

SPECIAL DIRECTIVE 20-10

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN   
District Attorney

SUBJECT: HABEAS CORPUS LITIGATION UNIT

DATE: DECEMBER 7, 2020

This Special Directive addresses issues of Bureau of Prosecution Support Operations, Habeas Corpus Litigation Team in Chapter 1.07.03 of the Legal Policies Manual. Effective **December 8, 2020**, the policies outlined below supersede the relevant sections of Chapter 1.07.03 of the Legal Policies Manual.

**INTRODUCTION**

Irrefutable evidence shows that wrongful convictions occur with unacceptable frequency, including convictions that are obtained in proceedings where due process violations and other fundamental constitutional errors denied a defendant their right to a fair trial. The mission of the Habeas Corpus Litigation (HABLIT) Unit is to ensure that justice is done in every case filed in that unit and that every potentially meritorious claim raised in a petition for a writ of habeas corpus is carefully reviewed and investigated.

In every case, HABLIT shall undertake a good-faith case review designed to ensure the integrity of the challenged conviction. In every case, where any injustice is uncovered, including racial injustice, whether or not it is of a constitutional magnitude, HABLIT shall examine and recommend appropriate remedies capable of redressing the harm uncovered, within the bounds of the law. For example, HABLIT is directed to ascertain whether, based on its review and investigation into claims raised in a petition, the outcome in the case comports with the office's current views what would constitute a fair and just conviction and sentence today and, if not, HABLIT shall take steps to find a remedial solution to bring the conviction and sentence into line with today's standards, such as recommending that a petitioner be considered for resentencing to a lesser term pursuant to Penal Code § 1170(d).

HABLIT shall not, as a policy, defend every conviction or raise every conceivable procedural challenge with equal fervor and without regard to the potential merits of the claims presented. Before relying on procedural challenges to defeat any claims raised in a petition, HABLIT shall make a fulsome initial assessment as to whether a petitioner's claims have potential merit, i.e., whether the facts alleged, if true, state a prima facie case for relief. Where a claim appears potentially meritorious on its face, HABLIT shall immediately commence investigating the claim, and seek the earliest possible resolution where it is determined that the claim is meritorious. If the petitioner has failed to state a prima facie case and/or the petitioner is abusing

the writ process by filing successive petitions without additional new evidence supporting the claims presented, HABLIT shall defend the conviction.

### **GUIDING PRINCIPLES**

“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict. The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion to not pursue criminal charges in appropriate circumstances. The prosecutor should seek to protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.”

-American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-1.2(b)

“When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor’s jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit..When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.”

-American Bar Association, Model Rules of Professional Conduct, Standard 3.8(g)-(h); California Rules of Professional Conduct (F)-(G)

### **POLICIES GOVERNING HABLIT UNIT CASE REVIEW OF NON-CAPITAL CASES**

#### **A. Habeas Corpus Litigation**

Post-conviction litigation differs significantly from the primary work of our office at the trial level. Postconviction litigation at its core is an attempt to balance the People’s interest in finality—that a jury’s verdict is presumed reliable and brings closure to a case—with an individual’s interest in fundamental Constitutional rights and statutory due process rights, and society’s interest in preventing wrongful convictions. When tasked with responding to a petition for writ of habeas corpus, HABLIT must weigh these competing interests and find the appropriate balance in each individual case.

Where a petitioner’s claims are patently meritless or plainly refuted by the record, the balance tips strongly in favor of finality and HABLIT shall defend that conviction. But where a petitioner presents allegations that are supported by reasonably available evidence, the balance tips against finality and HABLIT shall not simply oppose the petitioner’s claim, for the sake of protecting a conviction. Rather, HABLIT shall assess each claim on the merits and if it could potentially expose fundamental constitutional error and/or a statutory right to due process HABLIT’s response to the court should so indicate.

In weighing whether a conviction should be defended and protected, or whether a different outcome or resolution is in the interests of justice, HABLIT shall investigate and take into account the following considerations:

- Whether there is a reasonable probability that the applicant is actually innocent, despite the petitioner’s ability or inability to articulate a legally sound claim<sup>1</sup>;
- Whether material evidence relied upon to obtain the conviction is no longer deemed credible;
- Whether there is evidence the prosecution or conviction was tainted by racial discrimination, whether or not a court previously agreed with the applicant’s assertion of racial discrimination;
- Whether the prosecution failed to disclose material evidence in the possession of any law enforcement agency that was favorable to the defense, whether exculpatory, impeaching, or mitigating;
- Whether the fact-finding process was so corrupted as to deny the applicant a fair adjudication of his or her guilt or innocence at trial;
- Whether a manifest injustice rendered the trial fundamentally unfair; and/or,
- Whether, had the office known at the time of trial what it now knows about the evidence, the office would not have chosen to prosecute the case.

The above list is intended to be illustrative; it is not exhaustive.

HABLIT’s *de novo* weighing of these interests, prior to a decision to defend a conviction, will ensure greater confidence in this Office’s convictions, promote transparency, and strengthen the public’s confidence in our criminal justice system, which is capable of addressing errors when they are exposed.

HABLIT’s approach to case review and case resolution shall be guided by this office’s policy of avoiding unnecessary litigation and resolving cases at the earliest possible juncture, where it is in the interests of justice to do so. HABLIT shall consider what steps, if any, can and should be taken to remedy any injustice it uncovers, whether or not the error or errors are of a constitutional magnitude.

Where HABLIT determines, for example, that based on its review and investigation into claims raised in a petition, the outcome in the case does not comport with the office’s current views and policies of what constitutes a fair and just conviction and sentence today, HABLIT shall take steps to find a remedial solution to bring the conviction and sentence into line with today’s standards, including seeking dismissal of the case pursuant to P.C. 1385, moving for a reduction of sentence pursuant to P.C. 1170(d), advocating before the BPH for release on parole, supporting a petition for the restoration of rights, seeking expungement of the case, and/or supporting a request for clemency or pardon, where such remedies are in the interest of justice.

## **B. Screening and Litigation Prior to the Issuance of an Order to Show Cause**

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<sup>1</sup> See, Rule 3.8 Special Responsibilities of a Prosecutor (Rule Approved by the Supreme Court, Effective June 1, 2020)

Upon the filing of a petition, the reviewing court may either summarily dismiss the petition, ask our office for informal briefing, or issue an order to show cause (OSC). The issuance of an OSC is analogous to issuing the writ of habeas corpus, *i.e.*, requiring the body of the petitioner to be brought to court to initiate a cause of action as to whether the petitioner’s confinement is constitutional. The writ—an OSC—must issue if a petitioner’s allegations state a prima facie case on a claim that is not procedurally barred. *People v. Romero*, 8 Cal. 4th at 738; Pen. Code § 1476.

## 1. Informal Briefing

HABLIT’s involvement in the foregoing process is triggered when a reviewing court requests an informal response. The purpose of an informal response to assist the court in deciding whether to summarily deny a petition or issue an OSC. *See* Cal. Rules of Ct. R. 8.385(b).

If HABLIT is tasked with informal briefing, an independent review of the petitioner’s allegations must be done with the balancing between finality and individual rights discussed above as the paramount consideration. If a determination is made that the petitioner’s allegations—accepted as true and resolving inferences in favor of the petitioner as the law requires—set forth a prima facie claim for relief, HABLIT’s informal response to the court should be to advise it that an OSC is necessary. This does not mean that HABLIT is conceding the conviction should be overturned at this stage. It means that HABLIT acknowledges a case should be initiated, and that the court may exercise its “full power and authority” to hold a hearing, allow discovery, “and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.” Pen. Code. § 1484.

In the preparation of an informal response, HABLIT shall be cognizant of the expedited manner in which the California Legislature and Courts intend for habeas corpus petitions to be litigated. California Rules of Court 4.551; *Maas v. Superior Court* (2016) 1 Cal.5th 962, 981. The informal reply need only address the petition’s sufficiency as a pleading – that is, whether it states a prima facie claim for relief, and whether there are any applicable procedural bars. *People v. Romero* (1994) 8 Cal.4th 728, 737. The informal response shall not present evidence or otherwise address the merits of the claims presented, except to state whether or not a prima facie case has been made and an OSC should issue, or that, instead, the petition fails to state a prima facie case and/or is procedurally barred.

## 2. Procedural

## Bars

Procedural bars to post-conviction relief were erected for the express purpose of preventing abuse of the writ. When this office urges the court to dismiss a potentially meritorious claim on the basis of a procedural bar alone, it undermines confidence in our ability to fairly administer justice and, ultimately, in the People’s faith in our convictions and the integrity of our system.

Because HABLIT’s decision to argue that a procedural bar prevents a court from considering the merits of a petitioner’s claims, such decisions shall be based on whether the petition, in fact, constitutes an abuse of the writ. Procedural bars of otherwise meritorious claims should not be argued, ***absent compelling good cause that has been approved by a supervisor. In no circumstance shall HABLIT assert a procedural bar when there is a credible claim of factual innocence.***

While HABLIT’s post-conviction investigation into a petitioner’s claims will often be underway while informal briefing is being prepared, that ongoing investigation should not form

the basis of any requested extension of time in which to file the informal response.

### **3. Post-Conviction**

### **Investigation**

The goal of a post-conviction investigation is to uncover the truth and determine whether a petitioner's claims have merit, not to defend a conviction that is unsound. These investigations shall not be undertaken as a means of "protecting" a conviction, nor shall they be adversarial in nature. Threatening a witness, recanting or otherwise, with prosecution for perjury, either directly or indirectly, is witness intimidation and prosecutorial misconduct under California law. *People v. Bryant* (1984) 157 Cal.App.3d 582.

The HABLIT Unit Head Deputy shall work with the training division and management to ensure deputies and investigators are trained in best practices for conducting post-conviction investigations and deputies shall consult with relevant experts when investigating potentially meritorious claims raised in a petition. HABLIT investigations often require looking into convictions that are decades old, where witnesses' memories have faded, and/or that involve reluctant or recanting witnesses, and therefore often require specialized knowledge and training on issues such as memory science, as eyewitness identifications, and police practices used at the time that are no longer considered best practices.

These investigations shall not be undertaken as a means of "protecting" a conviction, nor shall they be adversarial in nature. Thus, for example, investigators should not engage in tactics designed to dissuade a recanting witness by threatening to charge that witness with perjury; rather the paramount goal of a HABLIT investigation shall be to determine the reliability and truthfulness of the recantation. Using a high-pressure, coercive, or intimidating approach in these investigations wastes time and resources and sends a mixed message to office staff about the HABLIT's mission and undermines the office's credibility with the public.

HABLIT deputies and investigators shall also make all reasonable efforts to avoid *unintentional* witness intimidation. These efforts will include, but are not limited to, conducting interviews outside of a police station in a non-threatening or neutral location, if possible, and the concealing of the investigator's gun, if one is carried, except where specifically required to do so by law, or if approved by the elected District Attorney.

HABLIT deputies and investigators shall audio record and/or video record all witness interviews conducted in the course of post-conviction investigations. HABLIT shall provide copies of those recordings to the petitioner or petitioner's counsel, once an OSC has issued, and shall continue providing all discovery to which the petitioner has a right, as soon as it is discovered. All discovery provided by this office shall be documented by signed discovery receipts.

HABLIT deputies and investigators shall understand what confirmation bias is—also referred to as tunnel vision—and how to avoid it. Studies have shown that confirmation bias is pervasive in reinvestigations in wrongful conviction cases, where prosecutors tasked with checking their own work and the work of their colleagues fail to see error because they are looking to confirm that no mistakes were made in the original investigation and trial. When original police reports are viewed deferentially and/or treated as unassailable accounts of the truth of what transpired in the case, for example, confirmation bias is likely driving the investigation. Research shows that police reports are often incomplete and contain inaccuracies, due to the fast-pace at which criminal investigations unfold, following serious felony offenses, and therefore should be reviewed critically, not deferentially. HABLIT deputies and investigators shall test and probe

information in police reports, witness accounts, and other new evidence presented by an applicant, in a manner designed to uncover the truth, rather than protect the conviction.

#### **4. Facilitating Informal Discovery and Limited Factfinding**

Prior to the issuance of an OSC, the court's power to compel discovery is limited. However, Penal Code § 1054.9 and ongoing *Brady* requirements obligate our office to provide discovery where conditions are met. HABLIT should interpret these bases in good faith and in accordance with this office's policies governing discovery.

Recognizing that certain categories of otherwise privileged information and work product prepared by this office may contain exculpatory or impeachment information relevant to a petitioner's claims, and the benefit to the truth-seeking process of having both parties review this material, HABLIT shall err on the side of disclosing the complete LACDA trial file to the petitioner's counsel for independent review, subject only to reasonable and necessary disclosure agreements. Any redactions shall be limited to those deemed strictly necessary to protect victim or witness privacy.

Moreover, absent clearly abusive or frivolous attempts to obtain information, HABLIT shall facilitate a petitioner's ability (or petitioner's counsel's ability) to speak with law enforcement agents and prosecution experts to obtain information and/or materials the petitioner needs to further support the claims raised in the petition, where such communications can be facilitated.

In the event the petitioner's case file(s) have been lost in whole or part, HABLIT shall immediately inform the petitioner, or their counsel, that the file(s) is lost or incomplete. HABLIT shall work with the Post-conviction Discovery Unit to reconstruct the case file by complete files from law enforcement agencies responsible for investigating the case, including:

- The LACDA's internal files;
- The LAPD, LASD, LAFD, and/or any other law enforcement agency or emergency services provider involved in the case;
- Crime labs;
- The coroner's office, in homicide cases;
- The original trial deputy's personal file;
- The superior court file;
- The courthouse exhibit room;
- The court of appeal; and
- Any other source reasonably likely to have relevant materials, records, and/or evidence, such as medical records, where appropriate releases are provided, 911 dispatch call recordings, etc.
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#### **5. Red**

#### **Flags**

Documented wrongful conviction cases show that convictions obtained by the presentation of certain types of evidence are at a higher risk of producing an unreliable or unconstitutional outcome. HABLIT shall pay special attention to claims involving any of the following high-risk

factors, most of which are considered to be the most common causes of wrongful convictions:

- the petitioner was convicted based, in whole or in part, on eyewitness identification evidence or testimony, particularly where it was a stranger identification or cross-racial identification, or both<sup>2</sup>;
- the petitioner was convicted based, in whole or in part, on a confession and there are allegations that this confession was false or coerced<sup>3</sup>;
- the petitioner was convicted based, in whole or in part, on testimony that has since been recanted as false or coerced;
- the petitioner's conviction is alleged to have been borne from official misconduct, including witness tampering, misconduct in interrogations, fabricated evidence and confessions, the concealment of exculpatory evidence, and misconduct at trial<sup>4</sup>;
- law enforcement personnel involved in the investigation or arrest of the petitioner were subsequently discharged or relieved of their duties for misconduct;
- the petitioner was convicted based on forensic evidence grounded in methodologies that have since been largely or wholly discredited as unreliable, including but not limited to bloodstain pattern analysis, comparative bullet lead analysis, forensic odontology (bitemarks), hair microscopy for the purpose of determining whether known/unknown hairs share a common source, Shaken Baby Syndrome (SBS). HABLIT shall review the forensic methods used to analyze the evidence and ensure that forensic evidence used to obtain a conviction has standardized scientific principles and/or otherwise remains foundationally valid and valid as applied<sup>5</sup>;

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<sup>2</sup> HABLIT shall verify that eyewitness identifications supporting a conviction comport with standards and research accepted by the scientific community and do not run afoul of the best practice and recommendations in the 2019 Third Circuit Eyewitness Identification Report. The CIU shall assess the reliability of eyewitness identification evidence in light of the non-exhaustive lists of system and estimator variables set forth in *State v. Henderson* (N.J. 2011) 27 A.3d 872, and continually examine and apply emerging research related to eyewitness identifications, including but not limited to the American Psychological Association white papers Policy and Procedure Recommendations for the Collection and Preservation of Eyewitness Identification Evidence (2020) and Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads (1998).

<sup>3</sup> HABLIT shall consult the 2010 American Psychological Association white paper on police interrogation and confessions, and any emerging literature or research regarding false confession and recanting witnesses, to inform its review of convictions supported by testimony that has since been recanted.

<sup>4</sup> HABLIT shall consult the National Registry of Exonerations report *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement* (2020), and any emerging literature or research regarding official misconduct, to inform its review of convictions alleged to have resulted in whole or in part from official misconduct.

<sup>5</sup> The use of unreliable and misleading forensic evidence, which we know is a common cause of wrongful convictions imperils the integrity of the criminal legal system. The CIU shall critically and continually examine emerging scientific literature, which may also call into question older forensic methods, and train staff about these changes, so that case review criteria can be updated as needed. The CIU shall ensure that forensic evidence supporting a conviction complies with the findings, recommendations, and best practices set forth in specific reviews of the relevant sciences, including but not limited to:

- the petitioner was convicted based on forensic evidence that the LACDA has generally accepted as reliable, but the particular conclusions or opinions presented to the jury in support of the prosecution’s case exceeded the bounds of what is now recognized to be valid science – for example, through testimony purporting to “identify” a petitioner as the unique source of an item of biological evidence through a method other than DNA analysis, or through expert testimony implying or stating a statistical basis for the likelihood of a particular conclusion that is not verifiable or otherwise valid;
- the conviction was based on evidence, the reliability of which has since been called into question, and was corroborated only with jailhouse informant testimony or testimony by an informant that has been used by law enforcement or this office on more than one occasion;
- a gang allegation was found true by a jury where the only evidence of gang membership was presented by a gang expert, and that evidence would now be deemed inadmissible hearsay under *People v. Sanchez* (2016) 63 Cal. 4th 665, and the evidence of gang membership served as the only evidence of motive used to obtain the conviction;
- evidence based on analysis by crime labs that were not accredited when the analysis was conducted, and/or have been implicated in scandals related to their handling and testing of evidence;
- evidence supporting the conviction was corroborated by one or more of the above types of unreliable evidence;
- defense counsel was disbarred or otherwise disciplined after the challenged conviction was obtained, or was found by a court to have provided ineffective assistance of counsel in one or more other cases.

## 6. Forensic

## Evidence

Where a petitioner challenges the reliability of forensic evidence the prosecution presented at trial to obtain the conviction, HABLIT shall examine the reliability of the forensic testing obtained at the time of trial. Where the reliability of that evidence is in question, HABLIT shall consult with experts and determine whether re-testing the evidence in question would be probative, in that it may tend to help identify the identity of the perpetrator of the crime, or may otherwise exculpate the petitioner. HABLIT shall request that forensic test results be expressed in reports

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- American Association for the Advancement of Science (AAAS) reports on Fire Investigation (2017) and Latent Fingerprint Examinations (2017)
  - American Statistical Association (ASA) Position on Statistical Statements for Forensic Evidence (2019)
  - National Academy of Sciences (NAS) report *Strengthening Forensic Science in the United States: A Path Forward* (2009)
  - National Institute of Standards and Technology (NIST) report on Latent Print Examination and Human Factors (2012), Working Group on Human Factors in Handwriting Examination (2020), and Scientific Foundation Studies on DNA mixture interpretation, bitemark analysis, firearms examination, and digital evidence (forthcoming)
  - President’s Council of Advisors on Science and Technology (PCAST) report *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016).

and testimony using clear and comprehensible language, to inform the HABLITS's decision making.

Where a petitioner seeks DNA testing of evidence as part of new evidence sought in support of a claim raised in a petition and has facially satisfied the requirements of P.C. 1405, HABLIT shall not raise procedural challenges or defenses to oppose, nor shall it oppose, requests DNA testing, where the testing may lead to evidence identifying the perpetrator of a crime. Where a petitioner requests DNA testing and needs assistance in ascertaining the status of the evidence to be tested, HABLIT shall assist the petitioner in ascertaining the status of physical evidence by facilitating contacts between petitioners seeking DNA testing, or their attorneys, and the crime lab, the coroner's office, law enforcement, or other entities, who can assist in searching the locations where the evidence may be stored in an effort to locate the evidence in question.

HABLIT shall carefully scrutinize cases in which experts or others opined or testified using terms like "reasonable degree of scientific certainty," which have no accepted scientific meaning, yet convey an unsupported measure of reliability or conclusiveness to the factfinder. HABLIT shall request that all information concerning the limitations of forensic techniques should be disclosed alongside the results of any analyses. All forensic methods have limitations, and none are error free. Where error rates for a method are not known or have not been adequately measured, reports shall state that fact. HABLIT shall carefully scrutinize any conviction based in whole or in part upon testimony that states or implies a "zero error rate" or which purports to provide an error rate that has not been independently validated. HABLIT shall similarly make those limitations clear in communications with the applicant and/or their counsel and the court. HABLIT shall also request that all methods of forensic analyses be documented in the first instance to permit HABLIT's review and disclosure of all steps followed and the methodology used to arrive at the conclusions reached.

HABLIT shall ensure that the petitioner and/or their counsel receive certificates or reports of forensic analyses, as well as complete documentation of the methods used and the results reached. HABLIT shall disclose to the petitioner or petitioner's counsel all inconclusive and exculpatory forensic results. If a petitioner alleges that evidence was improperly analyzed and/or mishandled by the crime lab or coroner's office, or other governmental entity, HABLIT shall seek and provide the petitioner with any information discovered concerning "corrective actions" taken in a laboratory relating to problematic methods and personnel, and proficiency testing of individual analysts, if any, where relevant.

Once HABLIT learns that a petitioner is seeking to test forensic evidence, HABLIT shall make a request to preserve any forensic evidence in the case.

## **7. Cumulative Error Claims**

Where a petitioner alleges a claim of cumulative error, the allegation is that there are at least two separately cognizable trial errors which, while viewed independently may be harmless error, but when the prejudice from the two or more errors is viewed cumulatively it rises to the level of prejudicial error. *People v. Hill* (1998) 17 Cal.4th 800, 844.

HABLIT shall be cognizant that errors can be and are made, both during the investigation and prosecution of felony cases. HABLIT shall, where a cumulative error claim is raised, affirmatively and fairly assess the combined prejudice to a petitioner, where the petition states a

prima case for relief as to one or more claims in the petition. HABLIT shall consider, in assessing whether the petitioner was denied the right to a fair trial, whether the court, during the direct appeal or a prior habeas proceeding, ruled that another error, or other trial errors, did occur (in addition to the errors alleged in the petition), but denied relief as to the earlier-identified error(s) on the ground that they were harmless. Any prejudice flowing from the error or errors earlier ruled to be harmless, must be considered along with the prejudice arising from the additional error identified in the petition, in determining whether the errors, combined, can together sustain a cumulative error claim. *In re Reno* (2012) 55 Cal.4th 428, 483. As with other claims, if a petitioner's cumulative error claim sets forth a prima facie claim for relief, HABLIT shall so advise the court in its informal response and indicate that an OSC as to the cumulative error should issue.

**8. C.C.P. §170.6 Challenges**

The superior court generally assigns habeas corpus petitions to the same department that presided over the trial and/or sentencing proceedings. On occasion, the matter will be reassigned to another judge, such as when a judge retires or where there may be a conflict of interest.

Conflicts are not infrequent because the vast majority of criminal court judges are former prosecutors, and petitions often allege government or prosecutorial misconduct that implicates former LACDA colleagues of the judge assigned to hear the post-conviction case.

When such reassignments occur, HABLIT shall not challenge, pursuant to Civil Procedure §170.6, any judge who is not a former prosecutor unless there is a non-pretextual and articulable justification for the filing of a §170.6 challenge, approved by a supervisor. When HABLIT files a C.C.P. §170.6 challenge to an assigned judge who is not a former prosecutor, it creates the appearance that this office believes it will receive more favorable treatment from a judge who was a former prosecutor than one who was not. While the law does not require that any specific reason be articulated in the public filing, HABLIT shall avoid even the appearance of judge-shopping and shall not file §170.6 challenges for that purpose.

**C. Post-OSC Litigation**

When the court issues an OSC, formal briefing begins. During this formal briefing and up to and including an evidentiary hearing, HABLIT's role shall not be merely adversarial to the petitioner but—again—one of seeking justice and balancing the interest of finality with potentially meritorious claims indicating a wrongful conviction.

**1. Post-OSC Discovery**

Once the court issues an OSC, the petitioner is entitled to discovery and has subpoena power to seek materials from sources outside this office. To the extent HABLIT did not already provide discovery to the petitioner informally as set forth in B.4., *infra*, once the OSC issues, HABLIT shall do so and shall continue providing the petitioner with additional new materials that are discovered, as they become available. As noted above, HABLIT deputies and investigators shall audio record or video record all witness interviews conducted in the course of post-conviction investigations and shall provide copies of those recordings to the petitioner. All discovery shall be documented through the use of signed discovery receipts.

## **2. The**

## **Return**

Upon issuance of the OSC, HABLIT shall file a timely Return that admits or denies the material factual allegations in the petition. Denials shall be supported by citations to evidence; general denials may be deemed “admissions,” and shall be avoided. The Return is the People’s opportunity provide the court with the factual bases for any denial, and allege new facts in support of petitioner’s conviction. HABLIT shall provide, in the Return, an articulable reason or justification for any allegation being denied, supported by a factual basis and evidence. HABLIT shall admit factual allegations where there is no basis for denying them. The purpose of the admission and denial of facts in the Return is to assist the court in determining whether the merits of the petition can be reached, without the need for an evidentiary hearing, and to limit the scope of any required evidentiary hearing only to those facts actually in dispute.

## **3. Communications with Petitioner’s Trial Counsel**

This Office respects the sanctity of the attorney-client privilege between a defendant and defense counsel. A petitioner who alleges Ineffective Assistance of Counsel may have impliedly waived some portion of the attorney-client privilege as to communications with petitioner’s trial counsel. This waiver is not absolute, however, and is extremely limited.

HABLIT shall err on the side of caution and notify a petitioner before seeking to contact defense counsel and provide petitioner with a chance to object or modify a claim to avoid an inadvertent or implied waiver of the attorney-client privilege. HABLIT will not seek disclosure of anything beyond that which is strictly necessary and legally allowable under California and Federal law, including information that exceeds the limited scope of a pending ineffective-assistance-of-counsel claim.

HABLIT shall not encourage any attorney to violate their ethical duties of confidentiality and loyalty to former clients, as articulated in the California Rules of Professional Conduct; rather, HABLIT attorneys or investigators speaking to defense counsel must remind defense counsel of the attorney-client privilege prior to the start of a substantive interview.

## **D. Case**

## **Resolution**

Where the court, or HABLIT, determines that a petitioner’s conviction and sentence must be vacated for any reason, HABLIT shall ascertain (i) if determined by the court, whether the court’s decision should be appealed; (ii) whether there still exists constitutionally permissible evidence sufficient to prove that person’s guilt beyond a reasonable doubt; and/or (iii) whether there are identifiable avenues for obtaining constitutionally permissible evidence sufficient to prove that person’s guilt beyond a reasonable doubt.

If there are grounds for appealing a court’s ruling, and it is in the interests of justice to do so, HABLIT shall ensure that a notice of appeal is timely filed. If a decision is made to appeal the grant of a habeas corpus petition, a memorandum shall be submitted to a supervisor for approval, justifying the decision to appeal before a notice of appeal is filed. If an appeal is taken, there shall be a strong presumption that a petitioner who has secured a grant of habeas relief in the superior court should be released OR, or granted bail, pending that appeal.

If, in HABLIT’s assessment, there exists constitutionally permissible evidence sufficient to prove that person’s guilt beyond a reasonable doubt and/or there are identifiable avenues for

obtaining constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt, and it is in the interests of justice to do so, HABLIT shall articulate what the remaining evidence is and, if approved by the District Attorney, shall announce that the LACDA intends to retry the petitioner.

If there are no grounds for appealing the court's ruling, and where there no longer exists constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt and there are no identifiable avenues for obtaining constitutionally permissible evidence sufficient to prove that person's guilt beyond a reasonable doubt, HABLIT shall announce that the LACDA does not intend to appeal, nor does it intend to retry, the petitioner.

### **1. Re-Sentencing Cases**

Where HABLIT determines that the fair and just resolution in a case involves, among other relief, seeking a reduction in the petitioner's sentence pursuant to P.C. 1170(d), and the decision is approved by the District Attorney, HABLIT shall inform the petitioner or petitioner's counsel of the decision at the earliest possible opportunity. With the petitioner's agreement, HABLIT shall coordinate with deputies tasked with resentencing so that a motion for resentencing can be filed by the LACDA at the earliest opportunity.

HABLIT's decision to seek a sentence reduction shall not be dependent upon the petitioner's agreement to withdraw any claims made in a pending petition. For example, a petitioner who maintains that they are actually innocent of the crimes of conviction shall not be forced to choose between dropping the claim of innocence and receiving the support of the LACDA for a P.C. 1170(d) reduction in sentence.

### **2. Reentry Assistance & Compensation Assistance**

HABLIT shall not delay the release of any person whose entitlement to post-conviction relief and release from custody has been established, for any reason; it is the duty of the HABLIT to immediately arrange for conditional release of those individuals pending the formalization of the conviction being vacated, including facilitating the release process by coordinating with the CDCR, providing the CDCR with court orders and any other documentation required to secure the petitioner's release from custody.

Where HABLIT determines that a conviction should be overturned and a case dismissed based on actual innocence, HABLIT shall assist the petitioner in securing necessary support and documentation, such as a finding of actual innocence, that facilitate successful reentry into the community and will support the enactment of systems of compensation for those wrongfully convicted.

### **3. Findings of Factual Innocence**

This office recognizes that monetary compensation is essential to a wrongfully convicted person's ability to rebuild their life. Under California law, wrongfully convicted persons who are innocent of the crimes for which they were convicted may file a claim for compensation with the California Victim Compensation and Government Claims Board (CVCGC Board), under California Penal Code section 4900.

Under current law, the CVCGC Board determines whether to approve a claim by either: (i) holding a hearing at which the claimant presents evidence supporting their claim of innocence, and reaching a determination as to whether the claimant has met the standard; or, (ii) receiving a “finding of factual innocence” made by the superior court, which is binding on the CVCGC Board.

Under current law, a wrongfully convicted person must demonstrate that they are innocent by a preponderance of the evidence. The burden is on the wrongfully convicted person to prove their innocence. Because that standard is antithetical to the bedrock principle of our criminal justice system—which presumes a person is innocent until they are proven guilty beyond a reasonable doubt<sup>6</sup>—absent extenuating circumstances and supervisor approval, it shall be the policy of this office to move jointly for and/or concede in the superior court that “a finding of factual innocence” should be made, where the conviction has been overturned, the charges have been dismissed, the LACDA does not intend to appeal the court’s ruling overturning the conviction, and there no longer exists constitutionally permissible evidence sufficient to prove that person’s guilt beyond a reasonable doubt.

In such cases, the LACDA shall proactively assist the petitioner in seeking the statutory compensation to which they are entitled, including filing in the superior court, jointly with the petitioner, if requested, a motion “for a finding of factual innocence by a preponderance of the evidence that the crime with which he or she was charged was either not committed at all or, if committed, was not committed by him or her.” Cal. Pen. Code 1485.55 (b). Because the court’s “finding of factual innocence,” is binding on the CVCGC Board, this office’s joint request for that finding will expedite and facilitate the compensation process. HABLIT shall also assist the petitioner, in the above-described circumstance, by supporting their claim before the CVCGC Board, when filed, if requested.

#### **4. Victim Outreach & Advocacy**

HABLIT shall comply with all statutes and rules governing victims’ rights and may engage a victim representative at any stage in the investigation when doing so may be in the best service of the investigation and/or the victim. HABLIT will be respectful of victims and institute a culture of keeping victims abreast of investigation outcomes, when the outcome affects or changes the nature of the conviction and/or sentence. Upon the District Attorney’s decision to seek relief in a case, HABLIT shall engage a victim representative to liaise with the victim or victims.

#### **5. “Learning Organization”**

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<sup>6</sup> “Absent conviction of a crime, one is presumed innocent.” *Nelson v. Colorado*. (2017) 137 U.S. 1249, 1255 (explaining that once a criminal conviction is erased, the presumption of innocence is restored and holding that the state “may not presume a person, adjudged guilty of no crime, nonetheless guilty enough for monetary exactions”), citing *Johnson v. Mississippi* (1988) 486 U. S. 578, 585 (1988) (holding that after a “conviction has been reversed, unless and until [the defendant] should be retried, he must be presumed innocent of that charge”); *Coffin v. United States* (1895) 156 U. S. 432, 453 [“axiomatic and elementary,” the presumption of innocence “lies at the foundation of our criminal law.”]

The outcomes of HABLIT investigations are intended to provide a critical opportunity to identify systemic gaps that go beyond just one individual's error and can reinforce the idea that the District Attorney's office is a "learning organization." HABLIT will have a clear avenue for recommending policy and procedural changes, as well as enhanced training, to address any deficiencies that are uncovered.

***The policies of this Special Directive supersede any contradictory language of the Legal Policies Manual.***

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