

CHAPTER 4

CRIME CHARGING - SPECIFIC CRIMES

4.01 SEX CRIMES

Victims of sex crimes often suffer severe trauma, both physical and emotional. Deputies shall make every effort to be sensitive to the victim's needs and emotional state at all stages of a case. The assignment of a specially trained vertical prosecutor and the use of a Victim Services Representative (VSR) help achieve this objective. Whether a case is filed or declined, sexual assault victims shall be referred to a VSR for assistance with counseling referrals, medical bills, and court support.

4.01.01 VERTICAL PROSECUTION

Vertical prosecution should begin at the time of filing. The Sex Crimes deputy or VIP deputy who initially interviews the victim should handle the case through conclusion whenever possible.

Vertical prosecution of sex crimes cases minimizes further trauma and unnecessary interviews of victims. Vertical prosecution allows a trust relationship to build between the victim and prosecutor. This trust relationship allows a victim to feel comfortable in providing as many facts as possible.

4.01.02 PRE-FILING INTERVIEW

Pre-filing interviews shall be conducted prior to making a filing decision to the extent possible. The investigating officer and, if the victim would like, a support person, shall be present for the pre-filing interview. Pre-filing interviews help to:

- Evaluate the victim's credibility;
- Evaluate the victim's memory and ability to recall the facts;
- Evaluate the victim's competency to testify (young child or elder or disabled adult);
- Evaluate the victim's ability to articulate the details of the assault (number and type of acts, date, time, location) and to withstand direct and cross-examination;
- Evaluate any potential defenses (e.g. if consent or a reasonable belief that the victim consented is a possible defense to the crime being considered);
- Establish a rapport with the victim/family;
- Explain the court process to the victim; and
- Provide an opportunity for the victim/family to meet with a VSR.

A deputy shall always be sensitive to, and aware of, the initial investigation that law enforcement conducted and any medical examinations or procedures a victim has experienced before the pre-filing interview.

A decision not to conduct a pre-filing interview shall be made after consideration of the following factors:

1. The availability of the victim/family within the statutory period for filing, if the suspect has been arrested;
2. The sufficiency of the evidence to prove the case beyond a reasonable doubt based only upon the reports presented at filing (the victim's credibility is not an issue, or the state of the evidence is of such convincing force that the case, as presented, satisfies Office crime charging standards); and
3. The ability to prove the case without the testimony of the victim.

Approval of the VIP Deputy-in-Charge in a Branch office, the Assistant Head Deputy or Head Deputy of the Sex Crimes Division, or the Deputy-in-Charge of the Juvenile office, is required prior to filing a case without a pre-filing interview. If a case is filed without a pre-filing interview, an interview with the victim shall be conducted as soon as possible prior to the preliminary hearing or adjudication.

All efforts shall be made to accommodate the victim of a sex crime. The assigned deputy shall meet the victim at his or her location (e.g., home, hospital, school or place of business) when an interview at the Office would create an unreasonable hardship.

A deputy shall interview a victim in the presence of an investigator. The investigator shall prepare a report documenting the interview. The deputy shall provide a copy of the report to the defense.

Especially where the victim is a young child (12 or younger) or a person with a disability, deputies shall attempt to have a forensic interviewer conduct a pre-filing interview of the victim at the earliest possible opportunity. Often victims, both adults and children, develop a reticence to discuss these incidents and may forget details, all of which can occur due to the passage of time as well as the traumatic and emotional nature of these crimes. This forensic interview can serve in lieu of a pre-filing interview conducted by a deputy; however, the assigned deputy shall meet with the victim as soon as possible to establish rapport.

See VIP Manual Chapter VII "Child Interviews and Testimony;" LPM § 24.02.06 (Measures to Minimize Trauma to Children); and LPM § 24.03 (Preference for Victim and Witness Interviews) for multi-disciplinary team coordination of child interviews and forensic interviews.

4.01.03 EVALUATING THE VICTIM'S CREDIBILITY

In evaluating the victim's credibility and the sufficiency of the evidence to support a filing, a deputy shall consider the following factors:

- Whether the victim has a motive to lie or has been manipulated to lie;
- Whether a young victim's report has been unduly suggested;

- Whether there exists any corroborative evidence to support the victim’s allegations such as physical injury, damage to clothing, forensic evidence (e.g., DNA, hair, etc.);
- Whether additional witnesses corroborate the victim’s account of the assault (including fresh complaint witnesses);
- The defendant’s prior record for committing sexual assaults (EC §§ 1108 and 1101(b)); and
- Any legally admissible statements made by the defendant (including pretext phone calls).

4.01.04 **SEXUAL ABUSE OF A CHILD UNDER 14 YEARS OF AGE**

There is an overlap among the various statutes that apply to sexual abuse of a child under the age of 14 years. Felony violations include the following:

- Penal Code § 288(a) - lewd or lascivious act upon a child under 14 years of age;
- Penal Code § 288(b) - lewd or lascivious act upon a child under 14 years of age; with force, violence, duress, menace or fear of immediate or unlawful bodily injury to the victim or another;
- Penal Code § 288.5 - continuous sexual abuse of a child under 14 years;
- Penal Code § 288.7 - sexual acts between an adult and a child age 10 and under;
- Penal Code § 269 - aggravated sexual assault of a child; and
- Penal Code §§ 286(c)(1), 288a(c)(1) and 289(j) - sodomy, oral copulation and sexual penetration of a victim under 14 years by a person more than 10 years older.

Whenever possible, separate counts of Penal Code § 288(a) or (b) should be filed rather than one count of Penal Code § 288.5 when multiple incidents of sexual abuse occurred. Penal Code §§ 667.61 and 667.71 sentence enhancements may be applied to violations of Penal Code §§ 288(a) and (b), as well as to Penal Code § 288.5.

A jury will not be permitted to return guilty verdicts on alternative charges covering the same time period if both Penal Code § 288.5 and multiple counts of Penal Code §§ 288 (a) or (b) are charged. Therefore, in cases where a victim cannot recall the specific time frame when the offenses occurred, deputies should consider filing one count of Penal Code § 288(a) or (b) for the first incident, another Penal Code § 288(a) or (b) count for the last incident and one Penal Code § 288.5 count for the incidents which occurred between the first and last offenses to avoid overlapping charges.

Felony sexual abuse charges shall be filed if any of the following apply:

- The abuse included an act of sexual intercourse, oral copulation, sodomy, sexual penetration of the genitals or anus with a foreign or unknown object, masturbation, or fondling of the skin of the genitals, anus or breast;
- The abuse was committed by restraint, force, violence, duress, menace or fear of immediate threat or unlawful bodily injury to the victim or another;
- The victim was very young;
- Multiple victims were involved;
- The defendant held a position of trust;

- The sexual abuse lasted more than a brief duration;
- The sexual abuse occurred repeatedly over an extended period of time; or
- The defendant has a prior record of child sexual abuse or other related offenses.

Misdemeanor sexual abuse of a child under 14 years is defined in Penal Code § 647.6 (annoying or molesting a child under 18 years).

Misdemeanor charges or a referral to the appropriate city attorney or city prosecutor for misdemeanor prosecution should be considered only when the sexual abuse involved fondling over the clothing and none of the above circumstances apply.

4.01.05 UNCOOPERATIVE VICTIM

Every reasonable effort shall be made to secure a sexual assault victim’s cooperation. However, should the victim refuse to testify and be found in contempt for refusing to testify, the court may not place the victim in custody. (CCP § 1219(b).)

4.01.06 VICTIMS’ RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right “to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.” (Cal. Const. Art, I § 28(b)(1).) (See LPM § [24.02.04](#))

4.02 DOMESTIC VIOLENCE

Deputies shall vigorously prosecute misdemeanor and felony domestic violence cases with or without victim cooperation, as long as there is legally sufficient evidence to support a conviction. Same sex relationships are included in this policy. (See Penal Code §§ 13700(a) and 13700(b) for definitions of abuse and domestic violence, respectively.) The filing decision in a domestic violence case shall not rest on whether a victim is cooperative. When a victim is uncooperative, the filing deputy shall look for other independent, corroborative evidence to support the charges, such as:

- Other witnesses to the crime or injuries;
- Medical reports of traumatic injury;
- A 911 tape with the victim’s spontaneous statements;
- Videotape of the crime being committed;
- A victim’s prior inconsistent statements;
- Physical evidence (e.g., photos, torn clothing, evidence of a physical altercation);
- A suspect’s prior acts of domestic violence with any partner;
- A suspect’s admission or confession; and
- Evidence of motive, especially reported and/or witnessed threats involving the victim.

A pre-filing interview of the domestic violence victim shall be conducted when, in the judgment of the filing deputy, it is necessary to establish the appropriate charges. When the domestic violence case also involves allegations of sexual assault, a pre-filing interview shall be

conducted. However, the inability to conduct an interview because the victim is unavailable or uncooperative shall not delay a filing if the facts warrant prosecution.

In domestic violence cases in which a child was present, deputies may wish to interview the child to determine if the child is a victim of child endangerment or a witness to the crime(s). See VIP Manual Chapter VII “Child Interviews and Testimony;” LPM § 24.02.06 (Measures to Minimize Trauma to Children); and LPM § 24.03 (Preference for Victim and Witness Interviews) for multi-disciplinary team coordination of child interviews and forensic interviews.

Successful domestic violence prosecutions depend heavily on the cooperation of victims. A deputy shall explain to an uncooperative victim that in the state of California, the victim does not “press charges” or “drop charges.” That decision rests solely with the Office. The victim’s duty to appear in court as a witness and testify truthfully shall be explained in a positive light rather than in a way that may dissuade or discourage a victim from accepting this duty.

Where available, a VSR from the Bureau of Victim Services serves as an important resource to victims: both to encourage them to cooperate with the prosecution and to lessen the trauma caused by participation in the judicial process. These services shall be made available to victims as soon as possible. When a felony domestic violence case is filed, copies of the police reports shall be forwarded to the VSR.

A domestic violence victim shall be notified of his or her right to have both a counselor and a support person present during a law enforcement, District Attorney or defense interview. (PC § 679.05.) A domestic violence victim also has the right to have two persons of his or her own choosing for support in the courtroom. (PC § 868.5(a).)

4.02.01 INFLICTION OF CORPORAL INJURY - CHARGING CRITERIA

Penal Code § 273.5(a) defines an alternative felony/misdemeanor offense for the infliction of a corporal injury resulting in a traumatic condition. Traumatic condition is defined as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force. When a traumatic condition cannot be proved, a deputy should consider charging a violation of Penal Code § 243(e)(1), spousal battery.

4.02.02 PRESUMPTIVE FELONY FILINGS

Absent unusual circumstances, violations of Penal Code § 273.5 shall be filed as a felony if the accused:

- Personally used a gun or other deadly weapon;
- Inflicted serious bodily injury;
- Has a prior serious or violent felony conviction (“Strikes”) within the last 10 years, or 290 registration requirement;
- Has a prior felony or misdemeanor conviction involving violence, threats of violence or weapons within the last 10 years.

4.02.03 DISCRETIONARY FELONY FILINGS

If either a felony or misdemeanor charge would be appropriate to file, a felony filing is warranted when:

- The accused has been previously convicted of a violation of one or more of the following (or the equivalent if the act occurred out of state):
 - Penal Code § 273.5 - spousal abuse;
 - Penal Code § 262 - spousal rape;
 - Penal Code § 245 - assault with a deadly weapon;
 - Penal Code § 273 - child abuse;
 - Penal Code § 422 - criminal threats;
 - Penal Code § 417 - exhibiting a weapon;
 - Penal Code § 136 - witness intimidation; or
- The accused has another case pending with one or more of the charges listed above.

4.02.04 PRESUMPTIVE MISDEMEANOR FILINGS

Penal Code § 243(e)(1), misdemeanor spousal battery, shall be filed if the victim suffered no injuries constituting a traumatic condition.

4.02.05 REFERRAL TO CITY ATTORNEY

Referral to a city attorney or city prosecutor pursuant to Penal Code § 17(b)(4) is appropriate if the case meets the criteria delineated in the current [Penal Code § 17\(b\)\(4\) Operational Agreement Schedule I](#). If a deputy city attorney or police officer questions the appropriateness of a referral, the Head Deputy or Deputy-in-Charge shall review the referral.

4.02.06 UNCOOPERATIVE VICTIM

Once a domestic violence case is filed, it shall not be dismissed because the victim is uncooperative. As long as there remains legally sufficient evidence to support a conviction, the prosecution shall proceed until the defendant either pleads guilty or his or her guilt is determined by the trier of fact.

Every reasonable effort shall be made to secure the cooperation of the domestic violence victim. When a domestic violence victim has been properly served with a subpoena or ordered to return by the court, and the victim fails to appear, the deputy should consult with the Head Deputy. After obtaining the Head Deputy's approval to request a body attachment, the deputy should request the court to issue a body attachment for the domestic violence victim so that the investigating officer can locate the victim and have him or her brought directly to court for testimony.

If the domestic violence victim refuses to testify, the court may refer the victim for consultation with a domestic violence counselor before finding that victim in contempt. All communications between the victim and the domestic violence counselor that occur as a result of that referral

shall remain confidential under § 1037.2 of the Evidence Code. However, should the victim refuse to testify and be found in contempt for refusing to testify, the court may not place the victim in custody. (CCP § 1219(b).)

“Domestic violence” as used above is defined in Family Code § 6211.

Commentary

Crimes of violence in domestic settings should be treated no less seriously than crimes of violence committed by strangers. These crimes are often repetitive and escalate in seriousness. The defendant is in a position to exert continuing influence over the victim, taking full advantage of the complex social, economic, and psychological pressures inherent in the situation.

A victim’s reluctance to cooperate is usually born of factors extraneous to the merits of the case and, by itself, should not be a reason for a dismissal. All available resources such as Victim Services Representatives should be used to counsel victims and foster cooperation. As in all crimes of violence, an objective assessment of the defendant’s culpability and propensity for violence should dictate the ultimate case disposition.

4.02.07 DOMESTIC VIOLENCE CRIMINAL PROTECTIVE ORDERS

Criminal protective orders may provide victims with a sense of security, often facilitating their roles as witnesses. Additionally, these orders place defendants on notice that further contact with victims or witnesses will result in criminal consequences.

- Pre-trial

Penal Code § 136.2 governs the issuance of pretrial criminal protective orders. PC § 136.2(h)(1) allows the court to find good cause to issue the protective order based solely on the current charge(s) and the defendant’s criminal history without an additional showing of intimidation or dissuasion for the following crimes:

- PC §§ 261, 261.5, 262;
- Any crime that requires the defendant to register pursuant to PC § 290(c);
- Any crime involving domestic violence as defined in PC § 13700 or FC § 6211.

The filing or arraignment deputy shall obtain a criminal protective order in any pending domestic violence case that merits protection for the victim or witnesses but particularly in the following circumstances:

- There has been a violent confrontation between the victim and the defendant that could recur without court intervention;
- The victim has received a threat of violence or retaliation against the victim, a person close to the victim or a pet;
- There is a likelihood that the defendant will attempt to dissuade the victim or witness from testifying truthfully or at all.

The deputy shall use the most recent edition of the state-issued domestic violence protective order, form CR-160. The most recent version of the form can be found on the California Courts website at <http://www.courts.ca.gov/forms.htm?filter=CR>.

If a victim seeks to maintain confidentiality pursuant to Marsy's Law (Cal. Const. art I § 28(b)(4)), or PC § 293.5 (the right for victims of sexual assaults to use the moniker, Jane Doe, to protect privacy), the deputy should identify the victim by first name and first initial of the last name on the protective order and complete the [CLETS-001](#) form with the victim's full name and identifying information.

The sole purpose for the CLETS-001 is to provide information to the data processor who inputs the protective warrant into the automated Domestic Violence Restraining Order System (DVROS) maintained in CLETS. Unless the judicial assistant is prepared to enter the protective order into CLETS, the CLETS-001 should not be provided to the court or placed in the court file because that file is a public record and the victim's identity could be disclosed inadvertently. If the judicial assistant is ordered to enter the protective order into CLETS, the deputy should request an order that the CLETS-001 be destroyed once the data entry is completed.

The defendant shall be served with the order and a copy provided to the victim, police agency and the DA file. If the court's judicial assistant is not prepared to enter the protective order into CLETS, it is the deputy's responsibility to ensure that the law enforcement agency does so.

Court Notification

Per PC § 273.75 and Los Angeles Superior Court Rule [8.34](#), in all cases involving domestic violence as defined in PC § 13700 or Family Code § 6203/6211, deputies shall advise the court of the existence of any current civil or criminal protective/restraining orders using the protective and restraining order worksheet. Deputies should be aware that there are many other kinds of restraining orders than the criminal protective order including emergency protective orders (FC §§ 6240, 6274, PC § 646.91), domestic violence prevention orders (FC § 6300 et seq.), civil harassment orders (CCP § 527.6), and others. In the event there are two competing orders, the criminal protective order generally takes precedence but great weight will be given to specific orders made in the Family or Dependency Courts regarding child visitation and exchange of children.

Personal Presence of Defendant

Per PC § 977(a)(2), if defendant is charged with a misdemeanor domestic violence crime as defined in FC § 6211 or PC § 273.6, the defendant must be present for arraignment and sentencing and at any time during the proceedings when ordered by the court for the purpose of being advised of the conditions of a pretrial criminal protective order.

Firearms

If there is reason to believe that the defendant has access to a firearm, the deputy shall request an order that it be relinquished to a licensed gun dealer or law enforcement under PC § 136.2/CCP § 527.9 and that subsequent proof of relinquishment be filed with the court. Firearms conditions are now included on the CR-160.

- Post-Conviction

A criminal protective order issued during the pendency of the case is no longer valid post-conviction. Upon conviction of certain crimes, the court may issue a criminal protective order as a condition of probation or pursuant to a non-probationary jail or prison sentence. The deputy must prepare a new order that specifies the authority for its issuance. The box in the upper middle of the CR-160 lists the various options for post-conviction orders.

Probation

Upon conviction of any crime, the court can issue a protective order as a probationary condition under PC §1203.1(j) (the court may impose any reasonable condition on probationer). *People v. Selga* (2008) 162 Cal.App.4th 113, 119.

- PC §1203.097 – In cases where the defendant is sentenced to probation for a crime in which the victim is a person defined in Family Code Section 6211, the court must issue a protective order as a condition of probation;
- PC §273a – For a misdemeanor or felony conviction, the court shall issue a criminal court protective order as a condition of probation unless waived by the court in the interests of justice;
- PC §273d – The court shall issue a criminal court protective order as condition of probation unless waived by the court in the interests of justice.

State Prison, Local Prison and Split Sentences

In most cases there is no provision for issuing a criminal court protective order when the defendant is sentenced to state or local prison. *People v. Ponce* (2009) 173 Cal.App.4th 378. The limited exceptions include:

- PC § 273.5 – Upon conviction of PC § 273.5(a), the court may issue an order for up to ten years whether the defendant is sent to prison, county jail, or placed on probation (PC § 273.5(j));
- PC § 136.2(i)(1) – Upon conviction of a crime involving domestic violence defined in PC § 13700 or FC § 6211, the court may issue an order for up to ten years whether the defendant is sentenced to prison, jail, or placed on probation;
- PC § 646.9 – Upon conviction of PC § 646.9, the court can issue an order for up to ten years whether the defendant is sentenced to state prison, county jail, or placed on probation (PC § 646.9(k)(1) and (2));

- PC § 136.2(i)(1) – Upon conviction of PC §§ 261, 261.5, 262, or any offense requiring registration under PC § 290, the court may issue order for up to ten years whether defendant is sentenced to prison, jail, or placed on probation;
- PC § 1201.3(a) – Upon conviction of sexual offense involving a minor victim, the court may issue an order for up to ten years;
- PC § 1202.05(a) – Upon conviction of PC §§ 261, 264.1, 266c, 285, 286, 288, 288a, 288.5, or 289, where defendant is sent to prison and the victim is a child under the age of 18 years, the court shall prohibit all visitation between the defendant and the child victim. See *People v. Scott* (2012) 203 Cal.App.4th 1303 (PC § 1202.05 does not apply to minor victim who has reached age 18 at the time of proposed visitation).

A deputy who is handling a post-conviction domestic violence case shall complete a new order, using the Confidential CLETS Information form (CLETS-001) to protect the victim’s privacy. The defendant shall be served with the order and a copy provided to the victim, the police agency and the DA file. If the court’s judicial assistant is not prepared to enter the protective order into CLETS, it is the deputy’s responsibility to ensure that the law enforcement agency does so.

If the order terminates by operation of law because the case is dismissed, probation terminates, or the defendant is sent to state prison AND the court has no jurisdiction to issue the order under any statutory exception, the deputy shall submit a protective order termination form (CR-165) to the court. The deputy must provide one copy to the protected person, another to law enforcement and retain one copy in the file.

- Modification of Criminal Protective Order

Only the court can change the terms of the criminal protective order pursuant to PC § 13710(b). In any case involving a request to modify or terminate the protective order in a case involving domestic violence as defined in FC § 6211, the prosecution is entitled to five days, written notice and an opportunity to be heard. PC § 1203.3(b)(1).

If the victim requests modification or termination of the criminal protective order the deputy should ask the victim to make his or her request on the record in open court and make arguments, as necessary, to protect the victim and the case.

4.02.08 VIOLATION OF A COURT ORDER - PENAL CODE § 166(A)(4)

Violations of domestic violence criminal protective orders are punishable under both Penal Code §§ 166(a)(4) and 273.6.

Under Penal Code § 273.6(a), a violation of the domestic violence protective order is punishable as a misdemeanor by imprisonment in a county jail for up to one year. Under § 273.6(b), a violation that results in physical injury is punishable for a minimum of 30 days in jail, although the court can reduce or eliminate that minimum sentence in the interest of justice. Penal Code § 273.6(d) provides that a subsequent conviction of violation of a protective order involving violence or threat of violence, occurring within seven years of a prior conviction for violating a

protective order is punishable as a wobbler of up to one year in jail or imprisonment in local prison pursuant to Penal Code § 1170(h).

A violation of *any* written process of court or court order may be punished under Penal Code § 166(a)(4) as a six-month misdemeanor. However, Penal Code § 166(c)(1) provides that violation of a *domestic violence protective order* is a misdemeanor punishable by one year in county jail. Furthermore, Penal Code § 166(c)(2) requires a minimum of 48 hours of custody regardless of the ultimate sentence imposed. There is no provision for reducing this minimum sentence.

Finally, Penal Code § 166(c)(4) makes a violation of a protective order involving an act of violence or threat of violence, occurring within seven years of a prior conviction for violating a protective order, punishable as a wobbler of up to one year in county jail or 16 months, 2, or 3 years in *state* prison. It is Office policy to file violations of domestic violence restraining orders under Penal Code § 166(a)(4), not under Penal Code § 273.6.

4.02.09 DEATH RESULTING FROM DOMESTIC VIOLENCE

All cases in which a death occurs as a result of domestic violence or abuse (as defined in PC § 13700) which are not prosecuted by the Family Violence Division shall be prosecuted vertically by a prosecutor assigned to the Victim Impact Program (VIP).

Upon presentation of all such cases for filing review, a deputy shall notify the VIP Deputy-in-Charge (VIP DIC). The VIP DIC shall then notify the Head Deputy District Attorney.

Further, all such cases are to be presumptively reviewed, filed and assigned by the VIP DIC. This policy is a presumption. Head Deputy District Attorney authority to determine the specific deputy assigned to file and/or prosecute such cases can override this presumption.

4.02.10 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right “to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.” (Cal. Const. Art. I § 28(b)(1).) (See LPM § 24.02.04)

4.03 CHILD ABUSE

Child abuse may be charged as a felony or misdemeanor pursuant to Penal Code §§ 273a(a) or 273d. To a large extent, these two statutes overlap and it is a matter of prosecutorial discretion, rather than a matter of law, which charge shall be filed and whether a particular charge shall be filed as a felony or misdemeanor.

Child endangerment, whether it results in physical injury or not, may be charged as a felony under Penal Code § 273a(a) or a misdemeanor under Penal Code § 273a(b).

In addition to Penal Code §§ 273a and 273d, filing deputies shall consider other child abuse charges and special allegations, including, but not limited to:

- Penal Code § 206 – torture;

- Penal Code § 273ab - assault on a child under 8 causing death;
- Penal Code § 273.4 - female genital mutilation;
- Penal Code § 647.6 – annoying or molesting a child under 18; and
- Penal Code § 12022.95 – child endangerment resulting in death allegation.

4.03.01 CHARGING CRITERIA

Child abuse cases shall be thoroughly reviewed and processed as expeditiously as possible. It is the responsibility of the filing deputy to determine whether, based upon all available evidence, charges can be proven beyond a reasonable doubt and whether prosecution is warranted.

The filing decision shall be made by a deputy thoroughly familiar with the applicable criminal laws and procedures concerning child abuse. Documents that shall be reviewed in the filing decision, include, but are not limited to:

- Investigative reports that include property reports and statements from the victim(s), percipient witnesses, fresh complaint witnesses, mandated reporters, the suspect;
- The suspect’s complete criminal history;
- Any prior reports of past abusive or assaultive conduct committed by any of the involved parties;
- Medical records prepared by paramedics, doctors, nurses, or other medical professionals;
- Expert witness reports concerning the cause of injuries suffered, the results of any examinations performed, and any opinions reached;
- Results of any examinations or interviews of siblings;
- Forensic reports (e.g., blood, hair or DNA);
- Photos of the crime scene, weapons, other criminal instruments, injuries, the suspect’s appearance, or the victim body;
- Relevant documentary evidence such as birth certificates, consent to search forms, school records, Suspected Child Abuse Reports (SCARs), dependency records, any Department of Children and Family Services records, and search warrants; and
- Any current or prior protective orders concerning the victim or other family or household members.

If some reports are not included, the filing deputy shall determine whether there is sufficient evidence to file or whether further investigation is necessary.

In appropriate cases, the filing deputy shall interview the child or consider scheduling a forensic interview to ensure that the child is competent to testify and can recall and recount the details of the event, determine if there is any additional evidence not previously identified, and establish rapport with the child.

See *VIP Manual Chapter VII* “Child Interviews and Testimony;” LPM § 24.02.06 (Measures to Minimize Trauma to Children); and LPM § 24.03 (Preference for Victim and Witness Interviews) for multi-disciplinary team coordination of child interviews and forensic interviews.

4.03.02 MISDEMEANOR VERSUS FELONY FILINGS

In reviewing child abuse allegations, a felony filing is warranted in circumstances that caused or were likely to cause great bodily injury or death. The appropriate charge level will depend upon whether the perpetrator caused, permitted or inflicted unjustifiable physical pain or mental suffering, or inflicted cruel or inhuman punishment, or inflicted actual injury, and the degree of injury inflicted.

4.03.03 SUSPECTED CHILD ABUSE REPORTS (SCARS)

When a case is presented for filing, the deputy reviewing the case shall access the electronic Suspected Child Abuse Report System ([ESCARS](#)) in any case where a child is a victim of child abuse and in some cases where a child is the witness to a crime. The deputy shall run the name of the child, the child's parents or guardians and/or the perpetrator of any offense in ESCARS to determine if a SCAR was created. It is expected that a SCAR has been generated in all child physical and sexual abuse cases. SCARs may also be generated in cases involving child endangerment, such as driving under the influence with a child in the car, possessing, selling, or manufacturing narcotics while a child is present, or shoplifting in the company of a minor. In many domestic violence cases, a SCAR may have been generated if a minor was present and a witness to abuse.

In some drive-by shootings, SCARs have been generated because the child's parents or guardians knew the minor was a gang member and failed to protect the child from congregating with known gang associates. However, one would not expect to see a SCAR if a minor was a victim of a random robbery. There is no expectation that a parent or guardian had failed to protect a child from harm in this type of situation.

If, at the time of filing, a SCAR is located in ESCARS, deputies shall follow the procedures described below for redacting and including the document in the DA case file. If a SCAR is not found, the filing deputy shall request the law enforcement personnel presenting the case for filing to call DCFS to determine if a SCAR was generated. If it was not, law enforcement must cross-report the allegations to DCFS. The resulting SCAR can be downloaded after the cross-report is made. In order to satisfy due diligence requirements and fulfill discovery obligations, the filing deputy shall make a note in the Statement of Facts detailing the steps that have been initiated to generate a SCAR. A note shall also be entered on the Attorney Notes form in the case file for the deputy in court to retrieve the SCAR when it is available and provide the document as part of the discovery process.

Data Entry into ESCARS

Deputies, or their designees, who file cases that have related SCARs, are responsible for entering the court case number of all felony cases in ESCARS. If the case is vertically prosecuted, the assigned deputy's name must also be entered into ESCARS at the time of filing.

Procedures Reconciling Discovery Obligations and Confidentiality

In the event the filing deputy determines that a SCAR contains exculpatory information or information which might be used to impeach a witness, the filing deputy shall prepare a redacted version of the SCAR containing only the 19-digit DCFS referral number, the defendant's name, the first name and last initial of the child victim/witness and an appropriately redacted narrative deleting all identifying information for the reporting party to give to the defense at the time of arraignment.

In the event the filing deputy determines that the SCAR does not contain any exculpatory information or information that might impeach a witness, the filing deputy shall include a redacted copy of the SCAR in the DA case file.

4.03.04 ACCESS TO CHILD DEATH RECORDS

Welfare and Institutions Code (WIC) § 10850.4 provides that the Department of Children and Family Services (DCFS) shall release the records of a child death when DCFS, a law enforcement agency, or the coroner has determined that the death was a result of abuse or neglect (with certain limitations - see WIC §§ 826.7 and 827). WIC § 10850.4 creates presumption in favor of public disclosure of these records unless there is information that would jeopardize a criminal investigation or proceeding, or other statutory grounds for non-disclosure exist.

Ten-Day Time Limit

Within 10 business days after a request has been received by DCFS, or after a determination has been made that the death was a result of child abuse or neglect, whichever is later, DCFS shall release the records of the child death to the public after redacting names, addresses, telephone numbers, ethnicity, religion and other identifying information. (See WIC § 10850.4(c) and (e).) Information that would jeopardize a criminal investigation or proceeding shall also be redacted after consultation with the District Attorney. (WIC § 10850.4(e)(1)(B).)

District Attorney's Office Responsibilities

The Office shall review all requests submitted by DCFS involving any child death in Los Angeles County. The Office has centralized all WIC § 10850.4 inquiries from DCFS in the Family Violence Division (FVD).

All WIC § 10850.4 requests for child death records on any case that has not been filed by the Office must be submitted to DCFS or Los Angeles County Counsel. If a criminal complaint has been filed, a request for information submitted to the Office should be handled like any other request under the Public Records Act and Media Relations should be notified.

No later than the fourth day of the 10-day period, DCFS will send a copy of the request and the redacted and unredacted copies of the records to the FVD Head Deputy or his or her designee for review. The deadline is not extended if DCFS fails to provide the records timely. The Office

has the responsibility to inform DCFS if it objects to the release of information that would jeopardize a criminal investigation or proceeding.

Upon receipt by FVD, the WIC § 10850.4 request will be logged into the SB 39/WIC § 827 database. This database includes all WIC § 10850.4 requests as well as public requests made pursuant to WIC § 827. FVD will promptly notify Media Relations Division and ascertain the jurisdiction where the alleged crime occurred.

When the jurisdiction has been ascertained, FVD will notify the Head Deputy of the Branch Office responsible for that jurisdiction, via e-mail, that a request for review of child death records has been received from DCFS and that the records are available for review in the SB 39/WIC § 827 database. If the case has been filed or is being reviewed for filing consideration, the filing/reviewing deputy will also be notified that the records are available for review in the database. If the jurisdiction cannot be ascertained, the FVD Head Deputy or his or her designee will review the records.

No later than the sixth day of the 10-day period, the deputy tasked with reviewing the records shall decide whether the release of the records as redacted by DCFS would jeopardize a criminal investigation or proceeding. The deputy shall consult with law enforcement when making this decision. Consideration should be given to further redacting any identifying suspect information, highly sensitive material or any specific details of the crime that have not been made public.

No Objection to Release of Records

If there is no objection to the release of the records, the deputy shall complete the required fields in the database; the FVD Head Deputy will be notified via e-mail automatically. The deputy shall place a copy of the records in the case file and shall note the deputy's decision on the Attorney Notes page.

Objection to Release of Records

If there is an objection to the release of the records, i.e., the deputy concludes that the release would jeopardize a criminal investigation or proceeding, the deputy shall:

1. Bates stamp the records;
2. Further redact the records if necessary;
3. Scan the redacted records into the database;
4. Fill in the action section of the database; and
5. Include in the comments section of the database why the additional redactions were made.

The FVD Head Deputy will be notified via the database of the action taken by the deputy. A copy of all records, memos and correspondence shall be placed or noted in the case file.

Notification to DCFS

On the seventh day of the 10-day period, the FVD Head Deputy will send, via the database, the Office's response to DCFS. The FVD Head Deputy will update the SB 39/WIC § 827 database.

Additional Requests for Records

FVD will maintain the SB 39/WIC § 827 database for all cases. Additional WIC § 10850.4 requests for information on a particular case may be received in the future. The assigned deputy shall review the records each time that a request is received to determine whether the reasons for the initial response have changed. If the reasons for the response have changed, the deputy shall notify the FVD Head Deputy so she/he may inform DCFS, County Counsel, or Dependency Court. If the reasons remain the same, the assigned deputy shall respond accordingly.

Deputy District Attorney Requests to Use Records

It is important to note that all documents received from DCFS through a WIC § 10850.4 request for release are considered confidential. If at a later time a deputy wishes to use the record(s) in criminal court and these records could not be obtained through independent means, a copy of the records shall be submitted to the Court under a protective order and the deputy shall petition the Juvenile Court pursuant to WIC § 827 for permission to use the records. In any subsequent prosecution, defense counsel should be made aware that these records exist. The defense attorney must petition the Juvenile Court for permission to review the records and use the information pursuant to WIC § 827. There are potential criminal sanctions for the improper use or release of confidential juvenile records.

The procedures set forth above are limited to requests received pursuant to WIC § 10850.4 or the public's request for records pursuant to WIC § 827. They do not apply to WIC § 827 petitions which are often generated by deputies in child abuse or child homicide prosecutions. WIC § 827 petitions are routinely filed by deputies to gather additional information about a victim or suspect and this policy in no way modifies or changes this practice.

4.03.05 COMPLEX CHILD ABUSE CASES

The Complex Child Abuse Section (CCAS) in the Family Violence Division handles all cases involving suspected abusive head trauma in a child under the age of eight, whether or not resulting in death. Additionally, the section handles any death of a child under the age of eight involving medically complex causes of death or timing of death issues. A complex case includes a child beaten about the body who died from internal injuries, such as lacerated liver, ruptured bowels, etc. In such a case, there is often no external sign of injury and no witness to explain how the child's injuries occurred.

In cases when the cause of death is obvious, (e.g. gunshot wound, stabbing, fatal car wreck), there is no need for complex medical analysis and the case may remain in line operations.

4.03.06 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right “to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.” (Cal. Const. Art. I § 28(b)(1).) (See LPM § 24.02.04)

4.04 CHILD ABDUCTION

4.04.01 CRIMINAL PROCEEDINGS

When a California resident is lawfully entitled to custody of a child, a criminal filing will be considered when an individual maliciously takes or conceals the child. This filing will be considered regardless of the accused’s location. Similarly, a California resident may be prosecuted for maliciously taking or concealing a child in California in violation of a custody decree from another state.

A criminal filing will be considered when a child is abducted from Department of Children and Family Services (DCFS) placement, whether by a parent or non-parent. In these cases, DCFS has actual custody of the child and is the named victim for filing purposes.

All child abduction cases, whether committed by a family member or non-family member, shall be referred to the Deputy-in-Charge of the Child Abduction Section. The Child Abduction Section prosecutes all child abduction cases in Los Angeles County. All matters related to child abduction, including law enforcement inquiries, shall be handled exclusively by the Child Abduction Section.

4.04.02 CIVIL PROCEEDINGS

Private citizens seeking enforcement of Los Angeles Superior Court custody orders in which child abduction is alleged may contact the Child Abduction Section directly whether or not law enforcement notification has been made. The California Family Code mandates that the Child Abduction Section enforce custodial orders by assisting in the service of civil documents and, in some cases, locating and returning a child to a lawful custodian.

4.04.03 VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY

Victims have a right “to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process.” (Cal. Const. Art. I § 28(b)(1).) (See LPM § 24.02.04)

4.05 ASSAULTS ON PEACE OFFICERS

To ensure the Office uniformly handles assaults on peace officers, a comprehensive policy addressing the filing, prosecution and disposition of these cases shall be followed.

The most serious assaults on peace officers shall be vertically prosecuted by experienced deputies. These cases shall be filed as felonies in all appropriate cases and deputies shall seek appropriate custody time in every case.

The Crimes Against Peace Officers Division (CAPOS) prosecutes the most serious crimes perpetrated against peace officers in the performance of their duties. CAPOS vertically prosecutes all cases in which a peace officer is killed, shot or seriously injured as well as selected other cases involving the use or threat of deadly force or violence on a peace officer. Deputies in line operations shall notify CAPOS as soon as possible of any felony assault involving a peace officer victim. The Head Deputy of CAPOS will determine whether the case should be handled by CAPOS or line operations.

4.05.01 CHARGING CRITERIA

All potential felony/misdemeanor charges involving assaults on peace officers must be submitted to the Office for review. A felony shall be filed anytime an accused commits an assault on a peace officer with a deadly weapon or instrument, or by any means likely to produce great bodily injury, even if no injury occurs.

When considering whether to file a felony or misdemeanor under Penal Code § 243(c)(2), a felony shall be filed if the accused:

- Used a weapon;
- Inflicted or intended to inflict other than a minor injury;
- Has a history of assaultive conduct; or
- Has a strike prior.

When any of the above factors exist, prior approval by a Head Deputy or Deputy-in-Charge shall be obtained before filing a misdemeanor charge. A misdemeanor may be filed only where unusual or mitigating circumstances exist.

These cases are to be reviewed with the same care and objectivity as all other cases. Whenever appropriate, the victim peace officer should be interviewed by the filing deputy before the filing decision is made.

If before a case has been filed, there is evidence to support a suspect's claim that an officer acted illegally, the claim should be investigated by the law enforcement agency. If the filing deputy determines there is evidence that a peace officer used excessive force or committed any crime, the deputy shall immediately forward a written memorandum (enclosing copies of all supporting documentation) to the Justice System Integrity Division (JSID).

If after a case has been filed, a deputy becomes aware of evidence that one or more peace officers may have used excessive force or committed any crime, that deputy shall review the entire case. After this review, if the deputy determines that different charges would have been filed had this newly discovered evidence been known at the time of filing, the pleadings should be amended to reflect the appropriate charges. If the deputy determines that the case would not

have been filed, the case shall be dismissed. The deputy shall inform JSID, in writing, of any allegation of criminal activity by the peace officer and the resolution of the original case.

JSID shall refer all allegations of peace officer misconduct to the law enforcement agency to conduct an investigation.

4.06 CONTROLLED SUBSTANCES

4.06.01 LABORATORY ANALYSIS

When an accused is in custody at the time a case is presented for filing consideration, a felony or misdemeanor complaint for a controlled substance violation may be filed when identification of the controlled substance is based upon a positive scientifically reliable field test or preliminary laboratory analysis. Additional confirmatory laboratory analysis must be completed prior to preliminary hearing on felony cases and prior to jury trial on misdemeanor cases.

When an accused is out of custody at the time a case is presented for filing consideration, a felony or misdemeanor complaint for a controlled substance violation should be filed only when identification of the controlled substance is based upon a positive laboratory analysis.

Statutorily Significant Large Quantities

Extremely large drug seizures may be difficult to unpack completely and determine net weight within filing deadlines. Most cases will not involve quantities within the measurement uncertainty for a statutory limit. If there may be an issue as to the net quantity of the controlled substance, the filing deputy shall contact the laboratory to make arrangements for any necessary weighing of controlled substances with all packaging fully removed.

4.06.02 PROPOSITION 215 - MEDICAL USE OF MARIJUANA

Proposition 215, known as the “Compassionate Use Act of 1996,” added § 11362.5 to the Health and Safety Code. It did not repeal any existing statutes. It is the policy of the Office that § 11362.5 created an affirmative defense to the offenses of possession of marijuana as defined in Health and Safety Code § 11357 and cultivation of marijuana as defined in Health and Safety Code § 11358. This affirmative defense applies only to a “patient, or to a patient’s primary caregiver” (as defined) “who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.”

Further, it is Office policy that Health and Safety Code § 11362.5 is inapplicable to Health and Safety Code § 11357(a) (concentrated cannabis) and to the sale of marijuana or any predicate act to the sale of marijuana.

In any case in which the medical use defense may apply, the filing deputy shall inquire of the investigating officer whether the medical use defense is factually applicable, and what investigation has been done to confirm or disprove the defense.

If evidence of the medical use defense comes to light after a case has been filed, the deputy shall ask the investigating officer to conduct further investigation. If the defense is determined to be valid, the deputy shall dismiss the case.

As with other affirmative defenses, the burden of proof is on the defendant. A deputy shall presume the conduct is unlawful unless the affirmative defense can be proven.

4.06.03 **MINIMUM WEIGHT REQUIREMENT IN POSSESSION CASES**

A charge involving the possession of cocaine, heroin, or methamphetamine shall be filed if the weight of the substance is equal to or greater than shown below:

<u>Substance</u>	<u>Weight</u>
Powder cocaine	0.053 grams
Cocaine base	0.023 grams
Powder heroin	0.053 grams
Tar heroin	0.023 grams
Methamphetamine	0.023 grams

A possession case shall not be filed if the weight of the controlled substance is less than shown above.

Controlled substance cases in which five or fewer pills are possessed may be treated as de minimis and rejected with the approval of the Head Deputy.

In cases involving the possession of all other controlled substances, filing decisions shall be governed by applicable statutes and case law. (*People v. Rubacalba* (1993) 6 Cal.4th 62.) The filing deputy shall consider the nature of the substance, the manner in which the substance is typically ingested, and the attributes of possession in deciding whether the amount seized is a usable quantity.

4.06.04 **NO MINIMUM WEIGHT REQUIREMENT IN SALE CASES**

When charging the sale of, or offer to sell, controlled substances, no minimum weight is required. (Bench Note, CALCRIM 2300; Use Note, CALJIC 12.02 and 12.03; and, *People v. Diamond* (1970) 10 Cal.App.3d 798, 801.)

4.06.05 **PHENCYCLIDINE (PCP)**

Possession of PCP should be charged whenever a usable quantity is found. The following are examples:

- The PCP was in a usable liquid or concentrated form in an amount sufficient to “lace” a secondary substance (e.g., mint leaves, marijuana, tobacco, etc.);
- The PCP was found in a “laced” or secondary substance exceeding four grams;

- The PCP was found in a quantity less than indicated above, but the accused demonstrated by overt conduct, reasonably related to PCP use, a propensity for violence or a threat to public safety.

4.06.06 DATE RAPE DRUGS

Possession of any usable amount of rohypnol, gamma hydroxybutyrate (GHB), or other controlled substances associated with the facilitation of sexual assaults (also known as “date rape drugs”) should be charged and vigorously prosecuted. When there is evidence of an intent to use the drug to facilitate a sexual assault the filing deputy shall carefully review all of the evidence to determine whether there is sufficient evidence to prove conduct that, when coupled with the requisite intent, would constitute an attempt to commit a sexual assault in violation of Penal Code § 220.

4.06.07 MDMA (“ECSTASY”)

MDMA (3,4-methylenedioxymethamphetamine) (“ecstasy”), unlike cocaine, heroin, or most other illegal substances, is not specifically listed as a prohibited substance in the Health & Safety Code. The current scientific view, shared by LASD and LAPD laboratories, is that MDMA is a controlled substance analog of prohibited drug MDA (3,4-methylenedioxyamphetamine). (H&S § 11054(d)(6).) Ecstasy is therefore illegal as it is a controlled substance analog of MDA. (H&S § 11401(a).)

Prosecuting an ecstasy case is no different from prosecuting any other case involving a controlled substance analog. A controlled substance analog is defined as:

1. A substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance classified in H&S §§ 11054 or 11055; or
2. A substance which has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect of the central nervous system that is substantially similar to, or greater than, the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance classified in H&S §§ 11054 or 11055. (H&S § 11401(b).)

To prove a substance is an analog of a scheduled drug, deputies must either prove that the alleged analog has a chemical structure that is substantially similar to the chemical structure of the scheduled drug, or that the alleged analog affects the central nervous system in a substantially similar manner. (§ 11401(b)(1)-(2).) Deputies should be prepared to obtain a stipulation that ecstasy is a structural analog of MDA or produce expert testimony to that effect.

If a criminalist is not available to testify and the defense has refused to stipulate that ecstasy is an analog of MDA, deputies may consider calling a Drug Recognition Expert who will testify that the effects of ecstasy are substantially similar to methamphetamine, within the meaning of § 11401(b)(2). (See, e.g., *People v. Becker* (2010) 183 Cal.App.4th 1151.) However, this

practice should be reserved only for situations where there is no other alternative method of proof.

4.07 DRIVING UNDER THE INFLUENCE

4.07.01 FELONY

It is the policy of the Office to charge driving under the influence as a felony when the defendant:

- Has been convicted of three or more driving under the influence or alcohol-related reckless driving offenses committed within 10 years of the current offense; or
- Has been convicted of a felony violation of Vehicle Code § 23152 or § 23153 that was committed within 10 years of the current offense; or
- Has been convicted of Penal Code § 192(c)(1) (gross vehicular manslaughter) that was committed within 10 years of the current offense; or
- Has been convicted of Penal Code § 191.5 (vehicular manslaughter while intoxicated) as a felony; or
- Causes serious injury to another person in the commission of driving under the influence causing bodily injury (VC § 23153). When provable, a separate great bodily injury enhancement (Penal Code § 12022.7) shall be alleged as to each seriously injured victim to enhance a charge of Vehicle Code § 23153.

Commentary

Appellate courts have consistently held that death is a form of great bodily injury. In appropriate circumstances, deputies should consider charging driving under the influence causing bodily injury as an alternative charge to vehicular manslaughter while intoxicated, enhancing the charged violation of Vehicle Code § 23153 by a great bodily injury allegation for each fatality or seriously injured victim. (Vehicle Code § 23153 is a lesser included offense of Penal Code § 191.5 and, as such, a defendant may not be convicted of both offenses when they involve the same victim.) Importantly, great bodily injury allegations are not available to enhance charges of murder or manslaughter, even when the allegation specifies a victim other than the one identified in the underlying homicide charge.

4.07.02 MISDEMEANOR

Cases involving a blood alcohol level of .08% or higher shall be charged under both subsections (a) and (b) of Vehicle Code §§ 23152 or 23153.

Cases involving a blood alcohol level below .08% shall be charged under subsection (a) of Vehicle Code §§ 23152 or 23153 when there is evidence of grossly erratic driving, sufficient symptoms of intoxication, or drug or narcotic ingestion.

Cases involving refusals of a chemical test shall be charged under subsection (a) of Vehicle Code §§ 23152 or 23153 if there are symptoms of being under the influence.

Cases in which a blood or urine test was taken but the results are unavailable may be charged under both subsections (a) and (b) of Vehicle Code §§ 23152 or 23153 if there are sufficient symptoms of being under the influence.

All allegeable priors shall be charged including alcohol-related reckless driving (VC § 23103.5).

4.07.03 VEHICULAR HOMICIDE

In *People v. Cook* (2015) 60 Cal. 4th 922, the California Supreme Court held that a great bodily injury (GBI) sentencing enhancement may not be applied to a murder or manslaughter charge, even when the enhancement specifies a victim other than the one identified in the underlying homicide charge. Deputies should carefully review pending cases with enhancements that could be proscribed in *Cook* and immediately seek to amend charges when necessary.

In appropriate circumstances, deputies should consider charging a violation of Vehicle Code § 23153 (DUI causing injury) and enhancing the offense by one or more GBI allegations, as an alternative or in addition to a charge of PC § 191.5 (vehicular manslaughter while intoxicated). See *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552 [“Prosecut(ors) have the sole discretion to ...choose, for each particular case, the actual charges from among those potentially available...”]; *People v. Fong* (2013) 217 Cal.App.4th 263, 269-270 [Veh. Code § 23153 enhanced by PC §12022.7, is a viable alternative to PC §191.5]; *Hale v. Superior Court* (2014) 225 Cal.App.4th 268, 276 [separate GBI enhancements may be alleged for each seriously injured victim]; and *People v. Calles* (2012) 209 Cal.App.4th 1200, 1220 [death is a form of GBI.]

The *Cook* opinion was relatively narrow in scope and expressed no opinion regarding the question whether and, if so, how great bodily injury enhancements may attach to other crimes for a defendant convicted of murder or manslaughter as well as those other crimes. (*Cook*, supra, at 938 fn.3)

4.07.04 DUI TRAINING AND PROSECUTION SECTION (DTAPS)

The DUI Training and Prosecution Section (DTAPS) in the Training Division directly addresses the growing threat to public safety posed by drivers operating motor vehicles while impaired by alcohol, drugs, or a combination of the two. The section vertically prosecutes some vehicular homicide cases involving DUI; provides consultation, support and training in the prosecution of alcohol and drug impaired driving cases; provides guidance and training to local law enforcement; and coordinates with law enforcement to increase the number of Drug Recognition Experts throughout the county.

In those cases where a homicide occurs as the result of impaired driving, and at the time of filing, the suspect is believed to have been impaired by drugs or a combination of drugs and alcohol, the case shall be reviewed by DTAPS for filing consideration. Deputies shall immediately contact DTAPS if a case is presented for filing that meets the above criteria. Upon contact, a DTAPS deputy shall be available to review the case.

Some homicide cases involving driving under the influence of drugs (DUID) shall be vertically

prosecuted by DTAPS. In all DUID homicide cases not vertically prosecuted by DTAPS, a DTAPS deputy shall be available to provide consultation and support for deputies handling DUID or DUI-alcohol homicide cases.

The filing process for these cases shall be conducted by the support staff at the office having jurisdiction over the offense. A DTAPS deputy shall be available during the entire filing process to answer any questions and shall be present at the arraignment.

4.08 HATE CRIMES

Hate crimes, as defined in Penal Code § 422.55, are criminal acts committed, in whole or in part, because of a victim's actual or perceived disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics. Penal Code § 422.56(d) defines the phrase "in whole or in part, because of" to mean that the hate motive must be a cause in fact of the offense, whether or not other causes also exist. When multiple motives exist, the hate motive must be a substantial factor in the defendant's conduct.

A person may commit an independent hate crime or may commit another crime that is hate motivated. The following non-exclusive factors shall be considered in evaluating whether there is sufficient evidence to prove a hate crime or that another crime was hate motivated:

- Membership in, or affiliation with, any hate group;
- Symbols of bias (e.g., tattoos, literature or memorabilia);
- The offense date (e.g., Hitler's birthday - April 20);
- The offense location (e.g., gay pride parade);
- The history of any relationship between the suspect and the victim;
- Derogatory slurs, however, if the crime is based upon speech alone, the filing deputy shall attempt to determine whether the defendant threatened a violent injury against a specific person or group of persons with the apparent ability to carry out that threat; or
- Lack of any other motive.

If an accused commits a crime that is hate motivated, the filing deputy shall add a special allegation under Penal Code §§ 422.7 or 422.75.

If the crime is against property and the property belongs to a public agency or private institution associated with a person or group of an identifiable protected characteristic and the damage exceeds \$950, it is a felony.

The Hate Crimes Section of the Organized Crime Division is responsible for maintaining office-wide statistics on all felony and misdemeanor hate crime cases. When a hate crime or hate allegation is charged, the filing deputy shall notify the Hate Crimes Section.

4.08.01 **PENAL CODE § 422.6**

Penal Code § 422.6, interference with the exercise of civil rights because of the actual or perceived characteristics of the victim, is a misdemeanor. However, if one or more of the aggravating factors enumerated in Penal Code § 422.7 is present, the offense may be charged as a felony. The factors enumerated in Penal Code § 422.7 are:

- The crime against the person of another either includes the present ability to commit a violent injury or causes actual physical injury.
- The crime against property causes damage in excess of nine hundred fifty dollars (\$950).
- The person charged with a crime under this section has been convicted previously of a violation of § 422.6(a) or (b), or has been convicted previously of a conspiracy to commit a crime described in § 422.6(a) or (b).

If one of these factors exists, the offense should generally be charged as a felony. In exceptional cases in which the victim's injury is slight and the incident appears to be aberrant behavior by an otherwise law-abiding citizen, a misdemeanor may be considered.

Commentary

The filing deputy should be sensitive to the victim's customs and mores. In some cases, the social consequences of being victimized and reporting the crime to authorities can be quite negative. A case should not be rejected merely because the victim demonstrates a reluctance to prosecute. The filing deputy should refer the victim to the appropriate victim's advocate or agency for counseling and support.

4.08.02 **VICTIMS' RIGHT TO RESPECT FOR PRIVACY AND DIGNITY**

Victims have a right "to be treated with fairness and respect for his or her privacy and dignity, and to be free from intimidation, harassment, and abuse, throughout the criminal or juvenile justice process." (Cal. Const. Art. I § 28(b)(1).) (See LPM § 24.02.04)

4.09 **FALSE GOVERNMENT DOCUMENTS**

Penal Code §§ 113 and 114, were enacted by initiative (Proposition 187) to address the manufacture, distribution, sale, or use of multiple false documents to conceal a person's true citizenship or resident alien status. Pursuant to Penal Code § 18, these offenses are alternate felony/misdemeanor crimes. It is Office policy to charge violations of Penal Code §§ 113 and 114 involving multiple false documents as felonies.

Both Penal Code §§ 113 and 114 require evidence of multiple "false documents." Penal Code § 113 requires a person knowingly "manufacture, distribute or sell" multiple documents with the intent to conceal the true citizenship or resident alien status of another person. Penal Code § 114 requires a person "use" more than one document with the specific intent to conceal his or her own true citizenship or resident alien status. A single false document is insufficient to trigger a criminal filing.

Mere possession of false documents does not constitute “use” pursuant to Penal Code § 114. There must be evidence of an act by the defendant that reveals the requisite specific intent to use the documents.

Penal Code § 112, a misdemeanor, prohibits a person from manufacturing or selling a single false government document with the intent to conceal the true citizenship or resident alien status of another person. Every false government document that is manufactured or sold in violation of this section may be charged and prosecuted as a separate and distinct violation, and consecutive sentences may be imposed for each violation. As used in this section, “government document” means any document issued by the United States government or any state or local government, including, but not limited to, any passport, immigration visa, employment authorization card, birth certificate, driver’s license, identification card, or social security card.

4.10 AUTO THEFT

When the accused has committed auto theft or a violation of Vehicle Code § 10851 and any of the following factors exist, the accused shall be charged with a felony:

- The method of theft demonstrates sophistication, such as switching vehicle identification numbers or license plates, altering ownership documents, or possession or use of special tools to force entry or operate a vehicle (e.g., a “slim jim” or slide hammer);
- The vehicle was stripped, substantially altered or damaged, or there is evidence that the defendant intended to strip, alter or damage the vehicle;
- The vehicle has not been recovered;
- The defendant stole the vehicle in Los Angeles County, and the vehicle was recovered in another county, state or country; or
- Any other circumstance which demonstrates that the defendant intended to permanently deprive the victim of the vehicle, or is engaged in a commercial criminal enterprise.

Theft of an automobile as defined in Penal Code § 487(d)(1), or a “taking” theory of Vehicle Code § 10851, is a misdemeanor unless the value of the automobile exceeds \$950, or the defendant has been convicted of a superseding prior. In most cases the value of an automobile will be greater than \$950 but Penal Code § 490.2 requires proof of the value at the preliminary hearing and at trial.

4.11 AUDIO AND VIDEO PIRACY

Audio and video piracy is the illegal duplication and subsequent possession, rental or sale of audiovisual or recorded works. It is a crime which has significant economic consequences to the owners of intellectual property. Piracy is not a victimless crime; it destroys jobs and steals billions of dollars from legitimate business entities and individuals. Penal Code §§ 653h, 653s, 653u, 653w and 653z address piracy offenses. Filing and trial deputies may consult the Cyber Crime Division for questions concerning video and audio piracy prosecutions.

4.11.01 OVERVIEW OF PIRACY STATUTES

The piracy statutes define alternative felony/misdemeanor offenses depending on the number of illegally duplicated items involved and whether the perpetrator has any prior convictions for similar conduct, with the exception of Penal Code § 653z which is a misdemeanor. Penal Code § 653z prohibits any person from recording a movie with any type of recording device while it is playing in a theater without the express written authority of the owner. The punishment for a violation of this offense is a sentence of up to 364 days in county jail and a fine not to exceed \$25,000, or both.

Penal Code § 653z does not preclude filing alternative charges, such as commercial burglary in violation of Penal Code § 459, if warranted. Commercial burglary is a wobbler, which permits charging as a felony in appropriate situations. Prosecution under a general criminal statute, such as Penal Code § 459 is not prohibited in this instance because the California Legislature made clear the intent not to “preclude prosecution[s] under any other provision of law” by enacting subdivision (c) of § 653z. This section is a “savings clause” that was added to the statute prior to its enactment at the request of the Office.

The other piracy statutes address the recording, transportation, sale or possession for sale of recordings or live performances or possession of counterfeit music or audiovisual products. Under Penal Code § 653h, it is a crime to re-record music or films for sale or use for commercial advantage or financial gain through public performance without the owner’s consent. Penal Code § 653u prohibits any person from recording live performances for sale without the owner’s consent while Penal Code § 653s prohibits the possession or transportation of these illegally recorded live performances.

Finally, Penal Code § 653w makes it a crime to possess pirated audio recordings or audiovisual products for rent or sale without disclosing the true name and address of the manufacturer. An alternative charge to Penal Code § 653w is a violation of Penal Code § 350(a) Counterfeit of Registered Mark, which is an alternative felony/misdemeanor and may result in asset forfeiture in certain cases.

The punishment and fine for these offenses vary depending on the number of articles involved and the perpetrator’s prior convictions, if any. Deputies should consult the specific code section for the appropriate sentencing scheme.

4.11.02 ALTERNATIVE FELONY/ MISDEMEANOR FILING POLICY

When deciding whether to file a misdemeanor or felony in an audio or video piracy case, deputies should consider the criteria set forth in the [Crime Charging - Generally](#) chapter of this manual and the criteria set forth below:

- Evidence of rentals or sales of the pirated material;
- Previous warnings, such as warning letters and/or seizure of pirated materials by personnel from the Motion Picture Association of America, theater operators or others;
- Previous attempts to resolve matters involving pirated material through civil lawsuits and other opportunities afforded to correct the problem;

- Circumstances showing sophistication, such as possessing or accessing equipment, devices or material used to record, duplicate, enhance, alter or distribute the pirated material;
- Circumstances showing the accused intended to distribute or disseminate the pirated material to others; or
- Circumstances showing the accused is associated with an organized criminal enterprise, regardless of whether the accused knew others in the organization.

4.11.03 **EXPERT WITNESS TESTIMONY**

Expert witness testimony is often necessary to assist in identifying counterfeit items. For expert witness referrals, contact the Los Angeles Police Department Commercial Crimes Division at (213) 486-6099 or Investigative Consultants at (310) 978-4554.

4.11.04 **RESTITUTION**

Many piracy cases are investigated by law enforcement agencies with the assistance of private agencies hired by the Motion Picture and Recording Industry Associations or Special Agents affiliated with production companies. Restitution in all piracy cases should include investigative costs incurred.

4.11.05 **ASSET FORFEITURE**

If a defendant commits two or more felony piracy offenses involving fraud or embezzlement and the taking is more than \$100,000, Office policy is to take full advantage of the “freeze and seize” legislation in Penal Code § 186.11. If a defendant is charged with Counterfeit of Registered Mark (PC § 350(a)), asset forfeiture law and rules may apply pursuant to Penal Code § 186.3. If the defendant has assets valued at \$5000 or more and the investigative agency can establish: (a) the defendant acquired the assets through a pattern of criminal profiteering; or, (b) the assets were proceeds of a pattern of criminal profiteering, the filing deputy should contact the Consumer Protection Division’s Criminal Profiteering and Forfeiture Section.

4.11.06 **FORFEITURE AND DESTRUCTION**

Under Penal Code § 653v, the court shall order the forfeiture and destruction or other disposition of the pirated material and the electronic devices used to criminally manufacture, reproduce or assemble pirated products. Forfeiture and destruction should be ordered in addition to any other penalty imposed by the court.

4.12 **PENAL CODE § 290**

Failure to register as a sex offender is a serious offense. Penal Code §§ 290 et seq. provide law enforcement with a powerful tool to ensure public safety, protect law-abiding citizens, and monitor offenders to deter further criminal activity. This policy is promulgated to provide

uniformity in the filing and settlement of these cases. For the case settlement guidelines, see Legal Policies Manual Chapter 12, [Felony Case Settlement Policy](#).

4.12.01 FILING GUIDELINES

Every violation of Penal Code §§ 290 et seq., failure to register as a sex offender, that can be proven beyond a reasonable doubt shall be filed.

Felonies:

- If the underlying registrable sex offense is a felony, generally the failure to register shall be filed as a felony. (PC § 290.018(b).)
- If the registrant has a prior conviction for Penal Code § 290 as a misdemeanor, the second offense shall be filed as a felony. (PC § 290.018(b).)
- Failure of a Sexually Violent Predator to verify his or her registration every 90 days is a wobbler. This offense shall be filed as a felony absent unusual circumstances. (PC § 290.018(f).)

Misdemeanors:

- If the underlying registrable sex offense is a misdemeanor, the penalty for the first violation is a misdemeanor. (PC § 290.018(a).)
- A misdemeanor shall be filed on the first and second misdemeanor offense in which a transient fails to register within a 30-day period. On the third offense, a felony shall be filed. (PC § 290.018(g).)
- Failure to provide proof of residence at the time of registration is a misdemeanor, regardless of the offense upon which the duty to register is based. (PC § 290.018(h).)
- Failure to provide information or providing false information at the time of registration is a misdemeanor in addition to any other penalty imposed by the section. (PC § 290.018(j).)

Statute of Limitations:

Any person who is required to register who willfully violates any requirement of the section is guilty of a continuing offense. (PC § 290.018(i).) Since these are continuing offenses, there is no statute of limitations bar to prosecution. (*People v. Wright* (1997) 15 Cal.4th 521.)

Jurisdiction:

When a registrant fails to provide written notice of a move to the last registering agency, a violation of Penal Code § 290.013(a), and fails to register at a new residence in another jurisdiction, a violation of Penal Code § 290 (b), the registrant has committed two crimes. In *People v. Britt* (2004) 32 Cal.4th 944, the court, citing Penal Code § 781, held it is proper to file both offenses in either jurisdiction if practical. The court further held that both counts should be tried together if the prosecutor knew or should have known about the second violation. The defendant can be convicted of both offenses, but multiple punishment is prohibited under Penal

Code § 654 if the violations of both (a) and (f) were part of one continuous transaction or one move.

4.13 PENAL CODE § 11414

Penal Code § 11414 makes it a misdemeanor to intentionally harass the child of another person because of that person's employment.

Misdemeanor cases that include a violation of Penal Code § 11414 presented for filing by law enforcement agencies at a branch or area office shall be referred to the Target Crimes Division for initial screening. Complex cases which include a charged violation of Penal Code § 11414 shall be retained for prosecution by the Stalking and Threat Assessment Team of the Target Crimes Division. Other cases which include a potential Penal Code § 11414 charge shall be referred through the appropriate Line Operations Bureau Director for filing consideration and potential subsequent prosecution.

4.14 ASSAULT WEAPONS AND OTHER FIREARMS

California's firearms laws are complicated and ever-changing. Each year the California Legislature passes new laws or amends existing laws, creating a complex and sometimes contradictory regulatory scheme that is often difficult to understand and apply. Due to their complexity, firearms laws have not always been prosecuted in a consistent manner throughout the Office.

As part of an effort to achieve uniformity throughout the Office, the following guidelines shall be followed when evaluating firearms violations presented by law enforcement for filing consideration.

4.14.01 ASSAULT WEAPONS

Assault weapons are classified in three different categories:

- Category I firearms are designated as assault weapons by being listed by type, series, and model in Penal Code § 30510(a)-(c). The type, series, and model is typically imprinted on the lower receiver of the firearm. The lower receiver houses the operating parts, such as the trigger assembly and safety. The upper receiver typically consists of the bolt carrier group, firing chamber, and barrel. Possession of these weapons is illegal unless the firearm was registered with the California Department of Justice (DOJ) by March 31, 1992. (PC § 30605.)
- Category II weapons were classified as assault weapons under a procedure commonly referred to as the "add-on provision." Certain superior courts, upon petition by the Attorney General, were called upon to declare a firearm an assault weapon because of its essential similarity to the firearms listed in Penal Code § 30510(a)-(c). As of August 16, 2000, listed firearm models that are variations of the AK (the ubiquitous AK47) or AR15 are assault weapons. These firearms are listed in § 5499 of Title 11 of the California

Code of Regulations and in the Attorney General's Assault Weapons Identification Guide. (See also PC §§ 30510(e) and 30510(f).) Possession of these weapons is illegal unless the firearm was registered with the DOJ by January 23, 2001. (PC § 30605.)

There may be a misconception among law enforcement that Category II also includes firearms that are only variations of listed weapons with minor differences, regardless of the manufacturer. In *Harrott v. County of Kings* (2001) 25 Cal.4th 1138, the California Supreme Court ruled that only the specific firearms listed in the California Code of Regulations and the Assault Weapons Identification Guide fall within Category II.

- Category III weapons are defined in Penal Code § 30515. Category III assault weapons are classified by their features. A semiautomatic centerfire rifle that does not have a fixed magazine AND one of the following features is an assault weapon:
 1. Pistol grip
 2. Thumbhole stock
 3. Folding or telescoping stock
 4. A grenade launcher or flare launcher
 5. A flash suppressor
 6. A forward pistol grip.

“Centerfire” refers to the ammunition. Centerfire ammunition has the primer located in the center of the cartridge case head. Common centerfire calibers include 5.56x45mm and 7.62x39mm. Rimfire ammunition uses a firing pin to strike the rim of the cartridge to ignite the primer.

Category III also includes a semiautomatic centerfire rifle with a fixed magazine with the capacity to accept more than 10 rounds, or a semiautomatic centerfire rifle that has an overall length of less than 30 inches. (PC §§ 30515(a)(2) and (a)(3).)

A fixed magazine is defined as an ammunition feeding device contained in, or permanently attached to, a firearm in such a manner that the device cannot be removed without disassembly of the firearm action. (PC § 30515(b).)

Prior to January 1, 2017, it was legal to possess an assault weapon exhibiting any of the six characteristics listed above if the weapon was equipped with a magazine lock. A magazine lock replaces the standard magazine release and prevents the magazine from being detached from the weapon without the use of a tool. These devices are commonly referred to as “bullet buttons” because the tip of an unfired cartridge can be used to release the magazine.

As of January 1, 2017, any person who lawfully possesses a Category III assault weapon with a magazine lock must register the firearm with the California Department of Justice no later than January 1, 2018. (PC §§ 30680, 30900.)

In the alternative, lawful possessors of an otherwise registrable Category III assault weapon can remove **all** of the features specified in Penal Code § 30515(a)(1)(A-F). Removal of all the features would not only eliminate the need to register the firearm, but also permit the removal of the magazine lock.

However, unregistered Category I and II weapons are illegal to possess regardless of the installation of a fixed magazine. Likewise, Penal Code § 30515(a)(2) and Penal Code § 30515(a)(3) weapons are illegal to possess even when equipped with a fixed magazine.

4.14.02 **PARTIALLY ASSEMBLED FIREARMS**

Law enforcement may present for filing consideration a case in which a partially assembled firearm or assault weapon was discovered. In *People v. Nguyen* (2013) 212 Cal.App.4th 1311, the defendant possessed a box of AK47 parts. The receiver lacked either an imprinted serial number or manufacturer name to identify it as a Category I or II assault weapon. The defendant explained to an officer he had purchased an “80%” or unfinished AK47 flat lower receiver. An “80%” or unfinished lower receiver is a partially machined lower receiver that requires the user to complete the machining process. This may require drilling, bending, or milling of the unfinished receiver. The defendant pulled up the AK-Builder.com web site on his computer and showed the officer the AK47 flat receivers for sale. The defendant had already bent his flat receiver into shape for assembly, by using a vise or a flat bending die set. A firearms expert went through the box of parts and compared them to an AK47 diagram and determined all the parts necessary to build a working AK47 were present. The defendant himself acknowledged having all the necessary parts. At least one more hole needed to be drilled into the receiver before the weapon could be completely assembled. Per the opinion, the evidence that the defendant obtained a kit to build an AK47, read Internet instructions, and took at least one step towards assembly by using a tool to bend the receiver into shape, was sufficient to support a conviction for attempting to manufacture and possess an assault weapon. The court reasoned that had the police not intervened, defendant would have completed the assembly and thereupon been in possession of an assault weapon.

The following inquiries should be made whenever filing charges related to attempted possession or manufacturing of an assault weapon:

- Was the firearm lawfully registered prior to March 31, 1992 (Category I) or January 23, 2001 (Category II)?
- For a Category III (PC § 30515(a)(1)) firearm equipped with a magazine lock (bullet button) and lawfully possessed from January 1, 2001, to December 31, 2016, was the firearm registered prior to January 1, 2018? (PC § 30900(b)(1).)
- Are all the necessary parts present to complete the assembly of a disassembled weapon?
- If an unfinished lower receiver is involved, were assembly instructions, tools, jigs, or bending dies found as well? Has any milling, drilling, or machining been completed?
- Is there sufficient evidence of specific intent as well as a direct but ineffectual act done towards the commission of the completed crime?

When evaluating whether to charge attempted possession or manufacturing of an assault weapon, it is crucial to keep CALCRIM 225 in mind - charges shall not be filed if two or more reasonable conclusions can be drawn from the circumstantial evidence and one conclusion supports a finding that the defendant did not have the required intent.

4.14.03 MEASURING OF FIREARMS

As stated above, a Category III assault weapon also includes a semiautomatic centerfire rifle that has an overall length of less than 30 inches. California law also restricts the possession of shotguns and non-assault rifles under a certain length. A short-barreled shotgun either has a barrel of less than 18 inches in length or an overall length of less than 26 inches. A short barreled non-assault rifle either has a barrel of less than 16 inches in length or an overall length of less than 26 inches. (PC §§ 17170, 17180, 33210, and 33215.)

Rifles, assault weapons, and shotguns are frequently equipped with accessories that can affect the barrel length and/or the overall length of the firearm. These devices include telescoping or folding stocks, removable stocks, muzzle brakes, and flash suppressors.

Questions may arise on how a particular weapon should be measured. In *People v. Rooney* (1993) 17 Cal.App.4th 1207, a suspected short-barreled rifle was measured without extending its folding stock. The rifle measured 35 inches with the stock extended but less than 26 inches with the stock folded. The court upheld a conviction for possession of a short-barreled rifle. The court reasoned it would defeat the purpose of the statute to allow possession of weapons that can be concealed during part of a criminal enterprise and only extended for more reliable use when needed.

Several local law enforcement agencies follow the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) policy and measure the rifle barrel in its shortest operational configuration. Temporarily, but not permanently, attached items such as muzzle brakes or flash suppressors are removed. Permanent methods of attachment include welding, high-temperature soldering, or blind pinning with the pin head welded over. However, some local law enforcement agencies do not follow ATF policy and only measure the weapon in the condition it was seized. This lack of a uniform law enforcement policy may result in disparate treatment throughout the county.

As part of an effort to achieve consistency, deputies shall verify that the submitting agency measured the weapon in its shortest operational configuration and request re-measurement if needed. Telescoping or folding stocks should be collapsed, and non-permanent muzzle attachments should be removed. Charges should only be filed if the length requirement is violated based on the shortest operational configuration. "Shortest operational configuration" means the weapon is capable of firing at least one shot after removing all non-permanent muzzle attachments, fully collapsing any folding or telescoping stocks, and removing any detachable stocks.

However, consideration should be given to the manner in which an individual acquired and maintained a particular firearm. Some California legal assault rifles, which can be purchased at licensed California firearms dealers, measure over 30 inches in length but are sold with muzzle

attachments that are not permanently attached; removal of the muzzle attachment reduces the overall length to less than 30 inches. Furthermore, California firearms dealers also sell legal upper receivers which, when attached to the lower receiver, create an assault rifle less than 30 inches in overall length. Because of the near-infinite creativity of firearms manufacturers, there are many products designed to ensure a firearm complies with California's firearms laws which may or may not actually bring the firearm into compliance with the law. Some of these products limit the ability of a collapsible or folding stock to function in order to ensure the rifle is over 30 inches in length. Although not permanent, these products take knowledge and sometimes tools to install.

A deputy shall consult with his or her Head Deputy when evaluating a case involving a firearm or firearm accessory lawfully purchased from a licensed California firearms dealer that nonetheless potentially violates the law. For example, removal of a non-permanently affixed muzzle attachment from a firearm, barrel, or upper receiver lawfully purchased from a licensed firearms dealer in California may result in a short-barreled rifle or an assault weapon less than 30 inches in length. Because an otherwise lawful firearm purchaser should be able to reasonably assume that a firearm or accessory lawfully purchased from a licensed California firearms dealer is legal to own in California, head deputies should exercise discretion when evaluating such cases. However, the purchaser of an otherwise California legal firearm increases the risk of being prosecuted by modifying the firearm through the use of parts ordered from companies located outside of California.

California's licensing requirements for firearm dealers include a valid federal firearms license, a valid seller's permit from the State Board of Equalization, and a certificate of eligibility issued by the Department of Justice. (PC §§ 26700-26725.)

4.14.04 **DESTRUCTIVE DEVICES**

Destructive devices are defined in Penal Code § 16460. The definition includes any bomb, grenade, explosive missile, or similar device or any *launching device therefor*. It is illegal to possess any destructive device. (PC § 18710(a).) The evidence needed to establish a violation of Penal Code § 18710 includes the defendant's knowledge that he or she possessed a destructive device. (CALCRIM No. 2570.)

Muzzle brakes are threaded attachments on the end (muzzle) of the rifle barrel designed to vent exhaust gasses in order to reduce recoil. A flash suppressor is designed to reduce the muzzle flash from the shooter's line of sight. Both are screwed on the muzzle of the barrel and are considered muzzle attachments.

Rifles used by the U.S. military and other NATO armed forces are designed with a 22mm flash suppressor attached to the end of the barrel to accommodate the standard NATO rifle grenade, which has a 22mm opening in its base so it can be fit over the flash suppressor and be fired from the end of the barrel. These "dual use" flash suppressors are specially designed to fire 22mm rifle grenades while also functioning as a flash suppressor.

Other muzzle attachments are designed with a single use in mind - either to fire a rifle grenade or to function as a flash suppressor or muzzle brake. For example, the muzzle attachment on a Zastava SKS carbine was not constructed to function as a flash suppressor or as a muzzle brake. The attachment appears to have one, and only one purpose: for use as an adapter to launch rifle grenades. The California DOJ has therefore determined that the muzzle attachment on a Zastava SKS carbine is an illegal destructive device based on its construction and the factory brochure. Many rifles are legally sold in California with a bullet button and an attached 22mm muzzle attachment. Some firearms experts may conclude that these commercially available and legally purchased muzzle attachments, which could theoretically launch a 22mm rifle grenade, are destructive devices.

Absent proof of knowledge, possession alone of a rifle equipped with an attachment that could be used to launch a destructive device is insufficient to file.

For dual use muzzle attachments, criminal charges should only be filed if there are some indicia the possessor actually intended to use it as a grenade launcher. This policy is not intended to turn a general intent crime into a specific intent crime. Rather, this policy is designed to protect from prosecution lawful owners of California-legal rifles who know that dual use muzzle attachments can theoretically fire 22mm rifle grenades, but do not harbor the intent to use the device to do so.

Evidence such as the presence of a 22mm rifle grenade on or near the suspect weapon, the possession of a user's manual describing the attachment as a launching device, videos or photographs depicting the weapon equipped with a rifle grenade, or statements by the suspect should be evaluated to determine whether charges should be filed.

4.14.05 GRAND THEFT OF A FIREARM

Pursuant to Proposition 63, any theft of a firearm committed on or after November 9, 2016, is a felony grand theft pursuant to Penal Code § 487(d)(2) and is punishable by state prison (PC § 489(a)). The provisions of Proposition 47 (Prop 47) may affect a pre-November 9, 2016, violation of Penal Code § 487(d)(2). Pending felony Penal Code § 487(d)(2) cases that were filed prior to November 9, 2016, are subject to reduction pursuant to Prop 47 if: (1) the gun was valued at less than \$950 and (2) a petition for reduction pursuant to Penal Code § 1170.18 was filed prior to November 9, 2016, and (3) no prior applicable felony convictions preclude reduction. All crimes of Penal Code § 487(d)(2) committed prior to November 9, 2016, but filed after that date present a possible argument for reduction pursuant to Prop 47 since the effective date of the statute was November 9, 2016. Therefore, Proposition 63 (Prop 63) will most likely only apply to a firearm theft committed after the effective date of the statute.

4.15 ANIMAL CRUELTY CASES

Filing animal cruelty charges requires specialized knowledge. The majority of the most commonly occurring animal cruelty crimes do not appear in the Office's Uniform Crime Charging Manual, and elements for the majority of animal-related crimes cannot be deciphered merely from reading the Penal Code due to the fact that they have been established by case law.

Additionally, at this time there are no jury instructions for most animal-related offenses. For these reasons the following policies apply to animal cruelty cases:

- All animal cruelty cases should be filed by the specially assigned animal cruelty designee. If the designee is unavailable, the Animal Cruelty Case Coordinator (ACCC) should be consulted prior to charges being filed.
- If a case presented for filing involves animal cruelty crimes and other offenses, the filing deputy should consult with either the animal cruelty designee assigned to that particular office, or with the ACCC prior to filing charges.
- Upon filing a case involving animal cruelty charges, the case should be entered into the Animal Cruelty Database.
- After filing is complete, animal cruelty cases shall not be sent to an early disposition court (EDP).

For further discussion of this topic, see Legal Policies Manual Chapters 9, 10, 11, 12, and 13.