

## **CHAPTER 7**

### **SPECIAL CIRCUMSTANCES CASES**

#### **7.01 CHARGING**

In a special circumstances case, the accused may be punished by death or life in prison without the possibility of parole (LWOP) if one or more special circumstances enumerated in Penal Code § 190.2 are charged and found to be true. Special circumstances cases should be vertically prosecuted. The following procedures shall be followed in all special circumstances cases except those cases in which the defendant was under the age of 18 at the time of the commission of the offense and therefore ineligible for the death penalty.

##### **7.01.01 AUTHORITY TO FILE**

A special circumstances case shall not be filed by other than a Deputy District Attorney IV or higher, or a designated filing deputy. A special circumstance allegation shall be charged if there is sufficient probable cause to believe that the special circumstance allegation is applicable, and regardless of whether the death penalty is ultimately sought.

The decision whether to seek the death penalty generally shall not be determined until after the preliminary hearing. Because of the possibility that the death penalty may be sought, the accused is ineligible for bail. (Cal. Const. Art. I, § 12.)

The filing deputy shall examine all available evidence to determine whether a special circumstance allegation exists. The filing deputy shall use the Request for Supplementary Case Preparation form to request further investigation when required to make this determination.

##### **7.01.02 AUTHORITY TO DECLINE TO FILE SPECIAL CIRCUMSTANCE AND ELIGIBLE/UNFILED MEMORANDUM**

Head Deputy approval shall be obtained prior to declining to file a valid special circumstance allegation in the interests of justice.

An abridged version of the special circumstances penalty evaluation memorandum is required whenever an otherwise valid special circumstance is not alleged at the filing stage. This document can be generated in PIMS as the “Special Circumstances - Eligible Unfiled” document. The memorandum contains instructions as to the required content.

Once completed, the memorandum shall be sent, through the chain of command, to the Chair of the Special Circumstances Committee, within 30 working days of filing.

## 7.02 PRELIMINARY HEARING

When a special circumstances allegation is charged in the complaint, the prosecutor shall present supporting evidence at the preliminary hearing. The preliminary hearing deputy need not be a Deputy District Attorney IV. Head Deputy approval is required before Proposition 115 hearsay testimony of any key witness is used at a preliminary hearing in a special circumstances case.

When a special circumstances allegation is not charged in the complaint, but it is later determined before the preliminary hearing that the evidence supports a special circumstances allegation, the complaint shall be amended, filed with the court and a copy given to defense counsel as soon as possible.

When a special circumstances allegation is not charged in the complaint because of lack of evidence at the time of filing, and the preliminary hearing deputy becomes aware of facts that support a special circumstances allegation, the deputy shall present all available evidence at the preliminary hearing. Upon completion of the preliminary hearing, the deputy shall notify the Head Deputy or Deputy-in-Charge that the case qualifies as a special circumstances case.

The Head Deputy or Deputy-in-Charge shall authorize the filing of the special circumstances allegation in the information when sufficient supporting evidence has been presented at the preliminary hearing and the accused has had due notice of the charge. (*Talamantez v. Superior Court* (1981) 122 Cal.App.3d 629, 634-636.)

Note: The special circumstances allegation that the defendant was previously convicted of murder, Penal Code § 190.2(a)(2), must be supported by evidence presented at the preliminary hearing. (*People v. Superior Court (Sholes)* (1995) 31 Cal.App.4th 564, 568-569.)

## 7.03 GRAND JURY INDICTMENTS

The same procedures set forth in this manual for securing approval to appear before the Grand Jury in other cases apply in special circumstances cases.

Evidence supporting the special circumstances allegation(s) known at the time the case is presented to the Grand Jury shall be proved during the Grand Jury proceeding.

## 7.04 SPECIAL CIRCUMSTANCES PENALTY EVALUATION

Within 30 working days following the preliminary hearing or the return of a Grand Jury indictment, the Head Deputy shall cause a “Special Circumstances Penalty Evaluation” memorandum to be executed and transmitted to the Chairperson of the Special Circumstance Committee through the Assistant District Attorney and Bureau Director containing a factual summary of the case, an evaluation of the case and his or her recommendation regarding the appropriateness of the death penalty. The penalty recommendation constitutes privileged attorney work product and shall not be disclosed to the court or opposing counsel.

In preparing the memorandum, deputies shall use the standardized special circumstances penalty evaluation format that can be generated in PIMS as the “Special Circumstances Memo” document.

Except for Section VI (“Attorney Work Product”), the defense attorney will receive a copy of the special circumstances penalty evaluation memorandum. It is therefore vitally important that any opinions, conclusions, strategies, immunity concerns, confidential information and similar issues be included only within the Attorney Work Product section.

If it is not possible to complete the evaluation within the 30 day working period, the Head Deputy shall send a memorandum to the Chair of the Special Circumstances Committee, through the Assistant District Attorney and Bureau Director, explaining the specific reasons for the delay and the expected completion date of the evaluation and request an extension of time to file the memorandum.

#### **7.04.01 BUREAU DIRECTOR EVALUATION**

The Bureau Director shall forward the Special Circumstances Penalty Evaluation along with a memorandum containing his or her evaluation and penalty recommendation to the Special Circumstances Committee Chair through the Assistant District Attorney within five working days of receipt.

#### **7.04.02 SPECIAL CIRCUMSTANCES COMMITTEE EVALUATION AND RECOMMENDATION**

Upon receipt of all applicable memoranda, the Special Circumstances Committee will meet and consider the case. The Special Circumstances Committee shall consider all material submitted in accord with this procedure in making its recommendation.

Individual committee members make penalty recommendations to the Committee Chair. The Committee Chair makes the final decision regarding the penalty to be sought. The Committee Chair may defer making a penalty decision to obtain additional information.

The Special Circumstances Committee Chair is responsible for determining whether the Office will seek the death penalty in every special circumstances case.

#### **7.04.03 APPROPRIATENESS OF DEATH PENALTY**

A recommendation that the death penalty is appropriate shall not be made unless it is believed that the evidence bearing on the issue is of such convincing force that a reasonable and objective fact finder, after considering all the relevant evidence, would conclude that the aggravating circumstances outweigh the mitigating circumstances (as defined in Penal Code § 190.3) and justify the death penalty. This recommendation shall be made after careful deliberation, taking into account all relevant aggravating and mitigating circumstances, including but not limited to the following factors:

- The circumstances of the crime charged in the present proceeding and the existence of any special circumstances as enumerated in Penal Code § 190.2;
- The presence or absence of criminal activity by the accused which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;
- The presence or absence of any valid prior felony conviction;
- Whether the offense was committed while the accused was under the influence of extreme mental or emotional disturbance;
- Whether the victim was a participant in the accused's homicidal conduct or consented to the homicidal act;
- Whether the offense was committed under circumstances which the accused reasonably believed to be a moral justification or extenuation for his or her conduct;
- Whether the accused acted under extreme duress or under the substantial domination of another person;
- Whether at the time of the offense the capacity of the accused to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental disease or the effects of intoxication;
- The age of the accused at the time of the crime;
- Whether the accused was an accomplice to the offense and his or her participation in the commission of the offense was relatively minor;
- Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime; and
- The accused's character, background, history, mental condition and physical condition, except that no criminal activity which did not involve the express or implied threat to use force or violence shall be considered unless it has resulted in a prior felony conviction.

A recommendation that the death penalty is appropriate must be the result of an informed opinion, taking into account the circumstances set forth above, together with the four basic purposes of a criminal prosecution, which are:

- The protection of society from individuals who pose a danger to others;
- The deterrence of other individuals from posing a similar danger in the future;
- The punishment of individuals for failing to fulfill their responsibilities to obey the laws on which the preservation of an orderly and free society rests; and
- The rehabilitation of individuals to the extent that they will no longer be a threat to others.

The factors listed above shall be addressed in the "Special Circumstances Penalty Evaluation" memorandum submitted to the Special Circumstances Committee Chair.

#### **7.04.04 CHANGE OF PENALTY RECOMMENDATION**

Once the Special Circumstances Committee Chair has determined the appropriate penalty in a special circumstances case, any change shall require the prior, written approval of the Committee Chair. The assigned deputy shall prepare a memorandum setting forth the facts, reasons and justification for the proposed action. The memorandum shall be forwarded to the Special

Circumstances Committee Chair through the Head Deputy, Bureau Director, and the Assistant District Attorney. The Head Deputy, Bureau Director, and the Assistant District Attorney shall review the memorandum and include a separate memorandum adopting or rejecting the proposed change.

The change may be from a greater to a lesser penalty or from a lesser to a greater penalty. (*Leo v. Superior Court* (1986) 179 Cal.App.3d 274, 284.) The change must be objectively determined in accordance with the criteria set forth above.

Notice shall be given to the defense attorney and defendant as soon as possible if a penalty decision is changed. In addition, at the next court appearance the prosecutor shall state on the record that the decision as to the appropriate penalty has been changed and that the defense attorney and defendant have been notified.

Defense attorneys are not to be referred directly to the Committee Chair before conferring with the Head Deputy and Bureau Director.

#### **7.04.05 WAIVER AND AGREEMENT FORM WHEN DEATH PENALTY NOT APPROPRIATE**

If it is decided that the death penalty is not appropriate, the Committee Chair will send a letter together with a “Waiver and Agreement” form to the defendant’s attorney providing notice that the Office is not seeking the death penalty. The defendant, through counsel, will be invited to (a) waive any right to a penalty hearing to which he or she may be entitled and (b) agree that the judge may impose a sentence of life imprisonment without possibility of parole in lieu of a penalty hearing if the defendant is found guilty of first-degree murder and a special circumstances allegation is found true. The trial deputy shall file a copy of the letter with the court.

If the accused, both personally and through counsel, executes a waiver and agreement form, the trial deputy shall file the completed form with the court. If the accused is convicted of first-degree murder and a special circumstances allegation is found true, a hearing will be held at which the accused, with the consent of counsel, will orally waive the penalty trial and agree to be sentenced to life imprisonment without possibility of parole.

While it is the policy of the Office to seek a defendant’s waiver of the penalty phase when it has been determined that the death penalty is not appropriate, a defendant’s failure to waive this hearing does not entitle the defendant to a penalty phase hearing. When the Office does not seek the death penalty and the defendant is found guilty of first-degree murder and a special circumstances allegation is found to be true, there exists only one other penalty under Penal Code § 190.3. Therefore, there is no triable issue of fact for the jury concerning penalty. The purpose for holding a penalty hearing is eliminated once the decision has been made that the death penalty will not be sought.

However, a defendant’s agreement to waive penalty phase does not preclude the Committee Chair from changing the penalty decision to death if newly discovered evidence or information

warrants a change. (*Leo v. Superior Court* (1986) 179 Cal.App.3d 274, 283-284.) The assigned deputy shall be responsible for advising the Special Circumstances Committee Chair in writing, through the Head Deputy, Bureau Director, and Assistant District Attorney, of any newly discovered evidence or information relevant to the appropriate penalty to be sought.

#### **7.04.06 SPECIAL CIRCUMSTANCES TRACKING FEATURE IN PIMS**

PIMS automatically tracks special circumstances case data and statistics. Events such as the punishment sought, guilt and penalty phase results, mistrials, reversals, and sentence imposed can now be tracked. After opening a case in PIMS, select “Other” from the pull-down menu at the top of the screen. Scroll to the bottom of the menu and highlight “Special Circumstance Tracking.”

Upon the receipt of the penalty evaluation memorandum, the Special Assistant for Special Operations shall verify that PIMS has been properly updated.

### **7.05 LENIENCY AND IMMUNITY**

All requests to offer leniency or immunity must be submitted in writing through the chain of command to the Special Circumstances Committee Chair.

#### **7.05.01 PROCEDURE TO REQUEST LENIENCY OR IMMUNITY**

The deputy shall prepare a memorandum containing the following information:

- A statement of the case which shall include a description of the offense(s), number of defendants, charge(s) filed against each defendant, and a summary of the admissible evidence available to prove the charge(s) without the testimony of the prospective witness;
- The charge(s) for which the prospective witness is being given immunity and any other consideration that is being sought for the witness;
- The reasons justifying the request for immunity;
- A summary of the recorded statement obtained from the prospective witness;
- The stage of criminal proceedings at which the prospective witness will testify;
- Whether any conflict exists with other jurisdictions which may prosecute the crime; and
- The criminal record of the defendant and the prospective witness.

When the Special Circumstances Committee Chair has authorized a grant of leniency or immunity to a witness or suspect, the deputy shall place a copy of the memorandum and authorization in the case file. The deputy shall inform the Post-Conviction Litigation and Discovery Division’s Discovery Compliance Unit (DCU) in writing of the date the grant of leniency or immunity was conveyed to the party, the date leniency or immunity was accepted or rejected by the party, the date the witness testified, the date the case was completed, and the final disposition of the case. In addition, the deputy receiving an approved grant of leniency or immunity shall use best efforts, including running the witness granted leniency or immunity in PIMS, to determine whether the subject of the grant is a witness in another pending or imminent

prosecution. If so, the deputy shall notify the deputy with case assignment responsibility for the other case(s), in writing. The efforts undertaken by the deputy and the notification provided to any other deputy with case assignment responsibility, if applicable, shall be documented in the case file.

#### **7.05.02 PROTOCOL WHEN REQUESTS FOR LENIENCY AND IMMUNITY HAVE BEEN AUTHORIZED**

When the Special Circumstances Committee Chair authorizes a grant of leniency or immunity, the Chair shall email the memorandum and authorization to the requesting deputy, the deputy's Deputy-In-Charge (DIC) and/or Head Deputy, and to the Post-Conviction Litigation and Discovery Division's Discovery Compliance Unit (DCU).

The secretary for the Special Circumstances Committee Chair will input the name, date of birth, CII number, case number of the person authorized to receive immunity or leniency, as well as the memorandum requesting leniency or immunity and corresponding approval into the Leniency and Immunity System (LIS).

Once inputted, an email will be automatically generated and sent to the requesting deputy and the deputy's DIC and/or Head Deputy reminding the requesting deputy to inform the DCU, in writing, of the date the grant of leniency or immunity was conveyed to the party, the date leniency or immunity was accepted or rejected by the party, the date the witness testified, the date the case was completed, and the final disposition of the case.

The DCU will input the information into LIS upon receipt from the requesting deputy.

#### **7.05.03 PROTOCOL WHEN AN AUTHORIZED GRANT OF LENIENCY OR IMMUNITY IS NOT IN THE LENIENCY AND IMMUNITY SYSTEM (LIS)**

If a deputy is aware of an authorized grant of leniency or immunity that is not contained in the LIS database, the deputy shall provide the name, date of birth, CII number, case number of the person authorized to receive leniency or immunity, as well as the memorandum requesting leniency or immunity and corresponding approval, if practical, to the Special Circumstances Committee Chair if the grant pertained to a special circumstance case.

If the Special Circumstances Committee Chair agrees the witness was previously authorized to receive leniency or immunity, the secretary for the Special Circumstances Committee Chair will input the name, date of birth, CII number, case number of the person authorized to receive immunity or leniency, as well as the memorandum requesting leniency or immunity and corresponding approval into LIS.

Once inputted, an email will be automatically generated and sent to the requesting deputy and the deputy's DIC and/or Head Deputy reminding the requesting deputy to inform the DCU, in writing, of the date the grant of leniency or immunity was conveyed to the party, the date

leniency or immunity was accepted or rejected by the party, the date the witness testified, the date the case was completed, and the final disposition of the case.

The DCU will input the information into LIS upon receipt from the requesting deputy.

## **7.06 JURY TRIAL**

### **7.06.01 JURY TRIAL WAIVER**

The Special Circumstances Committee Chair must approve, through the chain of command, a jury waiver or the refusal to waive jury in special circumstances cases.

### **7.06.02 MULTIPLE MURDERS - AMENDED PLEADINGS**

In any special circumstances case in which a jury has found the accused guilty of multiple murders within the meaning of Penal Code § 190.2(a)(3), the pleadings shall be amended to indicate that the accused has been convicted (rather than merely charged) of more than one offense of murder of the first or second degree.

### **7.06.03 RETRIALS**

The Special Circumstances Committee Chair must decide whether a special circumstances case will be retried.

## **7.07 SPECIAL CASE SETTLEMENT RULES**

The complexion of a case sometimes changes as it passes from stage to stage in the justice system. Factors may emerge which, when considered with all other factors in a case, call for a reevaluation of previous decisions. Because of the unique demands of equal justice that attach to death penalty cases, special rules apply to the dismissal of a special circumstances allegation or settlement of a special circumstances case.

### **7.07.01 WHEN SPECIAL CIRCUMSTANCES ALLEGATION FILED**

If, after a special circumstances allegation has been filed, the deputy assigned to the case objectively determines that the special circumstances allegation is fatally defective or irremediably deficient for evidentiary or legal reasons, the allegation may not be dismissed, nor the case settled, without the prior written approval of the Special Circumstances Committee Chair. The assigned deputy shall prepare an explanatory memorandum setting forth the facts and the justification for the proposed action which shall be forwarded through the chain of command to the Special Circumstances Committee Chair. The Special Circumstances Committee Chair shall return the memorandum along with his or her written approval or disapproval through the chain of command to the assigned deputy. The deputy shall place a copy of the memorandum and written approval or disapproval in the case file.

#### **7.07.02 WHEN SPECIAL CIRCUMSTANCES ALLEGATION NOT FILED**

If a special circumstances allegation is not filed in the complaint, but it becomes known or is discovered that evidence exists to support a special circumstances allegation, the case shall not be settled, nor the case dismissed, without the prior written approval of the Special Circumstances Committee Chair.

##### *Commentary*

*A special circumstances allegation which is supported by the evidence shall not be dismissed or stricken because of a personal or subjective belief that the case, in some respect, does not warrant either the death penalty or life without the possibility of parole. If the allegation is legally viable, it shall be pursued, or abandoned, only in accord with the above policy and the Felony Case Settlement Policy.*

#### **7.07.03 DEPARTURE FROM POLICY**

Any departure from policy in a special circumstances case must be approved in writing by the Special Circumstances Committee Chair, prior to the action being taken, in accordance with the case settlement rules set forth in this chapter and in the *Felony Case Settlement Policy* chapter.

#### **7.08 CONCLUSION OF CASE**

##### **7.08.01 NOTIFICATION TO ATTORNEY GENERAL IF DEATH SENTENCE IMPOSED**

In any case in which a death sentence has been imposed, the trial deputy shall promptly write a letter advising the Attorney General of the sentence and attach the non-Attorney Work Product portion of the Special Circumstances Penalty Evaluation Memorandum and all other related memoranda. Following approval by the Head Deputy, the letter and attachments shall be sent to:

Office of the Attorney General  
Capital Case Coordinator  
300 South Spring Street  
Los Angeles, California 90013

A copy of the letter shall be placed in the case file.

##### **7.08.02 CASE DISPOSITION MEMORANDUM**

Within 30 working days after all proceedings have concluded in the trial court, the Head Deputy shall submit a “Special Circumstances Case Disposition Memorandum” through the Bureau Director and Assistant District Attorney to the Special Circumstances Committee Chair. Deputies shall use the standardized case disposition memorandum that can be generated in PIMS as the “Special Circumstances Disposition Memo” document.

The memorandum contains instructions as to the required content, which includes:

- The deputy or deputies who appeared at all significant stages of the proceedings;
- Whether the death penalty was sought;
- The precise charges of which the defendant was convicted by the court or jury;
- The penalty selected by the court or jury;
- Whether the case was retried due to a hung jury or reversal;
- The reasons for an acquittal or dismissal;
- Whether the case resolved due to a negotiated disposition;
- The specific sentence imposed; and
- The specific dates of the verdict(s), plea, dismissal, and sentencing.

#### **7.08.03 SENTENCING MEMORANDUM ON JUVENILE DEFENDANTS**

Whenever an LWOP sentence is sought for a juvenile defendant pursuant to § 190.5(b), the trial deputy shall submit a sentencing memorandum addressing the factors set forth in *Miller v. Alabama* (2012) 567 U.S. 460:

- The juvenile’s age and life history;
- The circumstances of the crime and how it relates to the degree of responsibility the juvenile was capable of exercising; and
- The possibility of rehabilitation.

#### **7.08.04 SPECIAL CIRCUMSTANCES TRACKING**

Upon the receipt of the case disposition memorandum, the Special Assistant for Special Operations shall verify that PIMS has been properly updated.

#### **7.08.05 DISTRICT ATTORNEY STATEMENT OF VIEW**

A District Attorney’s Statement of View shall be filed in every case in which a defendant is sentenced to death or an indeterminate sentence, including life sentences imposed in third strike cases. Refer to Legal Policies Manual § [17.02.01](#) for a discussion of the documentation that shall be submitted in a Statement of View.