

SPECIAL DIRECTIVE 21-04

TO: ALL DEPUTY DISTRICT ATTORNEYS

FROM: GEORGE GASCÓN 
District Attorney

SUBJECT: HABEAS CORPUS LITIGATION

DATE: NOVEMBER 29, 2021

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 November 29, 2021, the policies outlined below supersede the relevant sections of Chapter 1.07.03 of the Legal Policies Manual and Special Directive 20-10.¹

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 Unit (HABLIT) 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 of 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) or 1170.03. HABLIT may also consider 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.

¹ Capital Habeas petitions in Los Angeles Superior Court are handled by the Clemency and Capital Case Coordinator who works with the Attorney General's Office to coordinate the handling of these petitions. The Clemency and Capital Case Coordinator reports to the Chief of Staff and/or their designee. See Chapter 7 of the Legal Policies Manual and Special Directive 20-11 for additional information on post-conviction Capital habeas petitions.

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.

POLICIES GOVERNING HABLIT UNIT CASE REVIEW

A. Habeas Corpus Litigation

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;²
- 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.

² See Rule 3.8 Special Responsibilities of a Prosecutor (Rule Approved by the Supreme Court, Effective June 1, 2020).

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

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

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* (1994) 8 Cal. 4th 728, 738; Pen. Code § 1476.

1. Informal Briefing

If HABLIT is tasked with informal briefing, an independent review of the petitioner's allegations must be done 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 HABLIT is conceding the conviction should be overturned at this stage. It means 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, Rule 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 may raise both factual and legal issues that address whether the petitioner has made a prima facie showing of entitlement to relief. As stated in *Romero*: “Through the informal response, the real party in interest may demonstrate, by citation of legal authority and by submission of factual materials, that the claims asserted in the habeas corpus petition lack merit and that the court therefore may reject them summarily....” *Romero, supra*, 8 Cal.4th at p. 742. The informal response shall not otherwise 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

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 the Director in HABLIT's chain of command. 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.

The assigned supervisor of HABLIT 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.

DDAs and investigators should not engage in tactics designed to dissuade a recanting witness by directly or indirectly advising a witness that if they provide statements or testimony contrary to how they testified at trial they may be prosecuted for perjury as such conduct could amount to witness intimidation and prosecutorial misconduct under California law. *People v. Bryant* (1984) 157 Cal.App.3d 582. The paramount goal of a HABLIT investigation shall be to determine the reliability and truthfulness of the recantation.

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.

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 of 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, 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. Police reports should therefore 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 a petitioner, 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 Los Angeles District Attorney (LADA) 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 legally necessary to protect victim or witness privacy or safety.

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 compiling files from law enforcement agencies responsible for investigating the case, including:

- The LADA'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 Appeals; 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.

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;³
- the petitioner was convicted based, in whole or in part, on a confession and there are allegations that this confession was false or coerced;⁴
- 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/or misconduct at trial;⁵
- 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, or 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;⁶

³ 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).

⁴ 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.

⁵ 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.

⁶ The use of unreliable and misleading forensic evidence, which we know is a common cause of wrongful convictions imperil the integrity of the criminal legal system. HABLIT 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. HABLIT 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: (1) American Association for the Advancement of

- the petitioner was convicted based on forensic evidence that the LADA 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; or
- 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 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

Science (AAAS) reports on Fire Investigation (2017) and Latent Fingerprint Examinations (2017); (2) American Statistical Association (ASA) Position on Statistical Statements for Forensic Evidence (2019); (3) National Academy of Sciences (NAS) report Strengthening Forensic Science in the United States: A Path Forward (2009); (4) 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); and (5) President’s Council of Advisors on Science and Technology (PCAST) report Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016).

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 for 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 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 also 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 petitioner 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 and shall support any requests to preserve forensic evidence even if habeas litigation has ended where a factual innocence claim is made and is being investigated.

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, 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.

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 by using 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 for any allegation being denied, supported by a factual basis and evidence when available. In those situations where such specific evidence is not available, a denial of the factual allegations made in the petition can be made when the return indicates: 1) why the information supporting the denial is not readily available; 2) the steps taken by the author of the return to obtain this information; and 3) why the author of the return believes in good faith that that certain facts alleged by the petitioner are untrue. *People v. Duvall* (1995) 9 Cal.4th 464, 485. 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

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 and will depend on the nature of the claim.

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 legally allowable under California and Federal law, including information that exceeds the scope of a pending ineffective assistance of counsel claim.

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: 1) if determined by the court, whether the court's decision should be appealed; 2) whether there still exists constitutionally permissible evidence to prove that person's guilt beyond a reasonable doubt; and/or 3) whether there are identifiable avenues for obtaining constitutionally permissible evidence 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 Director 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 on their own recognizance 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 in a memorandum. Prior to announcing that the LADA intends to retry the petitioner, the District Attorney or their designee must approve the recommendation to retry the case.

If there are no grounds for appealing the court's ruling, there no longer exists constitutionally permissible evidence to prove that person's guilt beyond a reasonable doubt and there are no identifiable avenues for obtaining constitutionally permissible evidence to prove that person's guilt beyond a reasonable doubt, HABLIT shall announce that the LADA 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 Penal Code §§ 1170(d) or 1170.03, HABLIT shall inform the petitioner or petitioner's counsel of the decision at the earliest possible opportunity. With the petitioner's agreement, HABLIT shall prepare a petition for resentencing and file it 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 without prior approval from the District Attorney's designee.

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 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 CDCR, providing 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, and other resources that facilitate successful reentry into the community and support the enactment of systems of compensation for those wrongfully convicted.

3. Findings of Factual Innocence

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 Penal Code § 4900.

Under current law, the CVCGC Board determines whether to approve a claim by either: 1) 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, 2) receiving a "finding of factual innocence" made by the superior court, which is binding on the CVCGC Board.

After a writ of habeas corpus has been granted, or a judgment has been vacated due to the presentation of newly discovered evidence within the meaning of Penal Code § 1473.6, a wrongfully convicted person may petition the court to find that he or she was factually innocent. A wrongfully convicted person must demonstrate that they are innocent by a preponderance of the evidence. 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 LADA does not intend to appeal the

court's ruling overturning the conviction; and a petitioner has demonstrated that it is more likely than not that the crime with which the petitioner was charged was either not committed at all or, if committed, was not committed by the petitioner.

Prior to filing or joining in a finding of factual innocence, deputies must provide notice to the Criminal Division of the Attorney General's Office. Absent unusual circumstances, Deputy District Attorneys should endeavor to provide the notice one week in advance of any filing.

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"

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 and Special Direction 20-10.