



Office of the District Attorney Alameda County

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SPECIAL DIRECTIVE 23-01 FAQs

TO: ALL STAFF, OFFICE OF THE ALAMEDA COUNTY DISTRICT ATTORNEY

FROM: PAMELA Y. PRICE
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JUSTIFICATION

1. **Question: How does the Directive advance public safety?**

Answer: Special Directive 23-10 directs prosecutors to be smart on crime. California's prison sentences are among the heaviest in the world – even without the added years of discretionary enhancements often used by district attorneys since the 1990s. There are over 100 enhancements, including 22 different special circumstances “add ons” to any sentence.

Overusing enhancements freely has led to Alameda County having the fifth largest jail in the country.¹ Using enhancements has not stopped or slowed crime. It has contributed to racial inequity and injustice, and siphoned away public resources, making it fiscally impossible to invest in interventions addressing the root causes of harmful behavior.

Our new normal in Alameda County is to not charge enhancements that tack extra time onto the base crimes that carry significant prison sentences, unless there are extraordinary circumstances involving harm to vulnerable victims or extreme acts of violence. Importantly, this Directive preserves prosecutorial discretion. To be clear, we have not stopped using enhancements altogether. We are simply requiring our deputies to check with their supervisors before adding an enhancement to a regular charge.

¹ County of Alameda, Santa Rita Jail Fuel Cell Power Plant
<<http://www.acgov.org/sustain/documents/fuelcellfactsheet.pdf>> (as of Apr. 10, 2023).

The Special Directive offers presumptive, not mandatory guidance. Where extraordinary circumstances suggest that an exception is appropriate, exceptions are allowed with supervisory approval.

2. **Question: How does limiting the use of enhancements reduce recidivism?**

Answer: Since the 90s, California has enacted over 100 sentencing enhancements, many of which are outdated, incoherent. There is no compelling evidence that enhancements improve public safety. In fact, the opposite is true. While initial incarceration prevents crime through incapacitation, studies show that each additional sentence year causes a 4% to 7% increase in recidivism that eventually outweighs any benefit.² The tremendous cost of mass imprisonment also means cities, counties, and the state lack fiscal resources to proactively address root causes of violence. If we are serious about reducing recidivism, we need to challenge mass imprisonment and address root causes of harmful behavior.

3. **Question: Is this Directive in sync with the wishes of Alameda County communities?**

Answer: This Directive brings us into sync with the demands of residents of Alameda County. California's status as the leader of mass imprisonment was tied directly to our extreme sentencing enhancement legislation of the 1990's. Voters began chiseling away at the injustice of these enhancements. In 2012, 78% of Alameda County voters voted in favor of Proposition 36, which passed statewide and modified the Three Strikes Law to reduce draconian penalties.³ In 2014, 74% of Alameda County voters again voted in favor of Prop. 47, which passed statewide and reduced sentences created through enhancements.⁴ And in 2016, 77% of voters said "yes" to Prop. 57, which statewide took the decision whether to criminally prosecute children as adults out of the hands of prosecutors with the specific intent to stop the practice and refocus the juvenile legal system.⁵ These statewide sentencing reforms began to shrink mass imprisonment in California, but the charging and prosecution practices in Alameda County itself have not followed suit.

4. **Question: How does this Directive advance racial justice in Alameda County?**

Answer: This Directive is essential for building an equitable, democratic rule of law in Alameda County. The District Attorney Office has been functioning without policy

² See, e.g., Mueller-Smith, Michael, *The Criminal and Labor Market Impacts of Incarceration* (2015) <<https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2015/09/incar.pdf>> (as of Apr. 10, 2023).

³ California Secretary of State, Statement of Vote (2012) p. 67 <<https://elections.cdn.sos.ca.gov/sov/2012-general/sov-complete.pdf>> (as of Apr. 10, 2023).

⁴ California Secretary of State, Statement of Vote (2014) p. 91 <<https://elections.cdn.sos.ca.gov/sov/2012-general/sov-complete.pdf>> (as of Apr. 10, 2023).

⁵ California Secretary of State, Statement of Vote (2016) p. 68 <<https://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf>> (as of Apr. 10, 2023).

guiding standardized use of enhancements and allegations, allowing enhancements to be applied unfairly.

Absent this Directive, the application of enhancements and allegations is tied to gross racial disparities in Alameda County. Consider the following facts related to the use of allegations leading to Life Without Parole (LWOP) sentencing.⁶

- 70.7% of the people sentenced to Life Without Parole (LWOP) from Alameda County are Black. Black people make up only 9.9% of Alameda’s population.
- 7.33% of the people sentenced to LWOP from Alameda County are White. White people account for 37.9% of the County’s overall population.
- Alameda County’s racial disparity for this particular type of enhancement is twice that of the statewide average - 70.7% of those serving LWOP from Alameda are Black, while Black people make up 34.7% of the entire LWOP population in California.
- 82.35% of the people from Alameda County serving LWOP who were under the age of 21 at the time of their offense are Black.
- 72.3% of the people serving LWOP from Alameda were youth at the time of their offense (under the age of 26).
- There are 22 different ‘special circumstances’ that mandate a life without parole or death penalty sentence. In Alameda County, the felony murder rule circumstance was used in 52% of all convictions. This rule allows people to be sentenced to LWOP and the death penalty because of the actions of others. This means that over half of the people sentenced in Alameda were convicted with a penal code that requires the lowest level of culpability or involvement in our first-degree murder sentencing scheme.

On the state level, the California Legislature has enacted the Racial Justice Act requiring review and correction of racial disparity in sentencing. On the County level, this Special Directive is vital for building equity into our legal system.

SUPERVISORY APPROVAL PROCESS⁷

5. **Question: In Special Directive 23-01, does the term “supervisory approval” always require the approval of the a) unit supervisor, b) the Chief Assistant District Attorney, and c) the District Attorney?**

⁶ Data provided by UCLA Special Circumstance Conviction Project, Special Circumstance Sentencing in Alameda County <<https://csw.ucla.edu/cswresearch/feminist-anti-carceral-studies/sccp/>> (as of Jan. 24, 2023).

⁷ Wherever the term “supervisory approval” is used in this document, it refers to the supervisory approval process outlined in Special Directive 23-01. That is, it requires approval of the prosecutor’s unit supervisor, Chief Assistant District Attorney, and District Attorney.

Answer: Yes.

6. **Question: How should deputy district attorneys request supervisory approval pursuant to Special Directive 23-01?**

Answer: Madam District Attorney has made it a priority to streamline the approval process through RD3. Those IT improvements are underway. In the interim, for first-level approval, deputy district attorneys and unit supervisors should type the required notes⁸ into RD3 and are otherwise encouraged to develop their own best communication practices. For second- and third-level approval, supervising attorneys should email the Chief Assistant District Attorney directly with the relevant facts of the case.

The subject line for this email should follow the following format:

SD 23-01 [Specify Enhancement/Spec Circ] Request, DEADLINE [time/date],
Case Name, Case No, Defendant's Name

In the body of the email, please include the following:

- 1) next hearing date;
- 2) what the hearing is for (i.e., arraignment, prelim, trial, filing, sentencing);
- 3) defendant's exposure with and without the enhancement for which you are requesting exception;
- 4) link to the blue card; and
- 5) description of what makes the exception necessary to protect public safety and ensure a just outcome.

The Chief Assistant District Attorney will request third-level review from the District Attorney, as appropriate.

7. **Question: How will supervisory approvals or disapprovals be communicated to deputy district attorneys?**

Answer: Unit supervisors are encouraged to develop their own best practices to communicate approval or disapproval, so long as it is documented in RD3 in accordance with Special Directive 23-01. Until the automated RD3 approval process is implemented, the Chief Assistant District Attorney will respond to supervising attorneys' email requests in writing. If the District Attorney has approved the request, the Chief Assistant District Attorney will include this fact in the email reply. The supervising attorney shall immediately forward this email to the line attorney and follow-up by call or chat to ensure the message is received. The line attorney will be responsible for updating RD3 Charging or Case Notes to reflect the final decision made and the individual(s) who proffered approval. Line attorneys may cut and paste email confirmation into the RD3 notes to expedite note taking.

⁸ These include the approval or disapproval, the rationale for and the date of approval, and identity of the requesting prosecutor and supervisor.

8. **Question: When either the Chief Assistant District Attorney or the District Attorney are unavailable or have not responded to a request for supervisory approval, how should deputy district attorneys proceed with time-sensitive matters, such as charging decisions?**

Answer: The District Attorney and the Chief Assistant District Attorney recognize that deputy district attorneys operate under tight deadlines and will make every effort to respond to supervisory approval requests in a timely manner. Should they be unable to do so, deputy district attorneys should proceed without deviating from the general policy, for example, by not charging the requested enhancement.

9. **Question: Is there an organizational chart to help line deputies understand who they should request first-level, unit supervisor, approval from if their direct supervisor is unavailable for an extended period, for instance on vacation or medical leave?**

Answer: Generally, prosecutors unclear on the approval workflow for their units should immediately contact the Chief Assistant District Attorney for clarity. The District Attorney will be releasing an organizational chart in the near future.

10. **Question: Is there a way to expedite a supervisory approval request?**

Answer: Yes. If a deputy district attorney requires expedited approval they should include that in the subject line of the approval email to the Chief Assistant District Attorney, flag the email as High Importance, add a follow up flag for “Today”, a tickler Reminder flag for both yourself and for the Recipient. To add a “tickler” or reminder to follow up on an email in Microsoft Outlook, you can flag an email in Outlook by finding where it says “Follow up” and clicking Add Reminder “Flag for Me” and “Flag for Recipients” and setting the Due date, then click the Reminder boxes for both yourself and the recipients and setting dates/times for the reminder.

11. **Question: The original version of Interim Final Special Directive 23-01 requires deputy district attorneys to obtain “signed approval” from their unit supervisor and the Chief Assistant District Attorney. However, a later revised draft version deleted the word “signed” and now only requires “approval.” What type of approval documentation does Special Directive 23-01 require?**

Answer: As discussed above, Special Directive 23-01 currently requires written approval that is documented in RD3. Eventually, this process will be integrated into RD3, which will contain all request for approval and responses to those requests.

12. **Question: Are there examples of instances when the District Attorney has approved enhancements or special allegations?**

Answer: The District Attorney and Chief will have regular meetings with unit supervisors to review and deliberate over cases in which enhancements and allegations are approved. This deliberative process and managerial feedback provided through the supervisory approval process, will provide guidance to inform prosecutors’ understanding of application of this special directives.

ENHANCEMENTS AND ALLEGATIONS

Section 2 – Strike Priors

13. **Question: Does Special Directive 23-01 require deputy district attorneys to plead a defendant’s prior strike convictions when charging the defendant, as required by Penal Code section 667(f)(1)?**

Answer: Yes. And, prosecutors shall seek supervisory approval before charging a case as a three strikes case.

14. **Question: Does Special Directive 23-01 require deputy district attorneys to move to dismiss all prior strike convictions at the first available opportunity pursuant to their authority under Penal Code section 667(f)(2)?**

Answer: Yes, absent supervisory approval.

15. **Question: Why are deputy district attorneys being asked to plead prior strike convictions that they are ultimately moving to dismiss?**

Answer: California Three-Strikes Law has seen troubled implementation. It has led to lengthy sentencing divorced from the circumstances of each case/defendant and has not proven to have deterrent value. Moreover, Three-Strikes Law has been shown to exacerbate racial disparities in the justice system: forty-five percent of people serving life sentences in California state prisons under the Three Strikes are Black.⁹ Fortunately, the Court of Appeals has offered a roadmap for prosecutors to ethically move to dismiss strike priors in accordance Penal Code section 667(f)(2). The District Attorney’s Office is following this roadmap by requiring deputy district attorneys to dismiss prior strikes absent supervisory approval.

16. **Question: Does Special Directive 23-01 prevent deputy district attorneys from moving to reinstate strikes that the court has dismissed, pursuant to a deputy district attorney’s 1385 motion or otherwise?**

Answer: Yes.

Section 3 – Other Conduct and Status Enhancements

17. **Question: Absent supervisory approval, are deputy district attorneys prohibited from charging and prosecuting sentencing enhancements pursuant to Penal Code sections 12022.5 and 12022.7.**

Answer: Yes. Deputy district attorneys must seek supervisory approval prior to charging and prosecuting all sentencing enhancements, including those pursuant to Penal Code sections 12022.5 and 12022.7. Approval to charge and prosecute enhancements may be

⁹ Elan Dagenais et. al., Sentencing Enhancements and Incarceration: San Francisco, 2005-2017 (Stanford Computational Policy Lab, 2019). Available online at https://policylab.stanford.edu/media/enhancements_2019-10-17.pdf.

granted on a case-by-case basis in cases involving the most vulnerable victims and in specified extraordinary circumstances.

18. **Question: Does Special Directive 23-01 apply the same standard for the charging of weapon enhancements under Penal Code sections 12022(a), 12022.5, and 12022.53? If not, in which cases should prosecutors seek supervisory approval to charge each of these three enhancements.**

Answer: In certain extraordinary circumstances, deputy district attorneys may charge weapon enhancements under Penal Code sections 12022(a), 12022.5, and 12022.53 after obtaining supervisory approval. The District Attorney Office will continue to introduce training and guidance to inform prosecutors' understanding of application of this and future special directives.

19. **Question: Penal Code sections 25400 and 25850 are firearm offenses that deputy district attorneys can charge as misdemeanors or felonies depending on whether certain factors are present. For instance, if the individual knew the firearm was stolen a deputy district attorney can charge the individual with a felony under either section. Does Special Directive 23-01 require deputy district attorneys to always charge Penal Code sections 25400 and 25850 as misdemeanors?**

Answer: No. Section II.A.3.2 “applies to charges where **felony status** elevates a wobbler to a felony...” (emphasis added). If the basis for the elevation to a felony is something other than a felony prior status, such as an unregistered or stolen gun, then prior supervisory approval is **not** required. In other words, prosecutors are not precluded from using discretion to charge 25850 or 25400 as a felony if the basis for the felony is **not** a prior felony. Note, even if a felony charge is based on felony status, a prosecutor may still charge the felony IF given prior supervisory approval. All sections of the directive are presumptive, not mandatory, and exceptions may be granted with prior supervisory approval.

20. **Question: Section 3.3 states that deputy district attorneys may allege enhancements in cases “[w]here the physical injury personally inflicted upon the victim is extensive.” How does this interact with the great bodily injury enhancement under Penal Code section 12022.7 and when should deputy district attorneys allege the great bodily injury enhancement?**

Answer: The bullet under subsection 3.3 authorizes deputy district attorneys to seek supervisory approval for any relevant and appropriate enhancements applicable in their case when the victim has suffered extensive injury. Put differently, when the victim has suffered extensive injuries, prosecutors may seek supervisory approval to allege enhancements including, but not limited to, great bodily injury under Penal Code 12022.7. The District Attorney Office will continue to introduce training and guidance to inform prosecutors' understanding of application of this and future special directives.

21. **Question: If a deputy district attorney believes they can prove an enhancement based on the defendant’s conduct, is it a violation of a prosecutor’s duty of candor to not charge that enhancement?**

Answer: No. Deputy district attorneys are not required to charge every enhancement they believe they can prove. However, if the court asks a deputy district attorney a question regarding the defendant’s conduct, whether charged or not, the deputy must always truthfully and transparently answer the question.

CASE SETTLEMENT

22. **Question: When a deputy district attorney offers that a defendant plea to a lesser offense than the charged offense are they required to offer the low term for the lesser offense?**

Answer: No. deputy district attorneys must offer the lowest term available under the charged offenses. However, deputy district attorneys may offer an even lower term than available under the charged offenses, even if that means the defendant pleads to the mid or high term of a reduced charge. The controlling requirement is that deputy district attorneys must not offer above the low term of the **charged offense(s)** absent supervisory approval.

23. **Question: If the defendant is facing an indeterminate sentence if found guilty at trial of the charged offenses, can deputy district attorneys offer that the defendant plea to the mid or high term of a lesser offense without obtaining supervisory approval?**

Answer: Special Directive 23-01 does not expressly speak to indeterminate sentencing. In those situations, prosecutors are directed to deliberate with their supervisors. Prosecutors should be guided and dictated by the evidence, facts, victim and defendant rights, and the goal of the Special Directive to bring balance back to sentencing and reduce recidivism.

24. **Question: Can a deputy district attorney offer that a defendant plea to a lesser offense than the charged offense plus an enhancement if the total sentence is lower than the low term of the charged offense without obtaining supervisory approval?**

Answer: Generally, if the offer is as low as or lower than the low term of the charged offenses, prosecutors may offer a plea to a lesser offense plus an enhancement without supervisory approval. However, prosecutors shall not require admission to strike priors in plea bargains absent supervisory approval, even if the total sentence is lower than the low term of the charged offense, and even if defense counsel proffers the plea.

25. **Question: What does the term “probation-eligible” mean when used in Special Directive 23-01?**

Answer: In response to this question, “probation eligibility” has been replaced in the updated version of Special Directive 23-01, Specifically Section II.B.2 has been revised to read “[f]or all misdemeanors or PC § 1170(h) eligible felonies probation shall be the

presumptive offer. This section shall not exclude or effect pre-charge, pre-plea or post plea diversion, or other dispositions up to probation, whether requiring a conviction or not.”

26. **Question: Under Special Directive 23-01, what is the presumptive offer in a case with a defendant facing numerous counts?**

Answer: Special Directive 23-01 does not expressly speak to situations where a defendant’s exposure involves multiple counts. In those situations, prosecutors are directed to deliberate with their supervisors. Prosecutors should be guided and dictated by the evidence, facts, victim and defendant rights, and the goal of the Special Directive to bring balance back to sentencing and reduce recidivism.

MISCELLANEOUS

27. **Question: Does Special Directive 23-01 apply to juvenile cases?**

Answer: Yes.

28. **Question: Can the District Attorney release a red-lined version of future iterations of directives?**

Answer: Yes. Moving forward, all iterations of directives will be released with a red-lined version.

29. **Question: What should prosecutors do when victims or their families do not agree with a plea offer made in compliance with Special Directive 23-01?**

Answer: The District Attorney’s Office is committed to 100% compliance with Marsy’s law. Pursuant to Marsy’s Law, prosecutors must, upon request, provide notice to victims and survivors before any pretrial disposition of a case. The District Attorney has been meeting with many families on her own initiative, regardless of a request, out of her personal concern for equity and transparency. The District Attorney recognizes that some victims and survivors may be unsatisfied with offers and their concerns may create friction with prosecutors. If prosecutors are unsure about how to handle difficult conversations with victims and survivors, they should discuss strategies with their supervisor or the Chief, as well as the assigned victim advocate. The victim advocates also may seek support from their own supervisor.

Further, the District Attorney Office is committed to increasing training and guidance to inform prosecutors’ and advocates’ communications with people who have been harmed. It should go without saying that it is damaging to individual victims and survivors, as well as to the prosecution of cases, for prosecutors to complain or make disparaging comments about the District Attorney’s Office to victims and survivors. The wellbeing of victims and survivors within all our direct communications is paramount.

30. **Question: How does Special Directive 23-01 apply to Penal Code provisions allowing consecutive sentencing, for instance under Penal Code 667.6?**

Answer: Special Directive 23-01 does not speak to consecutive sentencing provisions of the Penal Code. In instances where the Directive does not offer clear guidance, prosecutors are directed to deliberate with their supervisors. Prosecutors should be guided and dictated by the evidence, facts, victim and defendant rights, and the goal of the Special Directive to bring balance back to sentencing and reduce recidivism.

31. **Question: Under Special Directive 23-01, absent supervisory approval, deputy district attorneys are required to offer probation for certain offenses and the low term for all others. What incentive do defendants have to accept a negotiated disposition before the preliminary hearing?**

Answer: Special Directive 23-01 reduces the coercive role of overcharging in plea negotiation, which will reduce risk of wrongful conviction. The District Attorney expects that plea negotiations will continue, but will involve a tighter range of offers, incentivized by offering lower sentence than those likely imposed by judges and/or through alternative interventions designed to address the root cause of harmful behavior. This changed strategy may impact how defendants approach settlement negotiations, but it will likely streamline negotiations in many cases given that District Attorney's Office offers will be more straightforward.

32. **Question: For similar reasons, what incentive do defendants have to accept a negotiated disposition before trial?**

Answer: Under Special Directive 23-01, defendants will likely accept more offers pre-trial as judges will not necessarily sentence convicted defendants to the low-term.

33. **Question: Does Special Directive 23-01 apply to offers for stipulated agreements to convicted individuals approaching resentencing hearings?**

Answer: Yes. Deputy district attorneys may not offer a stipulated agreement that includes an enhancement to a convicted individual absent supervisory approval.

34. **Question: What deputy district attorney will handle the recall and resentencing of cases that fall within the 120 resentencing window pursuant to Penal Code section 1172.1(a)?**

Answer: We expect the attorney that tried/handled the case will handle the resentencing. The resentencing unit is available to provide guidance, if requested.