pled guilty and was sentenced. Two weeks later defendant called the co-defendant to testify. The co-defendant instead asserted his privilege against self-incrimination. The court found that, “the privilege evaporates in two ways, waiver and expiration. A defendant who takes the stand during his own trial to deny guilt, waives the privilege *as to that proceeding*, as does a defendant who pleads guilty. But in neither case does he waive the privilege as to ***subsequent proceedings*** against other defendants; at the earliest, the privilege expires when the time to file an appeal has passed with no notice of appeal filed.” (*Id.* at 637.) The court specifically stated that it was *not* deciding whether the privilege survives until the defendant has served his sentence, and that question remains uncertain.
  - In *People v. Williams* (2008) 43 Cal.4<sup>th</sup> 584, a witness testified at prelim without consulting a lawyer regarding possible self-incrimination and admitted that he was present at the time of the victim’s death and gave specifics regarding the facts and circumstances surrounding the murder of the victim, which placed him in the pool of possible suspects. At trial the court appointed counsel to advise the witness because in the court’s opinion he could be viewed as a potential suspect in the murder. Following consultation, the witness did in fact assert the privilege and

indicated his refusal to testify. The court conducted an EC §404 hearing wherein the witness refused to answer each of the specific questions put to him regarding the events surrounding the homicide citing the privilege against self-incrimination. However, he did say on both direct and cross examination that the testimony he gave at the preliminary hearing was complete and truthful. The court found the assertion of privilege proper, declared the witness unavailable for trial, and permitted the admission of the witness's prelim testimony pursuant to EC §1291. The court held that a witness's failure to invoke the privilege during one hearing within a proceeding does **not** necessarily constitute a waiver for purposes of subsequent hearings. The court further held that, "the grant of immunity is an **executive function** and prosecutors are **not** under a general obligation to provide immunity to witnesses in order to assist a defendant." Although there is a preference for live testimony, such gives way when a witness properly invokes a privilege and a prior appropriate opportunity for cross-examination existed. However, a witness, in a single proceeding, may not testify voluntarily about a subject, and then invoke the privilege when questioned about the details. The privilege is waived to matters to which the witness testifies, and the scope of the waiver is determined by the scope of relevant cross.

- NOTE: *Williams* at pp. 610-727 does a nice job demonstrating the steps to follow when a witness invokes. It then goes through the independent *de novo* review of the trial court's ruling on the appropriateness of the claim applying the standards set forth in *Hoffman*, *Cohen*, and EC §404.

**5. When NO Privilege is Found (or After Immunity Has Been Given) and Witness Still Refuses to Testify:** Where a privilege does not exist, a witness has no right to refuse to testify and must answer questions. (Evid. Code, § 911.) If a witness refuses to answer when there is no privilege, any testimony the witness gave will generally be stricken (and witness may be found in contempt).

- Arguing a negative inference **is** permitted based upon the unlawful refusal to testify (See below for case examples).
- A **refusal to answer** questions, even an improper refusal, is **not** an inconsistent statement allowing EC §1235 impeachment.
- NOTE: ***Improper examination after refusal will result in reversal*** (*Douglas v. Alabama* (1965) 380 U.S. 415). Defendant and his co-defendant were charged w/assault with intent to commit murder. Co-defendant was tried and convicted first. At the defendant's trial, the co-defendant was called by the prosecution; he claimed the privilege. The trial court found no valid privilege and ordered him to answer; however, he continued to refuse, was deemed hostile and the prosecutor was permitted to cross-examine him. Under the guise of cross-examination,

the prosecutor produced a confession purportedly signed by the witness which also implicated the defendant and read from the document, pausing after every few sentences to ask, “Did you make that statement?” Each time, the witness asserted the privilege. The U.S. Supreme Court held that the *questioning procedure* employed by the prosecutor violated the defendant’s rights under the Confrontation Clause. While the prosecutor’s reading of the confession was not technically testimony, the Court found that it “may well have been the equivalent in the jury’s mind” and that the jury might infer from the statement and the witness’s response to it that the contents as read were true.

- *People v. Shipe* (1975) 49 Cal.App.3d 343. Three defendants were charged in a drug dealer’s murder. Two of the defendants pled guilty, and the third went to trial. The prosecution called each of the two former co-defendants in its case. Each former co-defendant asserted his privilege against self-incrimination and refused to answer questions regarding the killing. The trial court found that the witnesses had no valid claim of privilege and ordered the witnesses to answer. They each refused. The trial court allowed the prosecutor to treat the witnesses as “hostile” and cross-examine them. The prosecutor then engaged in a lengthy, detailed, “isn’t it true that” series of questions describing the murder and the events surrounding the murder. Both witnesses invoked the privilege to every question. The court held that “[The prosecutor] may not, under the guise of cross-examination, get before the jury what is tantamount to devastating direct testimony . . . The constitutional error was not in calling the witnesses and forcing them to claim the privilege; the error was in the manner in which the witnesses were questioned.” The prosecutor could have compelled each witness to assert his privilege without resorting to the “flagrantly suggestive questions” he asked.
  - See also, *People v. Murillo* (2014) 231 Cal.App.4th 448, where a gang prosecutor went a little too far in questioning a recalcitrant witness. Citing *Douglas v. Alabama* and *People v. Shipe* the court held the prosecutor violated the defendant’s right to confrontation and the violation was not harmless beyond a reasonable doubt.
- a) Negative inference arguments are permitted: (*People v. Morgain* (2009) 177 Cal.App.4th 454.) In the defendant’s murder trial, the prosecution called the defendant’s girlfriend regarding statements she made to police inculcating the defendant. The girlfriend was assigned counsel and through counsel claimed her privilege against self-incrimination. The prosecution granted her *immunity*, which the court accepted, and the witness was ordered to testify. The witness

began by answering *some* of the prosecutor's questions. Eventually, however, the witness refused to answer. She was held in contempt and her testimony was stricken on defense counsel's motion. The prosecutor was permitted to argue to the jury that they could *infer from her refusal to testify without a legal basis* that she was simply "covering up" for her boyfriend, but he could not comment on any specific aspect of the testimony as it was stricken. In finding no Confrontation Clause violation, the court held that the witness's non-responsive testimony should be stricken, and the jury was instructed not to consider the testimony or the prosecutor's questions. However, the court also found the *negative inference* argued by the prosecutor was *not inappropriate*. It held, "Where a witness has no constitutional or statutory right to refuse to testify . . . jurors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony." (Italics in original).

- See also *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1554-1556. The prosecutor called a veteran gang member to testify about a gang-related assault that took place a month before the assault in the instant case. At the time of his testimony, the gang member already pled guilty and the time to appeal his conviction had passed. The gang member made it clear, that even without a privilege and knowing he would be held in contempt, he was not going to testify. The People were allowed to put him on the stand; however, he refused to testify and was held in contempt. The court held that "*jurors are entitled to draw a negative inference* when such a witness refuses to provide relevant testimony." They are "entitled to consider the witness's improper claim of privilege against him as evidence relevant to demonstrate exactly what the gang expert had opined: that gang members act as a unit to advance the cause of the gang and to protect their members."

- b) Contempt to gain compliance: When a witness *refuses to testify without any legal justification to do so*, the court can find the witness in "direct contempt" (Code Civ. Proc, §1211, subd. (a)) and order that the witness be taken into custody and remain there until he or she cures the contempt by testifying (Code Civ. Proc., §1219). If a witness unlawfully refuses to testify at *preliminary hearing* and is found in direct contempt, that witness can be remanded to custody and there remain until they testify, whether that be at prelim, at trial, or at some other earlier time as may be arranged. If, however, the witness unlawfully refuses to testify at *trial*, that witness can be remanded to custody and there remain until they testify, or the

trial concludes, whichever occurs first. See, *In re Keller* (1975) 49 Cal.App.3d 663; *Application of Myers* (1920 46 Cal.App. 92; *Ex parte Von Gerzabek* (1923) 63 Cal.App. 657.)

- **NOTE:** *There is no limitation on length of incarceration.* Any limitations on the length of incarceration set forth in PC §19.2 and CCP §1205 do *not* apply when the court incarcerates a witness held in contempt pursuant to CCP §1219.
- In *In Re Salkin* (1935) Cal.App.2d 436, the petitioner was held in contempt for failing to divide and distribute all community property as ordered by the court. The court ordered petitioner to be confined in the county jail until he complied. Petitioner appealed and claimed that the court's conditional sentence violated Penal Code section 19.2 and CCP section 1205. The court, however, held that those sections did not apply to the *contempt power* as Penal Code section 11 specifically states: "this code does not affect any power conferred by law upon . . . any tribunal to impose or inflict punishment for a contempt . . ." Lastly, the court clarified that incarceration until purged of contempt is not a "sentence." Rather, the term to be served rests solely in the hands of the contemnor.
- Later in *People v. Clemmons* (1962) 208 Cal.App.2d 696, a witness repeatedly refused to testify even after she was granted immunity pursuant to Penal Code section 1324 and advised by her own counsel that she must testify. The court held her in contempt and sentenced her to jail until she purged herself of the contempt. Relying on *In Re Salkin*, the appellate court rejected the defendant's claim that a sentence that had the potential to exceed six months was improper.
- **NOTE:** Many courts and lawyers appointed to counsel contemnor witnesses are of the belief and practice that the penalty for contempt in refusing to testify is simply 5 days in jail and up to \$1000 fine pursuant to CCP §1218, which is indeed the **penalty provision** for an act of contempt. However, it is CCP §1219 that specifically provides for **confinement to induce compliance**, which is what we want in order to obtain and preserve the necessary testimony of material witnesses, especially in cases where we may not be able to prove a case without that witness's testimony.
- **IMPORTANT NOTE:** If a witness has previously testified in a matter and now engages in a **persistent refusal** to testify without legal justification to do so, **after being found in contempt** by the court, in addition to being remanded into custody to gain compliance and cause him or her to testify under CCP §1219, the

witness is also “unavailable” within the meaning of EC240(a)(6) and his or her prior testimony may be admitted if by the end of trial the witness continues to refuse to testify.

- c) The judgment of contempt is final, conclusive, and not appealable: Review is limited to habeas corpus or certiorari, depending on the sanction imposed. (*In re Buckley* (1973) 10 Cal.3d 237.)
  - See Attachment “H”, Order Adjudging Contempt.
- d) DV and sexual assault victims and contempt: CCP §1219(b) prohibits a court from incarcerating a DV or sexual assault victim if the contempt consists of a refusal to testify about their domestic violence or sexual assault. However, CCP §1218 contains no such limitation. A court still may punish a DV or sexual assault contemnor with a fine up to \$1000 per instance for refusing to testify.
  - See Attachment “H”, Order Adjudging Contempt DV & SA.

### **C. PRACTICAL INFORMATION/TIPS**

If a witness asserts their 5<sup>th</sup> Amendment privilege in front of the jury (which shouldn’t happen very often, if at all), pursuant to EC §913, no party may comment on the witness’s exercise of privilege against self-incrimination. At the request of counsel, the court shall instruct the jury that no presumption shall be made and no inference shall be drawn from such – specifically regarding the credibility of that witness or as to any matter in the proceeding.

Although testimony of an accomplice requires corroboration to sustain a conviction for a criminal offense (see PC §1111), the same is not true for testimony received from an immunized witness (provided he/she is not an accomplice).

- See Attachment “D”, Flowchart procedure – what to do when a witness invokes their 5<sup>th</sup> Amendment privilege against self-incrimination in felony and misdemeanor cases.

## VI. Granting Immunity

Immunity can be a powerful tool for the prosecution. In some cases, by overcoming a witness's refusal to testify for fear of self-incrimination testimony can be made available to the prosecution without which a conviction could not be obtained. It is, however, an area where an unskilled or careless deputy can create untold problems for him or herself, including losing the case entirely.

In some circumstances, immunity may also reduce a witness's credibility in the eyes of jurors, the very argument made by the prosecution in declining to grant immunity to the juvenile in *People v. Seijas, supra.*, 36 Cal.4th 291. Granting immunity to a witness who did not really want or need it may unnecessarily and incorrectly transform an ordinary witness into an "immunized accomplice" to be discredited. Other problems necessarily relate to the nature of a witness who may himself be involved in criminal activity. Immunity, therefore, is a tool that should be used carefully.

California employs statutory procedures where the People can seek to compel testimony from a witness in a felony case who has claimed a 5<sup>th</sup> Amendment privilege (PC §1324) and to enforce a voluntary immunity agreement reached with a witness in a misdemeanor case (PC § 1324.1). In addition, the District Attorney has the power to grant immunity outside the statutory procedure, often referred to as "informal immunity." Because granting informal immunity is so easy to do, it is also easy to abuse.

### A. USE VS. TRANSACTIONAL IMMUNITY

1. **Transactional Immunity:** The immunized witness *cannot be prosecuted* for *any act or event described* or referred to in the compelled testimony, so long as the testimony was within the scope of the grant of immunity, *even if independent evidence* has come to light. (*People v. Campbell* (1982) 137 Cal.App.3d 867.) However, a witness granted transactional immunity can still be prosecuted for perjury or contempt of court for refusing to answer.
2. **Use/Derivative Use Immunity:** This form of immunity *favours the prosecution* because a witness who receives such immunity *can still be prosecuted* for a crime to which the immunized testimony relates if prosecution is based *solely* on evidence obtained from sources *independent of the immunized testimony*. No *compelled testimony*, and no evidence *derived* from the compelled testimony may be used if the person is subsequently prosecuted on independent evidence for the offense. If the witness challenges the source of the prosecution evidence, the prosecution has an affirmative duty to prove the proposed evidence is derived from a

legitimate source wholly independent of the compelled testimony. While *Kastigar v. United States* (1972) 406 U.S. 441, speaks of the prosecution's heavy burden to prove the independent source of prosecution evidence, the majority of courts have held the prosecution's burden is a preponderance of the evidence standard. (*United States v. North* (D.C. Cir. 1990) 910 F. 2d 843; *People v. Gwillim* (1990) 223 Cal.App.3d 1254.)

## B. AUTHORITY TO SEEK A GRANT OF IMMUNITY

1. **The Prosecutor's Monopoly**: Authority to seek compelled testimony is given only to the District Attorney or the Attorney General. The ***prosecution alone*** controls the invocation of the immunity statute. (*People v. Thompson* (1983) 145 Cal.App.3d 918.) Because the decision to seek immunity is an integral part of the ***charging process***, no judicial authority is usurped. (*In Re Weber* (1974) 11 Cal.3d 703.) Thus, a ***defendant has no right*** to demand immunity for a prospective defense witness. (*In re Williams* (1994) 7 Cal.4<sup>th</sup> 572.) California courts have no authority to confer use immunity on witnesses. (*People v. Masters* (2016) 62 Cal.4<sup>th</sup> 1019, 1050-1051.)
  - *People v. Hull* (2019) 31 Cal.App.5<sup>th</sup> 1003 decided whether the prosecution must grant use immunity [without a request by the DA] to a prosecution witness who invokes his right of self-incrimination at trial instead of introducing the witness's preliminary hearing testimony under the provisions of Evidence Code section 1291, the hearsay and confrontation clause exception for former testimony [of an "unavailable" witness – the question being, was he truly unavailable to the DA]. The court addressed issues related to defendant's opportunity to cross-examine the witness during the preliminary hearing [defense did not have the opportunity to cross-examine witness about a prior criminal conviction not disclosed by the prosecution until after the preliminary hearing or about alleged threats made to defendant's wife the day after defendant's arrest].
    - First, court rejected that the court could confer immunity on its own, citing *People v. Masters* (supra.).
    - Second, prosecutorial immunity can only be compelled if refusal to do so amounts to prosecutorial misconduct. The court used the 5-part federal *Smith/Quinn* test, referenced by *Masters*. [1] [witness immunity was] properly sought in the [trial] court; [2] the . . . witness [is] available to testify; [3] the proffered testimony [is] clearly exculpatory; [4] the testimony [is] essential; and [5] there [are] no strong governmental interests which countervail against a grant of immunity. Here, the court found the testimony was neither clearly exculpatory, nor essential. Exculpatory means exonerates

from guilt, not relates to credibility. And his testimony was clearly inculpatory. And the claim the jury should have seen his demeanor or heard him answer questions about the impeachment was purely speculative. Given that the significance, if any, of this new portion of testimony was speculative, it wasn't essential. The jury heard about the conviction, and the wife testified about the threats. The only ingredient lacking was to see his reaction to being questioned, and it is speculative that it would have helped the defense. (The court also found this wasn't a weak evidence case. And even evidence that directly contradicts the People's case is not "clearly exculpatory" when it is "overwhelmingly undercut or undermined by substantial prosecution evidence.")

- Lastly, unless the defendant makes a claim and prima facie case of prosecutorial misconduct under the 5-factor test, the prosecution "Is not obligated to articulate a countervailing governmental interest for refusing to grant [the witness] immunity." In light of those findings, the court found the witness was legally and properly "unavailable."
- Regarding cross-examination about impeachment information disclosed after prelim, the court found ". . . the interest and motive for cross-examination does not necessarily change just because the defense develops information after the preliminary hearing about which it did not have the opportunity to cross-examine the witness." And, "Our high court has stated that " 'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony.' " [...] Preliminary hearing testimony may be introduced at trial over a section 1291 and confrontation clause objection even when the defense develops information or discovers evidence after the preliminary hearing about which it did not have the opportunity to cross-examine the witness."
- Finally, the court effectively punted on the *Bridgeforth* issue of failing to turn over the info on witness's RAP sheet, finding that it did not affect the cross-examination/confrontation clause analysis and any due process error in failing to disclose in this case was harmless BRD.

2. **Defendant's Standing:** The privilege against self-incrimination is personal to the *individual who invokes* it, and as such, immunity affects only that person. Unless immunity amounts to an *improper coercion* of the witness's testimony or demonstrably affects the nature of that testimony, the defendant has no standing to complain. Therefore, a defendant ordinarily has no standing to object to a prosecutor's application to immunize a witness or object to an agreement for partial immunity. (*People v. Wisely* (1990) 224 Cal.App.3d 939; *People v. St. Joseph* (1990) 226 Cal.App.3d 289.)
  
3. **Immunity Applies to State and Federal Prosecutions:** The privilege against self-incrimination protects a state witness against incrimination under *federal as well as state law*, and vice versa. (*Murphy v. Waterfront Commission* (1964) 378 U.S. 52.) A witness granted immunity under PC §1324 may be compelled to testify despite a claim that he might be subjected to federal prosecution. The federal government is prohibited from making any use of the *compelled testimony or its fruits* in a criminal prosecution against the witness and, therefore, the witness can be compelled to testify in the state proceeding. (*Nelson v. Municipal Court* (1972) 28 Cal.App.3d 889.)
  
4. **Immunity in Civil Cases:** In *Daly v. Superior Court* (1977) 19 Cal.3d 132, the California Supreme Court held that a witness can be compelled to answer questions in a civil proceeding if granted use and derivative use immunity so long as the immunity does not unduly hamper the criminal prosecution. However, the court held that the prosecution has a right to notice and an opportunity to object- *notice must be sent to the District Attorney*, the Attorney General, and the local United States Attorney. Any or all the above-named prosecutorial agencies may file a declaration opposing the application for immunity. The *prosecution's objection is final*. It conclusively establishes that the immunity order cannot be issued.

## C. CALIFORNIA'S IMMUNITY STATUTES - PC §§1324 and 1324.1

1. **Type of Proceeding:** Penal Code section 1324 applies in any *felony* proceeding, or any investigation or proceeding before a grand jury for any felony offense. Penal Code section 1324.1 applies in any *misdemeanor* proceeding.
2. **Claim of Privilege and Compelled Testimony:** Section 1324 applies when a witness refuses to answer a question or produce evidence of any kind on the ground that he may be incriminated thereby, and the court has found a valid claim of privilege exists.
3. **Procedure to Compel Testimony:** The statute is invoked when the District Attorney requests, *in writing*, that the court order the person to answer the question or produce the evidence. The judge then sets a *hearing* for the witness to show cause why he should not be compelled to answer (or produce evidence). The procedures are more fully explained below.
4. **Discretion of Court:** The court *shall* order the question answered or the evidence produced *unless* it finds doing so would be *clearly contrary to the public interest* or could subject the witness to a criminal prosecution in *another jurisdiction*. Thus, if there are no compelling reasons against it, the court must accede to the request and compel the testimony.
5. **Immunity Coextensive with Privilege:** “After complying with the order to testify...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 witness in any criminal case.”
6. **No Immunity from Perjury or Contempt:** “. . .But he or she may nevertheless be prosecuted or subjected to penalty. . .for any *perjury, false swearing or contempt* committed in answering, failing to answer, producing, or failing to produce evidence in accordance with the order.” A witness who has derived the benefits of immunity and who has testified must be prepared to answer relevant probative questions. (*People v. Hathcock* (1971) 17 Cal.App.3d 646.)
7. **Different Rules for Misdemeanor Proceedings:** Unlike the felony procedures outlined in section 1324, in a *misdemeanor* proceeding a witness who establishes a valid 5<sup>th</sup> Amendment claim of privilege *cannot* be compelled to testify. Rather, section 1324.1 merely permits the court to enforce a *voluntary written immunity agreement* between the witness and the DA. If the witness declines the DA's offer of immunity, *there is no*

*statutory process to compel them to answer over a valid claim of privilege.* If a witness accepts the DA's offer of immunity but then fails to answer questions, the only remedy is to invalidate the immunity agreement.

#### D. PC §1324 PROCEDURE

In a felony proceeding, once the court determines a valid privilege exists the next question becomes whether to seek the witness's compelled testimony. While doing so will "effectively" confer immunity upon the witness, no "deal" is brokered between the witness and the prosecution as with an informal grant of letter immunity or a formal cooperation agreement/contract. Therefore, three major factors should be considered:

- (1) Whether the witness's testimony is *essential* to a successful prosecution;
- (2) Whether the *gravity of the offense* is such as to justify granting immunity; and
- (3) Whether the witness is *less culpable* than other persons charged. In determining the witness's culpability, a deputy must consider the witness's involvement in the present case, the witness's overall criminal record, and his cooperation in the present case.

#### 1. Necessary Pleadings and Hearing

- a) Compelling Testimony of a Witness: The prosecutor must demonstrate that the witness has *concrete knowledge of the subject matter*, which may be difficult when the witness is uncooperative. An offer of proof should be made in the form of an in limine motion to Determine 5th Amendment Privilege wherein the prosecutor should provide a brief statement of relevant facts of the case and a summary of the anticipated testimony of the witness based on interviews with police or other evidence. The court will typically appoint counsel for the witness and set a time for hearing outside the jury's presence/prior to trial.
  - Best practice is to provide appointed counsel with copies of all statements made by the witness and to summarize their role in your case so he or she can properly counsel the witness.
  - At the hearing, the witness should be called to the stand outside of the jury's presence/prior to trial. During the hearing the witness should be asked several substantive questions from your direct examination to illustrate the subject matter of the witness's testimony. When the witness responds, the prosecutor should be sure the record is clear whether the witness is asserting their 5th

Amendment right not to incriminate themselves or whether they are simply “refusing to answer.”

- NOTE: If the matter is before the Grand Jury, the deputy must request a recess and ask the foreman to direct the witness forthwith to the Presiding Department of the Superior court.

- b) Request for Order Compelling Privileged Testimony: Penal Code section 1324 simply requires the District Attorney to make its request of the court to compel testimony over claim of privilege “in writing.” The need for compelled testimony must be anticipated by the deputy. If the exercise of section 1324 is approved by his or her supervisors, the deputy should prepare the written Request for Order Compelling Privileged Testimony prior to any court hearing at which it may be needed.
  - c) Order to Testify: At the conclusion of the hearing, if the witness has not met his burden of establishing why he should *not* be compelled to answer, the court will issue an Order Requiring the Witness to Answer Questions. The court should ***order the witness to reappear*** for testimony if not testifying forthwith. The court has the power to hold the witness in contempt for any unlawful refusal to answer under Code of Civil Procedure section 1219 or Penal Code section 166.
- See Attachment “E” for long and short form P&As regarding 5<sup>th</sup> Amendment Claims and Penal Code 1324
  - See Attachment “F” for Penal Code section 1324 Request for Order Compelling Testimony and Order Compelling Testimony.

## **E. INFORMAL “LETTER IMMUNITY”**

The only statutory authority for granting immunity in felony matters in California is the formal procedure established by Penal Code section 1324. However, immunity may be employed outside section 1324 provided the ***witness agrees*** and is ***cooperative***. One type of informal immunity is letter immunity. While letter immunity does not comply with the formalities of the statute, because letter immunity is carefully drafted it avoids the confusion of an oral promise of immunity.

Carefully drafted written agreements should be used when preparing letters of immunity. The agreement is ***not enforceable*** until it has been accepted

or relied upon by the witness. (*People v. Superior Court (Perry)* (1989) 213 Cal.App.3d 536, 539-540.)

Finally, because an informal letter of immunity is merely a voluntary agreement between the witness to testify in exchange for the prosecution agreeing to not use their testimony against them in a criminal proceeding and does not have a court compelled component to it (after a valid assertion of privilege), the agreement only binds the parties entering into it. In other words, an informal grant of immunity will not necessarily prevent other prosecuting agencies who were not party to the immunity agreement from using the witness's testimony in future prosecutions.

➤ See Attachment "G" for sample letter of immunity.

## F. HIP-POCKET IMMUNITY

Hip-pocket immunity is immunity granted by a prosecutor that does not conform to the procedures established by statute or by letter immunity as described above. Hip pocket immunity is so-called because the prosecutor figuratively reaches into his or her hip pocket and pulls out a grant of immunity without following the proper policy and procedures.

Hip-pocket immunity is too often hasty, ill-considered and, because it is usually made orally, difficult to limit and define when the issue comes up in testimony.

## G. DRAFTING THE GRANT OF IMMUNITY

1. **Content of Immunity Grant:** "The prosecutor's request for court approval should set out the *terms of the agreement*, the *subject matter* of the testimony, the *proceedings* at which it will be given, the representations of the witness (or his counsel) as to the specific *content of his testimony*, and the *promise of the witness* to testify fully and truthfully in return for the promised grant of immunity. On court approval of the agreement, immunity will be granted the witness *after he has complied* with the representations of the agreement." (*People v. Brunner* (1973) 32 Cal.App.3d 908.)

➤ **Avoiding Witness Intimidation:** A deputy must be very careful to avoid witness intimidation problems. Carelessness can lead to allegations of abuse or suppression of the immunized witness's testimony. Immunity conditioned *solely upon the exact nature of the content* of the witness's testimony may create improper pressure.

- At times, the enticement of immunity alone may cause some to change the facts to suit the prosecution. (*People v. Brunner*, supra.) In *People v. Medina* (1974) 41 Cal.App.3d 438. Immunity was conditioned upon the witness not materially or substantially changing his testimony from the tape-recorded statement already given to the officers, or not to feign lapse of memory. Otherwise the immunity was of no effect. Under these circumstances, the court held the defendant was denied his right to a fair trial.
- When discussing immunity with a witness or their representative, a deputy must make a careful record of any conversations. Careful preparation and recording of such conversations is a must. Otherwise, the immunized witness's recollections of a deputy's incautious words may come back to haunt them.

**3. Writing Limits into the Immunity Grant:** Care must be taken to limit the terms of a grant of immunity. For example, the immunity order may be limited to designated crimes on or between specific dates. The order should not be a blanket immunity covering all criminal acts of the witness. (*People v. Label* (1974) 43 Cal.App.3d 766.)

- In *People v. Thompson* (1983) 145 Cal.App.3d 918, the District Attorney made it clear that the only transaction covered by the immunity grant was a particular murder, and that any evidence of an unrelated robbery was not within the scope of immunity. At the District Attorney's request, the trial court ordered ***use immunity*** for any testimony about the robbery. The court held it is within the District Attorney's sole discretion to limit the grant of transactional immunity in exchange for testimony. Therefore, on appeal from the robbery conviction, defendant's contention that he received transactional immunity as to that crime was denied.
- A grant of immunity may also be conditioned on the witness being only a ***peripheral participant*** and not a principal perpetrator. In *People v. Yu* (1983) 143 Cal.App.3d 358, a prosecutor offered a grant of immunity to a witness, but later prosecuted the witness as a principal.

# List of Priors Involving Moral Turpitude For Impeachment Purposes

---

<u>Crime</u>	<u>M.T.</u>	<u>Case</u>
<b>Aggravated Assault</b>	Yes	<u>People v. Elwell</u> (1988) 206 Cal. App. 3d 171
<b>Arson</b>	Yes	<u>People v. Miles</u> (1985) 172 Cal. App. 3d 474, 482
<b>Assault with a deadly weapon</b>	Yes	<u>People v. Hinton</u> (2006) 37 Cal. 4th 839, 888 <u>People v. Thomas</u> (1988) 206 Cal. App. 3d 689, 700 <u>People v. Armendariz</u> (1985) 174 Cal. App. 3d 674, 681 <u>People v. Cavazos</u> (1985) 172 Cal. App. 3d 589, 595
<b>Assault with a deadly weapon (auto)</b>	Maybe	<u>People v. Heckathorne</u> (1988) 202 Cal. App. 3d 458, 464 fn 4
<b>Assault with a deadly weapon (auto) on a peace officer</b>	Yes	<u>People v. Gutierrez</u> (2002) 28 Cal. 4th 1083, 1139.
<b>Assault with intent to murder</b>	Yes	<u>People v. Sandoval</u> (1992) 4 Cal. 4th 155, 177 <u>People v. Olmedo</u> (1985) 167 Cal. App. 3d 1085, 1098
<b>Assault with intent to rape</b>	Yes	<u>People v. Morris</u> (1991) 53 Cal. 3d 152, 195 (overruled on another point by <u>People v. Stansbury</u> (1985) 9 Cal. 4th 824, 830 fn 1) <u>People v. Bonilla</u> (1985) 168 Cal. App. 3d 201, 205
<b>Assault, simple</b>	No	<u>People v. Thomas</u> (1988) 206 Cal. App. 3d 689, 694 <u>People v. Cavazos</u> (1985) 172 Cal. App. 3d 589, 594
<b>Auto theft</b>	Yes	<u>People v. Hunt</u> (1985) 169 Cal. App. 3d 668, 674 <u>People v. Zataray</u> (1985) 173 Cal. App. 3d 390, 399
<b>Auto theft, attempt</b>	Yes	<u>People v. Rodriguez</u> (1986) 177 Cal. App. 3d 174, 178
<b>Battery, felony</b>	No	<u>People v. Lindsay</u> (1989) 209 Cal. App. 3d 849, 856 <u>People v. Thomas</u> (1988) 206 Cal. App. 3d 689, 694 <u>People v. Mansfield</u> (1988) 200 Cal. App. 3d 82, 87
<b>Battery, simple</b>	No	<u>People v. Lopez</u> (2005) 129 Cal. App. 4th 1508, 1522 <u>People v. Lindsay</u> (1989) 209 Cal. App. 3d 849, 856 <u>People v. Thomas</u> (1988) 206 Cal. App. 3d 689, 694 <u>People v. Mansfield</u> (1988) 200 Cal. App. 3d 82, 88
<b>Battery of a jail inmate</b>	Yes	<u>People v. Clarida</u> (1987) 197 Cal. App. 3d 547, 552
<b>Battery by an inmate on a non-inmate</b>	Yes	<u>People v. Williams</u> (1985) 169 Cal. App. 3d 951, 957 (criticized by <u>People v. Mansfield</u> (1988) 200 Cal. App. 3d 82)

<b>Battery on a peace officer</b>	Yes	<u>People v. Lindsay</u> (1989) 209 Cal. App. 3d 849, 857 <u>People v. Clarida</u> (1987) 197 Cal. App. 3d 547, 552
<b>Battery with a deadly weapon, attempt</b>	Yes	<u>People v. Clarida</u> (1987) 197 Cal. App. 3d 547, 552
<b>Brandishing a weapon at a peace officer</b>	Yes	<u>People v. Lepolo</u> (1997) 55 Cal. App. 4th 85, 91
<b>Bribery</b>	Yes	<u>People v. Hunt</u> (1985) 169 Cal. App. 3d 668, 675 fn 5
<b>Burglary</b>	Yes	<u>People v. Collins</u> (1986) 42 Cal. 3d 378, 395 <u>People v. Rodriguez</u> (1986) 177 Cal. App. 3d 174, 178 <u>People v. Statler</u> (1985) 174 Cal. App. 3d 46, 54 <u>People v. Hunt</u> (1985) 169 Cal. App. 3d 668, 675
<b>Burglary of an inhabited dwelling with intent to do harm</b>	Yes	<u>People v. Boyd</u> (1985) 167 Cal. App. 3d 36, 45
<b>Burglary, attempt</b>	Yes	<u>People v. Muldrow</u> (1988) 202 Cal. App. 3d 636, 645 <u>People v. Dillingham</u> (1986) 186 Cal. App. 3d 688, 695
<b>Carrying a loaded firearm on one's person or in a car</b>	Yes	<u>People v. Bedolla</u> (2018) 28 Cal.App.5th 535
<b>Carrying a concealed gun in a car</b>	Yes	<u>People v. Aguilar</u> (2016) 245 Cal.App.4th 1010
<b>Child Endangerment</b>	No	<u>People v. Sanders</u> (1992) 10 Cal. App. 4th 1268, 1275
<b>Child Molestation</b>	Yes	<u>Piscitelli v. The Salesion Society</u> (2008) 166 Cal. App. 4th 1, 5-6 <u>People v. Massey</u> (1987) 192 Cal. App. 3d 819, 823
<b>Conspiracy to commit crime of moral turpitude</b>	Yes	<u>People v. Garrett</u> (1987) 195 Cal. App. 3d 795, 800
<b>Conspiracy to possess an illegal weapon</b>	Yes	<u>People v. Garrett</u> (1987) 195 Cal. App. 3d 795, 800
<b>Controlled substance, transportation or sale</b>	Yes	<u>People v. Navarez</u> (1985) 169 Cal. App. 3d 936, 949
<b>Corporal injury on spouse or cohabitant, felony</b>	Yes	<u>People v. Rodriguez</u> (1992) 5 Cal. App. 4th 1398, 1402
<b>Corporal punishment of a child resulting in traumatic condition</b>	Yes	<u>People v. Brooks</u> (1992) 3 Cal. App. 4th 669, 672
<b>Discharging weapon into an inhabited dwelling / vehicle</b>	Yes	<u>People v. White</u> (1992) 4 Cal. App. 4th 1299, 1305
<b>Cultivation of marijuana</b>	Yes	<u>People v. Gabriel</u> (2012) 206 Cal. App. 4th 450, 459

<b>Driving, unauthorized vehicle use</b>	Yes	<u>People v. Lang</u> (1989) 49 Cal. 3d 991, 1011
<b>Driving under the influence of alcohol (with three or more DUI convictions within seven years of instant offense)</b>	Yes	<u>People v. Forster</u> (1994) 29 Cal. App. 4th 1746, 1756 (Vehicle Code §23175 recidivist-type crime indicative of a conscious indifference of consequences.)
<b>Escape, failure to return to custody / place of confinement</b>	Yes	<u>People v. Lee</u> (1991) 229 Cal. App. 3d 1504, 1507 <u>People v. Hunt</u> (1985) 169 Cal. App. 3d 668, 675 fn 5
<b>Escape, without force</b>	Yes	<u>People v. Barnett</u> (1998) 17 Cal. 4th 1044, 1126-27 <u>People v. Lang</u> (1989) 49 Cal. 3d 991, 1010 <u>People v. Waldecker</u> (1987) 195 Cal. App. 3d 1152, 1158
<b>Extortion</b>	Yes	<u>People v. Almarez</u> (1985) 168 Cal. App. 3d 262, 267
<b>Failure to appear on felony bond</b>	Yes	<u>People v. Maestas</u> (2005) 132 Cal. App. 4th 1552, 1556-1558
<b>Failure to file federal income tax return (when not for purpose of financial gain or with the intent to avoid ultimate payment of tax obligations)</b>	No	<u>In re Fahey</u> (1973) 8 Cal. 3d 842, 850
<b>False imprisonment</b>	Yes	<u>People v. Cornelio</u> (1989) 207 Cal. App. 3d 1580, 1585
<b>False information to a police officer</b>	Yes	<u>People v. Maestas</u> (2005) 132 Cal. App. 4th 1552, 1556 fn 4
<b>Flight from peace officer (by driving in willful or wonton disregard for the safety of others)</b>	Yes	<u>People v. Dewey</u> (1996) 42 Cal. App. 4th 216
<b>Forgery</b>	Yes	<u>People v. Flanagan</u> (1986) 185 Cal. App. 3d 764, 771 <u>People v. Parrish</u> (1985) 170 Cal. App. 3d 336, 349 <u>People v. Almarez</u> (1985) 168 Cal. App. 3d 262, 267
<b>Hit and run, felony</b>	Yes	<u>People v. Bautista</u> (1990) 217 Cal. App. 3d 1, 7
<b>Indecent exposure (felony)</b>	Yes	<u>People v. Ballard</u> (1993) 13 Cal. App. 4th 687, 696
<b>Kidnapping</b>	Yes	<u>People v. Morris</u> (1991) 53 Cal. 3d 152, 194 (overruled on another point by <u>People v. Stansbury</u> (1995) 9 Cal. 4th 824, 830 fn 1) <u>People v. Zataray</u> (1985) 173 Cal. App. 3d 390
<b>Larceny, grand</b>	Yes	<u>People v. Boyd</u> (1985) 167 Cal. App. 3d 36, 45
<b>Lewd conduct</b>	Yes	<u>People v. Rowland</u> (1992) 4 Cal. 4th 238, 259 fn 1
<b>Lewd and lascivious acts on child under 14</b>	Yes	<u>People v. Massey</u> (1987) 192 Cal. App. 3d 819, 823

<b>Lewd and lascivious acts on child under 14, attempt</b>	Yes	<u>In re Lesansky</u> (2001) 25 Cal. 4th 11, 17
<b>Maintaining place where drugs distributed</b>	Yes	<u>People v. Vera</u> (1999) 69 Cal. App. 4th 1100, 1103
<b>Manslaughter, involuntary</b>	No	<u>People v. Solis</u> (1985) 172 Cal. App. 3d 877, 883
<b>Manslaughter, voluntary</b>	Yes	<u>People v. Foster</u> (1988) 201 Cal. App. 3d 20, 25 <u>People v. Coad</u> (1986) 181 Cal. App. 3d 1094, 1109 <u>People v. Parrish</u> (1985) 170 Cal. App. 3d 336, 349
<b>Murder, second degree</b>	Yes	<u>People v. Littrel</u> (1986) 185 Cal. App. 3d 699, 702
<b>Murder</b>	Yes	<u>People v. Hinton</u> (2006) 37 Cal. 4th 839, 888
<b>Murder, attempt</b>	Yes	<u>People v. Hinton</u> (2006) 37 Cal. 4th 839, 888
<b>Negligent discharge of firearm</b>	Yes	<u>People v. Feaster</u> (2002) 102 Cal. App. 4th 1084, 1093
<b>Oral copulation</b>	Yes	<u>People v. Rowland</u> (1992) 4 Cal. 4th 238, 259 fn 1
<b>Pandering</b>	Yes	<u>People v. Jaimez</u> (1986) 184 Cal. App. 3d 146, 150
<b>Perjury</b>	Yes	<u>People v. Hunt</u> (1985) 169 Cal. App. 3d 668, 675 fn 5
<b>Pimping</b>	Yes	<u>People v. Jaimez</u> (1986) 184 Cal. App. 3d 146, 150
<b>Possession of an assault weapon</b>	Yes	<u>People v. Gabriel</u> (2012) 206 Cal. App. 4th 450, 459
<b>Possession of controlled substance (simple)</b>	No	<u>People v. Valdez</u> (1986) 177 Cal. App. 3d 680, 697 (marijuana) <u>People v. Castro</u> (1985) 38 Cal. 3d 301, 317 (heroin) <u>People v. Dossman</u> (1985) 171 Cal. App. 3d 843, 849 (heroin)
<b>Possession of controlled substance for sale</b>	Yes	<u>People v. Williams</u> (2009) 170 Cal. App. 4th 587, 607-608 (cocaine) <u>People v. Standard</u> (1986) 181 Cal. App. 3d 431, 435 (marijuana) <u>People v. Castro</u> (1985) 38 Cal. 3d 301, 317 (heroin) <u>People v. Dossman</u> (1985) 171 Cal. App. 3d 843, 849
<b>Possession of deadly weapon with intent to assault (misdemeanor)</b>	Yes	<u>People v. Rivera</u> (2003) 107 Cal. App. 4th 1374, 1382
<b>Possession of firearm by felon</b>	Yes	<u>People v. Williams</u> (2009) 170 Cal. App. 4th 587, 607-608 <u>People v. Littrel</u> (1986) 185 Cal. App. 3d 699
<b>Possession of illegal weapon</b>	Yes	<u>People v. Robinson</u> (2005) 37 Cal. 4th 592, 626 (concealed weapon) <u>People v. Garrett</u> (1987) 195 Cal. App. 3d 795, 800 (unregistered firearm)
<b>Prostitution</b>	Yes	<u>People v. Chandler</u> (1997) 56 Cal. App. 4th 703, 709
<b>Rape</b>	Yes	<u>People v. Lewis</u> (1987) 191 Cal. App. 3d 1288, 1295 <u>People v. Bonilla</u> (1985) 168 Cal. App. 3d 201, 205 <u>People v. Mazza</u> (1985) 175 Cal. App. 3d 836, 844

<b>Rape, statutory (without good belief the female was of the age of consent)</b>	Yes	<u>People v. Fulcher</u> (1987) 194 Cal. App. 3d 749, 754
	No	<u>People v. Flanagan</u> (1986) 185 Cal. App. 3d 764, 773 (if prior conviction occurred at a time when a good faith mistake as to the victim's age was not a defense to the crime)
<b>Rape, attempt</b>	Yes	<u>People v. Morris</u> (1991) 53 Cal. 3d 152, 195 (overruled on another point by <u>People v. Stansbury</u> (1985) 9 Cal. 4th 824, 830 fn 1)
<b>Receiving stolen property</b>	Yes	<u>People v. Gray</u> (2007) 158 Cal. App. 4th 635, 641 <u>People v. Turner</u> (1990) 50 Cal. 3d 668, 705 <u>People v. Rodriguez</u> (1986) 177 Cal. App. 3d 174, 179
<b>Resisting or deterring executive officer by means of force or violence</b>	Yes	<u>People v. Williams</u> (1999) 72 Cal. App. 4th 1460
<b>Robbery</b>	Yes	<u>People v. Gray</u> (2007) 158 Cal. App. 4th 635, 641 <u>People v. Stewart</u> (1985) 171 Cal. App. 3d 59, 64 <u>People v. Brown</u> (1985) 169 Cal. App. 3d 800, 806
<b>Sale / transportation of controlled substance</b>	Yes	<u>People v. Navarez</u> (1985) 169 Cal. App. 3d 936, 949 (heroin) <u>People v. Hunt</u> (1985) 169 Cal. App. 3d 668, 674
<b>Sexual battery, misdemeanor</b>	Yes	<u>People v. Chavez</u> (2000) 84 Cal. App. 4th 25, 30
<b>Sodomy</b>	Yes	<u>People v. Rowland</u> (1992) 4 Cal. 4th 238, 259 fn 1
<b>Solicitation to commit murder</b>	Yes	<u>People v. Greenberger</u> (1997) 58 Cal. App. 4th 298, 361
<b>Theft</b>	Yes	<u>People v. Doolin</u> (2009) 45 Cal. 4th 390, 442-443 (grand theft) <u>People v. Gray</u> (2007) 158 Cal. App. 4th 635, 641
<b>Threatening death or great bodily injury</b>	Yes	<u>People v. Thornton</u> (1992) 3 Cal. App. 4th 419, 424
<b>Threatening a peace officer in performance of duties</b>	Yes	<u>People v. Williams</u> (1999) 72 Cal. App. 4th 1460, 1464
<b>Terrorist threats, making</b>	Yes	<u>People v. Thornton</u> (1992) 3 Cal. App. 4th 419, 424
<b>Vandalism, felony</b>	Yes	<u>People v. Campbell</u> (1994) 23 Cal. App. 4th 1488, 1496

ATTORNEY OR PARTY WITHOUT (Name, State Bar number, and address)  TELEPHONE NO: _____ FAX NO. (Optional) _____ EMAIL ADDRESS (Optional): _____ ATTORNEY FOR (NAME): _____	<b>COURT USE ONLY</b>
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO</b> <input type="checkbox"/> CENTRAL DIVISION, 220 W. BROADWAY, SAN DIEGO, CA 92101-3814 <input type="checkbox"/> HALL OF JUSTICE, 330 W. BROADWAY, SAN DIEGO, CA 92101-3827 <input type="checkbox"/> MADGE BRADLEY BLVD., 1409 FOURTH AVE., SAN DIEGO, CA 92101-3294 <input type="checkbox"/> FAMILY COURT, 1555 SIXTH, SAN DIEGO, CA 92101-3284 <input type="checkbox"/> KEARNY MESA BRANCH, 8950 CLAIREMONT MESA BLVD., SAN DIEGO, CA 92123-1187 <input type="checkbox"/> NORTH COUNTY DIVISION, 325 S. MELROSE, VISTA, CA 92081-6698 <input type="checkbox"/> EAST COUNTY DIVISION, 250 E. MAIN, EL CAJON, CA 92020-3941 <input type="checkbox"/> SOUTH COUNTY DIVISION, 500 THIRD AVE., CHULA VISTA, CA 91910-5649 <input type="checkbox"/> JUVENILE COURT, 2851 MEADOWLARK DR., SAN DIEGO, CA 92123-2781	
PLAINTIFF(S)/PETITIONER(S) _____	
DEFENDANT(S)/RESPONDENT(S) _____	
<b>WARRANT OF ATTACHMENT</b> (CCP 491.160, 708.170; CCP 1209 et seq; PC 166; PC 1331 et seq.)	CASE NUMBER _____

TO THE SHERIFF OF SAN DIEGO COUNTY  
 OR ANY PEACE OFFICER IN THIS STATE:

YOU ARE COMMANDED to attach the body of: \_\_\_\_\_  
 and bring said person before this court to show cause why punishment should not be imposed for contempt in disobeying  
 the process of this court, properly served, summoning appearance before the court this day.

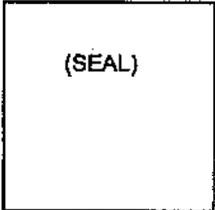
Said person is to be admitted  without bail  to bail  cash only (no 10%) in the sum of \$ \_\_\_\_\_  
 for appearance in the above-entitled Court, Department \_\_\_\_\_ at \_\_\_\_\_ AM / PM on:  
 the first court day  the third Tuesday  the first Friday  OTHER \_\_\_\_\_  
 following apprehension / contact with the subject of this warrant.

**UPON CONTACT OF THE SUBJECT:** The Sheriff is further directed to notify the above department (phone  
 number): \_\_\_\_\_ when subject is apprehended or notified to appear.

**IF SUBJECT IS ARRESTED,** the Sheriff is to contact the Clerk of the Department immediately to set the hearing.

DAY OR NIGHT SERVICE IS APPROVED

Date: \_\_\_\_\_ Judge / Commissioner of the Superior Court



ATTEST: \_\_\_\_\_ CLERK OF THE SUPERIOR COURT  
 Date: \_\_\_\_\_ by \_\_\_\_\_, Deputy

Attribution:  
 Sheriff Orig - (2) and CIV-87 DESCRIPTION OF DEFENDANT/WITNESS (1)  
 DA/Party: (1)  
 File: (1)

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, state bar number, and address):

Case Number: \_\_\_\_\_

Vs. \_\_\_\_\_

TELEPHONE NO.:  
ATTORNEY FOR (Name):

FAX NO.:

**DESCRIPTION OF DEFENDANT/WITNESS**

Name \_\_\_\_\_ Address \_\_\_\_\_

Race \_\_\_\_\_ Sex \_\_\_\_\_ Hair \_\_\_\_\_ Eyes \_\_\_\_\_ Height \_\_\_\_\_ Weight \_\_\_\_\_ Compl \_\_\_\_\_ Age \_\_\_\_\_ DOB \_\_\_\_\_

Make of car \_\_\_\_\_ Year \_\_\_\_\_ Body type \_\_\_\_\_ Color \_\_\_\_\_ Lic.# \_\_\_\_\_ DL# \_\_\_\_\_

Occupation \_\_\_\_\_ Employer \_\_\_\_\_ Address \_\_\_\_\_

Hours Worked \_\_\_\_\_ Friends and/or Hangouts \_\_\_\_\_

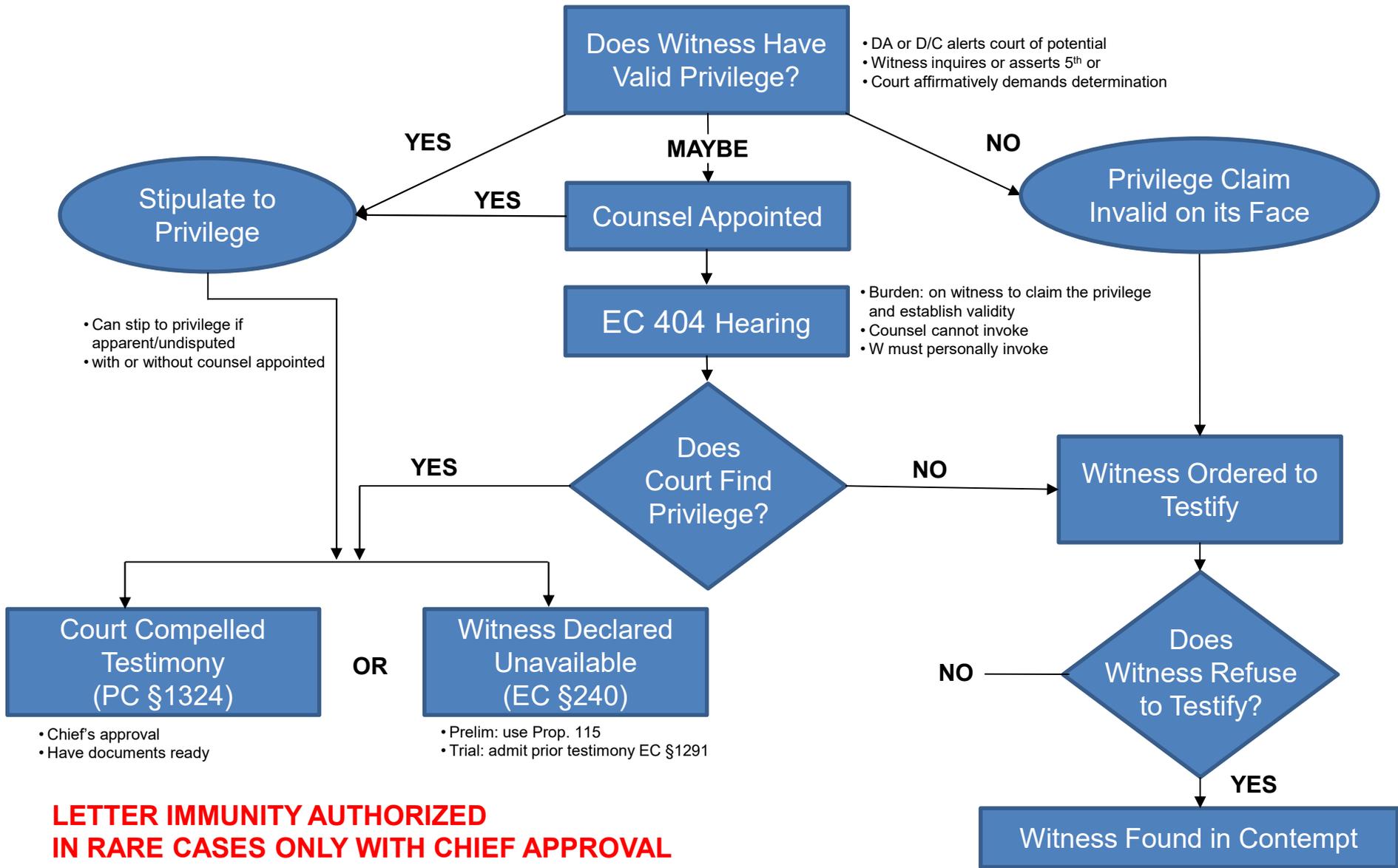
Union Membership or Lodge \_\_\_\_\_

Has Subject Ever Been Arrested? \_\_\_\_\_ Where and Dates \_\_\_\_\_

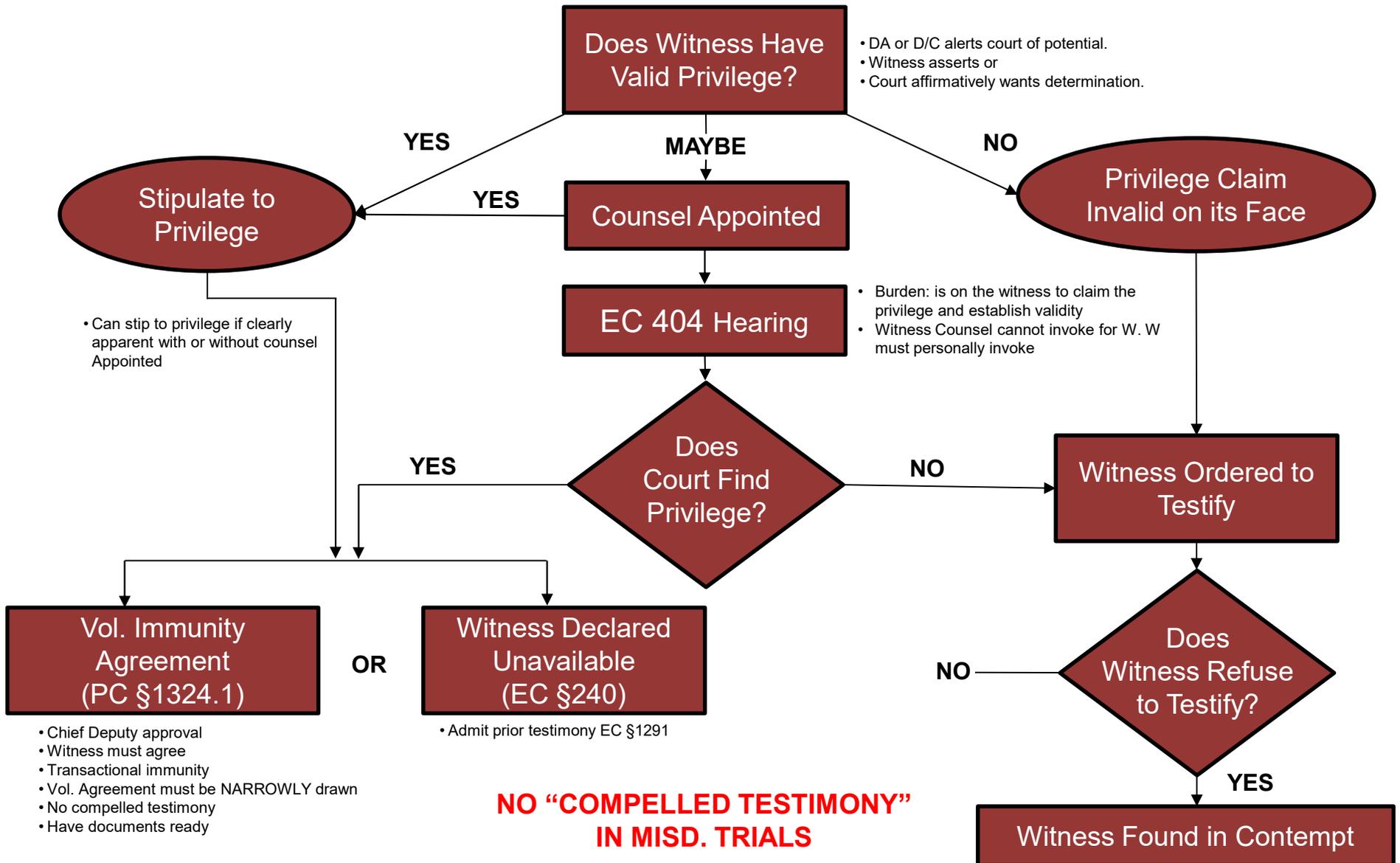
Has Subject Been Served With Civil Process? \_\_\_\_\_ When and by Whom \_\_\_\_\_

Additional Information \_\_\_\_\_

# WHAT TO DO WHEN A WITNESS CLAIMS THE 5<sup>TH</sup> IN A **FELONY** TRIAL OR PRELIM



# WHAT TO DO WHEN A WITNESS CLAIMS THE 5<sup>TH</sup> IN A MISDEMEANOR TRIAL



1 SUMMER STEPHAN  
District Attorney  
2 [NAME]  
Deputy District Attorney  
3 [OFFICE  
ADDRESS]  
4 Tel.  
5 Fax  
6 Email:  
Attorneys for Plaintiff

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF SAN DIEGO

10 THE PEOPLE OF THE STATE OF CALIFORNIA,  
11 Plaintiff,  
12 v.  
13 [DEFENDANT],  
14 Defendant.

Case No.:  
DA No.:

**PEOPLE'S POINTS AND  
AUTHORITIES RE: FIFTH  
AMENDMENT PRIVILEGE AND  
PENAL CODE SECTION 1324  
COURT COMPELLED  
TESTIMONY [AND WITNESS  
IMMUNITY]**

Date:  
Time:  
Dept:  
Trial Date:

15  
16  
17  
18  
19  
20 Comes now the plaintiff, the People of the State of California, by and through their  
21 attorneys, BONNIE M. DUMANIS, District Attorney, [NAME], Deputy District Attorney, and  
22 respectfully submits the following POINTS AND AUTHORITIES RE FIFTH AMENDMENT  
23 PRIVILEGE AND PENAL CODE SECTION 1324 COURT COMPELLED TESTIMONY  
24 [AND WITNESS IMMUNITY].

25 **THE FOLLOWING IS AN EXTENSIVE BRIEF ON THE 5<sup>TH</sup> AMENDMENT**  
26 **PRIVILEGE, CLAIMS OF IMMUNITY, ALONG WITH ISSUES THAT MAY BE**  
27 **RAISED BY JUDGES OR DEFENSE BAR. IT IS DESIGNED AS AN INTERNAL**  
28 **EDUCATIONAL BRIEF FOR DDAS AND READY RESOURCE TO FILE IN COURT.**

1 **HOWEVER, IT IS NOT INTENDED TO BE FILED WHOLESALE. SECTIONS MAY**  
2 **BE DELETED OR SHORTENED BEFORE FILING BASED ON YOUR INDIVIDUAL**  
3 **CASE NEEDS AND CERTAIN ISSUES MAY ONLY BE RELEVANT AS RESPONSES**  
4 **TO BOGUS ARGUMENTS RAISED BY THE COURT OR DEFENSE COUNSEL.**

5 **INTRODUCTION**

6 **[INSERT A VERY BRIEF STATEMENT OF FACTS RELATING TO YOUR**  
7 **SPECIFIC ANTICIPATED ISSUE AND WHAT THE “PEOPLE’S REQUEST” IS.]**

8 **POINTS AND AUTHORITIES**

9 **I.**

10 **A WITNESS MAY INVOKE THE FIFTH AMENDMENT TO AVOID**  
11 **EXPOSING HIM OR HERSELF TO CRIMINAL PROSECUTION**

12 Both the Fifth and Fourteenth Amendments to the United States Constitution and the  
13 California Constitution article 1, section 15 guarantee the right against self-incrimination in  
14 criminal cases. Recognizing the extent that such privilege exists, a defendant in a criminal case  
15 has a statutory privilege not to be called as a witness and not to testify. (Evid. Code, § 930.)  
16 Likewise, a person has a privilege to refuse to disclose any matter that may tend to incriminate  
17 him or her. (Evid. Code, § 940.) Thus, what is generally referred to as the privilege against self-  
18 incrimination actually consists of two separate and distinct privileges: (1) a defendant in a  
19 criminal proceeding has a right not to be called as a witness and not to testify; and (2) a witness  
20 in any proceeding has a right to decline to answer questions that may tend to incriminate him or  
21 her in criminal activity. Both aspects of the privilege apply only to the compulsory giving of  
22 testimony or of other communicative evidence, such as documents. The privilege also  
23 encompasses answers to questions that would furnish a link in the chain of evidence needed to  
24 prosecute the witness for a crime. (*Blau v. United States* (1950) 340 U.S. 159.) The privilege is  
25 inapplicable to compulsory production of non-testimonial physical evidence. (See *People v.*  
26 *Roberts* (1992) 2 Cal.4th 271, 311; *People v. Tai* (1995) 37 Cal.App.4th 990, 997; *People v.*  
27 *Thomas* (1986) 180 Cal.App.3d 47, 52.)  
28

1 Innocent persons, as well as the guilty, are entitled to invoke the privilege. “The privilege  
2 serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances.”  
3 (*Grunewald v. United States* (1957) 353 U.S. 391, 421.) Even if a person denies culpability, they  
4 may exercise the privilege if the witness has reasonable cause to apprehend danger from her  
5 testimony. However, in order to invoke the Fifth Amendment privilege the witness must be  
6 legitimately at risk of revealing incriminating information against herself. (*Ohio v. Reiner*  
7 (2001) 532 U.S. 17.)

## 8 II.

### 9 PROCEDURE WHEN PRIVILEGE IS CLAIMED

10 When a trial court has reason to believe that a witness may be charged with a crime  
11 arising out of events to which he might testify it has a duty to ensure that the witness is fully  
12 advised of his privilege against self-incrimination. The court may either do so on its own or by  
13 appointing counsel for the witness. If the court chooses to advise the witness on its own, it must  
14 be careful to remain neutral and not dissuade the witness from giving testimony. (*People v.*  
15 *Schroeder* (1991) 227 Cal.App.3d 784; *People v. Warren* (1984) 161 Cal.App.3d 961; *People v.*  
16 *Seastone* (1969) 3 Cal.App.3d 60.) Conversely, the court does not have a duty to advise a *pro se*  
17 defendant of a right against self-incrimination. (*People v. Barnum* (2003) 29 Cal.4th 1210.)

18 A witness cannot assert his or her privilege until questions having a tendency to  
19 incriminate are asked after being sworn. (*People v. Ford* (1988) 45 Cal.3d 431, 440; *People v.*  
20 *Apodaca* (1993) 16 Cal.App.4th 1706.) A witness may not refuse to be sworn because his or her  
21 testimony might incriminate him or her. (*Overend v. Superior Court* (1900) 131 Cal. 280.)  
22 Rather, a witness must first be placed under oath, take the stand, and actually refuse to answer  
23 an incriminatory question. It is then the court's duty to determine whether the particular question  
24 put to the witness has the tendency to subject him or her to punishment for a crime; it cannot do  
25 so in advance of an actual question being asked. (*People v. Apodaca, supra*, 16 Cal.App.4th at p.  
26 1714.) Thus, the witness must generally assert the privilege on a question-by-question basis, and  
27 initial inquiries intended to test the validity of the claim are conducted outside the presence of  
28 the jury. (*People v. Lopez* (1999) 71 Cal.App.4th 1550, 1555.) If the court finds a valid

1 privilege exists, it can either limit the questions the parties may ask before the jury or excuse the  
2 witness if it becomes clear that any testimony at all would implicate the privilege.  
3 (*Ibid.*) However, the court has no independent authority to grant “judicial immunity” to the  
4 witness. (*People v. Masters* (2016) 62 Cal.4th 1019.)

5 To avoid the potentially prejudicial impact of having a witness assert the privilege against  
6 self-incrimination before the jury, it has been recommended that in determining the propriety of  
7 the witness's invocation of the privilege, the trial court hold a pre-testimonial hearing outside the  
8 jury's presence, commonly known as a “404 hearing.” (*People v. Mincey* (1992) 2 Cal.4th 408,  
9 441; Evid. Code, § 404.) The party calling the witness may then commence with asking the  
10 questions it intends to ask of the witness in trial. The witness must object/claim privilege as to  
11 each question the witness believes would tend to incriminate. In some instances, a “blanket”  
12 claim of privilege may be raised once it becomes clear after some questioning that the witness  
13 intends to answer no questions at all relating to an event. (*People v. Fonseca* (1995) 36  
14 Cal.App.4th 631, 637; *People v. Cornejo* (1979) 92 Cal.App.3d 637, 659.) Next, the court must  
15 analyze the hazard of incrimination and rule on the claim as to each question. The invoking  
16 witness has the initial burden of showing that the testimony sought might tend to incriminate  
17 him or her. (Evid. Code, § 404.) “The witness is not exonerated from answering simply because  
18 he declares that his testimony would incriminate himself; his say-so does not of itself establish  
19 the hazard of incrimination.” (*Hoffman v. United States* (1951) 341 U.S. 479, 486.) However,  
20 the witness is not required to produce evidence as such to satisfy this burden. In addition to  
21 considering evidence, the court must consider the matters disclosed in argument, the  
22 implications of the question, the setting in which it is asked, the applicable statute of limitations,  
23 and all other relevant factors. (See *Cohen v. Superior Court* (1959) 173 Cal.App.2d 61, 70.)  
24 Nonetheless, the burden is on the witness to present to the court information of this sort  
25 sufficient to indicate that the testimony sought might incriminate him or her. (Evid. Code, §  
26 404.) In order to approve invocation of the privilege, it need only be evident from the  
27 implications of the question, in the setting in which it is asked, that a responsive answer to the  
28

1 question or an explanation of why it cannot be answered might be dangerous because injurious  
2 disclosure could result. (*People v. Lucas* (1995) 12 Cal.4th 415, 454.)

3 The invocation of the privilege against self-incrimination is only proper when:

4 The danger to be apprehended [is] real and appreciable with  
5 reference to the ordinary operation of law in the ordinary course of  
6 things, not a danger of imaginary and unsubstantial character, having  
7 reference to some extraordinary and barely possible contingency so  
8 improbable that no reasonable person would allow it to influence his  
9 or her conduct. [A] merely remote and naked possibility, out of the  
10 ordinary course of the law, and such as no reasonable man would be  
11 affected by, should not be suffered to obstruct the administration of  
12 justice.

13 (*Coleman v. Galvin* (1947) 78 Cal.App.2d 313, 320; *In re Berman* (1930) 105 Cal.App.37, 46;  
14 *Brown v. Walker* (1896) 161 U.S. 591, 599-600.)

15 The court must sustain the objection of privilege unless it clearly appears to the court that  
16 the evidence sought cannot possibly have a tendency to incriminate the person claiming the  
17 privilege. (Evid. Code, § 404.) To deny an assertion of the privilege against self-incrimination,  
18 the court must find that the witness is mistaken and that the answer cannot possibly have a  
19 tendency to incriminate. (*People v. Williams* (2008) 43 Cal.4th 584, 614.)

### 18 III.

#### 19 FIFTH AMENDMENT PRIVILEGE CLAIMS ARE DISALLOWED 20 OUTSIDE THE SCOPE OF A CRIMINAL PROSECUTION

21 If an offense is barred by the statute of limitations, and there is no pending prosecution  
22 against the witness, he cannot claim the privilege since the testimony could not be used against  
23 him in any criminal case. (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414.) Likewise,  
24 the privilege against self- incrimination is not available to a witness on the ground that  
25 answering a question might lead to a revocation of probation, because a probation revocation  
26 proceeding is not a criminal proceeding. (*Minnesota v. Murphy* (1984) 465 U.S. 420, 435, fn. 7  
27 (*Murphy* ).) “[A] probationer may only invoke his privilege against self-incrimination if a  
28 truthful answer would expose him to a prosecution for a crime different from the one on which

1 he was already convicted.” (*U.S. v. Lee* (3d Cir.2003) 315 F.3d 206, 213, citing *Murphy*.)  
2 Finally, the privilege against self-incrimination does not apply if the risk is fear of prosecution  
3 by a foreign government. (*People v. Balsys* (1998) 524 U.S. 666.)

#### 4 IV.

#### 5 DURATION OF FIFTH AMENDMENT PRIVILEGE

6 The duration of privilege is determined either by expiration or waiver. Privilege expires  
7 when time to file an appeal in an action has passed. In the case of waiver, the waiver of privilege  
8 is as to that proceeding only, not future proceedings. (*People v. Fonseca* (1995) 36 Cal.App.4th  
9 631 (*Fonseca*.) In *Fonseca*, the defendant and his co-defendant were charged with drug  
10 trafficking. Co-defendant pled guilty and was sentenced. Two weeks later the defendant called  
11 the co-defendant to testify. The co-defendant instead asserted his privilege against self-  
12 incrimination. The court found that, “the privilege evaporates in two ways, waiver and  
13 expiration. A defendant who takes the stand during his own trial to deny guilt, waives the  
14 privilege *as to that proceeding*, as does a defendant who pleads guilty. But in neither case does  
15 he waive the privilege as to subsequent proceedings against other defendants; at the earliest, the  
16 privilege expires when the time to file an appeal has passed with no notice of appeal filed.” (*Id.*  
17 at 637.)

#### 18 V.

#### 19 SECURING TESTIMONY IN LIGHT OF 20 SUSTAINED PRIVILEGE OR REFUSAL TO TESTIFY

#### 21 A. Former Testimony

22 When the court sustains a claim of the privilege against self-incrimination, either party  
23 may ask to declare the witness unavailable pursuant to Evidence Code section 240 and move to  
24 admit the witness’s former testimony pursuant to Evidence Code section 1291. “Former  
25 testimony” includes testimony stated under oath in another action or in a prior hearing or trial of  
26 the same action. (Evid. Code, § 1290.) A witness’s former testimony is hearsay. (See Evid.  
27 Code, § 1200.) However, Evidence Code section 1291 provides a hearsay exception for former  
28 testimony.

1 Former testimony is not barred by the hearsay rule if: (1) the witness is unavailable; and  
2 (2) the prior testimony is offered against the person who offered it in evidence originally; or (3)  
3 the prior testimony is offered against a party who, at the time it was originally offered, had an  
4 opportunity to cross examine the witness with a similar interest and motive. (Evid. Code, §  
5 1291.)

6 A witness is deemed unavailable if exempted or precluded on the ground of privilege  
7 from testifying concerning the matter to which his or her statement is relevant. (Evid. Code, §  
8 240, subd. (a)(1).) Thus, the court’s finding of a valid privilege renders the witness unavailable.  
9 Further, the court may deem a witness unavailable and admit his or her prior testimony if the  
10 witness is physically present and capable of testifying, yet refuses to testify without lawful  
11 excuse to do so. (*People v. Rojas* (1975) 15 Cal.3d 540.) A person is deemed unavailable when  
12 they are “[p]ersistent in failing to testify concerning the subject matter of the declarant’s  
13 statement despite having been found in contempt for refusing to testify.” (Evid. Code, § 240,  
14 subd. (a)(6).) This provision appears to codify previous case authority such as *People v. Francis*  
15 (1988) 200 Cal.App.3d 579, 587 [“We find that a witness who is physically available yet refuses  
16 to testify, after the court has used all available avenues to coerce such testimony, is  
17 unavailable.”].)

18 Section 1291, subdivision (a)(1) of the Evidence Code provides a hearsay exception for  
19 former testimony of an unavailable witness who was called by the party whom the testimony is  
20 against. (Evid. Code Section, § 1291.) If the declarant is unavailable as a witness, and “the  
21 former testimony is offered against a person who offered it in evidence in his own behalf on the  
22 former occasion,” nothing further need be shown by a proponent of the evidence except the  
23 unavailability of declarant as a witness. (Evid. Code Section, § 1291, Comment.) In this  
24 situation, the former testimony is offered against the party whom originally called the witness.  
25 Therefore, the direct and redirect examination of the witness serves as a substitute to cross  
26 examine the declarant. The requirement of a “right and opportunity to cross-examine” ensures  
27 that the primary objection to hearsay, a lack of opportunity to cross-examine the declarant, is  
28 inapplicable. (Evid. Code, § 1291, Comment.) This section requires an *opportunity* to cross

1 examine, not an effective cross examination in fact. The Supreme Court has held that “the  
2 Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-  
3 examination that is effective in whatever way, and to whatever extent, the defense might  
4 wish.’ ” (*U.S. v. Owens* (1988) 484 U.S. 554, 559.)

## 5 **B. Voluntary Immunity Agreements**

6 While either party may seek to admit former testimony if a witness is deemed unavailable  
7 after asserting his or her right against self-incrimination, only the prosecution may request that  
8 the court compel a witness’s testimony over their sustained privilege objection pursuant to Penal  
9 Code section 1324 or otherwise enter into a voluntary immunity agreement with the witness  
10 directly.

11 Prosecutors have the authority to grant immunity to witnesses in order to encourage  
12 otherwise incriminating testimony of a witness. It is an executive function, given to prosecutors,  
13 in order to compel the witness to testify against the defendant at trial. (*People v. Williams* (2008)  
14 43 Cal.4th 584, 622; *People v. Thompson* (1983) 145 Cal.App.3d 918; *People v. Samuels*  
15 (2005) 36 Cal.4th 96, 127.) A defendant does not have the right to demand immunity for a  
16 prospective defense witness. (*In re Weber* (1974) 11 Cal.3d 703, 720; *In re Williams* (1994) 7  
17 Cal.4th 572, 609.) Further, a grant of immunity does not invade judicial privileges because the  
18 decision to seek immunity is an integral part of the charging process.

19 While the prosecuting agency may not *unilaterally compel* a witness’s testimony over his  
20 Fifth Amendment objection (*People v. Superior Court (Perry)* (1989) 213 Cal.App.3d 536,  
21 539.), it may develop voluntary agreements exchanging the witness’s testimony for transactional  
22 or use immunity. However, while a prosecuting agency is entitled to *offer* immunity outside  
23 Penal Code section 1324 (*infra*), such an offer is not enforceable until it has been accepted or  
24 relied upon by the witness. (*People v. Superior Court (Perry)* (1989) 213 Cal.App.3d 536, 540;  
25 *People v. Brunner* (1973) 32 Cal.App.3d 908.).

### 26 **1. Transactional and Use Immunity**

27 The prosecuting agency may seek a voluntary agreement conferring either transactional  
28 immunity or use immunity upon a testifying witness. A grant of transactional immunity offers

1 the witness considerably broader protection than does the Fifth Amendment privilege. (*Kastigar*  
2 *v. United States* (1972) 406 U.S. 441, 453 (*Kastigar*.) The immunized witness cannot be  
3 prosecuted for any act or event described or referred to in the compelled testimony whether or  
4 not the testimony is in fact used in a subsequent prosecution, so long as the testimony was  
5 within the scope of the grant, even if independent evidence has come to light. (*People v.*  
6 *Campbell* (1982) 137 Cal.App.3d 867.) Immunity is granted to the extent that the witness's  
7 testimony was incriminating. (See *People v. Thompson* (1983) 145 Cal.App.3d 918)

8 Use immunity can also overcome a Fifth Amendment claim of privilege. (*People v.*  
9 *Cooke* (1993) 16 Cal.App.4th 1361.) Use immunity protects a witness only against the actual  
10 use of the witness's given testimony, as well as the use of any other evidence derived therefrom.  
11 (*People v. Kennedy* (2005) 36 Cal.4th 595, disapproved of on other grounds in *People v.*  
12 *Williams* (2010) 49 Cal.4th 405.) It does not provide protection against prosecution, it merely  
13 prevents a prosecutor from using the immunized testimony against the witness. (*People v. Cooke*  
14 (1993) 16 Cal.App.4th 1361, 1366.) Use and derivative use immunity is coextensive with the  
15 scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony  
16 over a claim of the privilege. While a grant of immunity must afford protection commensurate  
17 with that afforded by the privilege, I need not be broader. (*Kastigar, supra*, at p. 453.)

### 18 C. Penal Code Section 1324 – Felony Proceedings

19 The statutory methods for seeking the compelled testimony of a witness after the court  
20 has determined the witness has validly asserted the Fifth Amendment privilege are different  
21 depending on whether the case in which the testimony is being offered is a misdemeanor or a  
22 felony prosecution. (Pen. Code, §§ 1324, 1324.1.)

23 Following a court's finding of a valid claim of privilege in any felony proceeding,  
24 pursuant to Penal Code section 1324 the prosecution may request in writing that the court  
25 compel the witness's testimony over their claim of privilege. Upon request, the court must  
26 conduct a hearing and order the witness to appear and show cause why he or she should not be  
27  
28

1 required to comply<sup>[1]</sup>. The court must order the questions answered (or the evidence produced)  
2 unless it finds that to do so would: (1) be clearly contrary to the public interest; or (2) could  
3 subject the person to a criminal prosecution in another jurisdiction. (Pen. Code, § 1324.)

4 A witness compelled to testify pursuant to Penal Code section 1324 may be so compelled  
5 to testify despite a claim that he might be subjected to federal prosecution. In *Murphy v.*  
6 *Waterfront Comm'n of New York Harbor* (1964) 378 U.S. 52 (*Murphy*), the Supreme Court held  
7 a state witness who was immune from prosecution under state law, could not be prosecuted  
8 under federal law on the basis of their incriminating testimony, and vice versa. It would be  
9 intolerable to allow a prosecutor in another jurisdiction to eliminate the privilege by offering  
10 immunity less complete than the privilege's dual jurisdictional reach. (*U.S. v. Balsys* (1998) 524  
11 U.S. 666, 682.) "Cooperative federalism," where the federal and state governments unite against  
12 criminal activity, prevents a witness from being "whipsawed into incriminating himself under  
13 both state and federal law." (*Murphy*, at pp. 55-56.) The federal government is prohibited from  
14 making any use of the compelled testimony and its fruits in a criminal prosecution against the  
15 witness, and, therefore, the witness can be compelled to testify in the state proceeding. (*Id.* at  
16 79.)

17 "After complying . . . no testimony or other information compelled under the order or any  
18 information directly or indirectly derived from the testimony or other information may be used  
19 against the witness in any criminal case." (Pen. Code § 1324.) Except that he or she may be  
20 prosecuted for any "perjury, false swearing or contempt committed in answering, or failing to  
21 answer, or in producing, or failing to produce, evidence in accordance with the order." (*Id.*)  
22  
23

24 <sup>[1]</sup> This hearing usually occurs immediately following the Evidence Code section 404  
25 hearing after the court has sustained the privilege objection and the prosecuting agency has filed  
26 its Penal Code section 1324 request in writing, but does require the witness' presence. The  
27 hearing is for the sole purpose of considering whether there exist clear grounds to deny the  
28 People's request to compel testimony, and otherwise to order the witness to answer questions.  
Absent the extraordinary circumstance of needing to delay the hearing for the witness'  
appearance, the request may be immediately considered and granted, and the underlying  
proceeding resume without substantial delay.

1 Prior to 1997, Penal Code section 1324 provided that if a person refused to answer a  
2 question on the ground that he or she may be incriminated, and if the person was ordered to  
3 comply but would have been privileged to withhold the answer given except for the order, the  
4 person could not be prosecuted or subject to any penalty for, or on account of, “any fact or act  
5 concerning which he or she was required to answer.” Such statutory prosecutorial prohibition  
6 was “transactional” in nature. However, Penal Code section 1324 was amended in January 1997  
7 to prohibit any prosecution using the witness’s testimony or derivative evidence. In other words,  
8 after 1997 the consequence which attends compulsion of the testimony sought pursuant to  
9 section 1324 is *use and derivative use* immunity. The amendment and current statute also  
10 permits prosecutors to seek a court order to enforce an immunity agreement entered into outside  
11 the statute (once it is accepted and relied upon by a witness), and such agreements may confer  
12 either use or transactional immunity.

13 **D. Penal Code section 1324.1 – Misdemeanor Proceedings**

14 Penal Code sections 1324 and 1324.1 are fundamentally different. Penal Code section  
15 1324 grants a court the power to compel testimony over a witness’s Fifth Amendment claim  
16 upon written request by the prosecutor. As a consequence of compelling testimony, the  
17 witness’s statements cannot be used against them, also known as use immunity. On the other  
18 hand, section 1324.1 does not grant such compulsory authority to the court. Rather, the court is  
19 limited to approving a voluntary agreement entered into by the parties upon written request by  
20 the prosecuting agency unless to do so would be clearly contrary to the public interest.  
21 Additionally, after testifying in accordance with the voluntary agreement, the witness is granted  
22 transactional immunity rather than use immunity. (Pen. Code, § 1324.1.) Should a witness fail to  
23 give any answer or produce any evidence in accordance with his voluntary agreement, the  
24 witness may be prosecuted in the same manner as he would notwithstanding section 1324.1.  
25 (*Id.*)

26 Notably absent from Penal Code section 1324.1 is the authority granted under section  
27 1324 for prosecutors to seek a court order enforcing an immunity agreement entered into outside  
28 the statute, which may confer either use or transactional immunity. Thus, in misdemeanor cases

1 Penal Code section 1324.1's voluntary agreement scheme is the only method with which to  
2 "immunize" witness testimony and that immunity is necessarily transactional in nature.

3 **VI.**

4 **CALIFORNIA'S STATUTORY SCHEME IS CONSTITUTIONAL**

5 California has long had a statutory procedure to compel the testimony of a witness who  
6 asserts a valid Fifth Amendment claim. Pursuant to Penal Code section 1324, following a  
7 court's finding of a valid claim of privilege in any felony proceeding, the prosecution may  
8 request in writing that the court compel the witness's testimony over their claim of privilege.  
9 Upon such written request, the witness must show cause why he or she should not be required to  
10 comply. Thereafter, the court must order the questions answered (or evidence produced) unless  
11 it finds that to do so would: (1) be clearly contrary to the public interest; or (2) could subject the  
12 person to a criminal prosecution in another jurisdiction. (Pen. Code, §1324.)

13 In *People v. Clemons* (1960) 182 Cal.App.2d 808, 818, the court held that Penal Code  
14 section 1324 is constitutional. "Appellant argues to the effect that the state may not single out  
15 persons and give them immunity if they testify and deny immunity to others, 'nor may it base  
16 that immunity solely upon the fact that they are called as witnesses for the People without giving  
17 the same right to the defense.' A similar argument, with reference to an immunity statute, was  
18 made in *People v. Fowler*, 119 Cal.App.2d 657. It would not serve a useful purpose to restate  
19 herein extended portions of that opinion. The said section 1324 of the Penal Code, as applied to  
20 appellant's position as shown by the evidence herein, is not unconstitutional."

21 In *People v. Boehm* (1969) 270 Cal.App.2d 13, 20, citing *Clemons*, *Fowler* and others,  
22 the court instructed that Penal Code section 1324 is constitutional. Boehm argued that to grant  
23 immunity to his codefendant but not to him was a denial of equal protection of the laws. In  
24 finding no merit to the defendant's contention the court held, "It has been repeatedly held that  
25 California's immunity statute is constitutional, and that, absent a policy of unfair and unequal  
26 law enforcement (which does not appear here), the prosecution may select the codefendant or  
27 coconspirator to whom immunity shall be given. [Citations] This rule is particularly applicable  
28

1 where, as here, the evidence indicates the person granted immunity so that he may testify is not  
2 the leading figure, or originator, of the conspiracy.”

3 In *People v. Traylor* (1972) 23 Cal.App.3d 323, 331-332, the defendant claimed that the  
4 statute allowed the prosecution to secure immunity for its witnesses, but gave no correlative  
5 right to a defendant, and thus denied him equal protection of the laws. “To whatever extent this  
6 theory has application in criminal procedure, it has no application here. The decision as to who  
7 shall be granted immunity is ultimately a legislative function. . . . The Fourteenth Amendment to  
8 the United States Constitution does not require that the power to trigger the effect of a law such  
9 as section 1324 of the Penal Code which the Legislature has vested in the district attorney must  
10 also be exercisable by a defendant. Clearly a legislature can react differently to the probable  
11 motives of a prosecutor who requests immunity, and those of a defendant in a criminal case.”

12 Finally, a defendant has no right to demand immunity for a prospective defense witness.  
13 (*In re Williams* (1994) 7 Cal.4th 572, 609.) “Due process does not require that defense witness  
14 immunity be ordered whenever it seems fair to grant it. The essential fairness by U.S.  
15 Constitution, Fifth Amendment, guards the defendant against overreaching by the prosecutor. It  
16 does not create general obligations for prosecutors or courts to obtain evidence protected by  
17 lawful privileges.” (*People v. Cooke* (1993) 16 Cal.App.4th 1361, 1371; *United States v. Turkish*  
18 (1980) 623 F.2d 769, 777.) Criminal proceedings have never been “symmetrical.” (*People v.*  
19 *Cooke* (1993) 16 Cal.App.4th 1361, 1371; *People v. Sutter* (1982) 134 Cal.App.3d 806, 816.)  
20 “The ‘accuser and accused have inherently different roles, with entirely different powers and  
21 rights’ and so it is nonsensical to argue that certain procedural devices are unfair merely because  
22 they put the two sides on unequal footing.” (*People v. Cooke* (1993) 16 Cal.App.4th 1361, 1370;  
23 see *United States v. Turkish* (1980) 623 F.2d 769, 774-775.)

24 Recently, the California Supreme Court settled the law in California courts regarding  
25 whether a trial court could confer immunity to a defense witness refusing to testify where the  
26 prosecutor refused to provide immunity to the witness or otherwise request the court to compel  
27 the testimony. In *People v. Masters* (2016) 62 Cal.4th 1019, 1051-1052, the court explained:

1 We previously have “characterized as ‘doubtful’ the ‘proposition  
2 that the trial court has inherent authority to grant immunity.’ ”  
3 (*People v. Stewart* (2004) 33 Cal.4th 425, 468, 15 Cal.Rptr.3d 656,  
4 93 P.3d 271 (*Stewart*)). We have noted that “the power to confer  
5 immunity is granted by statute to the executive.” (*Ibid.*, citing §  
6 1324.) Moreover, “prosecutors are not under a general obligation to  
7 provide immunity to witnesses in order to assist a defendant.”  
8 (*People v. Williams* (2008) 43 Cal.4th 584, 622, 75 Cal.Rptr.3d 691,  
9 181 P.3d 1035; see *People v. Samuels* (2005) 36 Cal.4th 96, 127–  
10 128, 30 Cal.Rptr.3d 105, 113 P.3d 1125 [prosecutor did not commit  
11 misconduct by not granting immunity to a nonessential defense  
12 witness who asserted her right against self-incrimination and refused  
13 to testify].)

14 At the same time, we have acknowledged that the *Third*  
15 *Circuit in Government of Virgin Islands v. Smith* (3d Cir.1980) 615  
16 F.2d 964, 972 (*Smith*), articulated limited circumstances in which  
17 judicially conferred use immunity might be constitutionally  
18 necessary. (See *Stewart, supra*, 33 Cal.4th at pp. 468–469, 15  
19 Cal.Rptr.3d 656, 93 P.3d 271; *People v. Hunter* (1989) 49 Cal.3d  
20 957, 974, 264 Cal.Rptr. 367, 782 P.2d 608.) *Smith* held that a court  
21 has the inherent authority to grant immunity if the failure would  
22 otherwise prevent the defendant “from presenting exculpatory  
23 evidence which is crucial to [the defense's] case.” (*Smith*, at p. 969.)

24 Smith’s holding, however, has been partially abrogated in  
25 *United States v. Quinn* (3d Cir.2013) 728 F.3d 243, 251–257  
26 (en banc) (*Quinn*), in which the Third Circuit explained that other  
27 courts had rejected the theory of judicial use immunity and that  
28 Smith’s rule impermissibly interfered with the executive branch's  
prosecutorial discretion. We agree with *Quinn*’s rationale and  
conclusion, and now hold that California courts have no authority to  
confer use immunity on witnesses. Accordingly, we conclude the  
magistrate and the trial court were correct in denying Masters’  
requests for immunity for Richardson.

Thus, the issue is now settled, judicial use immunity does not exist in California.

## VII.

### **ENTERING VOLUNTARY IMMUNITY AGREEMENTS OR REQUESTING A COURT TO COMPEL TESTIMONY IS THE EXCLUSIVE RIGHT OF THE PROSECUTOR**

1 This court should not grant immunity to a defense witness. The power to provide for the  
2 exercise of a grant of immunity is essentially a legislative function. It is within the legislature's  
3 power to make the grant of immunity conditional upon a request of a prosecuting agency. (*In re*  
4 *Weber* (1974) 11 Cal.3d 703, 720.) The decision to initiate a request for immunity rests in the  
5 sole discretion of the prosecuting attorney. (*People v. Label* (1974) 43 Cal.App.3d 766, 774.)  
6 The granting of immunity is an executive function and prosecutors are not under a general  
7 obligation to provide immunity to witnesses in order to assist a defendant. (*People v. Williams*  
8 (2008) 43 Cal.4th 584, 622; *People v. Samuels* (2005) 36 Cal.4th 96, 127; *People v. Stewart*  
9 (2004) 33 Cal.4th 425, 468.) Authority to seek a grant of immunity is given only to the District  
10 Attorney or the Attorney General. The prosecution alone controls the invocation of the  
11 immunity statute. (*People v. Thompson* (1983) 145 Cal.App.3d 918, 923.) California law clearly  
12 conditions a grant of immunity only upon a written request by the prosecutor. (*People v. Cooke*  
13 (1993) 16 Cal.App.4th 1361, 1367; Pen. Code, § 1324; see *People v. Hunter* (1989) 49 Cal.3d  
14 957, 973; *People v. Sutter* (1982) 134 Cal.App.3d 806, 814; *Daly v. Superior Court* (1977) 19  
15 Cal.3d 132, 146.) Because the decision to seek immunity is an integral part of the charging  
16 process, no judicial authority is usurped. (*In Re Weber* (1974) 11 Cal.3d 703.) There is no  
17 doctrine of judicial use immunity for defense witnesses in criminal cases. (*People v. Cooke*  
18 (1993) 16 Cal.App.4th 1361, 1371.) As the California Supreme Court recently pronounced, "we  
19 now hold that California courts have no authority to confer use immunity on witnesses." (*People*  
20 *v. Masters* (2016) 62 Cal.4th 1019,1051.)

## 21 VIII.

### 22 REFUSAL TO TESTIFY IN ABSENCE OF SUSTAINED PRIVILEGE OBJECTION 23 OR AFTER TESTIMONY HAS BEEN COMPELLED IS CONTEMPT OF COURT 24 AND THE CONTEMNOR MAY BE HELD IN CUSTODY 25 UNTIL THEY PURGE THE CONTEMPT AND TESTIFY

26 A witness is expected to testify if the Fifth Amendment privilege does not apply to the  
27 requested testimony or if the court has compelled the testimony pursuant to Penal Code section  
28 1324. A refusal to be sworn or to testify may be punished as contempt of court. (Civ. Proc.  
Code, §§ 1209, subd. (a)(10) and 1991; See *People v. Sul* (1981) 122 Cal.App.3d 355.)

1 In the face of a witness' contempt, and with the goal of promoting a just determination of  
2 the underlying cause based on all the facts, the court may hold in custody the uncooperative  
3 witness until he or she conforms to the order of the court. (Civ. Proc. Code, § 1219). "If the  
4 contempt consists of the omission to perform an act which is yet in the power of the person to  
5 perform, he or she may be imprisoned until he or she has performed it." (*Id.*) Accordingly, a  
6 witness who refuses to comply with an order of the court may be imprisoned until he or she  
7 complies, provided he or she is able to comply. (*H. J. Heinz Co. v. Superior Court In and For*  
8 *Alameda County* (1954) 42 Cal.2d 164; *Ex parte Joutsen* (1908) 154 Cal. 540; *Ex parte Krouse*  
9 (1905) 148 Cal. 232; *Crocker v. Conrey* (1903) 140 Cal. 213.) An order of commitment  
10 incarcerating a person until he or she complies with a valid order of court is coercive and not  
11 penal in nature. (*Morelli v. Superior Court* (1969) 1 Cal.3d 328; *In re Farr* (2d Dist. 1974) 36  
12 Cal.App.3d 577.) The purpose of the commitment is not to punish but to enforce an order of  
13 court made by it to comply with its legal obligation. Thus, such a commitment, not being  
14 punishment, does not constitute cruel and unusual punishment. (*In re Farr* (1974) 36  
15 Cal.App.3d 577.)

16 Because the contempt of refusal to be sworn or testify is committed in the "immediate  
17 view and presence of the court [ . . . ], it may be punished summarily." (Civ. Proc. Code, § 1211,  
18 subd. (a).) The only procedural requirements are 1) a written order reciting the fact that, in the  
19 immediate presence and view of the court, the witness failed to be sworn or testify after being  
20 ordered to do so, 2) the court to declare the witness guilty beyond a reasonable doubt of  
21 contempt for refusal to be sworn or testify, and 3) order them be held pursuant to the Code of  
22 Civil Procedure section 1219 until he or she complies with the order of the court to be sworn and  
23 testify. (Civ. Proc. Code, § 1211, subd. (a); *In re Ciruolo* (1969) 70 Cal.2d 389, 393.) A minute  
24 order setting forth the above elements in lieu of a separate written order is also sufficient. (*In re*  
25 *Rosen* (1973) 31 Cal.App.3d 71, 72 (overruled on other grounds in *Boysaw v. Superior Court*  
26 (2000) 23 Cal.4th 215.)

27 **A. Length of Time Court Has Authority Over Contemnor**  
28

1 California courts have followed the plain meaning of Code of Civil Procedure section  
2 1219 to imprison those who fail to abide by a valid court order. (See, e.g., *In re Jousten* (1908)  
3 15 Cal. 540, 545 [husband may be imprisoned until he complies with court order to pay alimony  
4 if husband has the ability to do so and willingly chooses not to].) Despite the absence of limiting  
5 language, however, California courts have interpreted section 1219 to allow confinement for  
6 civil contempt only “so long as the underlying litigation remains alive.” (*In re Lifschutz* (1970) 2  
7 Cal.3d 415, 439; see also *Ex parte Rowe* (1857) 7 Cal. 175, 177.) The theory behind this policy  
8 is that a contemnor no longer has the ability to purge himself of the contempt once the case no  
9 longer exists. (*Ex parte Rowe, supra*, at p. 177.)

10 This leaves the remaining question of how to define whether the underlying litigation  
11 remains alive. The purpose of contempt under the Code of Civil Procedure section 1219 is to  
12 compel a witness to perform as instructed. Since this is the purpose of section 1219, it logically  
13 follows that a court may imprison a contemnor during a criminal case for as long as the  
14 litigation “remains alive,” so long as the contemnor has an opportunity to purge himself of the  
15 contempt and the subsequent purging has some effect on the proceedings. In a criminal case, the  
16 underlying litigation must necessarily mean the criminal proceedings up to and through the trial.  
17 If a witness refuses to testify and the court subsequently holds him in contempt, it is within the  
18 court’s power to incarcerate the witness until at least a jury reaches a verdict or a mistrial is  
19 declared.

#### 20 **B. No Limit to the Length of Incarceration**

21 Any limitations on the length of incarceration set forth in Penal Code section 19.2 and  
22 Code of Civil Procedure section 1205 do not apply when the court incarcerates a witness held in  
23 contempt pursuant to section 1219. In *In Re Salkin* (1935) 5 Cal.App.2d 436, the petitioner was  
24 held in contempt for failing to divide and distribute all community property as ordered by the  
25 court. The court ordered petitioner to be confined in the county jail until he complied. Petitioner  
26 appealed and claimed that the court’s conditional sentence violated Penal Code section 19.2 and  
27 Code of Civil Procedure section 1205. The court, however, held that those sections did not apply  
28 to the contempt power as Penal Code section 11 specifically states: “this code does not affect

1 any power conferred by law upon . . . any tribunal to impose or inflict punishment for a  
2 contempt . . .” Lastly, the court clarified that incarceration of a contemnor until purged of  
3 contempt is not a “sentence.” Rather, the term to be served rests solely in the hands of the  
4 contemnor. Later, in *People v. Clemmons* (1962) 208 Cal.App.2d 696, a witness repeatedly  
5 refused to testify even after she was compelled to do so by operation of Penal Code section 1324  
6 and advised by her own counsel that she had no right to refuse to testify. The court held her in  
7 contempt and ordered her incarcerated until she purged herself of the contempt. Relying on *In*  
8 *Re Salkin*, the appellate court rejected the defendant’s claim that a sentence that had the potential  
9 to exceed six months was improper. Thus, a court may incarcerate a contemnor-witness who  
10 refuses to testify at a preliminary examination or grand jury proceeding until the witness either  
11 purges the contempt by giving testimony or the prosecution is concluded by guilty plea or trial  
12 verdict, whichever occurs first.

13 **C. Code of Civil Procedure Section 1219 is Inapplicable to Victims of Sexual**  
14 **Assault or Domestic Violence**

15 Code of Civil Procedure section 1219 is the mechanism by which a court may use  
16 custody to gain compliance from a witness who unlawfully refuses to testify or otherwise  
17 comply with a valid court order. Section 1219, subdivision (b), however, specifically limits the  
18 court’s ability to use custody to gain compliance from victims of domestic violence or sexual  
19 assault crimes who unlawfully refuse to testify.

20 Specifically, section 1219, subdivision (b) states:

21 Notwithstanding any other law, a court shall not imprison or  
22 otherwise confine or place in custody the victim of a sexual assault  
23 or domestic violence crime for contempt if the contempt consists of  
24 refusing to testify concerning that sexual assault or domestic  
25 violence crime. Before finding a victim of a domestic violence crime  
26 in contempt as described in this section, the court may refer the  
27 victim for consultation with a domestic violence counselor.

28 In other words, Code of Civil Procedure section 1219, subdivision (b) prohibits only the  
incarceration of domestic violence and sexual assault victims who are in contempt of court.  
Section 1218, however, remains a remedy for contemptuous conduct. Section 1218 states in

1 pertinent part, “. . . I]f it be adjudged that he or she is guilty of the contempt, a fine may be  
2 imposed on him or her not exceeding one thousand dollars (\$1000) payable to the court . . .”  
3 Code of Civil Procedure section 128, subdivisions (d) and (e), relating, respectively, to sexual  
4 assault and domestic violence victims who are found in contempt for refusing to testify  
5 concerning their victimization, further requires that the court stay the execution of any sentence  
6 pending the filing within three judicial days of a petition for extraordinary relief testing the  
7 lawfulness of the court’s order upon which the contempt violation rests.

8  
9 **CONCLUSION**

10 Therefore, based upon **[INSERT BRIEF CONCLUSION REGARDING YOUR**  
11 **SPECIFIC ISSUE]**, the People hereby request orders in compliance with the prevailing statutory  
12 and case law outlined herein.

13  
14 Dated:

Respectfully submitted,

SUMMER STEPHAN  
District Attorney

17 By: \_\_\_\_\_  
18 [NAME]  
19 Deputy District Attorney  
20 Attorneys for Plaintiff

1 SUMMER STEPHAN  
2 District Attorney  
3 [NAME]  
4 Deputy District Attorney  
5 [OFFICE  
6 ADDRESS]  
7 Tel.  
8 Fax  
9 Email:  
10 Attorneys for Plaintiff

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF SAN DIEGO

12 THE PEOPLE OF THE STATE OF CALIFORNIA,

14 Plaintiff,

16 v.

18 [DEFENDANT],

19 Defendant.

No.  
DA

**PEOPLE'S POINTS AND  
AUTHORITIES RE: 5<sup>TH</sup>  
AMENDMENT PRIVILEGE AND  
PENAL CODE § 1324 COURT  
COMPELLED TESTIMONY**

Date.  
Time:  
Dept:  
Trial Date:

22 Comes now the plaintiff, the People of the State of California, by and through their  
23 attorneys, SUMMER STEPHAN, District Attorney, [NAME], Deputy District Attorney, and  
24 respectfully submits the following POINTS AND AUTHORITIES RE 5<sup>TH</sup> AMENDMENT  
25 PRIVILEGE, COURT COMPELLED TESTIMONY AND WITNESS IMMUNITY.

26 **INTRODUCTION**

27 [INSERT A VERY BRIEF STATEMENT OF FACTS RELATING TO YOUR  
28 SPECIFIC ANTICIPATED ISSUE AND WHAT THE "PEOPLE'S REQUEST" IS.]  
29

1 **POINTS AND AUTHORITIES**

2 **I**

3 **A WITNESS MAY INVOKE THE FIFTH AMENDMENT TO AVOID EXPOSING HIM**  
4 **OR HERSELF TO CRIMINAL PROSECUTION**

5 All persons are guaranteed the right against self-incrimination. The privilege  
6 encompasses not only directly incriminating statements, but also answers to questions that  
7 would furnish a link in the chain of evidence needed to prosecute the witness for a crime. (*Blau*  
8 *v. United States* (1950) 340 U.S. 159; Evid. Code, § 940.)

9 In order to invoke the Fifth Amendment privilege the witness must be legitimately at risk  
10 of revealing incriminating information against herself. (*Ohio v. Reiner* (2001) 532 U.S. 17.) The  
11 burden is on the witness to present to the court information of this sort sufficient to indicate that  
12 the testimony sought might incriminate him or her. (Evid. Code, § 404.) To sustain invocation  
13 of the privilege, it need only be evident from the implications of the question, in the setting in  
14 which it is asked, that a responsive answer to the question or an explanation of why it cannot be  
15 answered might be dangerous because injurious disclosure could result. (*People v. Lucas* (1995)  
16 12 Cal.4th 415, 454.)

17 The court must sustain the objection of privilege unless it clearly appears to the court that  
18 the evidence sought cannot possibly have a tendency to incriminate the person claiming the  
19 privilege. (Evid. Code, § 404.) To deny an assertion of the privilege against self-incrimination,  
20 the court must find that the witness is mistaken and that the answer cannot possibly have a  
21 tendency to incriminate. (*People v. Williams* (2008) 43 Cal.4th 584, 614.)

22 **II**

23 **PENAL CODE SECTION 1324 SECURES TESTIMONY IN LIGHT OF**  
24 **A SUSTAINED PRIVILEGE**

25 Following a court’s finding of a valid claim of privilege in any felony proceeding, the  
26 prosecution may request in writing pursuant to Penal Code section 1324 that the court compel  
27 the witness’s testimony over their claim of privilege. Upon request, the court must conduct a  
28 hearing and order the witness to appear and show cause why he or she should not be required to  
29

1 comply<sup>[1]</sup>. The court must grant the request to compel testimony and order the questions  
2 answered unless it finds that to do so would: (1) be clearly contrary to the public interest; or (2)  
3 could subject the person to a criminal prosecution in another jurisdiction. (Pen. Code, §1324.)

4 A witness may be compelled to testify pursuant to Penal Code section 1324 despite a  
5 claim that he might be subjected to federal prosecution. In *Murphy v. Waterfront Comm'n of*  
6 *New York Harbor* (1964) 378 U.S. 52, the Supreme Court held that a state witness who was  
7 immune from prosecution under state law, could not be prosecuted under federal law on the  
8 basis of their incriminating testimony, and vice versa. It would be intolerable to allow a  
9 prosecutor in another jurisdiction to eliminate the privilege by offering immunity less complete  
10 than the privilege's dual jurisdictional reach. (*U.S. v. Balsys* (1998) 524 U.S. 666, 682.)

11 "After complying...no testimony or other information compelled under the order or any  
12 information directly or indirectly derived from the testimony or other information may be used  
13 against the witness in any criminal case." (Pen. Code §1324.) The exception is that he or she  
14 may be prosecuted for any "perjury, false swearing or contempt committed in answering, or  
15 failing to answer, or in producing, or failing to produce, evidence in accordance with the order."  
16 (*Id.*) In other words, the consequence which attends compulsion of the testimony sought  
17 pursuant to section 1324 is *use and derivative use* immunity.

### 18 III

#### 19 REFUSAL TO TESTIFY AFTER BEING ORDERED TO PROVIDE TESTIMONY IS 20 CONTEMPT OF COURT

21 A witness is expected to testify if the 5th Amendment privilege does not apply to the  
22 requested testimony or if the court has compelled the testimony pursuant to Penal Code section  
23 1324. A refusal to be sworn or to testify may be punished as contempt of court. (Civ. Proc.  
24 Code, §§ 1209(a)(10) and 1991; See *People v. Sul* (1981) 122 Cal.App.3d 355.)

25 To encourage the witness to follow the lawful order requiring their testimony, the court  
26

---

27 <sup>[1]</sup> This hearing usually occurs immediately following the EC404 hearing after the court has sustained the privilege objection  
28 and the prosecuting agency has filed its PC1324 request in writing, but does require the witness' presence. The hearing is for  
29 the sole purpose of considering whether there exist clear grounds to deny the People's request to compel testimony, and  
otherwise to order the witness to answer questions. Absent the extraordinary circumstance of needing to delay the hearing  
for the witness' appearance, the request may be immediately considered and granted, and the underlying proceeding resume  
without substantial delay.

1 may place an uncooperative witness in custody until he or she conforms to the order of the court,  
2 referred to as “civil” or “coercive contempt.” (Civ. Proc. Code, § 1219.). “If the contempt  
3 consists of the omission to perform an act which is yet in the power of the person to perform, he  
4 or she may be imprisoned until he or she has performed it.” (*Id.*) Accordingly, a witness who  
5 refuses to comply with an order of the court may be imprisoned until he or she complies,  
6 provided he or she is able to comply. (*H. J. Heinz Co. v. Superior Court In and For Alameda*  
7 *County* (1954) 42 Cal.2d 164; *Ex parte Joutsen* (1908) 154 Cal. 540; *Ex parte Krouse* (1905)  
8 148 Cal. 232; *Crocker v. Conrey* (1903) 140 Cal. 213.)

9 Because the contempt of refusal to be sworn or testify is committed in the “immediate  
10 view and presence of the court [...], it may be punished summarily.” (Civ. Proc. Code, §  
11 1211(a).) The only procedural requirements are 1) a written order reciting the fact that, in the  
12 immediate presence and view of the court, the witness failed to be sworn or testify after being  
13 ordered to do so, 2) the court to declare the witness guilty beyond a reasonable doubt of  
14 contempt for refusal to be sworn or testify, and 3) order them be held pursuant to the Code of  
15 Civil Procedure section 1219 until he or she complies with the order of the court to be sworn and  
16 testify. (Civ. Proc. Code, § 1211(a); *In re Ciraolo* (1969) 70 Cal.2d 389, 393.) A minute order  
17 setting forth the above elements in lieu of a separate written order is also sufficient. (*In re*  
18 *Rosen* (1973) 31 Cal.App.3d 71, 72.)

19 California courts have interpreted section 1219 to allow confinement for civil contempt  
20 only “so long as the underlying litigation remains alive.” (*In re Lifschutz* (1970) 2 Cal.3d 415,  
21 439; see also *Ex parte Rowe* (1857) 7 Cal.175, 177.) The theory behind this policy is that a  
22 contemnor no longer has the ability to purge himself of the contempt once the case no longer  
23 exists. (*Ex parte Rowe, supra*, at p. 177.) In a criminal case, the underlying litigation must  
24 necessarily mean the criminal proceedings up to and through the trial. If a witness refuses to  
25 testify and the court subsequently holds him in contempt, it is within the court’s power to  
26 incarcerate the witness until the witness testifies or the case concludes by verdict. (See e.g.  
27 *People v. Clemmons* (1962) 208 Cal.App.2d 696.)

28 ///

29 ///

**CONCLUSION**

Therefore, based upon [INSERT BRIEF CONCLUSION REGARDING YOUR SPECIFIC ISSUE], the People hereby request orders in compliance with the prevailing statutory and case law outlined herein.

Dated:

Respectfully submitted,  
SUMMER STEPHAN  
District Attorney

By: \_\_\_\_\_  
[NAME]  
Deputy District Attorney

1 SUMMER STEPHAN  
District Attorney  
2 Deputy District Attorney, SBN  
330 West Broadway, Suite  
3 San Diego, CA 92101  
4 (619) 531-  
@sdcda.org

5 Attorneys for Plaintiff  
6  
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF SAN DIEGO

10  
11 **CASE CAPTION**  
12

**REQUEST FOR ORDER  
COMPELLING PRIVILEGED  
TESTIMONY**

13 Date:  
14 Time:  
Dept:

15 [The People assert that questions which will be asked in the above entitled inquiry may  
16 implicate a valid 5<sup>th</sup> Amendment privilege for the following witness: JANE DOE (hereinafter  
17 “Witness”).] OR [The court has determined that witness JANE DOE (hereinafter “Witness”) has  
18 a valid Fifth Amendment privilege which will be implicated by her testimony in the above  
19 entitled matter.]

20 It is anticipated that Witness will testify to the following topics (including the following  
21 potentially self-incriminating topics): [Include a brief statement of the witness’s evidence they  
22 will provide and its significance to the case being tried. Include a brief statement of the 5th  
23 amendment concerns of the witness, if not already known to the court through prior hearings. If  
24 the witness has potential culpability for the same or related events, be sure to also include facts  
25 that illustrate why witness is a “small fish” that we are using to get the defendant “big fish.”]

26 Witness’s criminal history includes the following convictions: [insert]

27 In light of the above, the People hereby request that the Court compel Witness to testify  
28 as contemplated by Penal Code section 1324. Doing so in the instant case is not “clearly  
29 contrary to the public interest,” and will allow the jury to be more fully informed as to the facts

1 upon which they are being asked to make a decision. Compelling Witness's testimony will also  
2 best protect the interests of Witness, given that such compelled testimony may not be used  
3 against Witness in any future prosecution against her unless that prosecution is based on the  
4 provision of false testimony while under oath.

5  
6 SUMMER STEPHAN  
7 DISTRICT ATTORNEY

8  
9  
10 by: [DDA]  
11 Deputy District Attorney  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

330 West Broadway  
San Diego, CA 92101  
(619) 531-4040

OFFICE OF  
**THE DISTRICT ATTORNEY**  
COUNTY OF SAN DIEGO  
SUMMER STEPHAN  
DISTRICT ATTORNEY

**DAVID GREENBERG**  
ASSISTANT DISTRICT ATTORNEY

[Date]

RE: [Witness], GRANT OF IMMUNITY

Dear [Witness]:

The San Diego District Attorney's Office hereby promises that no testimony given in the prosecution of [Defendant] in [Case name], [Case No.], nor any evidence derived therefrom will be used in any criminal prosecution against you.

The use and derivative use immunity granted in this letter does not immunize you from perjury; therefore, any knowing and intentionally false statement made during testimony in the prosecution of the above named defendant and criminal case will make this agreement null and void. In that event, you will be subject to prosecution for perjury and all of the evidence you have given pursuant to this immunity agreement can be used against you in a prosecution for any provable crime.

A copy of this letter will be given to all judges and juries who hear your testimony, as well as [Defendant's] defense attorney.

Very truly yours,

SUMMER STEPHAN  
District Attorney

[DDA]  
Deputy District Attorney

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,  
Plaintiff,

No.  
DA

v.

(Name),

Defendant.

**ORDER ADJUDGING CONTEMPT  
COMMITTED IN THE  
IMMEDIATE VIEW AND  
PRESENCE OF JUDGE**

Judge:  
Dept:

**\*\*IN THE MATTER OF [CONTEMNOR- NAME]\*\***

On [date] during [proceeding] in the above entitled criminal action, [contemnor] was called and [refused to be sworn] [was sworn but refused to testify] in violation of CCP § 1209(a)(10). The Court previously warned [contemnor] that [he/she] could be held in contempt and incarcerated for such refusal. Following the [proceeding] [contemnor] was found in contempt and incarcerated pursuant to CCP § 1219(a).

On [date] [contemnor] was called by [party] to be sworn and testify. [Party] attempted to question [contemnor] regarding facts and circumstances relevant to the above captioned criminal matter. [Contemnor] [refused to be sworn] [was sworn but refused to testify]. The Court determined [contemnor] had no legal right or privilege to [refuse to be sworn] [refuse to testify] and warned that [he/she] could be found in contempt based upon [his/her] refusal and that [he/she] may be held in custody during the entire length of the pendency of the underlying litigation.

1           The Court observed and described on the record [contemnor's] refusal to testify in the  
2 immediate view and direct presence of the Court. The Court found beyond a reasonable doubt  
3 this refusal constituted contempt under CCP §1209(a)(10). The Court remanded [contemnor] to  
4 custody pursuant to CCP 1219(a).

5           Good cause appearing, IT IS ORDERED that [contemnor] be remanded to the custody of  
6 the Sheriff to be held in the county jail until such time as [he/she] agrees to be sworn and testify,  
7 or until the conclusion of the underlying litigation or further order of this Court.

8           The Clerk of the Court is ordered immediately to file this Order and enter the contempt  
9 on the docket of the Court, and the Bailiff is ordered to deliver to contemnor, [name], a copy of  
10 this Order.

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

Dated: \_\_\_\_\_

\_\_\_\_\_  
[JUDGE]  
Judge of the Superior Court