

**First Supplement to Memorandum 2022-07
First Contact with the Legal System: Traffic Enforcement and
Assignment of Counsel**

Memorandum 2022-07 gave an overview of issues related to traffic enforcement and the assignment of counsel. This supplement presents and summarizes written submissions from panelists scheduled to appear before the Committee on September 2, 2022, as well as other relevant material received by Committee staff.

Traffic Enforcement

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Discussion Panel 1: Traffic Enforcement

Jordan Woods, Professor of Law, University of Arizona College of Law

Professor Woods's submission gives historical perspective on the policing of traffic infractions. First, he explains the consequences of wide-spread decriminalization of traffic offenses that began in the 1970s. Even though these cases were pushed out of the traditional criminal adjudicatory process, police officers still retained their traditional powers to stop and detain people for them. Next, the federal Fourth Amendment does very little to constrain police action in these circumstances because traffic codes are so extensive and provide a valid basis for pulling people over, ordering them out of the car, and other intrusive measures. Finally, Professor Woods briefly maps the harms of policing during traffic stops, including nationwide racial disparities in who is stopped and searched and harder to quantify harms such as stigmatizing young men of color.

Chauncey Smith, Senior Manager of Criminal Justice, Advancement Project California

Using data from California's Racial Identity Profiling Advisory (RIPA) Board, Mr. Smith discusses how racially disparate enforcement of traffic laws (and other police actions during traffic stops) results in significant harms to individuals and communities without corresponding public safety benefits. Mr. Smith recommends that California take steps to decrease the role of law enforcement in traffic enforcement by creating a robust system of non-law enforcement traffic safety programs, prohibiting consent searches, and improving RIPA data collection, reporting, and accuracy.

Maria Ponomarenko, Co-Founder and Counsel, NYU Policing Project

Ms. Ponomarenko's submission highlights several problems related to the current policing of low-level traffic violations, and goes on to describe research conducted by the NYU Policing Project that found that low-level traffic stops do little to improve public safety. She explains that an evaluation of the Nashville, Tennessee Police Department's use of pretext stops as a crime-fighting tool found that less than 1% of stops resulted in a gun charge, the discovery of an outstanding warrant, or an arrest for a serious crime like robbery. The evaluation also found that crime rates varied independently of the amount of traffic stops conducted. Ms. Ponomarenko recommends adopting the NYU Policing Project's [model legislation](#) on traffic stops — similar to statutes adopted in Virginia and Oregon — which (1) prohibits traffic stops for low-level infractions (2) limits the scope of stops and (3) requires better data gathering.

Lizabeth Rhodes, Director, LAPD Office of Constitutional Policing

Ms. Rhodes' submission presents the most recent stop data collected by the Los Angeles Police Department in accordance with the Racial Identity Profiling Act

(RIPA). The data demonstrate that the overall number of stops conducted by LAPD officers has declined dramatically from 712,806 people stopped in 2019, to only 163,693 people stopped in the first six months of 2022. The submission also discusses LAPD's recent establishment of a pretextual stop policy that focuses officers' actions on conducting stops that affect public safety. Comparing stop activity during the few months the policy has been in place to the same period of time last year, shows that stops for both moving and nonmoving violations have continued to decline. A copy of the LAPD policy is included.

Discussion Panel 2 Assignment of Counsel

Paul Heaton, Professor of Law & Academic Director, Quattrone Center for the Fair Administration of Justice

Professor Heaton's submission highlights several high-quality studies showing whether someone is detained pretrial directly affects conviction rates, sentence severity, and future arrests. The submission also describes randomized-control trials showing that early appointment of counsel increases the likelihood of pretrial release and improves perceptions of fairness of the process. The submission concludes by presenting Professor Heaton's recent study of an early representation pilot in Philadelphia that demonstrated that providing quality indigent defense at a first court appearance improved public safety by decreasing bail violations and future arrests and also helped reduce racial disparities in pretrial detention, among other benefits.

Aditi Goel, Senior Program Manager, Sixth Amendment Center

Ms. Goel's submission describes the Sixth Amendment Center's evaluation of right to counsel services in Santa Cruz County in 2019-2020, in which staff observed uncounseled people resolving their cases quickly by accepting plea deals offered by the prosecutor. Ms. Goel highlights a model appointment of counsel process in Massachusetts, which requires courts to appoint counsel prior to the initial appearance and concludes by offering the recommendations: (1) require all indigent people to receive appointed counsel as early as possible after arrest; (2) prohibit prosecutors from discussing plea offers with a person unless and until they have formally waived their right to counsel; and (3) establish a presumption of indigency in order to allow counsel to start working on a case before formal appointment.

Galit Lipa, Executive Director, Indigent Defense Improvement Division, Office of the State Public Defender

Ms. Lipa's submission outlines unique aspects of California's indigent defense system that make it particularly challenging to provide early access to counsel. Using examples from two counties, Ms. Lipa explains the practical impacts of California's current laws, including people lingering in jail for up to 10 days

before being appointed counsel, and many Californians being saddled with “assembly line convictions.” Ms. Lipa asserts that implementing the following reforms will allow California’s processes to meet basic standards: (1) promptly inform indigent defense providers when people are detained; (2) promptly appoint counsel; (3) allow meaningful opportunity for legal advice; (4) require plea offers to be conveyed by defense counsel; and (5) prohibit judges from asking people to waive counsel prior to appointment.

Judge Juliet J. McKenna, Associate Judge, Superior Court of the District of Columbia

Judge McKenna, a judge appointed to the Superior Court of the District of Columbia, and former Presiding Judge of the Criminal Division, explains that in her jurisdiction counsel is appointed for each person held in custody before their initial court appearance. In Judge McKenna’s experience, appointment of counsel prior to the initial appearance results in three primary benefits: (1) increased compliance with pretrial release conditions and return to court; (2) more efficient case processing; and (3) protection of constitutional rights and advancement of procedural justice.

Carlie Ware, PARR Team Supervisor, County of Santa Clara Public Defender Office

Ms. Ware details what happens during the early stages of the criminal legal process after a person is arrested, and advocates for reforms that would extend pre-arraignment representation to all people. She describes her experience supervising an innovative pre-arraignment representation program in Santa Clara County and offers six specific recommendations — including mandating information sharing between prosecutors, public defenders, and jail authorities — that would expand similar services statewide.

Additional Materials

Letter from Immigrant Legal Resource Center

The Immigrant Legal Resource Center — a national nonprofit that seeks to improve immigration law and policy — explains the complex intersection between immigration and criminal law that makes it imperative that noncitizens charged with crimes be provided counsel as early as possible. The ILRC highlights three issues unique to noncitizens that necessitate appointing counsel early in the process: (1) even minor misdemeanor convictions can have severe immigration consequences; (2) defense attorneys need sufficient time to consult immigration attorneys before advising their clients; and (3) prosecutors and judges sometimes give inaccurate immigration advisals, or demand waiver of basic immigration rights to enter a plea.

Letter from ACLU California Affiliates

The letter describes the ACLU's research relating to the practice of uncounseled pleas at arraignment in California. Through public records requests, conversations with stakeholders and impacted people, and monitoring of court appearances, researchers found that uncounseled pleas at arraignment are widespread across several counties in the state. In Kern County (the only county that responded to the ACLU's records request with useful data), at least one-third of all misdemeanor arraignments over a seven-year period resulted in an uncounseled guilty plea — more than 67,000 individual cases. The authors provide several recommendations aimed to ensure effective assistance of counsel at the first appearance.

Letter from California Attorneys for Criminal Justice

Based on its membership's experience throughout California, CACJ's letter describes the need for reforms in (1) the timing of probable cause determinations for warrantless arrests, which are not explicitly provided in the Penal Code but required under the Fourth Amendment (2) forbidding the rearrest of people who are released from jail for failure to hold a timely arraignment (3) requiring the advice of counsel to defendants before and during arraignments and (4) eliminating the Sundays and weekends exceptions to the timing of when an arraignment must occur.

Respectfully submitted,

Thomas M. Nosewicz
Legal Director

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Exhibit A

Jordan Woods

Professor of Law, University of Arizona College of Law

Written Comments on Policing During Traffic Stops
for
The California Committee on Revision of the Penal Code

September 2, 2022

Jordan Blair Woods, J.D., Ph.D.
Professor of Law
The University of Arizona
James E. Rogers College of Law

Introduction

Thank you for inviting me to comment on policing during traffic stops and the need for reform. The Committee has asked me to address three topics: (1) the effect that decriminalizing traffic violations has had on policing during traffic stops, (2) the lack of Fourth Amendment protections for motorists during traffic stops, and (3) the harms of policing during traffic stops. In anticipation of my testimony before the Committee, I offer the following comments with supporting citations on these topics.

1. The Effect of Decriminalizing Traffic Offenses on Policing During Traffic Stops

In my research, I have examined the effect (or lack thereof) that decriminalizing traffic offenses has had on policing during traffic stops.¹

Before the 1970s, states generally classified run-of-the-mill traffic violations as minor crimes and adjudicated those violations within the criminal framework and criminal courts. In the 1970s and 1980s, a wave of over 20 states² decriminalized run-of-the-mill traffic violations by removing criminal penalties for those offenses, reclassifying the offenses as noncriminal violations punishable by fine only with no possibility of immediate incarceration, and streamlining the adjudication of noncriminal traffic violations to the administrative realm.³ In those states, a small set of traffic violations considered “more serious” remained criminalized as misdemeanors or felonies (namely, driving under the influence, driving without a valid driver’s license or vehicle registration, reckless driving, failure to stop for or eluding a police officer, and excessive speeding).

The primary effects of traffic decriminalization reforms had more to do with how traffic violations were *adjudicated* and *punished*, not how traffic violations were *policed*. Lawmakers stressed that decriminalizing traffic violations and streamlining their adjudication to the administrative realm

¹ Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672 (2015),

² Those states included Alaska (1976), Arizona (1983), Colorado (1982), Connecticut (1975), Florida (1974), Hawaii (1978/1993), Idaho (1982), Indiana (1981), Maine (1975), Massachusetts (1986), Michigan (1978), Nebraska (1976), New Hampshire (1974), New York (1970), North Carolina (1986), North Dakota (1973), Oregon (1975), Rhode Island (1975), Vermont (1990), Virginia (1977), Washington (1979), and Wisconsin (1971). *Id.* at 698-99.

³ My research did not consider other states that technically classified traffic violations as low-level crimes, even if those violations were categorically less severe than ordinary misdemeanors and punishable by fine only.

reduced various costs to the government, including: (1) judicial costs by reducing the heavy burden that traffic cases put on criminal court dockets; (2) state costs of providing procedural protections incident to a criminal trial – including the right to counsel – that were required to adjudicate traffic violations in criminal courts, and (3) the costs on law enforcement because officers had to take time away from their shifts or days off to testify in court for traffic tickets to “stick.” Traffic violators could avoid criminal sanctions and admit fault more easily by paying a ticket without having to appear in court, but they also had fewer procedural protections in traffic cases.

These reforms did little to change when police officers could initiate traffic stops and what police officers could lawfully do during those stops. Rather, law enforcement retained full access to traffic stops as a crime-fighting tool even though those stops were now based on driving conduct that lawmakers intended to remove from the criminal framework. This access has only expanded over time given the lack of Fourth Amendment protections for motorists during traffic stops, as described below.

2. The Lack of Fourth Amendment Protections for Motorists During Traffic Stops⁴

A long line of legal scholarship discusses the lack of Fourth Amendment protection during traffic stops. To begin, the breadth of state traffic codes provides endless opportunities for officers to pull drivers over, especially for pretextual reasons. State traffic codes include a wide range of both moving and nonmoving violations. Some traffic violations are also not precisely defined (for instance, reckless driving). At the same time, officers have vast discretion to decide both when to initiate and what actions to take during a traffic stop.

After the U.S. Supreme Court’s highly controversial decision in *Whren v. United States*,⁵ the Fourth Amendment does not require traffic law compliance to be the primary motivation for a traffic stop. Rather, regardless of their actual motivation, police officers only need probable cause of a traffic violation to conduct a traffic stop. As many scholars have described, *Whren* put a constitutional rubber-stamp on police practices of racial profiling on roads and highways.⁶

During a traffic stop, officers have discretion to invoke their authority in various ways without violating the Fourth Amendment. Examples include ordering drivers and passengers out of vehicles,⁷ routinely frisking drivers and passengers,⁸ conducting protective searches of certain

⁴ This discussion is summarized from Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1480-85 (2021).

⁵ 517 U.S. 806 (1996).

⁶ See, e.g., Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 130 (2017); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIA. L. REV. 425, 427-32 (1997); David A. Harris, Essay, “*Driving While Black*” and All Other Traffic Offenses: *The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 546 (1997); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 316-17.

⁷ *Pennsylvania v. Mimms*, 434, U.S. 106, 111 (1977) (per curiam); *Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997).

⁸ *Arizona v. Johnson*, 555 U.S. 323, 328 (2009).

areas of the inside of vehicles,⁹ conducting dog sniffs,¹⁰ asking permission to search a motorist or their vehicle,¹¹ and even making custodial arrests for minor traffic violations.¹²

Unfortunately, state laws often do not fill these constitutional gaps. The breadth and imprecision of state traffic codes illustrates that state laws can exacerbate these problems even further.

3. The Harms of Policing During Traffic Stops

Recent high-profile killings of Black men during traffic stops, including Philando Castile, Samuel Dubose, Walter Scott, and Duante Wright, among many others, illustrate the tragic ways in which routine traffic stops are escalating and resulting in the unnecessary killings of Black and Latinx motorists. And even when traffic stops don't escalate into officer killings of stopped motorists, they can still cause serious privacy, liberty, dignitary, and physical harms. Most vulnerable are communities of color that disproportionately experience over-policing and pretextual police conduct during traffic stops.

Several empirical studies have reported that people of color are not only disproportionately stopped, but also disproportionately questioned, searched, arrested, or subjected to force during traffic stops.¹³ A recent study conducted by researchers affiliated with the Stanford Open Policing Project investigated approximately 95 million traffic stops conducted between 2011 and 2018 by 21 state-patrol agencies and 35 municipal police departments.¹⁴ The findings revealed widespread racial disparities in stop and search rates between white and nonwhite drivers. Specifically, “Black drivers were, on average, stopped more often than white drivers” for both state-patrol stops and municipal-police stops.¹⁵ On average, Black and Hispanic drivers were searched about twice as often as white drivers.¹⁶ In the evaluated state-patrol agencies, the search rates were 4.3% for Black drivers, 4.1% for Hispanic drivers, and 1.9% for white drivers.¹⁷ In the evaluated municipal police departments, the search rates were 9.5% for Black drivers, 7.2% for Hispanic drivers, and 3.9% for white drivers.¹⁸ The researchers applied more sophisticated statistical tests to test for racial bias, and found that “the bar for searching black and Hispanic drivers is generally lower than that for searching white drivers” for both state-patrol and municipal-police stops.¹⁹

⁹ *Michigan v. Long*, 463 U.S. 1032, 1049, 1051 (1983).

¹⁰ *Florida v. Harris*, 568 U.S. 237, 246-47 (2013).

¹¹ *Schneckloth v. Bustamonte*, 412 U.S. 2018, 248-49 (1973).

¹² *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

¹³ See, e.g., Pierson et al., *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736, 738 (2020); Robin Shepard Engel & Jennifer M. Calnon, *Examining the Influence of Drivers' Characteristics During Traffic Stops with Police: Results from a National Survey*, 21 JUST. Q. 49, 69-73 (2004); Wendy C. Regoeczi & Stephanie Kent, *Race, Poverty, and the Traffic Ticket Cycle: Exploring the Situational Context of the Application of Police Discretion*, 37 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 190, 197 (2014); Sunghoon Roh & Matthew Robinson, *A Geographic Approach to Racial Profiling: The Microanalysis and Macroanalysis of Racial Disparity in Traffic Stops*, 12 POLICE Q. 137, 161 (2009); Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 657 (2021).

¹⁴ Pierson et al., *supra* note 13, at 737.

¹⁵ *Id.*

¹⁶ *Id.* at 739.

¹⁷ *Id.* at 738.

¹⁸ *Id.*

¹⁹ *Id.* at 739.

Many harms of policing during traffic stops are possible to quantify. Many others, however, are more difficult to quantify, yet still important. For instance, policing during traffic stops has facilitated and perpetuated stereotypes that force communities of color – and especially young men of color – to live with the everyday stigma of being viewed as “suspicious” by others. These problems are only exacerbated when police officers have the legal authority to initiate encounters with drivers and passengers of color for any suspected traffic violation. Under such circumstances, communities of color must negotiate their everyday behavior in public spaces, including roads and highways, with the hope of avoiding harmful policing. In traffic situations, this might mean that people of color refrain from driving on certain streets at particular times, or refrain from driving at all at particular times, to avoid being subjected to pretextual traffic stops and other harmful police practices during traffic stops.

Conclusion

Thank you for the invitation to comment on these topics. I am looking forward to meeting with the Committee.

Exhibit B

Chauncey Smith

Senior Manager of Criminal Justice, Advancement Project
California



August 19, 2022

Michael Romano, Chairperson
Committee on Revision of the Penal Code
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RE: THE COMMITTEE SHOULD RECOMMEND LEGISLATIVE ACTION TO ADVANCE NON-LAW ENFORCEMENT ALTERNATIVES TO TRAFFIC SAFETY TO PREVENT RACIALLY BIASED HARMS, IMPROVE TRAFFIC SAFETY, AND ENSURE THAT PUBLIC DOLLARS ARE USED MORE RESOURCEFULLY

The Honorable Michael Romano:

I am the Senior Manager of Criminal Justice at Advancement Project California (APCA), a racial equity organization with over 20 years of expertise in policy research, data analysis, and advocacy. APCA works alongside community partners to transform public systems and shift investments to create a more racially equitable California. As explained below, I strongly urge the Committee on the Revision of the Penal Code (Committee) to recommend legislative action that advances non-law enforcement traffic safety alternatives.

I. LAW ENFORCEMENT-DRIVEN TRAFFIC ENFORCEMENT RESULTS IN SIGNIFICANT RACIALLY BIASED HARMS, FAILS TO MEANINGFULLY PREVENT FATAL VEHICLE COLLISIONS, AND WASTES TREMENDOUS PUBLIC DOLLARS

In California, law enforcement patrol activities are largely dedicated to conducting unsolicited traffic stops. Specifically, data from the Racial & Identity Profiling Act of 2015 (RIPA) show that across racial/ethnic groups, a traffic violation (vs. reasonable suspicion, warrant to arrest, etc.) is the stop reason in 77.9% (Blacks) to 95.5% (Middle Eastern/South Asian) of all stops.¹ In addition, over 90% of all stops are officer-initiated and less than 10% are based on calls for service—a relevant distinction because many view law enforcement patrol activities as significantly focused on responding to calls for help (e.g., 911) from community members, which is not the case.

A. Racial Disparities: Figures show that, compared to Whites, people of color are far more likely be stopped, and subjected to degrading officer actions (e.g., searched, handcuffed, curbside or patrol car detention, ordered out of car) and uses of force. However, people of color are less likely to be found in possession of contraband or evidence of a crime than Whites.

- Stops: RIPA data on officer-initiated stop rates compared to residential population statistics show that Black people are stopped 9.4 percentage points higher than their population make-up (i.e., 15.82% vs. 6.42%). In contrast, White people are stopped at a rate 3.6 percentage points lower than their residential population (i.e., 31.66% vs. 35.26%).²
- Actions Taken During Stops: Compared to other race/ethnicity groups, Black people are subject to officer actions during stops at the highest rate (31%). And, while officers stop over 445,000 more White people, Blacks are subjected to over 9,000 more officer actions annually.

¹ See Steven Raphael (Co-Chair), et al., “Racial & Identity Profiling Act Advisory Board, Annual Report 2022,” Appendix (A.1), p. 1 (2022) (hereafter “RIPA Report 2022”), <https://oag.ca.gov/system/files/media/ripa-appendices-2022.pdf>.

² *Id.* at (D.1.3), p. 76.

In addition, Multiracial (21.7%), American Indian (21%), Latinx (20%) and Pacific Islander (16.9%) people are subjected to actions by officers at greater rates than Whites (15.2%).³

- **Discovery Rates:** Black people are searched at rates greater than all other racial/ethnic groups. For example, Whites and Blacks are searched at rates of 8.8% and 20.7% (an 11 percentage point difference), respectively. Stated differently, Black people are 2.4 times more likely to be searched than Whites.⁴ In addition, officers search Multiracial (+5.4%), American Indian (+3.9%), and Latinx (+3.7%) people more than Whites.⁵ However, in terms of discovering contraband or evidence of a crime, Latinx (-3.3%), Middle Eastern/South Asian (-3%), American Indian (-2.5%), Multiracial (-1.9%), Black (-1.2%), and Pacific Islander (-0.9%) people are all less likely than Whites to be found in possession.⁶
- **Uses of Force:** RIPA data show that Black (1.32 times) and Latinx (1.16 times) people are more likely to be subjected to uses of force by officers compared to Whites.⁷ Notably, however, anecdotal reports and analyses from partners in the field indicate that RIPA use of force data is significantly underinclusive and unreliable, and people of color are subject to uses of force at rates that far exceed those collected and reported pursuant to RIPA.⁸

B. Racially Biased Harms: As a result of the above racial biases, research shows that people of color are disproportionately forced to endure a litany of harms, including but not limited to, dehumanization,⁹ degraded health,¹⁰ economic extraction and financial stress,¹¹ and the devaluation of their lives. For example, the publicly posted draft RIPA Board Report for 2023 provides that “research shows that the types of contact and frequency of involuntary contact with law enforcement may have a traumatic impact on the stopped individuals, including mental

³ RIPA Report 2022 at 38 (Note that Report data apparently not disaggregated by officer-initiated vs. calls for services for this sub-issue).

⁴ RIPA Report 2022 at 52.

⁵ Disparities reflect percentage point differences. Complete figures provided in RIPA Report 2022 Report Appendix at D.2 (pp. 85-91).

⁶ RIPA Report 2022 at 53-54. (Note that Report data apparently not disaggregated by officer-initiated vs. calls for services for this sub-issue); Disparities reflect percentage point differences. Complete figures provided in RIPA Report 2022 Report Appendix at D.2 (pp. 85-91).

⁷ *Id.* at 61. (Note that Report data apparently not disaggregated by officer-initiated vs. calls for services for this sub-issue).

⁸ *Compare, e.g.*, RIPA Report 2022 at 58 (“Officer reported using legal force [firearm discharged or used] against 0.005 percent (146) of individuals they stopped”), with Deepak Premkumar, et al., “Police Use of Force and Misconduct in California,” (PPIC Oct. 2021) (“Nearly 250 people are shot by police each year”).

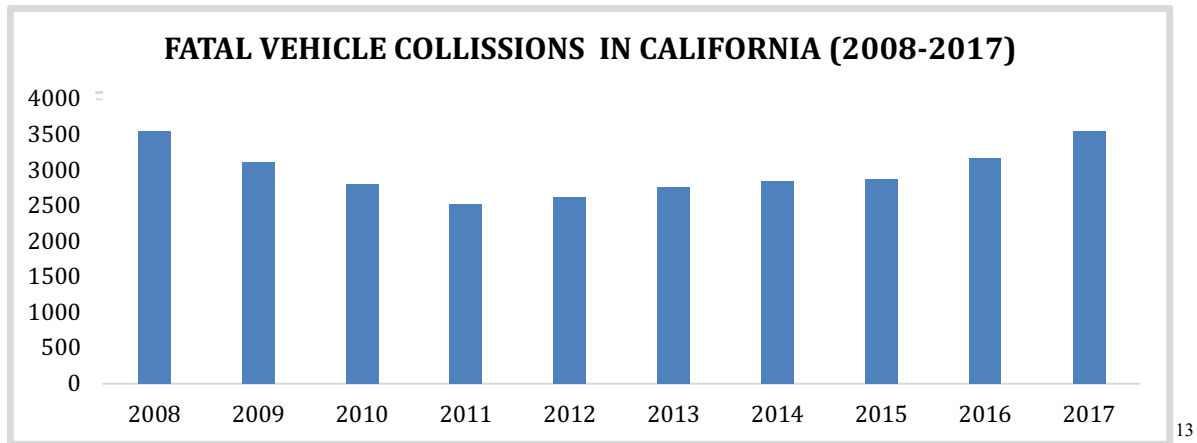
⁹ “Getting Pulled Over as a Black Man in America.” NowThis News. June 3, 2020, <https://twitter.com/nowthisnews/status/1268277022314414082>.

¹⁰ Feldman, Justin. “Public Health and the Policing of Black Lives.” *Harvard Public Health Review* 7 (2015): 1–3. <https://www.jstor.org/stable/48503132>; Juan Del Toro, et al., “The Criminogenic and Psychological Effects of Police Stops on Adolescent Black and Latino Boys.” *PNAS, National Academy of Sciences*, April 23, 2019. <https://www.pnas.org/content/116/17/8261>.

¹¹ Annette Case & Jhumpa Bhattacharya. “Driving into Debt: The Need for Traffic Ticket Fee Reform.” Insight Center for Community Economic Development, May 2017, https://insightcced.org/wp-content/uploads/2017/05/insight_drivingintodebt.pdf; “Stopped, Fined, Arrested: Racial Bias in Policing and Traffic Courts in California.” Back on the Road (CA) Coalition, April 2016. https://lccrsf.org/wp-content/uploads/Stopped_Fined_Arrested_BOTRCA.pdf.

health trauma and anxiety . . . high rates of distress, a sense of injustice, feelings of hopelessness and even further, feelings of dehumanization.”¹²

C. Detriment to Traffic Safety: California traffic fatality trends indicate that roadway safety is not substantially improving over time.



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A 2021 study, *Traffic Stops Do Not Prevent Traffic Deaths*, compared over 150 million traffic stops in 33 states to vehicle collision rates in the same geographic areas between 2006 to 2016. In aggregate, no significant correlation between high stop rates and low crash rates was found. Stated differently, the data did not show that traffic stops decreased collisions.¹⁴ Similarly, a RACE COUNTS report, *Reimagining Traffic Safety & Bold Political Leadership in Los Angeles*, evaluated the relationship between arrests for vehicle code violations and vehicle collisions. It found that in numerous L.A. city council districts higher arrest rates for vehicle code violations did not translate to lower collision rates.¹⁵

D. Waste of Public Dollars: Research shows that California cities and counties annually spend over \$20 billion on police and sheriff’s departments. Disaggregated, cities spend nearly 3 times more on police than housing and community development, and counties spend more general fund revenue on sheriff’s departments than on social services by a substantial margin.¹⁶ Within this context, the Committee’s 2020 Annual Report and Recommendations found that “the vast majority of all criminal filings in California are traffic cases – more than

¹² See RIPA Board Meeting Archives, “DRAFT 2023 RIPA Board Report,” p. 3 (July 28, 2022), <https://oag.ca.gov/system/files/media/ripa-draft-2023-ripa-board-report-072822.pdf>.

¹³ California Highway Patrol, 2017 Annual Report of Fatal and Injury Motor Vehicle Traffic Collisions, [https://www.chp.ca.gov/InformationManagementDivisionSite/Documents/6-Section%20One%202017%20\(Revised%20on%2001302020\).xls](https://www.chp.ca.gov/InformationManagementDivisionSite/Documents/6-Section%20One%202017%20(Revised%20on%2001302020).xls). In addition, more recent data show that there were 3,606 traffic fatalities in 2019.

¹⁴ Sarode AL, Ho VP, Chen L, Bachman KC, Linden PA, Lasinski AM, Moorman ML, Towe CW. “Traffic stops do not prevent traffic deaths.” *J Trauma Acute Care Surg.* 2021 Jul 1;91(1):141-147. <https://pubmed.ncbi.nlm.nih.gov/34144561/>.

¹⁵ Chauncey Smith, Elycia Mulholland Graves & Laura Daly, “Reimagining Traffic Safety & Bold Political Leadership in Los Angeles.” RACE COUNTS, May 3, 2021, <https://www.racecounts.org/push-la>.

¹⁶ Scott Graves & Chris Hoene, “How much Does California Spend on Law Enforcement, the Criminal Legal System, and Incarceration,” California Budget & Policy Center (June 23, 2020), https://calbudgetcenter.org/app/uploads/2020/06/CA_Budget_Center_Spending-on-Criminal-Justice_062320.pdf.



81% or 3.6 million filings a year.”¹⁷ Approximately seventy-five percent of those filings are infractions, and 6% are misdemeanors. These relatively low-level offenses “consume considerable resources among police, courts, prosecution and defense offices, and county jails.”¹⁸ To add, annually, we now see large settlements between localities and people harmed by law enforcement or (in the case of death) their loved ones. For example, in approximately five and a half years, the City of Los Angeles paid over \$245 million for claims against the Los Angeles Police Department.¹⁹ In 2021, the City and County of San Francisco agreed to a \$2.5 million settlement with the mother of an unarmed Black man killed by a police officer.²⁰ And, the City of Sacramento recently settled to pay the family of Stephon Clark (who was shot to death by police in 2018 while holding a cell phone) \$1.7 million.

II. THE COMMITTEE SHOULD RECOMMEND LEGISLATIVE ACTION THAT SHIFTS CALIFORNIA TOWARD NON-LAW ENFORCEMENT TRAFFIC SAFETY ALTERNATIVES

To offset the above racially biased harms, improve roadway safety, and ensure that public dollars are allocated more resourcefully, the Committee should recommend that the Legislature urgently take action to decrease the role of law enforcement in traffic enforcement, create a robust ecosystem of non-law enforcement traffic safety programs, prohibit consent searches, and improve RIPA data collection, reporting, and accuracy.

A. Decrease the Role of Law Enforcement in Traffic Enforcement: Throughout California and around the U.S., there has been significant movement toward innovative approaches to roadway safety that do not rely on armed law enforcement. Last year, for example, the City of Berkeley passed a motion to decrease officer enforcement of low-level traffic violations.²¹ In 2020, the State of Virginia passed a bill prohibiting officers from stopping people for, among other things, having tinted windows, an object hanging from a rear view mirror, or expired vehicle registration.²² And, the Attorney General of the State of New York declared that the New York Police Department should no longer be responsible for enforcing minor traffic violations.²³ This year, the California Legislature took a step in that direction by introducing SB 1389 (Bradford), which, if enacted, would have added § 2804.5 to the Vehicle Code to preclude officers from enforcing a small set of low-level traffic violations unless there is a separate, independent basis for a stop.²⁴ However, the Vehicle Code includes roughly 1,000 infractions.²⁵ Many of those infractions are used to racially profile and extract economic resources (via fees and fines) from

¹⁷ Committee on the Revision of the Penal Code, “Annual Report and Recommendations 2020,” p. 15 http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2020.pdf.

¹⁸ *Id.* at 15-16.

¹⁹ Emily Alpert and Kevin Rector. “L.A. to Pay Nearly \$1.6 Million to Settle Three Lawsuits Alleging Police Wrongdoing.” Los Angeles Times, April 7, 2021. <https://www.latimes.com/california/story/2021-04-07/l-a-to-pay-nearly-1-6-million-in-three-suits-alleging-lapd-wrongdoing>.

²⁰ “SF Supes Approve \$2.5 Million Settlement for Mother of Man Killed in 2017 Police Shooting.” Bay City News. Dec. 8, 2021. <https://www.nbcbayarea.com/news/local/san-francisco/sf-supes-approve-2-5-million-settlement-for-mother-of-man-killed-in-2017-police-shooting/2750439/>.

²¹ City of Berkeley, Office of the Mayor, “Report and Recommendations from Mayor’s Fair and Impartial Policing Workgroup,” (Feb. 23, 2021), <https://newspack-berkeley-side-cityside.s3.amazonaws.com/wp-content/uploads/2021/02/Motion-Item-1-Fair-and-Impartial-Policing.pdf>.

²² Virginia Acts of Assembly – 2020 Special Session I, Ch. 25 (Nov. 9, 2020), <https://static1.squarespace.com/static/58afc5861b631bb7fa6729f6/t/609325f4e3157f0a949d8c45/1620256244752/legp604.exe-14.pdf>.

²³ Michael R. Sisak, “NYPD should stop making traffic stops, attorney general says” (Associated Press Sep. 25, 2020), <https://apnews.com/article/bronx-arrests-traffic-archive-new-york-c93fa5fc03f25c2b625d36e4c75d1691>

²⁴ Legislative Information, SB-1389 Vehicles: Traffic Stops (Introduced Feb. 18, 2022), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB1389.

²⁵ SB 1389 P.S. Comm. Analysis.

people of color, especially those who are low-income.²⁶ In addition, the connection between a litany of those infractions and actually improving roadway safety is tenuous at best and, at worst, unfounded.²⁷ Thus, the Committee should recommend that the Legislature shift enforcement of Vehicle Code infractions away from law enforcement agencies.²⁸

B. Create an Ecosystem of Non-Law Enforcement Traffic Safety Alternatives: The general thrust of the community safety landscape increasingly trends toward developing community-connected approaches of harm prevention. For example, instead of using a punitive approach through issuing fines (an ineffective deterrent) for speeding, urban design investments—such as adding more speed bumps, stops signs, and clear street markings—could be added to prevent speeding in the first place, which would, in turn, minimize the overwhelming economic impact of excessive fees extracted from low-income people of color.²⁹ What if instead of having an armed police officer pulling a person over to issue a ticket—which could lead to another unnecessary episode of police violence—unarmed traffic safety personnel are there to provide the driver with a voucher that they can take to a mechanic in their neighborhood to cover repair costs? This service would help the driver who cannot afford to repair their vehicle, improve roadway safety, and support the economic viability of small businesses—especially in under-resourced communities.³⁰ Localities around the nation are already taking this reimagined approach.³¹

C. Prohibit Consent Searches: The RIPA Board’s 2022 Report provides that “officers reported that 94.6 percent of individuals consented to a search when asked by an officer. Given such high rates of consent . . . it is important to consider if these searches are truly consensual. The research . . . coupled with RIPA data, strongly suggest that consensual searches actually may be submissions to a claim of lawful authority. If this is true, it is important to ask whether consent searches should be permitted at all given the important constitutional issues at stake.”³² Additional research shows that consent is often identified as the basis for searching a person even though consent was not actually provided, not provided voluntarily, or that the person did not understand that they had a right to refuse consent.³³ For people of color, such unjust searches routinely amount to unnecessary trauma and harassment, especially when combined with pretextual stops. Because of such problems, jurisdictions around the country have banned consensual searches.³⁴ California should do the same.

D. Improve RIPA Data Collection, Reporting, Accuracy: (i) Accuracy: As explained above, the accuracy of RIPA data on uses of force is questionable and appears to be very underinclusive. This has the affect of greatly masking the severity of racialized police violence and attendant harms endured by communities and localities across California; (ii) Collection: In addition, RIPA should be improved by requiring agencies to also collect and report

²⁶ See Chauncey Smith, Elycia Mulholland Graves & Laura Daly, *Reimagining Traffic Safety & Bold Political Leadership in Los Angeles*. RACE COUNTS, May 3, 2021, <https://www.racecounts.org/push-la>; Lawyers’ Committee for Civil Rights of the San Francisco Bay Area, “Cited for Being in Plain Sight: How California Polices Black, Brown and Unhoused In Public” (Sep. 2020), https://lccrsf.org/wp-content/uploads/2020/09/LCCR_CA_Infraction_report_4WEB-1.pdf.

²⁷ See, e.g., *supra* note 17 at 15.

²⁸ This solution may require technical clarification legislation related to preemption issues. See, e.g., Letter from Liam Garland to Berkely Reimagining Safety Task Force, pp. 9-10 (May 19, 2020), <https://newspack-berkeleyside-cityside.s3.amazonaws.com/wp-content/uploads/2021/05/Reimagining-5-19-BerkDOT.pdf>.

²⁹ See *supra* note 26.

³⁰ *Id.*

³¹ Khalifa Uchiche, “Pretext traffic stops under fire,” Minnesota Spokesman Recorder (March 6, 2021), <https://spokesman-recorder.com/2021/05/06/pretext-traffic-stops-under-fire/>.

³² RIPA Report 2022 at 100, 107-16.

³³ Los Angeles Office of Inspector General, “Review of Stops Conducted by the Los Angeles Police Department in 2019” (Oct. 2020), https://www.oig.lacity.org/files/ugd/b2dd23_d3e88738022547acb55f3ad9dd7a1dcb.pdf.

³⁴ See, e.g., R.I. Gen. L § 31-21.2-5(b) (2014). Peter Yankowski, “5 Things to know about CT Police accountability law.” CT Post. Oct. 1, 2020. <https://www.ctpost.com/local/slideshow/Photos-from-article-CT-police-accountability-law-210080.php>



the location of stops pursuant to geographic coordinates so that researchers can better understand law enforcement patrol practices. Currently, agencies use varying approaches (e.g., nearest block or cross-streets) that are insufficiently clear and require the expenditure of enormous resources to meaningfully analyze; (iii) Reporting: Lastly, RIPA should be amended to clarify that the Department of Justice must publicly report the geographic location of stops—particularly if the use is to advance public policy or for scientific studies and the publication of data analysis or research would not result in the disclosure of confidential information.^{35,36}

Accordingly, for the reasons discussed above, the Committee should recommend legislative action to shift California toward a path of non-law enforcement alternatives to traffic safety that would better protect communities of color from racially biased police violence, improve roadway safety, and ensure that public dollars are used more resourcefully.

Chauncey Smith
Senior Manager of Criminal Justice

cc: The Honorable Michael Romano, Chairperson
The Honorable Members, Committee on the Revision of the Penal Code

³⁵ See, e.g., Gov. Code Sec. 6254(f)(3).

³⁶ Lastly, it should also be noted that RIPA data should include instances when officers perform sweeps on public transportation (i.e., buses and trains). The California Department of Justice recently proposed a regulation that would preclude data collection for such stops. See, e.g., “Proposed Text of Modified Regulations” § 999.227(d)(1)(E), <https://oag.ca.gov/system/files/media/ripa-2nd-mods-to-proposed-amends-052522.pdf>. This would have a damaging impact on people of color (who tend to disproportionately rely on public transportation because of lower incomes compared to other racial/ethnic groups) who are all too often disproportionately targeted by law enforcement on transit systems. See, e.g., ACT-LA, *Metro as a Sanctuary: Reimagining Safety on Public Transit* (2021), available at <http://allianceforcommunitytransit.org/wp-content/uploads/2021/03/Metro-as-a-Sanctuary-ACT-LA.pdf>, pp. 12-14; Labor/Community Strategy Center, *Re: Civil Rights Complaint Against the Los Angeles Metropolitan Transportation Authority, the Los Angeles County Sheriff’s Department and all employed and contracted police, for Racial Discrimination and a Pattern and Practice of Systemic Criminalization Against Black Transit Riders* (Nov. 14, 2016), available at <https://fightforthesoulofthecities.com/dotcomplaint>; Kelly Puente, “Black riders disproportionately stopped for fare evasion on Long Beach public transit, data shows,” *Long Beach Post* (July 7, 2020), <https://lbpost.com/news/black-riders-metro-bus-racial-profiling-long-beach>.

Exhibit C

Maria Ponomarenko

Co-Founder and Counsel, NYU Policing Project

Written Submission to the California Commission on Revision of the Penal Code

Maria Ponomarenko, *Co-Founder and Counsel, Policing Project at NYU Law*

I am a law professor at the University of Texas School of Law and also the Co-founder and Counsel at the Policing Project at NYU Law. At the Policing Project, we have worked closely with police departments and community members in more than a dozen jurisdictions—including New York, Chicago, Los Angeles, Tucson, and Nashville—to help make policing more effective, equitable, and just.

I was asked to provide testimony regarding the steps that the California legislature might take to address the pervasive disparities in traffic stops and searches by police in this state.

The Policing Project has developed model legislation¹—similar to statutes adopted in Virginia and Oregon—to reduce unnecessary stops for low-level offenses and still give the police the tools that they need to promote traffic safety and address crime.

Concerns with Low-Level Traffic Stops

Police officers in the United States make more than 20 million traffic stops each year. Many of these stops have little to do with traffic safety. Instead, officers often pull people over for minor rule violations, such as hanging an air freshener or graduation tassel on a rearview mirror. Low-level violations are so common that if you drive long enough on the road, you will commit one. This means that officers can stop virtually any driver, at any time. In many cities, officers use these low-level stops as an excuse to go “fishing” for other crimes.

Although we all commit these types of violations, we are not all equally likely to be stopped by the police. Black drivers are disproportionately likely to be stopped—and once stopped, to be subjected to intrusive questioning or asked for consent to search. This is true in California as well.² In some communities, residents report being stopped dozens of times. These interactions erode trust in the police and undermine the cooperation that is necessary to keep communities safe.

Moreover, a traffic stop, even for minor reasons, can also have lasting consequences for those involved. The widely reported police killings of Daunte Wright and Philando Castile—both pulled over for low-level infractions—are stark examples of the tragic outcomes that pretextual policing can give rise to. But the consequences need not be deadly to have lasting effects. Even citations for minor traffic offenses can lead to hefty fines and, for those unable to pay, license suspensions or even incarceration. And this is to say nothing of the fright, humiliation, and other indignities that these encounters visit upon those stopped.

Limited Public Safety Benefits

Low-level traffic stops also do very little to improve public safety.

In 2017, the Nashville Mayor’s office and Police Department invited the Policing Project to evaluate the department’s use of pretextual stops as a crime-fighting tool. Like many agencies, the department instructed its officers to go into higher crime neighborhoods and look for people to

¹ Overview: <https://tinyurl.com/2p9b94y7>; Full Statute: <https://tinyurl.com/3vzfsft4>.

² See 2021 RIP A Report: <https://oag.ca.gov/system/files/media/ripa-quick-facts-2022.pdf>.

stop. Everyone in the department, from the command staff on down, emphasized the importance of pretextual stops both as a way to establish “presence” and as a way to look for evidence of more serious crimes.

The data did not back up these assertions. Working with researchers from the Stanford Computational Policy Lab, we looked at the “hit rates” for stops—which is to say the number of stops that resulted in arrests for more serious crimes. And we also evaluated the impact of stops on crime rates in the neighborhoods in which they were used.³

What we found is that only a tiny fraction of stops—less than 1%—resulted in a gun charge, the discovery of an outstanding warrant, or an arrest for a more serious crime, like robbery or burglary. The vast majority of people stopped were not guilty of anything other than the low-level offense that justified the stop.⁴ And importantly, we also found no effect on surrounding crime rates. Crime rates naturally varied over time in different parts of the city, but they did so completely independently of whether officers were flooding a particular neighborhood with stops.⁵

To the Department’s credit, they quickly recognized that there were much better ways for their officers to spend their time. In the two years after our study, the Department cut stops by more than 80%. The Department now emphasizes that traffic enforcement should focus primarily on *traffic* safety. And it relies on more targeted strategies—often in collaboration with residents—to address violent crime.

Our Model Legislation

This model legislation focuses on three main goals: (1) prohibiting traffic stops for low-level infractions, (2) limiting the scope of these stops and the incentives that lead to them, and (3) collecting robust data on officer stops.

California already has adopted a robust stop-data regime. But legislators should consider following Virginia and Oregon’s lead in prohibiting stops for low-level offenses and reducing the intrusiveness of the stops that do occur.

The model legislation preserves officers’ authority to pull someone over if they reasonably suspect them of engaging in criminal activity. And of course, officers will also still be able to enforce the many more serious traffic laws that are on the books. It does, however, make clear that when someone is guilty of little more than a minor vehicle infraction, an officer’s vague hunch that they may be up to something more should not be sufficient to justify making a stop.

We very much appreciate to invitation to contribute to the California Commission on Revision of the Penal Code examination of this important issue. The Policing Project stands ready to help California transform their traffic stop legislation, reduce racial disparities, and improve public safety.

³ Policing Project Report on Traffic Stops in Nashville: <https://tinyurl.com/t84p8nav>.

⁴ Hit rates were considerably higher for “investigative” stops based on reasonable suspicion of criminal activity, which is consistent with the view that randomly stopping large numbers of people is a poor use of officer time.

⁵ Nationwide, studies suggest that *very* targeted use of proactive enforcement tactics like traffic stops can have some crime-reduction benefits. See [National Academies Report summarizing the research](#). But there also is ample evidence to suggest that problem-oriented strategies generate much larger crime-reduction benefits, and do so without imposing the significant social costs that enforcement-based approaches entail. See [Braga meta-analysis](#).

Exhibit D

Lizabeth Rhodes

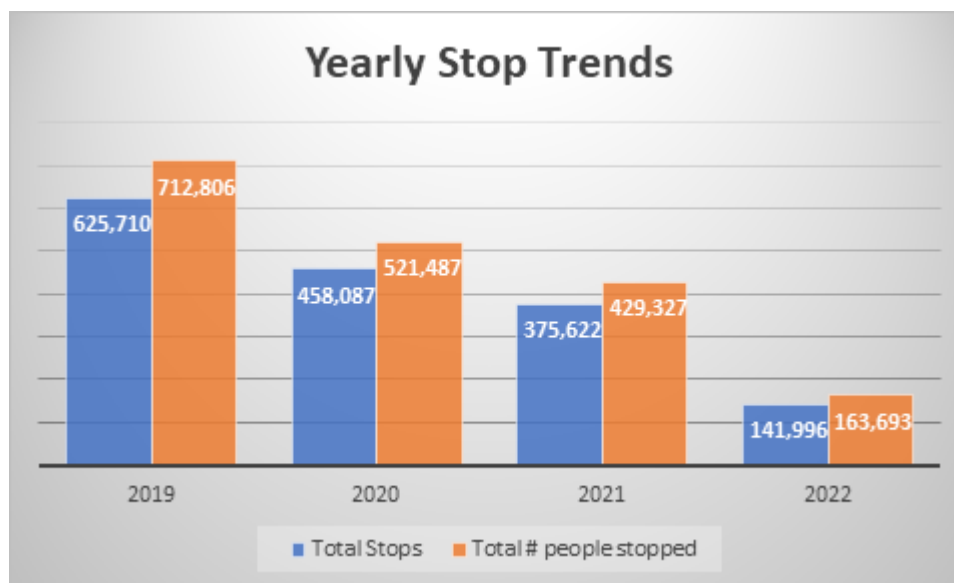
Director, LAPD Office of Constitutional Policing

In 2015, the California legislature passed Assembly Bill 953, also known as the Racial Identity Profiling Act (RIPA), to address concerns of racial bias in policing. The bill and the associated RIPA Board established data collection requirements for California law enforcement agencies (LEAs) which included: (1) collection of perceived demographic information and (2) other detailed data regarding vehicle, pedestrian, and bicycle stops. The Act specifically stated that LEAs were not to collect data from identification documentation such as a driver's license or passport. Instead, the Act directed LEAs to report data based upon the officers' perception of the person stopped. The rollout of data collection and reporting from California law enforcement agencies occurred in phases. As of July 1, 2018, the largest LEAs, defined as agencies with more than 1,000 officers, were required to comply with the Act by collecting the required data elements.

The Los Angeles Police Department was part of the first wave of LEAs to submit their stop data to the California Department of Justice (DOJ). Data is submitted to the DOJ yearly and is available on the DOJ's Open Justice website.

Table No. 1 – *Stop Data Trends from 2019 to 2022* reflects the Department's stop data from 2019 through the first six months of 2022.

**Table No. 1 – Stop Data Trends from 2019 to 2022
(January 1, 2019 through June 30, 2022)**

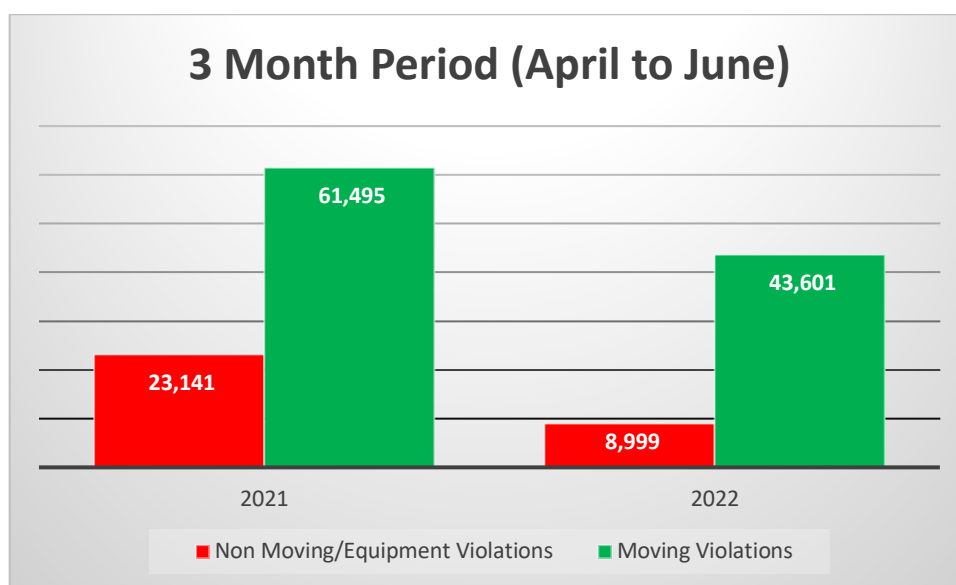


In 2020, the Office of the Inspector General (OIG) conducted a review of the Department's 2019 vehicle, pedestrian, and bicycle stops. The review relied primarily on an analysis of stop data collected and maintained by the Department pursuant to RIPA and included a qualitative assessment of stop videos. Several RIPA recommendations came from the review and were grouped into distinct categories such as policy, training, information technology, data analysis, internal audits, and community engagement.

One of the analyses performed by the OIG concluded that a portion of racial disparities seen in traffic stops, or stops for other minor violations, were the result of strategies designed to use these violations as a pretext to identify or suppress more serious crimes. To address this, on March 9, 2022, the Department established its pretext policy. The policy delineated the parameters and responsibilities for Department personnel when using pretextual stops such that they remained in compliance with the 4th and 14th Amendments to the United States Constitution. The policy *does not* restrict pretext stops but instead focuses the officers' actions on conducting stops that affect public safety.

Table No. 2 – *Stop Data Comparison* reflects the stop data activity for non-moving/equipment and moving violations in the three-month period of April to June for both 2021 and 2022. This date range was selected because, though the pretext stop policy was established in March 2022, the mechanism for tracking pretext stops did not come online until April 1, 2022.

**Table No.2 - Stop Data Comparison
2021 vs. 2022**



As reflected in Table No. 1 - *Stop Data Trends from 2019 to 2022*, stop activity was on the decline well before the implementation of the Department's pretext policy. The total reduction in stops thereby cannot be solely attributed to the policy; however, the policy's intention was not to drive down stops but rather to increase the quality of all stops officers conducted. To that end, the Department is focusing its efforts on training officers and reviewing their actions for compliance with the pretext stop policy, the tenets of procedural justice, and safety strategies that center on communities' expressed needs. The Department believes this approach allows law enforcement agencies to apply existing laws in a manner that is responsive to community calls to end the over-policing of select neighborhoods while increasing the safety of all residents and city stakeholders.

INTRADEPARTMENTAL CORRESPONDENCE

March 1, 2022
1.14

TO: The Honorable Board of Police Commissioners

FROM: Chief of Police

SUBJECT: POLICY – LIMITATION ON USE OF PRETEXTUAL STOPS - ESTABLISHED

RECOMMENDED ACTION

That the Board of Police Commissioners REVIEW and APPROVE the revised policy pertaining to pretextual stops.

DISCUSSION

On February 1, 2022, the Department presented a draft policy on the Limitation on Use of Pretextual Stops to the Board of Police Commissioners. Thereafter, the Department solicited and obtained public comment on the draft policy between February 1, 2022, and February 15, 2022. Based on that feedback and other considerations, a further refined draft policy is being presented for consideration.

The newly established policy provides parameters and responsibilities for Department personnel when using pretextual stops so that they remain in compliance with the 4th and 14th Amendments to the United States Constitution, and build public trust and transparency, and provide for public safety.

The revised policy adds Section 1/240.06, *Policy – Limitation on Use of Pretextual Stops*, to the Department Manual.

Should you have any questions regarding this matter, please contact Director Lizabeth Rhodes, Office of Constitutional Policing and Policy, at (213) 486-8730.

Respectfully,



MICHEL R. MOORE
Chief of Police

Attachments

OFFICE OF THE CHIEF OF POLICE

SPECIAL ORDER NO.

APPROVED BY THE BOARD OF POLICE COMMISSIONERS ON

SUBJECT: POLICY - LIMITATION ON USE OF PRETEXTUAL STOPS – ESTABLISHED

BACKGROUND: Members of our community and communities around the country have expressed concern regarding the manner and frequency with which officers are stopping individuals (pedestrians, cyclists, and motorists) for perceived minor violations to investigate other crimes (a subset of which are known as and approved by the United States Supreme Court as “pretextual stops”). Their fears stem in large measure from a belief that such enforcement activities are arbitrary, capricious, and a reflection of an individual officer’s implicit or explicit bias(es). Moreover, some community members question the impact such pretextual stops have on crime reduction.

The Department continually assesses community concerns and expectations with respect to its responsibility to ensure public safety. The Department works regularly with various City entities (e.g., City of Los Angeles’ Vision Zero for 2025 initiative) to identify and resolve problematic street corridors, which requires that officers actively engage motorists, bicyclists, and pedestrians – via education and enforcement of California Vehicle Code violations (e.g., red light and stop sign violations, distracted driving, unsafe speed, driving under the influence) to improve roadway safety in all communities throughout the City of Los Angeles. In addition, the increase in violent crime necessitates proactive and vigilant enforcement efforts to ensure public safety.

In fulfilling its mission to increase safety and reduce the incidence and fear of crime, the Department seeks to eliminate bias in any form from within its ranks and practices. The Department also strives to reduce and, if possible, ultimately eliminate any perception of bias within the LAPD. For these reasons, the Department seeks to hone the focus of its traffic enforcement and crime prevention strategies to reduce traffic injuries and fatalities, and address crime (especially violent crime) while also facilitating trust and improving community relations. This mandate requires the judicious use of our legitimate authority as we endeavor to protect the various communities we serve. Therefore, absent intelligence or information connecting an individual to a crime or public safety concern, less attention should be given to observations of vehicle equipment violations where no strong causal connection to collisions – and hence public safety – exists. This re-prioritization of efforts and other Department policies (e.g., *Policy Prohibiting Biased Policing*) as well as training are part of the Department’s goal of eliminating any actual or perceived disparities in treatment.

SPECIAL ORDER

-2-

PURPOSE: The purpose of this Order is to establish Department Manual Section 1/240.06, *Policy - Limitation on Use of Pretextual Stops*. The policy provides parameters and responsibilities for Department personnel when utilizing pretextual stops so that they remain in compliance with the 4th and 14th Amendments to the United States Constitution.

PROCEDURE:

- I. POLICY - LIMITATION ON USE OF PRETEXTUAL STOPS – ESTABLISHED.** Department Manual Section 1/240.06, *Policy - Limitation on Use of Pretextual Stops*, has been established and is attached.

AMENDMENTS: This Order adds Section 1/240.06 to the Department Manual.

AUDIT RESPONSIBILITY: The Commanding Officer, Audit Division, shall review this directive and determine whether an audit or inspection shall be conducted in accordance with Department Manual Section 0/080.30.

If you have any questions, you may contact the Office of Constitutional Policing and Policy, at (213) 486-8730.



MICHEL R. MOORE
Chief of Police

Attachment

DISTRIBUTION "D"

DEPARTMENT MANUAL
VOLUME I
Established by Special Order No. , 2022

240. 06 POLICY - LIMITATION ON USE OF PRETEXTUAL STOPS

PREAMBLE. *While the exercise of an officer's discretion in initiating a "stop" or conducting a detention is authorized under the law, it should reflect the necessary balance of the role of law enforcement in the prevention of crime and receiving and thereafter maintaining the community's trust that the officer's actions are fair and without bias. Conducting a vehicle or pedestrian stop and/or detention can promote public safety and the protection of the public from serious and sometimes violent crime. Such stops can also subject motorists and pedestrians to inconvenience, confusion, and anxiety, and strain relationships between law enforcement and the community because some members of the community perceive stops as biased, racially motivated, or unfair. To maintain public trust, the Department's use of pretext stops as a crime reduction strategy must be measured, in furtherance of achieving the necessary balance between the perception of fairness and identifying those engaged in serious criminal conduct.*

Pretext Stops Defined. *A pretextual or pretext stop is one where officers use reasonable suspicion or probable cause of a minor traffic or code violation (e.g., Municipal Code or Health and Safety Code) as a pretext to investigate another, more serious crime that is unrelated to that violation.*

Policy.

Use of Traffic/Pedestrian Stops - General. *Traffic or pedestrian stops made for the sole purpose of enforcing the Vehicle Code or other codes are intended to **protect public safety**. Therefore, officers should make stops for minor equipment violations or other infractions only when the officer believes that such a violation or infraction significantly interferes with public safety.*

Note: *The public safety reason for all traffic/pedestrian stops, citations and warnings should be articulated on body-worn video (BWV) and should include an officer's response to any questions posed by the individual stopped.*

Pretext Stops – Restricted. *It is the Department's policy that pretextual stops shall not be conducted **unless** officers are acting upon articulable information in addition to the traffic violation, which may or may not amount to reasonable suspicion, regarding a serious crime (i.e., a crime with potential for great bodily injury or death), such as a Part I violent crime, driving under the influence (DUI), reckless driving, street racing, street takeovers, hit and run, human or narcotics trafficking, gun violence, burglary, or another similarly serious crime. Such decisions should not be based on a mere hunch or on generalized characteristics such as a person's race, gender, age, homeless circumstance, or presence in a high-crime location.*

**DEPARTMENT MANUAL
VOLUME I
Established by Special Order No. , 2022**

Department personnel seeking one or more specific persons who have been identified or described in part by one or more of these characteristics may rely on them only in combination with other appropriate identifying factors.

***Note:** The reason for all pretext stops, and the citations and warnings resulting from them, should be articulated on BWV and should include an officer's response to any questions posed by the individual stopped.*

***Note:** An officer's training, experience and expertise may be used in articulating the additional information the officers used to initiate the stop.*

***Note:** A failure to sufficiently articulate the information which – in addition to the traffic violation – caused the officer to make the pretext stop, shall result in progressive discipline, beginning with counseling and retraining. Discipline shall escalate with successive violations of this mandate.*

***Duration and Scope of All Stops.** Officers' actions during all stops (e.g., questioning, searches, handcuffing, etc.) shall be limited to the original legal basis for the stop, absent articulable reasonable suspicion or probable cause of criminal activity that would justify extending the duration or expanding the scope of the detention. Officers shall not extend the duration or expand the scope of the detention without additional reasonable suspicion or probable cause (beyond the original legal basis for the stop).*

***Conduct During the Stop.** Officers are to ensure their conduct during the course of any stop demonstrates the tenets of Procedural Justice, fairness, and impartiality. Consistent with the Department's procedural justice and community engagement initiatives, when tactics, operational security, and investigative continuity permit, officers shall, as early as practicable, provide the detainee(s) with the information that caused officers to stop them. These precepts are further discussed in the Department Training Bulletins, such as:*

- *Legal Contacts with the Public, dated February 2001;*
- *Contacts with the Public – Part II, Procedural Justice, dated April 2020; and,*
- *Contacts with the Public – Part I, Legal Considerations, dated March 2021.*

***Note:** Training Bulletins are often revised over time. Personnel are encouraged to query the Department Local Area Network (LAN) to ensure review of the most current information.*

Exhibit E

Paul Heaton

Professor of Law & Academic Director, Quattrone Center for the
Fair Administration of

The Value and Impacts of Effective Counsel at First Appearance

Comments Prepared for the California Committee on Revision of the Penal Code

by

Paul Heaton

Professor of Law and Academic Director, Quattrone Center for the Fair Administration of Justice

University of Pennsylvania Carey Law School

August 25, 2022

Numerous high-quality empirical studies demonstrate that the decisions made at the earliest stages of the adjudication process affect whether people are convicted, the sentences they receive, and their future outcomes.¹

- Recent scholarly work measures the impact of early-stage decisions regarding pretrial detention on later outcomes. This literature provides a particularly useful guide for policymakers because it 1) uses sophisticated quasi-experimental methods designed to deliver valid causal estimates of the effects of being detained; 2) exploits administrative data that capture the experiences of tens or sometimes hundreds of thousands of individual defendants across numerous jurisdictions; and 3) considers not just immediate case outcomes, but downstream effects after the case is resolved.
- For example, an analysis of over 300,000 cases in Philadelphia and nearly 100,000 in Miami-Dade demonstrates that pretrial detention reduces the likelihood of failure to appear (FTA) by 16 percentage points, but that this improvement in appearance rates comes with substantial ancillary consequences.² Detention increases defendants' likelihood of pleading guilty from 33% to 44% (a 32% increase), and the reductions in rearrest that accrue from incapacitating defendants pretrial are completely offset by increases in post-trial offending. As of three to four years post-adjudication, detention reduces the likelihood of employment from 47% to 38% (a 20% decrease) and reduces defendants' likelihood of accessing social safety net programs like the earned income tax credit.
- Other work confirms these results. For example, a quasi-experimental study of New York City demonstrates that detention increases the probability of conviction by 20% (12 percentage points) for felony cases and 11% (7 percentage points) for misdemeanor cases and more than doubles average incarceration sentence length.³ Another study of Pittsburgh and Philadelphia finds that cash bail increases conviction likelihood from 50% to 56% (a 12% increase), does not measurably reduce nonappearance, and increases future crime by 9%.⁴
- The large volume and seemingly lower consequences of misdemeanor cases often lead jurisdictions to de-prioritize robust process for misdemeanors, but evidence suggests early-

¹ See Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. REV. 369 (2020) for a review of this literature.

² Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201 (2018).

³ Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. ECON. 529, 543, 547 (2017).

⁴ Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471 (2016).

stage decisions may be even more consequential in these cases. A quasi-experimental study of nearly 400,000 misdemeanor cases in Harris County, Texas shows that pretrial detention increases the likelihood of pleading guilty from 53% to 66% (a 25% increase) and more than doubles sentence length. While initially reducing crime through incapacitation, as of eighteen months post-hearing, misdemeanor pretrial detention increases felony offending by 30% and misdemeanor offending by 23%.⁵

Despite the importance of protecting due process at the early stages of adjudication, there is considerable jurisdictional variation in case law governing provision of counsel at first appearance, with some but not all jurisdictions offering a robust right to counsel.⁶

- Because early-stage decisions about pretrial detention and other matters have a cascading effect on later outcomes, failure to provide robust protections at the earliest stages of adjudication may compromise the overall integrity of the process.
- The U.S. Supreme Court has found that the Sixth Amendment right to effective counsel encompasses “critical stages” of the adjudication process⁷, but has not clearly indicated whether certain early-stage proceedings, such as bail hearings, qualify as critical stages.⁸
- Some states have gone further by providing a right to counsel at all stages of the process through statute⁹ or controlling case law.¹⁰
- California law requires public defenders, where constituted, to represent indigent defendants “at all stages of the proceedings, including the preliminary examination”.¹¹
- However, California leaves many of the details of funding and organizing indigent defense services to counties.¹²
- This means that even if present, the practical effectiveness of counsel in early-stage proceedings will also be shaped by local norms and rules, such as those governing caseloads, attorney access to paraprofessionals such as social workers, the process and timing of appointing counsel, and physical access to clients in custody.

Providing counsel at first appearance increases the likelihood of pretrial release and improves defendants’ perceptions of the fairness of the adjudication process.

- Numerous randomized-controlled trials (RCTs)—the gold standard for evidence of cause-and-effect relationships—demonstrate the value of early provision of counsel.

⁵ Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 756 (2017).

⁶ See John Gross, *The Right to Counsel but Not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FL. L. REV. 831 (2017) for a review of federal and state law in this area.

⁷ *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975).

⁸ *Rothgery v. Gillespie County*, 544 U.S. 191 (2008).

⁹ See, for example, Idaho Code § 19-852(1)(a) or Florida Rules of Criminal Procedure 3.111(a).

¹⁰ See, for example, *Hurrell-Harring v. State*, 15 N.Y.3d 8 (2010) or *DeWolfe v. Richmond*, 76 A.3d 1019 (2013).

¹¹ California Government Code §§ 27706(a).

¹² See, for example, California Government Code §§ 27700-27712 or California Penal Code, § 987.2.

- In an early, influential experiment in providing counsel at first appearance, the Manhattan Bail Project demonstrated that collecting individualized defendant information prior to bail hearings substantially increased the likelihood of release on recognizance (ROR) (60% vs. 14%) while actually reducing failure to appear (FTA) rates (1% vs. 4%).¹³
- In the 1980s, a three-site RCT sponsored by the Department of Justice randomly assigned over 5000 subjects to receive representation as usual or early assignment to public defender services. Early representation increased pretrial release rates in one of the three sites and release occurred more quickly on average in all sites. Early representation also reduced conviction rates and shortened case processing time.¹⁴
- In the 1990s, a team from the University of Maryland provided counsel to Baltimore defendants who would have gone otherwise unrepresented in early bail review hearings in an RCT. They found that representation increased the pretrial release rate from 50% to 65% with no corresponding increase in rearrest up through six months post-hearing. The authors did not explicitly consider FTA but did find that representation improved defendants' perceptions across a range of procedural justice items, including intention to abide by the bail decision.¹⁵
- A recently published RCT conducted by the RAND Corporation in Allegheny County, PA, finds that providing a defense attorney at the initial bail hearing increases the likelihood of release on recognizance (ROR) by 22% (49% vs. 60%) and is particularly effective for people charged with non-violent crimes and those over age 30. There was no evidence that these more lenient release conditions led to an increase in FTA.¹⁶

Recent research demonstrates that beyond simply providing counsel, enabling counsel to provide higher quality representation of clients can have significant incremental benefits.

- A recent experimental study published by the Quattrone Center at the University of Pennsylvania Carey Law School demonstrates the importance of not only the presence of counsel, but that defense counsel be adequately resourced and staffed.¹⁷
- In Philadelphia, people charged with crimes have initial bail set at a video preliminary arraignment held before a magistrate shortly after booking. Although public defenders are present at the hearing, they traditionally did not have an opportunity to confer with clients prior to initial appearance.
- Beginning in 2017, the Defender Association of Philadelphia launched a pilot program that embedded Defender Association social workers in the city's Pretrial Detention Unit. These

¹³ Charles E. Ares, Anne Rankin & Herbert Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. REV. 67, 82, 86 (1963).

¹⁴ Ernest Fazio, Jr., Sandra Wexler, Thomas Foster, Michael J. Lowy, David Sheppard & Juliet A. Musso, *Early Representation By Defense Counsel Field Test: Final Evaluation Report*, Nat'l Inst. Of Just., U.S. Dep't Of Justice, NCJ 97595 (1984).

¹⁵ Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002).

¹⁶ Shamena Anwar, Shawn Bushway, and John Engberg, *The Impact of Defense Counsel at Bail Hearings*, RAND WR-A1960-1 (2022).

¹⁷ Paul Heaton. *Enhanced Public Defense Improves Pretrial Outcomes and Reduces Racial Disparities*, 96 IND L. J. 701 (2021).

social workers met with clients shortly after arrest, and assisted them by engaging in emotional de-escalation, gathering information that could be used to argue more effectively for pretrial release, contacting family members, and helping clients plan for successful pretrial release. Information collected by these bail advocates was transmitted to public defenders for use in the preliminary arraignment.

- Pilot capacity was limited, so bail advocates could only cover certain arraignment shifts. The Defender Association randomized the shifts where bail advocates were present, allowing for a gold-standard experimental evaluation of the effects of the bail advocates.
- Bail advocates did not reduce pretrial detention rates (at least on average) but did substantially reduce clients' likelihood of bail violation (-64%) and future arrest (-26%).
- Access to bail advocates also led to more lenient case outcomes. Advocates increased the likelihood that a defendant was acquitted or had all charges dismissed by 14% and reduced the likelihood of a sentence carrying a probation tail.
- Bail advocates also reduced racial disparities in pretrial detention. In Philadelphia, under the status quo, 59% of arrestees are Black, but 66% of those detained pretrial are Black. The experimental estimates imply that if all defendants had access to bail advocates, only 58% of detainees would be Black. Thus, bail advocates essentially undo the increase in racial disparity normally produced during this stage of the process.
- Interviews with prosecutors, defenders, and bail advocates suggest that these impacts likely represent both a better understanding of defendant risk and needs by magistrates and a better sense of procedural justice by defendants.
- This study demonstrates that improving the quality of indigent defense at first appearance can reduce the scope of the criminal system while improving public safety and reducing racial disparities.

Key Takeaway

High-quality empirical evidence demonstrates that a robust system for providing counsel at or before first appearance can improve fairness, enhance public safety, promote procedural justice, and reduce racial disparity. California policymakers should consider new laws, programs, and procedural rules that would enhance access to effective counsel at first appearance.

Exhibit F

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Senior Program Manager, Sixth Amendment Center



California: Early Appointment of Counsel

U.S. Supreme Court on Critical Stages: In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright* that providing the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is a constitutional obligation of the states under the due process clause of the Fourteenth Amendment.¹ The Court further held in *United States v. Cronin* that the state must ensure that each and every indigent defendant who faces a possible loss of liberty in a criminal case is actually represented by an attorney at every “critical stage” of the proceeding.² In 2008, the Court in *Rothgery v. Gillespie County* explained that an event is considered a critical stage if there is a “need for counsel’s presence” that “would help the accused ‘in coping with legal problems . . . or meeting his adversary.’”³

Whether a particular proceeding is a critical stage at which counsel must be present to provide representation (unless the defendant makes an informed and intelligent waiver of counsel) is distinct from whether the right to counsel has “attached” – the “first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty” – at which counsel need not be present.⁴ The U.S. Supreme Court has categorized certain events in a criminal proceeding as critical stages, and that therefore warrant “effective assistance of competent counsel,”⁵ such as custodial interrogation,⁶ preliminary hearing,⁷ pretrial lineup,⁸ plea negotiation and plea acceptance,⁹ and arraignment.¹⁰ The U.S.

¹ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

² *United States v. Cronin*, 466 U.S. 648, 659 (1984).

³ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 n. 16 (2008) (quoting *United States v. Ash*, 413 U.S. 300, 312-313 (1973)).

⁴ *Id.* at 211 (2008).

⁵ *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970).

⁶ *Brewer v. Williams*, 430 U.S. 387, 399 (1977) (holding that in-custody interrogation constitutes a critical stage at which defense counsel “is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen”).

⁷ *Coleman v. Alabama*, 399 U.S. 1, 9–10 (1970) (holding that preliminary hearing is critical stage because defense counsel can cross-examine witnesses and make arguments on behalf of the defendant).

⁸ *United States v. Wade*, 388 U.S. 218, 236–38 (1967) (holding that a “post-indictment lineup [i]s a critical stage of a prosecution”).

⁹ *Lafler* at 177 (2012) (holding that “the acceptance of a plea is a critical stage”); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (“In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”).

¹⁰ *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961) (holding that arraignment is a critical stage because “[w]hat happens there may affect the whole trial”).

Supreme Court has not yet addressed whether an initial bail determination hearing is a critical stage for Sixth Amendment purposes.¹¹

Early Presence of Counsel vs. Early Appointment of Counsel. The State of California is one of only eight states that does not have a state government entity overseeing any part of trial-level indigent defense services.¹² Instead, California delegates to each of its 58 counties the state’s constitutional and statutory obligations of providing effective assistance of counsel at the trial level in all types of cases for which California guarantees a right to counsel. When a state chooses to place this responsibility on local governments, the state must guarantee not only that those local governments are capable of providing constitutional representation, but that they are in fact doing so.¹³ For example, the state must ensure that an attorney is appointed to meaningfully represent each and every indigent defendant in all critical stages of a criminal case, as defined by the U.S. Supreme Court.

Under California state law, in counties that have established a public defender office, the public defender is allowed to begin representing a person in a criminal or delinquency case *before* that person has been determined eligible for appointed counsel by the court.¹⁴ There is no such provision in state law that allows for counties with no public defender office (e.g., appointed or contract private attorney systems) to do the same. In these counties, even though a private attorney providing indigent defense services may be *present* in a courtroom, that attorney cannot represent an indigent defendant unless and until they are appointed to do so by the court.

This is precisely the scenario that the Sixth Amendment Center (6AC) observed during its 2019-2020 evaluation of right to counsel services in Santa Cruz County.¹⁵ At that time, Santa Cruz County contracted with three private law firms to provide all indigent representation services in exchange for a flat annual fee. In its evaluation, 6AC staff observed uncounseled defendants in

¹¹ John P. Gross, *The Right to Counsel, but not the Presence of Counsel: A Survey of State Criminal Procedures for Pre-Trial Release*, 69 FL. L. REV. 832, 840 (2018) (“The Supreme Court has never specifically addressed whether there is a legal requirement that counsel be present at a defendant’s initial appearance where his liberty is subject to restriction.”); Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 389 (2011) (using surveys to determine that “only 10 states uniformly provide counsel at the first bail and pretrial release judicial determination that typically is conducted within 24–48 hours of arrest. In contrast, 10 states continue to deny counsel at the initial bail hearing. The remaining 30 states decide representation at the pretrial release hearing on a county-by-county basis.”).

¹² The other seven states are Arizona, Illinois, Mississippi, Nebraska, Pennsylvania, South Dakota, and Washington.

¹³ Settlement Agreement in *Phillips v. California* (Cal. Super. Ct. Fresno County filed citing Jan. 7, 2020) (holding that the state of California “cannot disclaim its constitutional responsibilities merely because it has delegated such responsibilities to its [counties]. . . . If the State created an indigent defense system that is systematically flawed and underfunded, . . . the State remains responsible, even if it delegated this responsibility to political subdivisions”). See also *Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “‘ultimate responsibility’ . . . remains at the state level.”); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); Letter and white paper from American Civil Liberties Union Foundation *et al* to the Nevada Supreme Court, regarding *Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services* (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”).

¹⁴ CAL. GOV. CODE § 27707 (West 2021). That public defender office representation must cease, however, if a court makes a contrary determination and finds a defendant is not indigent and entitled to appointed representation.

¹⁵ SIXTH AMENDMENT CENTER, *The Right to Counsel in Santa Cruz County, California: Evaluation of Trial Level Indigent Representation Services* (2020).

criminal cases regularly enter plea negotiations with prosecutors and enter pleas with the court (most notably in jailable misdemeanor cases). Additionally, 6AC staff observed:

- Misdemeanor court judges conduct a group colloquy at the start of court that explained the defendant’s right to counsel. A group colloquy is insufficient to ensure that defendants understand the rights they may potentially waive. For example, out-of-custody defendants sometimes arrive in the courtroom after the group colloquy has begun or even after it is completed. The judges try to confirm, as each defendant is called up individually, whether they heard and understood the judge’s earlier announcement. But the judge does not know who was or was not present at what stage of the colloquy, and the defendant does not know what they did not hear. An individualized colloquy takes time and slows down the courtroom process. However, the time is well spent as ensuring that waivers of counsel are knowingly and intelligently made prevents against unnecessary appeals, post-conviction hearings, and retrials.¹⁶
- Misdemeanor court judges ask the prosecutor to announce a plea offer on the record as a means of quickly resolving cases. Many defendants face practical and financial hurdles in attending multiple court appearances (e.g., losing income through lost working hours, finding alternate care of dependents for whom they are responsible, obtaining transportation to and from the courthouse), making their desire to get their case resolved in a single court appearance quite understandable. Nevertheless, having seen other people waive the right to counsel and plead guilty, and without an individualized colloquy at the outset to ensure the choice to forego the right to counsel is made knowingly, voluntarily, and intelligently,¹⁷ some defendants can experience subtle pressure to do likewise without fully understanding all of the consequences of doing so.
- Misdemeanor court judges state to indigent defendants that they must pay a \$50 fee within two months in order to receive an appointed lawyer, and then inquire the defendants’ financial ability to pay.¹⁸ Announcing from the bench that invoking the right to counsel will cost money may chill an indigent person’s exercise of their right to counsel, particularly if they do not understand that “[n]o defendant shall be denied the assistance of appointed counsel due solely to a failure to pay the registration fee.”¹⁹

In all these scenarios, although counsel was *present* in the courtroom in the early stages of the criminal proceeding, counsel was not *appointed* and therefore barred from providing meaningful representation. And, although a misdemeanor conviction carries less potential jail time than a

¹⁶ U.S. v. McDowell, 814 F.2d 245, 252 (6th Cir. 1987) (Engel, Circuit Judge, concurring) (noting that a detailed colloquy is “consummate good sense and usefulness as a tool for avoiding the least useful and productive of all grounds for appellate review: procedural error which can easily be avoided . . . [I]t would probably be useful for a judge to inquire as to the extent of any defendant’s education and training, and particularly whether he has observed other criminal trials either as a defendant or as a witness. The point is, of course, that the more searching the inquiry at this stage the more likely it is that any decision on the part of the defendant is going to be truly voluntary and equally important that he will not be able to raise that issue later if he does then decide to represent himself. It is simply a question of taking enough time at the moment to make a meaningful record and thus to avoid the very real dangers of reversal should the defendant not prove himself up to the task of his own self-defense.”)

¹⁷ See *Faretta v. California*, 422 U.S. 802 (1975) (holding that a defendant may exercise the Sixth Amendment right of self-representation so long as there is a knowing, voluntary, and intelligent waiver of the right to counsel).

¹⁸ CAL. PENAL CODE § 987.5 (West 2019) (permitting assessment of a \$50 fee only if the county board of supervisors has adopted a resolution or ordinance so providing).

¹⁹ CAL. PENAL CODE § 987.5 (West 2019).

felony, the collateral consequences can be just as severe.²⁰ Going to jail for even a few days may result in a person losing employment, professional licenses, housing, necessary medical or mental healthcare, and student loan eligibility. A misdemeanor conviction may even result in deportation and contribute to the dissolution of a family unit that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers' expense.

Benefits of Early Appointment of Counsel: The benefits of early appointment of counsel, especially at the initial bail determination hearing where counsel can provide meaningful representation, is well researched and documented.²¹ These benefits span from the individual defendant's legal case (e.g., early investigation and mitigation) to the individual defendant's life outside the legal case (e.g., reducing the likelihood of pretrial incarceration can lend itself to stable housing, employment, childcare, medical/mental healthcare, substance abuse treatment) to the larger community that the defendant belongs to (e.g., the community experiences fewer rates of homelessness, unemployment, crime, and better health outcomes).

A benefit that is less researched is that early appointment of and representation by counsel may lead to fewer requests by indigent defendants for new counsel because early representation can provide appointed counsel an opportunity to display at the outset that, although an indigent client did not choose them as their attorney, the client will nonetheless be zealously advocated for.

Massachusetts – A Model for Early Appointment of Counsel: Massachusetts offers a model for providing the early appointment of counsel. The Committee for Public Counsel Services (CPCS) is a statutorily created statewide agency with an independent board that appoints a chief counsel to run the agency from its central office in Boston. Since its establishment in 1983, CPCS has administered a hybrid model for administering all indigent representation services, with public defender offices staffed by approximately 500 government employees providing 20% of the state's indigent representation needs (Public Defender Division) and approximately

²⁰ Collateral consequences are those things that automatically happen to a defendant when he is convicted of a crime, even though they are not contained as part of the sentence that is publicly imposed on the defendant in court. In 2009, the American Bar Association attempted to compile, for the first time, an exhaustive listing of the collateral consequences of a felony conviction that arise under federal laws. ABA, INTERNAL EXILE, COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (Jan. 2009). In explaining the limitations of that report, the ABA noted:

[I]t does not include the many collateral consequences contained in state laws and regulations, or in state-controlled federal benefit programs such as welfare, food stamps, and public housing. Moreover, it does not include court-imposed conditions of probation and parole that may have a collateral effect on travel, employment, and other family matters, or civil forfeiture provisions that are often triggered by an arrest. . . . People with criminal convictions who served time in prison may have significant difficulty due to gaps in work experience on a resume in a job application. More and more frequently potential employers and landlords are requesting and using background check information, including arrest and conviction records in their decisions regarding jobs and leases independent of statutory requirements.

²¹ ALISSA POLLITZ WORDEN ET AL., U.S. DEP'T OF JUSTICE, EARLY INTERVENTION BY COUNSEL: A MULTI-SITE EVALUATION OF THE PRESENCE OF COUNSEL AT DEFENDANTS' FIRST APPEARANCES IN COURT: FINAL SUMMARY REPORT (2020); Alissa Pollitz Worden et al., *The Impact of Counsel at First Appearance on Pretrial Release in Felony Arraignments: The Case of Rural Jurisdictions*, 0 CRIM. JUST. POL. REV. 1, 3 (2019); Alissa Pollitz Worden et al., *What Difference Does a Lawyer Make? Impacts of Early Counsel on Misdemeanor Bail Decisions and Outcomes in Rural and Small Town Courts*, 0 CRIM. JUST. POL. REV. 1, 2, 5 (2018); ERNEST J. FAZIO ET AL., U.S. DEP'T OF JUSTICE, EARLY REPRESENTATION BY DEFENSE COUNSEL AND FIELD TEST: FINAL EVALUATION REPORT (1985). See also Memo on Pre-Arrest Representation and Review (PARR)'s Mission and Service Model pilot project funded by the Santa Clara County Board of Supervisors (Oct. 15, 2020).

3,000 trained and certified private attorneys providing 80% of the state’s indigent representation needs (Private Counsel Division).

CPCS has exclusive statutory authority to assign counsel to indigent criminal defendants.²² The statutory scheme, court rules, and CPCS policies and procedures outline a process for the early appointment of counsel: prior to the initial appearance before the court (typically also the arraignment and bail hearing)²³ of an in-custody or out-of-custody defendant, the judge first determines a defendant’s indigency, and if eligible for court-appointed counsel, the judge “shall” assign CPCS to represent the defendant in the case.²⁴ Every day, in every district court across the state, attorneys from both the CPCS public and private counsel divisions staff the arraignment sessions to accept court appointments and provide representation to indigent defendants.²⁵ The CPCS attorney accepting the court appointment must enter a notice of appearance *on or before* the arraignment to allow for the defendant to have a meaningful opportunity to consult with counsel, and in turn, for counsel to effectively represent the defendant at the hearing.²⁶

Recommendations:

1. Establish a mechanism to allow all indigent defendants – not only those who are charged with a crime in a county that has a public defender office – to apply for and receive appointed counsel as early as possible following citation/summons or arrest, without having to wait until the arraignment.
2. Prohibit prosecutors from discussing plea offers with defendants *unless and until* the defendant has formally waived their right to counsel in writing²⁷ and prohibit judges from asking defendants to waive their right to counsel for the purposes of discussing a plea offer with the prosecutor.
3. Establish a uniform statewide threshold at which a defendant is presumed indigent to receive appointed counsel, to be used by all judges in all courts, while allowing judges discretion to appoint counsel to a defendant whose income exceeds that presumptive threshold.

The Sixth Amendment Center (6AC) is a national, non-partisan, non-profit organization dedicated solely to ensuring that justice systems fulfill their constitutional obligation to provide effective representation to the indigent accused.

²² M.G.L. c. 211D, § 5 (2022).

²³ Mass. R. Crim. Pro. Rule 7 (2022) (“The initial appearance and arraignment can be held on the same day if assigned or appointed counsel is then present in court or is available without delay, and if there is opportunity for adequate consultation.”).

²⁴ M.G.L. c. 211D, § 5 (2022).

²⁵ SIXTH AMENDMENT CENTER AND PRETRIAL JUSTICE INSTITUTE, *Early Appointment of Counsel: The Law, Implementation, and Benefits* (2014) (“Because CPCS keeps detailed historical records of the number and severity of assignments received in each of the district courts across the state, an assigned counsel administrator can accurately predict the number and qualifications of attorneys needed to staff any particular bail hearing/arraignment proceeding anywhere in the state on any given day.”).

²⁶ Mass. R. Crim. Pro. Rule 7 (2022).

²⁷ See *Faretta v. California*, 422 U.S. 806 (1975) (holding that the defendant’s waiver of counsel must be knowingly, voluntarily, and intelligently made).

Because the 6AC is not a membership organization, it is widely regarded by policymakers and criminal justice stakeholders as the most objective and reliable source of detailed information about jurisdictional successes and failings in providing the right to counsel to the poor.

Exhibit G

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First Contact with the Legal System Importance of Prompt Assignment of Counsel

Background and Context

It has been 60 years since the Supreme Court affirmed that the Sixth Amendment right to counsel applies in state prosecutions and that those who are arrested and accused of a crime must be provided an attorney if they could not afford one.¹ Many people now envision an orderly system, where people who are arrested promptly meet with attorneys, are quickly brought to court, and have the opportunity to meaningfully challenge the basis of their arrest and argue for their release. But in California, unlike in some other states,² people can be detained for up to five days prior to being brought to court.³ When brought to court, attorneys may or may not be present and appointed at that initial hearing. While some counties have instituted prompt representation programs, meaningful access to counsel at the early stages of a case is inconsistent across the state and nonexistent in many counties. The lack of prompt access to counsel means that indigent people in California face judges without attorneys, are evaluated for detention without attorneys and plead guilty and are sentenced without attorneys.

Although the failure to provide counsel at initial appearance is not a problem unique to California,⁴ we have certain systemic factors that make the failure particularly challenging to address. California has 25 counties without a county public defender office.⁵ Many California counties rely on low bidder solutions such as flat fee contracts with individual attorneys that contain no case caps or reporting, despite the fact that for 20 years the American Bar Association has specifically warned against the practice.⁶ California is currently one of only five states in the nation that provides no regular funding for trial level public defender systems.⁷ The cost for counsel and necessary defense services are borne entirely by the counties.⁸ California also suffers from significant disparity between district attorney and public defender funding. Generally, California counties spend twice as much on district attorney budgets than indigent

¹ Gideon v. Wainwright, 372 US 335 (1963)

² Four states run weekend courts because they require initial appearance within 24 hours or less: Arizona, Florida, Maryland and South Carolina. Ariz. R. Crim. P. 4.1(a); Fla. R. Crim. P. 3.130; Md. Code Ann., Crim. Proc. § 4-212(e)-(f); S.C. Code Ann. § 22-5-510(B). Other jurisdictions, for example Washington D.C., Chicago, New York State, and Colorado also run courts on weekends to ensure that people are brought to court promptly.

³ Cal. Pen. Code 825 (requiring arraignment within 48 hours unless it is a holiday, weekend, or the court is not in session.)

⁴ Metzger, P., Hoeffel, J., Meeks, K., & Sidi, S., Ending Injustice: Solving the Initial Appearance Crisis, Deason Criminal Justice Reform Center (October 2021).

⁵ Legislative Analyst's Letter to Rep. Arambula, Overview of Indigent Defense Counsel, (September 16, 2020)

⁶ The Ten Principles of Public Defense Delivery System, (2002); see also, Interview of Stephen Bright in Current Affairs, Feb. 25, 2022. ("Many of the offices in California-it's county by county-may have an outstanding public defender office. San Diego, for example, is excellent. They have not only a public defender office, but a conflict defender office, and then even another defender office besides that...But you go to other counties, and the representation of poor people accused of crimes is led by low bid systems where law firms bid and undercut each other in terms of how cheaply they can provide representation for what some people have called a Walmart system of representation, which really is not fair to Walmart.")

⁷ The others are Arizona, Pennsylvania, South Dakota and Washington

⁸ Cal. Pen. Code 987.2(a). The legislature recently provided time limited grant funding solely for post-conviction work.

defense. This funding disparity creates tremendous workload disparity and, on average, there are under 300 arrests per attorney in prosecutors' offices but almost 500 arrests per attorney in defense offices.⁹

Because of the diffuse nature of indigent defense services in California, and the wide variability in county resources and attention to the matter, it is particularly important that the requirement for prompt representation by counsel be codified so that geographic and fiscal inequities are not amplified.

Need for Prompt Appointment and Representation by Counsel

California law describes a theoretical system of prompt access to counsel upon being taken into custody. "After the arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of the prisoner, visit the prisoner." [Cal. Pen. Code 825\(b\)](#). The benefit of that quick access is further expounded upon in statutes that permit for attorney intervention *before* bail is set, [Cal. Pen Code 1269c](#), and in the automatic review of bail within five days, [Cal. Pen. Code 1270.2](#). Prompt access to counsel would allow for an attorney to be prepared for arraignment or the immediate contested probable cause hearing envisioned in [Cal. Pen. Code 991](#).

Despite this promise of prompt access to counsel, the time frame for appointing counsel is not codified. Most counties do not provide a lawyer for detained individuals until they are brought to court and the appointment is made in court. Most people do not have their first substantive conversation with counsel until some point after that in-court appointment. The various protections envisioned in these statutes are available *only* to the very few who can afford to pay for their own attorneys.

To effectuate a meaningful right to counsel for every Californian, not just the wealthy, the penal code must ensure that people are appointed attorneys and meaningfully represented by counsel promptly upon arrest.

Case Study: Butte County

In Butte, a county without a public defender's office, people who are arrested and held in custody are brought to court within two to five days pursuant to PC 825(a). When the individual is brought before the court, a prosecutor is present but there is no counsel for the accused. Despite there being no defense counsel, the prosecutor makes a recommendation regarding release or bail. If the individual is detained, they are returned to jail and brought to court the following Wednesday or Thursday at which point counsel is appointed in court. If someone is arrested on a Sunday and brought to court on Wednesday, they will return to court the following Wednesday and be appointed counsel for the first time, having already spent 10 nights in jail. It may take several additional days for the attorney to visit and talk about their case for the first time.

Need for Appointment of Counsel Prior to Guilty or No Contest Plea

In California, almost half of misdemeanor cases resolve in less than 30 days, and 99% of misdemeanors ultimately end without a trial.¹⁰ In many courtrooms, individuals without attorneys are advised of their right to counsel at their first appearance in a group setting. They are told that if they want an attorney, they will need to come back for one to be appointed. If they raise any questions specific to their case,

⁹ Attachments to Legislative Analyst's Letter to Rep. Arambula, Overview of Indigent Defense Counsel, (September 16, 2020). Available by request.

¹⁰ See [Judicial Council of California, 2020 Court Statistics Report: Statewide Caseload Trends](#), pp 54-56

they are told that to get an answer they will have to come back another day or wait an unspecified amount of time to talk to a lawyer. In the meantime, they are often given a plea offer that promises no jail time and can quickly “resolve” their case. This means that hundreds of thousands of Californians a year are saddled with assembly line convictions for misdemeanor offenses without anyone looking at the evidence or carefully advising them of the ramifications of entering a plea. But even pleas resulting in no jail time are not burdenless to individuals. Collateral convictions can include deportation, barriers to academic financial aid, difficulty attending children’s school activities, inability to be a kinship placement and a myriad of other housing, employment, and financial barriers. Group advisements do little to make clear these consequences or ensure that individuals understand the implications. Unrepresented people are also far more vulnerable to quickly pleading guilty. An ACLU review of data in Kern County showed that over a period of seven years, 93 percent of those with lawyers at misdemeanor arraignment plead not guilty, while only 3 percent of unrepresented individuals plead not guilty at arraignment.

Case Study: Kern County

An ACLU review of Kern County data from January 2015 to May 2022 reveals that more than three quarters of individuals (160,000 people) went before a judge without counsel at misdemeanor arraignment. At least 30 percent of total arraignments resulted in a guilty or no contest plea without an attorney—more than 67,000 individual cases. And of those individuals who used an interpreter, approximately 84 percent entered a plea of guilty or no contest without an attorney between Jan. 2015 and Oct. 2021. Common offenses for these uncounseled pleas were drug possession, driving under the influence, domestic battery, spousal injury and violation of restraining orders. A conviction for any of these can carry serious immigration consequences, revocation of DACA status, as well as federal and state [consequences](#) related to custody housing and employment.

Recommendations

Adopting the following reforms, aligned with the [American Bar Association Criminal Justice Standards for the Defense Function](#), will allow California to meet basic standards and ensure that individuals are aware of how a guilty plea will specifically affect their own circumstances. These proposals will also ensure that the courts continue to serve their role as accountability partners to police and prosecutors by ensuring evidence is reviewed by defense counsel prior to entry of a plea.

1. Promptly Inform Indigent Defense Providers of Detained Individuals: When taking an individual into custody the booking officer should immediately inform the person of their right to appointment of counsel and immediately and effectively place the individual in communication with the office of the public defender, the contractor for services, or the official responsible for assigning counsel. Also, authorities should inform indigent defense providers of anyone in custody without counsel.¹¹
2. Prompt Appointment of Counsel: Counsel should be appointed as soon as feasible after custodial restraint.¹² If the accused is in custody, appointment of counsel should take place no later than 24

¹¹ See [Metzger, P., Ending Injustice, at \(p.24-26\)](#). See also, [ABA Standards 4-2.2](#); [Fla. R. Crim. P. 3.111\(c\)](#) (“[the booking] officer shall immediately advise the defendant: of the right to counsel...the officer shall immediately and effectively place the defendant in communication with the public defender...”)

¹² See e.g., [Fla. R. Crim. P. 3.111\(a\)](#) (A person entitled to appointment of counsel...shall have counsel appointed when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing judge, whichever occurs earliest)

hours after arrest. A person for whom counsel is appointed shall be represented at every stage of the proceedings including initial appearance.¹³

3. **Meaningful Opportunity to Receive Legal Advice:** The public defender, or any indigent defense provider, may begin representation when contacted by an individual who asserts their indigence. If the individual is in custody, the indigent defense provider should provide such advice as is indicated by the facts of the case, seek release or the setting of a reasonable bail, and otherwise represent the accused pending a formal judicial determination of indigency. Jail and court staff must ensure that counsel have access to detained individuals prior to any court proceeding, including prior to formal appointment of counsel.
4. **Plea offers must be conveyed by defense counsel:** Any plea offer requiring an admission of guilt, must be conveyed by defense counsel.
5. **The Court should not ask individuals to waive counsel prior to appointment of counsel:** There should be a presumption that every person criminally charged will be promptly appointed counsel. An individual shall not be considered to have waived the assistance of counsel until they have spoken individually to a defense attorney, and an inquiry has been made into their understanding of the right to counsel. A person who requests counsel should not have their case delayed due to the request for counsel.

Notification that detained individuals are in custody and prompt appointment allows counsel to reach their clients at the earliest opportunity, conduct conflict checks, and confirm housing and employment information. A study of Chicago and Cook County, Illinois, predicted that providing an attorney within 24 hours of arrest would save \$12 million to \$43 million a year.¹⁴ In a 2022 RAND study in Pittsburgh, researchers found that, “providing a public defender at the bail hearing led to a significant decrease in the use of monetary bail and short-term pretrial detention, with no impact on failure to appear rates or the probable cause determination at the preliminary hearing.”¹⁵

In addition, an attorney who has had time to talk to their client prior to a court hearing will be able to provide and/or confirm useful information to the court. This will allow judicial officers to have better information as they make decisions about release. This must be able to occur *without causing a delay or continuance in the initial hearing*.

In addition, prompt assignment of counsel should not be bypassed for those who may plead guilty. Plea offers must be explained by someone who has an attorney-client relationship with the accused. This gives the individual the opportunity to discuss and understand critical issues about immigration and family status, the evidence in the case, and individualized advice about potential consequences. “To note the prevalence of plea bargaining is not to criticize it... In order that these benefits can be realized,

¹³ See e.g., [DC Code Section 11-2603](#)

¹⁴ Bryan L. Sykes, Eliza Solowiej, & Evelyn J. Patterson, *The Fiscal Savings of Accessing the Right to Legal Counsel Within Twenty-Four Hours of Arrest: Chicago and Cook County*, 2013, 5 U.C. Irvine L. Rev. 813 at table 4.

¹⁵ [Anwar, Bushway, & Engberg, *The Impact of Defense Counsel at Bail Hearings \(March 2022\)*](#). See also, [Keyser, M., *As Calls for Bail Reform Ring Nationwide, Could the Answer Lie with Public Defenders?*](#); [Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*](#), 122 Yale L.J. 2316, 2328 (2013) (“Those who are receptive to the smart-on-crime approach eventually will recognize that the better equipped our indigent defense system is, the less waste and inefficiency our criminal justice system will produce.”).

however, criminal defendants require effective counsel during plea negotiations. Anything less ... might deny a defendant effective representation by counsel at the *only* stage when legal aid and advice would help him.” Missouri v. Frye, 566 U.S. 134, 144 (2012) (internal citations omitted, emphasis added). Ensuring the equitable application of the Sixth Amendment requires that courts appoint attorneys, and do so promptly, to all those accused of crimes who are brought before our courts.

Office of the State Public Defender

In 2020, in part as a result of Phillips v. State of California, the State recognized it had to play a role in providing competent defense services to meet its constitutional obligations under the United States and California Constitutions. As part of this recognition, the Legislature expanded the mandate of the Office of the State Public Defender (OSPD) to include supporting indigent defense by providing training and technical assistance to attorneys representing the indigent and by engaging in other efforts to improve the overall quality of indigent defense. See Gov. Code 15420(b). The Indigent Defense Improvement Division effectuates this part of OSPD’s mandate. This did not create an oversight, enforcement, or funding role for the agency.

Exhibit H

Judge Juliet J. McKenna

Associate Judge, Superior Court of the District of Columbia

**Written Submission of Judge Juliet J. McKenna
to California Committee on Revision of the Penal Code
re: Appointment of Counsel at Initial Appearance**

I welcome the opportunity to share my experiences as a judge appointed to the Superior Court of the District of Columbia, where local rules require appointment of and an opportunity to consult with counsel prior to a criminal defendant's initial appearance.¹ My comments are based upon ten years serving in the Criminal Division, including as Deputy and then Presiding Judge of the Division in 2020 and 2021, during the height of the COVID-19 pandemic when public health and safety concerns required modifications to initial appearance procedures, and as Co-Chair of the Criminal Justice Act (CJA) Panel Committee for the past six years, overseeing the application and periodic review of approximately 200 private criminal defense attorneys appointed and compensated by the court to represent indigent defendants.

The D.C. Superior Court is a court of general jurisdiction and serves as the local trial court for Washington, D.C., handling criminal cases ranging from shoplifting to homicides. The criminal defense bar includes members of the CJA Panel, attorneys with the D.C. Public Defender Services Agency (PDS), and, to a lesser extent, privately retained counsel and law students affiliated with local law school clinics. The arraignment courtroom, where all arrestees are presented within 24-48 hours of arrest, operates six days a week, including Saturdays and holidays. On average, 30 to 60 people are arrested each day with approximately two-thirds of those arrests leading to criminal charges, resulting in 20 to 40 arraignments or presentments Monday through Saturday.

Several hours before the arraignment calendar commences at 1:30 p.m., the Court, with the assistance of the Defender Services Office staffed by PDS, appoints an attorney for each person appearing on that day's lock up list. Attorneys may meet with their clients in the courthouse cellblock prior to their hearings and/or are given an opportunity to confer briefly once the case has been called. A "stand-in" attorney is present in arraignment court every day to handle fugitive cases and cases in which an individual already has appointed counsel and has been arrested on new charges, or on a bench warrant for their failure to appear for a court hearing. During the COVID pandemic, the Court relied almost exclusively on stand-in attorneys to handle all initial appearance hearings on behalf of appointed counsel.

¹ See D.C. Superior Court Criminal Rule 44(a) ("Right to Appointed Counsel. A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right"); D.C. Superior Court Criminal Rule 5(c) ("The court must allow the defendant reasonable time and opportunity to consult counsel").

In my experience, the appointment of counsel prior to the initial appearance is invaluable in countless ways, both in increasing compliance with release conditions and expediting case processing, and in protecting constitutional rights and promoting procedural justice for defendants. While these areas are intertwined with one another, I have separated the primary benefits into three general categories below.

Compliance with release conditions and return to court:

The majority of individuals in the District of Columbia are released at initial appearance, many with conditions to report to the pretrial supervision agency either by telephone or in-person to verify an address, drug test and/or undergo a mental health or substance abuse evaluation. Some defendants are released with a stay-away order or an order to return to be placed on a GPS monitor. In some cases, release is conditioned on an individual having a verified address where they can remain on home confinement. And all defendants are released with the condition that they return for their next court date.

Compliance with these conditions is facilitated by counsel, who is better able to ensure that their client both understands and can reasonably comply with the conditions being set. This is particularly important when a stay-away/no contact order is being entered. Frequently an individual will have left essential belongings at the stay away location, live on the same block or share a child with the subject of the stay-away order. Information provided by counsel following consultation with their client enables the judge to tailor the stay-away order in a manner that will both protect the complainant and promote compliance with the order. The presence of counsel at the time that release conditions and the next court date are set better ensures not only that their client is aware of the conditions set, but knows what they must do to comply with the conditions and the consequences of failing to do so.

Expediting case processing:

On the most basic level, the presence of counsel facilitates and expedites the initial appearance hearing. Counsel is able to speak with their client in advance about what is likely to happen when they appear before the judge and answer many of their questions about the charges they face. They are able to discuss potential release conditions or, if it is likely that the client will be detained, explain to them what will happen next.

The appointment of counsel at the initial hearing results in a more productive next appearance by enabling the prosecutor to provide discovery and extend any plea or diversion offers to appointed counsel immediately following arraignment. The ability for client and counsel to meet and exchange

contact information at the initial hearing facilitates counsel's ability to discuss that information with their client before returning to court.

Protecting constitutional rights and promoting procedural justice:

While defendants are warned as they are arraigned that "anything they say can be used against them," in the absence of counsel some may blurt out an incriminating statement in anger or frustration or in a misguided attempt to secure their release. The presence of counsel to speak on their behalf greatly mitigates that risk.

Early appointment of counsel may also ensure that evidence which may otherwise be lost is preserved, whether that is through securing an immediate court order to photograph a client's injuries, a subpoena to obtain video evidence, or information about key witnesses whose whereabouts may be difficult to track down with the passage of time.

During the initial consultation with their client, even if brief, counsel may learn important information about the client's physical or mental condition that requires special attention at the jail, such as diabetes, epilepsy, or suicidal thoughts, or that necessitates a forensic screening to address potential competency issues.

Finally, the presence of appointed counsel, or at minimum a stand-in attorney, exponentially increases a defendant's understanding of the court process, as well as both the perception and actuality that they are given an opportunity to be heard at the time of their first appearance when a release or detention decision is being made.

I appreciate the opportunity to submit these written comments to the California Committee on Revision of the Penal Code and look forward to your questions at the upcoming Committee meeting.

August 18, 2022

**Juliet J. McKenna, Associate Judge
Superior Court of the District of Columbia**

Exhibit I

Carlie Ware

PARR Team Supervisor, Santa Clara Public Defender



August 19, 2022

via e-mail

Committee on Revision of the Penal Code
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: Pre-Arrest Representation

Dear Committee Members,

I write to respectfully recommend Penal Code be revised to enable and empower pre-arrest legal representation for indigent criminal defendants. I am a public defender in Silicon Valley. I represent indigent community members who are accused or suspected of crimes. Most of my clients are legally presumed innocent, but incarcerated in the county jail because they cannot afford to pay bail. In this document, I share my experience in providing pre-arrest representation and my ideas on how the Penal Code could be revised to achieve meaningful access to justice.

A. Current Reality: Incarceration Without Legal Representation.

California statutes recognize that police can bring a person into physical custody in the jail by arrest warrant or warrantless arrest. Most arrests occur without a warrant. Police may make a warrantless arrest if they believe there is probable cause of a crime in the officer's presence or probable cause of a prior felony offense. (Penal Code, hereafter "PC" § 836). The arresting officer will document the booking charges by writing an affidavit of probable cause (usually a brief paragraph describing the suspected crime) and take the person to jail. The jail will set bail based on a pre-determined list of bail amounts corresponding to the booking charges. (PC § 1269b). A judge will review the arrest for probable cause and will decide whether to modify the pre-arrest bail. (PC §§ 1269c; 1270.1). Those who cannot afford bail are incarcerated two to five days before being brought to court to face charges, depending on whether the pre-arrest incarceration spans a weekend or holiday. (PC §§ 825; 849).



Under the current reality of the criminal justice system, no counsel is appointed for an indigent arrestee during this pre-arraignment incarceration. Even the brief pre-arraignment detention between arrest and in-custody arraignment can have profound impact. A [2016 George Mason University research study](#) found that 30% of individuals detained pretrial between one and three days and who were employed before their arrest lost their job as a result of their incarceration. The study also found that, of the 54% of arrestees who were parents or guardians of a child, 24% indicated the living situation of that child was impacted.

Days later, if the District Attorney files a complaint (PC § 949), the arrestee will appear for an in-custody arraignment (PC § 988), where the judge may appoint a public defender. At the arraignment, the court advises the defendant of the charges and constitutional rights, and conducts a bail hearing. This bail hearing is tremendously important. A recent California Supreme Court case called [In re Humphrey](#) (2021) 11 Cal.5th 135 requires that the arraignment judge consider the defendant's individualized ability to pay bail, and details about the defendant's life and community. This fact-specific inquiry enables the judge to determine whether pre-trial detention is the least restrictive means to reasonably assure public safety and the defendant's return to future court dates, or whether to impose a non-monetary release order.

B. Meaningful Justice Requires Pre-Arraignment Representation.

Arraignment is the traditional starting point for legal representation. Often, one public defender will arraign a large group of in-custody defendants, with little or no opportunity for a private pre-arraignment conversation. In Santa Clara County, a public defender will typically arraign 20 clients that she is meeting for the first time in court moments before the hearing. They have a time-constrained conversation in which the attorney gathers as much information as possible about the client's community ties, employment and family situation. The attorney immediately presents the client's information to the court at the arraignment hearing.



I supervise an innovative team that seeks to shift this paradigm. Our team is called PARR (Pre-Arrestment Representation and Review). PARR includes attorneys, a paralegal, an investigator, and a social worker. PARR’s mission is supportive intervention and advocacy at the earliest possible stage of criminal prosecution. PARR begins conversations about a client’s case, community ties, employment and family situation in the first 48 hours of incarceration, before arraignment. This allows the public defender to advocate on behalf of our clients more meaningfully and earlier in their criminal proceedings, often before charges have even been filed. We accomplish this mission by speaking to clients in the jail during their first 48 hours of incarceration, communicating with clients’ families, conducting exigent investigation when appropriate, communicating with the prosecution about the case, connecting clients with community resources, and advocating to the pre-filing and/or the arraignment judge. This advocacy protects against the harms that often flow from even brief periods of incarceration.

C. Suggested Revisions to the Penal Code

1. Create a default pre-arrestment finding of indigency and appointment of counsel for defendants who cannot post scheduled bail at booking.

Penal Code 1269b allows an arrestee to post scheduled bail on the booking charges. Penal Code § 987 empowers appointment of counsel at arraignment upon a finding that the defendant “desires and is unable to employ counsel.” (PC § 987(a)). The Penal Code should be revised to presume that, if a detainee does not post scheduled bail at booking, that the detainee desires and is unable to employ counsel. Indigency and incarceration should guarantee meaningful access to counsel.

2. Fulfill the empty promise of access to the pre-arrestment judge by providing counsel.

In at least two places, current statutes describe a system in which the pre-arrestment judge is theoretically accessible to the arrestee. Penal Code § 810(b)



mandates that jail staff “shall assist the arrested person or the arrested person’s attorney in contacting the magistrate on call as soon as possible for the purpose of obtaining release on bail.” (P.C. § 810(b)). Penal Code § 1269c states that, if the arresting officer in a particular set of circumstances is seeking to raise/modify the booking bail, “... the defendant, either personally or through his or her attorney, friend or family member, also may make application to the magistrate for release on bail lower than that provided in the schedule of bail or on his or her own recognizance.” (P.C. § 1269c). Without the logistics necessary to link an arrestee to an attorney, these existing provisions are empty promises. The Penal Code should be revised to ensure meaningful access to these processes.

3. Guarantee transparent pre-arraignment recordkeeping by the Court.

Many Superior Court jurisdictions are transitioning from paper filing systems to electronic filing systems. The Superior Court of Santa Clara County uses an electronic system called Odyssey to document its proceedings, but does not maintain or preserve any of its pre-filing decisions in Odyssey. Court recordkeeping only occurs after a case is filed. This means that arrestees have no access to the basis for pre-arraignment judicial decisions, and no meaningful way to intervene or challenge pre-arraignment judicial decisions. Pre-arraignment actions by the court, including what documents or information is considered, and the outcome of a pre-arraignment bail/detention decision should be immediately accessible, at least to defense counsel.

4. Require local agencies to provide transparent pre-arraignment information.

In Santa Clara County, our pre-arraignment program has been a success because the criminal justice agencies have collaborated toward the common goal of early access to justice. Our county provides a list of daily bookings to the public defender, so we can identify potential pre-arraignment clients. Attorneys may enter the jail and access an



in-person meeting with any incarcerated person to ask if they would like early legal representation. Our jail has implemented technology that allow attorney-client communication remotely on tablets, so that even in a public health emergency, an incarcerated person has access to an attorney. The District Attorney's Office has voluntarily shared a daily list of in-custody charging decisions with the public defender, so we can see which arrestees will be charged and arraigned and which will not. This type of access should be codified so that information is available regardless of the political temperature of the moment or the dynamic collaborative culture of any particular jurisdiction.

5. Abolish the so-called "Ramey Warrant," or require appointment of counsel upon arrest on a PC § 817 warrant.

Penal Code § 817 creates a pre-charging arrest warrant for felony cases. (PC § 817(a)(2)). Law enforcement can seek this type of arrest warrant without filing a case, upon a police officer's declaration of probable cause, sworn under penalty of perjury. It is sometimes nicknamed a "Ramey warrant." Police sometimes seek a pre-charging warrant if they want authority to arrest a felony suspect without simultaneously filing formal charges. But because no arraignment attaches to a Ramey warrant, arrestees detained pursuant to Penal Code 817 have no meaningful access to appointed defense counsel. The section should be abolished or revised to include mandatory access to appointed defense counsel upon arrest.

6. Create an enforceable time limit for in-custody arraignment, adding remedies when timely arraignment is denied

Penal Code 825 sets forth a clear time frame for in-custody arraignment, but has no meaningful remedy. The section contemplates a default of 48 hours, with permissible delay for periods when court is not in session. But it has no remedy. On a daily basis, defendants are denied timely arraignment because they are not transported from the jail, or because of clerical error. But the agencies controlling those mechanisms have no consequences for the failure. The Penal Code should be revised to require release or dismissal of charges if an in-

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custody defendant is denied timely arraignment, even if done inadvertently or due to clerical error.

Thank you for considering my submission.

Respectfully,

Carlie Ware

Carlie Ware
Supervising Public Defender
Santa Clara County PARR Team

Exhibit J

Letter from Immigrant Legal Resource Center



August 19, 2022

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To: California Committee on Revision of the Penal Code

Re: Access to Counsel and Arraignment Issues Affecting Immigrants

Dear Members of the Committee,

The Immigrant Legal Resource Center (ILRC) is a national nonprofit headquartered in San Francisco, with over thirty years of experience in the complex intersection between immigration and criminal law. The ILRC has extensively analyzed, written about, taught, and advised on the immigration effect of California crimes and sentences, as well as helped to draft and advocate for California laws that affect this area. We educate and advise California public defenders, prosecutors, superior court judges, and stakeholders in delinquency proceedings about immigration consequences. Among other forms of technical assistance, we provide regular training to California Judicial Council, the California Public Defender Association, the California District Attorney Association, and the County Welfare Directors Association about the unique needs of systems-impacted noncitizens.

The immigration consequences of criminal convictions are especially important in California, which has the largest non-U.S. citizen population in the United States both in percentage of the population and in total numbers. Over 25% of all people residing in California were born in another country.¹ Because a great many of them are U.S. citizens, one may estimate that *one out of seven or eight California defendants* is a non-U.S. citizen and is vulnerable to extraordinary immigration penalties, many of which are triggered by conviction of commonly charged misdemeanors.

Mass deportations affect both our citizen and noncitizen residents, because in California mixed immigration status households are the norm. Over 50% of all children in our state reside in a household headed by at least one foreign-born person, and the great majority of these children are U.S. citizens.² Unnecessary, mass deportations fracture communities in our state, especially communities of color.

We understand that the Committee is considering recommendations regarding prompt access to defense counsel, including for misdemeanor charges. We write to underscore the critical importance of the right to prompt, effective counsel for defendants who are not U.S. citizens.

¹ US Census 2010, available at <https://www.census.gov/quickfacts/CA> (last accessed August 2022).

² *Ibid.*



We would like to discuss three issues. Our focus here is on noncitizens charged with misdemeanors, because the lack of counsel for misdemeanor defendants is a concerning practice in California. But the discussion applies at least as much to noncitizens facing felony charges.

Noncitizen defendants charged with misdemeanor offenses need access to effective and informed counsel, because even a six-month misdemeanor with no custody time imposed can have unknown, unintended, and extremely severe immigration consequences. Indigent defense counsel must be available at all misdemeanor cases. Expert, case-specific advice by criminal defense counsel is the only way to avoid unintended adverse immigration outcomes and meet constitutional and statutory requirements. See Part 1, below.

Noncitizen defendants need prompt access to effective counsel, before arraignment, for the reasons that apply to all defendants and in addition because it takes time for defense counsel to collect additional needed information and to obtain an immigration analysis from an expert. Indigent defenders must meet with clients before arraignment. See Part 2, below.

Prompt access to informed and effective counsel is particularly important because some courts provide inaccurate and inappropriate immigration advisals to defendants, in contravention of PC § 1016.5(a), and some prosecutors or judges demand that defendants sign documents containing illegal waivers of basic rights and misstatements relating to immigration consequences. Judges and prosecutors must be instructed to not deviate from the substance of PC § 1016.5(a), and to not require defendants to sign on to misstatements or to blanket waivers of any right to contest the conviction should information arise later. See Part 3.

The first two of these recommendations require extra staff time on the part of some indigent defense offices. Some offices forego misdemeanor representation on the grounds that they lack the resources to do this in light of their more “serious” cases. Indigent defenders should be required to do this work, and their offices should receive the resources that are needed to support it. The human, social, and economic costs to the state of mass deportations must be considered.³

1. Noncitizen defendants charged with misdemeanors are entitled to and require advice of defense counsel, because even a very minor conviction can have extremely severe immigration consequences.

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the United States Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative and competent advice to noncitizen defendants regarding the potential immigration consequences of their criminal cases. The Court found that “accurate legal advice for noncitizens accused of crimes has never been more important” because “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Id.* at 364 (footnote deleted).

California courts have made similar rulings since 1987,⁴ and California codified the obligations of parties and set out the priority of addressing immigration issues in each criminal case, in [Penal Code §§ 1016.2, 1016.3, 1016.5](#). It provides that defense counsel must investigate and advise a noncitizen regarding the immigration consequences of the available dispositions, and should defend against adverse immigration consequences. PC § 1016.3(a).

³ See [PC § 1016.2](#) and see, e.g., Julia Preston, “The True Costs of Deportation” (*The Marshall Project*, June 2020), <https://www.themarshallproject.org/2020/06/22/the-true-costs-of-deportation>. Please let ILRC know if the Committee would like more information on the costs of deportation.

⁴ See, e.g., *People v. Soriano*, 194 Cal.App.3d 1470 (1987), *People v. Barocio*, 216 Cal.App.3d 99 (1989), *People v. Patterson*, 2 Cal.5th 885, (2017).

Unfortunately, in some counties indigent defenders do not appear at some or all misdemeanor hearings, on the grounds that they lack resources to do this. ***Defenders should appear at all misdemeanor arraignments, and the state or county should adequately resource them to make this possible.*** Without an immigration consultation and the opportunity for counsel to negotiate an immigration neutral offense, noncitizens' pleas are not knowingly and voluntarily entered, in violation of their Fifth and Sixth Amendment rights and California law.

A noncitizen defendant may know the criminal penalties for a plea, but they face additional and often more severe immigration consequences that are hidden. To the extent that a judge may indicate to a defendant that they should accept the initial plea offer without defense counsel, or defense counsel does not appear to represent people in misdemeanor arraignments, this violates the rights of noncitizen defendants to make a knowing and intelligent plea and places them at severe risk. This is especially true due to the fact that commonly charged misdemeanors – and even some infractions – can cause extraordinary immigration consequences.

California misdemeanors can trigger severe immigration consequences. The immigration consequences of a conviction are not based on the severity of the state offense, but rather on whether the elements of the state offense happen to match federal definitions.⁵ The results can be counter-intuitive: some California misdemeanors and even infractions trigger mandatory deportation, while some strike offenses have no immigration consequences. Competent advice requires a case-specific analysis by a “crim/imm” expert.

For example, very severe immigration penalties are imposed for any controlled substance misdemeanor, including a first conviction for possession for personal use, possession of paraphernalia, or being under the influence.⁶ Growing seven or more marijuana plants for personal use is a six-month misdemeanor under California [H&S C § 11358\(c\)](#), but for immigration purposes it is a “drug trafficking aggravated felony” that carries the most serious immigration penalties possible. (The same is true for the related *infraction* of growing a single marijuana plant while between the ages of 18 and 21.)⁷ Non-violent property misdemeanors such as PC § 488/petty theft, § 459.5/shoplifting, § 476/misdemeanor passing bad checks, § 487/misdemeanor grand theft, and others can trigger serious consequences.⁸ The same is true for a misdemeanor conviction for several non-property-related wobblers, such as PC §§ 245, 273.5, 422,⁹ even if no sentence to custody is imposed.

Informed defense counsel often can negotiate a plea to a related offense of the same level, that for technical reasons does not have adverse immigration consequences. For example, depending on the facts,

⁵ This is true under the federal “categorical approach,” also adapted for some purposes in *People v Gallardo*, 4 Cal 5th 120 (2017). See also ILRC, *How to Use the Categorical Approach Now* (Oct. 2021), <https://www.ilrc.org/how-use-categorical-approach-now-2021>

⁶ See INA § 212(a)(2)(A)(i) [[8 USC § 1182](#)], INA § 237(a)(2)(B)(i) [[8 USC § 1227](#)].

⁷ See *United States v. Reveles-Espinoza*, 522 F.3d 1044 (9th Cir. 2008) (§11358 including growing for personal use is a federal “aggravated felony” as an analogue to the federal felony of drug manufacture). See also § 11358(b), an infraction (growing any marijuana while between age 18 and 21). See, e.g., the case of Maria Sanchez, an LPR grandmother with arthritis who barely avoided deportation after conviction of § 11358 (then a felony, although that is irrelevant for immigration purposes) <https://www.npr.org/2016/04/09/473503408/immigrant-felons-and-deportation-one-grandmothers-case-for-pardon>. Other marijuana and theft infractions also have serious immigration consequences, as a controlled substance offense (marijuana) or crime involving moral turpitude (theft, PC § 490.1).

⁸ Any offense that has as an element the intent to steal (other than a temporary taking) or to commit fraud is a crime involving moral turpitude (CIMT) for immigration purposes. Conviction/s of a CIMT can cause deportability, inadmissibility, mandatory detention, and can be a bar to immigration relief., depending on the individual. See, e.g., INA §§ 212(a)(2)(A)(i), 237(a)(2)(A), 236(c).

⁹ These are CIMTs and also can be deportable crimes of domestic violence under INA § 237(a)(2)(E)(i).

a plea to misdemeanor PC §§ 496 or 530.5(a) might be a good substitute for PC § 488 or misdemeanor PC § 487, but PC § 530.5(c) would not be.

The consequences of a misdemeanor conviction can be life-destroying for the person and their family. They far exceed the contemplated punishment for a misdemeanor. Consequences can include:

- Arrest by ICE and detention in ICE facilities anywhere in the United States, including mandatory detention *without possibility of bond*. See [PC § 1016.2\(f\)](#), [8 USC § 1226\(c\)](#). Detention can last weeks, months, or years, depending on the individual.
- The person’s removal proceedings will take place while they are detained. Over 80% of ICE detainees have no representation in these proceedings. See [PC 1016.2\(f\)](#).
- The misdemeanor conviction can destroy the person’s eligibility to apply for lawful status or, if they have lawful status, for a “waiver” of the deportation.
- Any non-citizen, including a lawful permanent resident, can be removed (deported) based on a misdemeanor conviction.
- If the person attempts to return illegally to rejoin their family in the United States, they face federal prosecution for illegal re-entry following removal, which carries a potential sentence of 20 years. This is the most commonly prosecuted federal offense in the United States.¹⁰

California misdemeanor convictions easily can result in deportation and permanent separation from family, damage to that family when a member suddenly disappears, and other penalties that go far beyond the potential or actual sentence for the offense.

2. Non-citizen defendants need prompt access to counsel before arraignment, because counsel needs time to collect information and obtain the immigration analysis from an expert before they can advise regarding immigration consequences.

All defendants require prompt access to counsel and a meaningful opportunity to discuss their case prior to arraignment in order to make an informed plea, but noncitizen defendants have additional reason, because two added steps must take place before their counsel can provide them with competent advice on immigration consequences. First, counsel must collect information sufficient to provide an individualized analysis, and second, they must provide and act on that analysis, which in the majority of cases requires consultation with a criminal and immigration law (“crim/imm”) expert.

Unfortunately, because most defender offices lack resources and/or access, they do not meet promptly with their clients. ***Defenders should appear as promptly as possible, and before misdemeanor arraignments, and the state or county should adequately resource them to make this possible.***

Each noncitizen defendant requires an individual “crim/imm” analysis, based on their personal history, criminal record history, and immigration status or prospects. To accomplish this, first the defender must gather specific information. They need to complete a basic immigration questionnaire with the defendant,¹¹ which requires time and privacy to complete. They need to obtain the defendant’s complete rap sheet, because prior convictions can affect the analysis. In some counties, defense counsel do not have quick access to their client’s rap sheet.

¹⁰ See [8 USC § 1326](#) and see, e.g., <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions%20> (8 USC §§ 1325, 1326 are the most commonly prosecuted federal offenses).

¹¹ See a sample questionnaire at https://www.ilrc.org/sites/default/files/resources/crimimm_questionnaire-20200727v2.pdf.

Second, in most cases the defender cannot perform the immigration analysis while in court. They must send the information to their crim/imm expert. The expert will respond with an analysis of the consequences of the current charge(s) and, if necessary, propose alternative plea options. Depending on the case, this may take a few days or longer.

In many counties, however, the defender will meet the defendant at or just before arraignment. Even if they are able to find the time and privacy to complete the questionnaire, generally they must tell the noncitizen defendant that they need a few days to provide an immigration recommendation and goals for negotiating a plea bargain or other disposition. Defendants in custody may be desperate to get out, especially if they are employed or have young children, and are unwilling or unable to wait.

3. Prompt access to informed and effective counsel is particularly important because some courts and prosecutors give improper and incorrect advisals, or require defendants to sign improper waivers and misstatements as a condition of the plea.

Unlawful advisal under PC § 1016.5(a). Pursuant to [PC § 1016.5\(a\)](#), prior to accepting any plea other than for an infraction, the court “shall administer the following advisement on the record” to all defendants: “If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged *may* have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” (Emphasis added.)

The purpose of this advisal is to give a general warning that this is a *possible* outcome for any noncitizen.¹² In some counties, however, judges or prosecutors state, or have modified the text on the plea form to state, that a conviction “will” have these immigration consequences, rather than that it “may” have them. This change in the statutory language may be based on the court’s or prosecutor’s wish to protect the conviction from any post-conviction challenge relating to immigration issues.

Stating to every defendant that their conviction “will” cause deportation constitutes inaccurate and inappropriate legal advice to the defendant from the court or prosecutor. This problem is heightened where a defendant does not have prompt access to counsel who can properly advise, where counsel does not have sufficient time to examine and explain the individualized risks in advance of a plea, or where there is no counsel at all. The “will” statement contradicts the language in PC § 1016.5(a) and in Judicial Council’s model plea forms, [CR 101](#) and [102](#).

An official’s statement that the plea “will” cause deportation, exclusion, and a bar to naturalization is damaging because:

- The judge or prosecutor is unlawfully providing individual legal advice to the defendant about the immigration consequences of their plea.
- Their statement often is false, because the particular conviction does *not* cause those immigration penalties for that defendant. This is the same as if a judge were to state at every misdemeanor plea, regardless of the actual sentence, “This conviction *will* cause you to spend 364 days in jail.”
 - The official does not know whether their statement is true or false. Besides lacking expertise, they lack access to the person’s immigration history, which is required to make the analysis. See also PC § 1016.5(d), “[A]t the time of the plea no defendant shall be required to disclose his or her legal status to the court.”

¹² Defendants are entitled to receive “a general warning of three immigration consequences that ‘may’ occur.” *People v. Patterson* (2017) 2 Cal.5th 885, 896 (Cal. 2017), citing *In re Resendiz* (2001) [25 Cal.4th 230](#), 247.

- This problem is heightened where a defendant does not have prompt access to counsel who can properly advise, and/or where counsel does not have sufficient time to examine and explain the individualized risks in advance of a plea.
- If the defendant has effective counsel who has informed their client that they were able to arrange an immigration neutral plea that *avoids* removal, this statement by the judge or prosecutor contradicts defense counsel's advice to their client, which can cause confusion and subvert their professional relationship.

Demands to sign documents as a condition of plea that contain misstatements of the law and illegal waivers of rights. Noncitizen defendants face demands by the prosecutor and/or judge to sign inaccurate statements and unlawful waivers relating to immigration consequences. Defendants need prompt, effective, and informed representation by defense counsel who can recognize and advocate against this. Further, prosecutors and judges should be advised not to impose inappropriate requirements.

This happens frequently. A recent example is a document that the San Bernadino County District Attorney introduced in July 2022. See attached "Wavier and Allocution" document. Some statements in the document, to which the defendant is required to swear under penalty of perjury, are:

- "2. That my attorney has provided thorough, accurate, affirmative, and competent advice about the immigration consequences of the proposed disposition."
- "9. That the prosecution has engaged in an open, fair, and just manner in reaching this plea."
- "10. That I have completely understood everything my attorney has said and that we have discussed all immigration consequences fully and that I understand I *will* be deported/ removed from, excluded from, and denied naturalization by the United States." (Emphasis added.)
- "15. That I will not be able cite as a basis to withdraw my plea the lack of advisal, insufficient advisal, or failure to understand the advisal of the immigration consequences of deportation/removal, exclusion from admission, or denial of naturalization."

This requires the defendant to waive any challenge based on ineffective assistance of counsel, which is not permitted; to swear that their counsel provided accurate and competent analysis and the prosecution has behaved in a fair manner, which the defendant is not qualified to do; and to state that they will be deported, which is not true in every case. In San Bernadino County, expert defenders so far have been able to block the use of this document, but similar documents have been introduced in other counties.

Thank you for considering these comments. We would be happy to provide additional information to the Committee or to consult on this or matter relating to noncitizens interaction with the criminal law system.

Sincerely,

s/s Katherine Brady

Katherine Brady
Senior Staff Attorney
Immigrant Legal Resource Center
kbrady@ilrc.org

1 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO

2
3 THE PEOPLE OF THE
4 STATE OF CALIFORNIA,

Case No.:

5 *Plaintiff,*

**SUPPLEMENTAL DECLARATION
BY DEFENDANT**

6 vs.

7 ,
8 *Defendant.*

9 I, _____, do hereby declare, freely and voluntarily, after having been fully
10 advised by my counsel, that I understand and agree to all of the following:

11 1. That I am pleading guilty to a violation of

12 _____
13 _____
14 _____
15 _____
16 _____
17 _____
18 _____
19 _____

20 2. That my attorney has provided thorough, accurate, affirmative, and competent advice about the
21 immigration consequences of the proposed disposition and my attorney has answered every question
22 I have on the plea. _____

23 3. That my counsel has competently and thoroughly investigated and advised me of all of the
24 immigration consequences attendant to this plea. _____

25 4. That if I am not a citizen of the United States of America, I shall be deported/removed from the United
26 States, excluded from admission to the United States, and denied naturalization pursuant to the laws
27 of the United States. _____
28

1 5. That I understand and accept the consequence that I may be permanently separated from close
2 family through my deportation from, exclusion from, and denial of naturalization by the United States.

3 _____

4 6. That if I am not a citizen and in deportation/removal proceedings, I may be taken into custody by
5 immigration authorities and transferred to any immigration detention facility in the country.

6 _____

7 7. That in immigration proceedings there is no right to no-cost, court-appointed counsel. _____

8 8. That my attorney has requested a non-deportable offense and that the prosecution, in the interests of
9 justice, and in furtherance of the findings and declarations of Penal Code sections 1016.2 and
10 1016.3, has fairly considered the avoidance of adverse immigration consequences in the plea
11 negotiation process as one factor in an effort to reach a just resolution but has declined to offer a plea
12 to a different offense. _____

13 9. That the prosecution has engaged in an open, fair, and just manner in reaching this plea.

14 _____

15 10. That I have completely understood everything my attorney has said and that we have discussed all
16 immigration consequences fully and that I understand I will be deported/removed from, excluded
17 from, and denied naturalization by the United States. _____

18 11. That I have been advised in the language of my choosing which I understand and can reason in.

19 _____

20 12. That if I have used the services of an interpreter, I have understood everything that the interpreter has
21 relayed to me. _____

22 13. That if I have used the services of an interpreter, I understand that the interpreter only translates what
23 others have said or written and cannot and did not provide me with legal advice.

24 _____

25 14. That I have been advised I have a right to consult with an immigration attorney prior to this plea, and
26 that I either have consulted with an immigration attorney or freely and voluntarily decline to do so.

27 _____

28

1 15. That I will not be able cite as a basis to withdraw my plea the lack of advisal, insufficient advisal, or
2 failure to understand the advisal of the immigration consequences of deportation/removal, exclusion
3 from admission, or denial of naturalization. _____

4 16. That I have chosen to enter the plea agreement negotiated by my attorney and the District Attorney
5 because I believe it is beneficial to me, despite the immigration consequences that will result.
6 _____

7 17. That I understand that I have the right to take my case to trial, but the plea agreement is more
8 beneficial to me than taking the risk of going to trial, despite the immigration consequences that will
9 result. _____

10 18. That, consistent with professional standards, my goals and with my informed consent, I choose not to
11 defend against and instead fully accept the immigration consequences of conviction, which include
12 deportation/removal, exclusion from admission, and denial of naturalization by the United States.
13 _____

14 19. That I have had sufficient time to consider the appropriateness of the plea in light of the advisement
15 as described above and in Penal Code section 1016.5 and decline additional time to consider the
16 plea and consequences further. _____

17
18 I certify or declare under penalty of perjury under the laws of the State of California that the foregoing
19 is true and correct.

20
21 Executed on _____, in San Bernardino, California

22
23 _____

24 DEFENDANT NAME PRINT DEFENDANT

25
26 _____

27 INTERPRETER NAME/ID ATTORNEY FOR DEFENDANT

28

Exhibit K

Letter from ACLU California Affiliates



August 19, 2022

Michael Romano, Chairperson
Hon. Alex Lee, Assembly Member
Hon. Nancy Skinner, Senate Member
Hon. Peter Espinoza
Hon. Thelton E. Henderson
Hon. Carlos Moreno
Committee on Revision of the Penal Code

Via Email to Committee Staff

**Re: Committee Evaluation of First Contact with the Legal System
September 2, 2022 Committee Meeting**

Dear Committee:

The ACLU of Northern California and Southern California (“ACLU California affiliates”) are concerned that the lack of meaningful access to counsel at arraignment in various California counties results in significant, deleterious and long-term consequences for indigent defendants. The consequences of the lack of effective—or indeed, any—counsel at arraignments where pleas are taken can include increasingly severe criminal penalties, prolonged detention, deportation or the loss of immigration status for noncitizens, and other collateral consequences.

Over the past year, the ACLU California affiliates have analyzed the practice of uncounseled pleas at first appearance in California. We accessed information through public records requests, conversations with court personnel, outreach to public defenders, interviews with people who have faced charges, and direct or indirect monitoring of court appearances. First, what we found: every year, thousands of California residents plead pro per at their first court appearance. Where plea offers are extended and taken pro per at arraignment, the ramifications of this fast-track plea mill can be wide-reaching and severe, even for misdemeanor charges. Second, what we could not find: comprehensive data about the extent of uncounseled pleas at first appearance is nonexistent. Few counties collect or produce meaningful data which would permit a fulsome review of this practice statewide.

The ACLU California affiliates welcome the Committee on Revision of the Penal Code’s inquiry into early contact with the legal system. In advance of the Committee’s upcoming meeting on this issue, we provide an early evaluation of the limited available data concerning delayed access to counsel, as well as recommendations for reform.

I. Overview

In California and nationwide, high numbers of individuals charged with misdemeanors plead guilty or no contest at their first court appearance.¹ Yet misdemeanor courts often fail to protect the rights of individuals facing charges.² “In comparison to felony adjudication, misdemeanor processing is largely informal and deregulated, characterized by high-volume arrests, weak prosecutorial screening, an impoverished defense bar, and high plea rates.”³

The failure to ensure access to effective counsel for all arraignments raises serious constitutional concerns. “The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.” *Gideon v. Wainwright* (1963) 372 U.S. 335, 342. Due process requires that the assignment of defense counsel be timely and effective.⁴ The right to counsel attaches when formal judicial proceedings have begun, and at all “critical” stages of the process, including arraignment and plea bargaining, and for both misdemeanors and felonies.⁵ “The right to representation by counsel persists until a defendant affirmatively waives it, and courts indulge every reasonable inference against such a waiver.”⁶ Resource constraints cannot nullify the right to counsel.⁷

The lack of representation at first appearance for misdemeanor defendants can lead to serious and irreversible direct and collateral consequences and contributes to individuals cycling

¹ See, e.g., *Missouri v. Frye* (2012) 566 U.S. 134, 143 (recognizing that 94 percent of state convictions are secured through guilty pleas).

² Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, “Minor Crimes, Massive Waste: The Terrible Toll Of America’s Broken Misdemeanor Courts,” 7, 14-20 (2009), at [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf) (systematic review of existing studies and site visits in seven states concluding that “misdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution”).

³ Alexandra Natapoff, “Misdemeanors,” 85 S.Cal. L.Rev. 1313, 1313 (2012).

⁴ *Powell v. Alabama* (1932) 287 U.S. 45, 71–72; *Glasser v. United States* (1942) 315 U.S. 60, 70.

⁵ *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1003-05, 1009-11 (the right to counsel under the California Constitution “has [] been understood to extend more broadly than its federal counterpart, particular in relation to misdemeanor cases”) (internal citations omitted); *United States v. Wade* (1967) 388 U.S. 218, 224; *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 301; Cal. Const. Art. I § 15.

⁶ *People v. Dunkle* (2005) 36 Cal.4th 861, 908; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464 (“[C]ourts indulge every reasonable presumption against waiver’ of fundamental constitutional rights and . . . ‘do not presume acquiescence in the loss of fundamental rights.’”). The trial court has the “serious and weighty responsibility” to determine whether there has been a voluntary, intelligent and competent waiver of the right to counsel. *Id.* at 465; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 545.

⁷ See *Argersinger v. Hamlin* (1972) 407 U.S. 25, 37 n. 7.

through the legal system and facing progressively harsher criminal penalties. Consequences of misdemeanor pleas include criminal records; fines; incarceration; harsher subsequent penalties; the deprivation of other fundamental rights; implications on child custody or in family court proceedings; and detrimental effects on employment, housing, education, and professional licenses.⁸ Misdemeanor offenses can also trigger deportation and other severe immigration consequences.⁹ Misdemeanor arrests and convictions are major drivers of this country’s bloated criminal legal system, and often the first way that individuals—disproportionately low-income people of color from heavily policed communities—enter the system.¹⁰

II. Pro Per Pleas at Arraignment Are Widespread in Some Counties.

In some California counties, judges regularly accept uncounseled pleas for misdemeanors at arraignment. For instance, in **Orange County**, out-of-custody misdemeanor defendants have to affirmatively ask for a public defender and sometimes are actively discouraged from doing so, resulting in the widespread practice of the courts accepting pro per pleas for misdemeanor charges. In **Napa**, there are neither prosecutors nor defense attorneys present for the misdemeanor arraignment calendar. Prosecutors file offers with their complaints, and Napa judges regularly convey those offers to unrepresented defendants without first taking a waiver of counsel. Counsel is only appointed where defendants reject the plea offer or otherwise specifically request a lawyer. Due to budget cuts over the past decade, **Nevada** public defenders no longer staff out-of-custody misdemeanor arraignments. As a result, pro per defendants regularly enter pleas at arraignment, with the court asserting that this occurs most frequently in DUI cases but also for other misdemeanor charges.¹¹ In **Sacramento**, public defenders do not staff the court which typically hears misdemeanor driving under the influence charges; and defendants appearing in this court regularly plead guilty or no contest at their first appearance. In the **Los Angeles** courthouses in West Covina and Pomona, there have been reports of judges taking misdemeanor guilty or no contest pleas prior to the assignment of counsel as a common practice.

⁸ See John D. King, “Beyond ‘Life and Liberty’: The Evolving Right to Counsel,” 48 Harv. C.R.-C.L. L. Rev. 1, 48 (2013).

⁹ See, e.g., Alice Clapman, “Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation,” 33 Cardozo L. Rev. 585, 595 (2011); *Padilla v. Kentucky* (2010) 559 U.S. 356, 364 (recognizing that immigration consequences may be “the most important part [] of the penalty that may be imposed on noncitizen defendants).

¹⁰ See, e.g., Robert C. Boruchowitz et al., “Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts,” 11 (2009), <https://www.nacdl.org/reports/misdemeanor/>; Amanda Agan, Jennifer Doleac & Anna Harvey, “Misdemeanor Prosecution,” Nat’l Bureau of Economic Research Working Paper 28600 (Mar. 2021), at <https://www.nber.org/papers/w28600> (concluding, based upon empirical research, that “for the marginal defendant, nonprosecution of a nonviolent misdemeanor offense leads to large reductions in the likelihood of a new criminal complaint over the next two years”).

¹¹ The court estimates that pro per guilty or no contest pleas are entered in 5-10 percent of misdemeanor cases but lacks available data which would determine the extent of the practice.

Uncounseled pleas are very common for individual defendants facing misdemeanor charges in **Kern** County. Pro per pleas follow a videotaped general rights advisal by a Superior Court Judge and the former County Public Defender, who retired in 2016. In some courts, defendants are provided a form at or prior to the start of the hearing where the accused may be advised of and/or waive their rights. Uncounseled misdemeanor defendants receive no individualized rights advisal or analysis of immigration or other collateral consequences prior to entering a guilty or no contest plea.¹² A retired Kern County judge who oversaw the misdemeanor court recognized his preference for this fast-track misdemeanor court precisely “because there are no lawyers.”¹³ The same judge asserted that in his courtroom about 90 percent plead guilty or no contest at arraignment.¹⁴

Analysis of Available Data: The ACLU California affiliates analyzed extensive data produced by Kern County demonstrating how widespread the practice of pro per pleas is for misdemeanor defendants at their first appearance. The data produced covered the seven-year period from January 2015 to May 2022. The data showed that in Kern County:

- **More than three-quarters** of individuals arraigned for misdemeanor offenses (amounting to almost 160,000 cases) **were unrepresented** at their arraignment, for the period between January 2015 and May 2022.
- At least **one-third of total misdemeanor arraignments resulted in a pro per guilty or no contest plea—more than 67,000 individual cases** over the seven-year time period for which data was provided.¹⁵
- Unrepresented people were far more likely to enter a guilty or no contest plea at arraignment than those who were represented. Whereas 93 percent of *represented* misdemeanor defendants plead not guilty, **only 3 percent of unrepresented defendants plead not guilty** at arraignment.
- Where the practice of taking pro per guilty or no content pleas is most common (currently, “Department IC”), more than **85 percent of individuals appearing without counsel entered a plea of guilty or no contest.**

¹² In advance of some misdemeanor arraignments, public defenders may enter at the start of the calendar and ask generally whether any defendants have immigration concerns, but there are otherwise no individualized advisals.

¹³ Steve Swenson, “Misdemeanor cases handled efficiently in Division G,” Bakersfield.com, Aug. 10, 2008, updated Sept. 13, 2016 (“We have no deputy district attorney and most of the time we have no public defender. . . A lot of judges don’t like this assignment, but I do,” said Judge] [Pfister, who politely handled each case and thanked the defendants for their cooperation.”).

¹⁴ *Id.*

¹⁵ This is a very conservative estimate—more than 40 percent of individual cases have no recorded plea included in the data provided, and only 25 percent have a recorded not guilty plea.

- Unrepresented individuals using an interpreter are significantly more likely to plead guilty or no contest than individuals who do not use an interpreter. **Approximately 84 percent of unrepresented individuals who used an interpreter entered a plea of guilty or no contest** during the seven-year time period for which data was provided.¹⁶ (In the Bakersfield Metro Division courthouse, a stunning 95 percent of unrepresented individuals who used an interpreter entered a plea of guilty or no contest at their arraignments for the most recent period where data is available—the seven-month period between October 2021 and May 2022.)
- Lack of counsel at arraignment is not a problem exclusive to out-of-custody defendants. **More than 14 percent of misdemeanor defendants recorded as in custody (over 2700 people)** appeared without counsel. **More than 22 percent of these unrepresented detained defendants** entered guilty or no contest pleas during the seven-year time period evaluated—amounting to **hundreds of individuals**.
- Of individuals pleading guilty or no contest without counsel present, offenses included drug possession, driving under the influence, domestic battery, firearms offenses, spousal injury and violation of restraining orders. A conviction for any of these offenses can carry **devastating immigration consequences** depending on an individual’s legal status in the United States. These pleas can also **impact employment licensing, spousal support and other family court proceedings**.

The data from Kern demonstrates the serious ramifications of uncounseled pleas where the practice is pervasive. Large numbers of people enter uncounseled guilty or no contest pleas without any individualized advisal and with limited awareness of the direct and collateral consequences of the conviction.

III. Counsel Must Be Both Present and Effective.

Provision of counsel alone, however, will not resolve the problem of plea mills in places where counsel is not currently appearing at arraignments. Counsel must not only be present but *effective* to prevent both the constitutional and pragmatic harms that can result from institutional pressure to plea bargain.

The Sixth Amendment guarantees the right to “effective assistance of counsel.”¹⁷ The mere presence of counsel does not ensure its effectiveness. Where indigent defense is inadequately resourced, counsel may be physically present but unable to act in the interests of

¹⁶ Unrepresented individuals who used an interpreter were also far more likely to plead *guilty* (rather than either not guilty or no contest). More than 46 percent of unrepresented individuals who used an interpreter pled *guilty* – as compared with only nine percent pleading guilty among the total population of unrepresented individuals.

¹⁷ *McMann v. Richardson* (1970) 397 U.S. 759, 771 n.14 (“[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel”); *Strickland v. Washington* (1984) 466 U.S. 668, 686–87; *People v. Ledesma* (1987) 43 Cal. 3d 171, 215.

their client. This is something we repeatedly witnessed or heard reports of from court observers. Effective counsel is necessary, for instance, to provide meaningful and individualized immigration advisals prior to a plea; present evidence in support of an individual's release from custody; or identify alternative pleas, diversion eligibility, or weaknesses in a case which would favor dismissal of the charges. The right to counsel is violated where defense counsel fails to provide noncitizen clients with affirmative, accurate advice on the immigration consequences of convictions; or to pursue dispositions to mitigate deleterious immigration consequences.¹⁸

IV. There Is a Dearth of Data About the Extent and Impact of Uncounseled Pleas in California.

Public records requests made by the ACLU California affiliates and partners demonstrate that most California counties lack meaningful data showing the extent and impact of uncounseled pleas. In mid-2021, the ACLU California affiliates and partners filed public records requests with courts in twenty California counties.¹⁹ The requests asked for individual and cumulative data including, *e.g.*, charges, whether defendants were represented by counsel at arraignment; whether a state party or the court presented a plea offer at arraignment; and whether defendants entered a plea of guilty or no contest at their first appearance. Of the twenty target counties, only Kern produced data sufficient to show whether defendants entered uncounseled pleas at arraignment. Most counties only collected and/or were able to produce insufficient partial or summary data.²⁰ This lack of usable information prevents a comprehensive

¹⁸ *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); *People v. Soriano*, 194 Cal. App. 3d 1470, 1480–82 (Cal. Ct. App. 1987); *People v. Barocio*, 216 Cal. App. 3d 99, 109 (Cal. Ct. App. 1989); *People v. Bautista*, 115 Cal. App. 4th 229, 242 (Cal. Ct. App. 2004). *See also* Cal. Pen. Code § 1016.3(a) (defense counsel are mandated to “provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and . . . defend against those consequences.”).

¹⁹ We filed records requests with courts pursuant to Rule 10.500 of the California Rules of Court jointly by the ACLU California affiliates, California Attorneys for Criminal Justice, and the University of California at Irvine Criminal Justice Clinic. The counties who received the requests were: Alameda, Calaveras, Contra Costa, Fresno, Kern, Los Angeles, Napa, Nevada, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Joaquin, San Mateo, Santa Clara, Shasta, Tulare, and Ventura. The counties were chosen based on their size (with requests filed in all of the largest counties) and knowledge of the existence of the practice of systematic uncounseled pleas (where a few smaller counties were chosen based on evidence of this practice).

²⁰ For instance, San Mateo County Superior Court identified that it had *no* responsive records to our data requests, and ultimately only was able to produce information about final dispositions but not whether the defendant was represented at the time of the plea. Nevada County Superior Court was only able to produce the cumulative number of misdemeanors charged, but not any individualized data or cumulative number of pro per pleas. Sacramento County does not track, *e.g.*, whether a defendant was represented at arraignment; whether a plea was offered at arraignment; whether counsel was appointed after the first appearance; or the cumulative number

understanding of the problem of uncounseled pleas, and its impact. It also limits the ability of state actors to remedy the problem.

V. Recommendations

Counsel should be appointed by default, and without any prerequisite of an express request for counsel by the charged individual. Only subsequent to appointment, and following an advisal, should the right to waive counsel be permitted to be exercised.

Access to counsel should be prompt: counsel should be appointed in all cases prior to arraignment. Counsel should be appointed when an individual is formally charged with an offense, as soon as feasible after custodial restraint, or at the first appearance, whichever comes first.²¹ Efforts should be made to allow for early access to counsel even before appointment. The failure to ensure *prompt* access to counsel imposes undue pressure on charged individuals to enter uncounseled pleas to resolve their case rapidly or avoid continued pretrial detention.

No individual should be permitted to waive their right to counsel without an individualized advisal. The protection of an individual's right to waive counsel should not be used as a shield justifying a system of plea mills. Judges should not authorize the waiver of the right to counsel absent a thorough and individualized advisal by counsel of their rights, and an inquiry into whether any waiver is knowing and intelligent.

Nor should an individual be permitted to plead without being advised, individually, by counsel of their rights.

Defense counsel should be present during the first court appearance for all charges including misdemeanors.

Indigent defense should be adequately resourced to ensure that counsel may competently represent all arraigned individuals. Defense counsel should also have resources to consult with and advise charged individuals prior to arraignment wherever possible.

Charged individuals should be ensured *effective* counsel at their first court appearance, and prior to entering a plea. Effective representation of noncitizen defendants must include an inquiry by counsel into potential immigration consequences of any plea offer,

of defendants pleading pro per at arraignment, or their pleas. Some counties also asserted that the requested data constituted "adjudicative records" not subject to public disclosure obligations.

²¹ Similar provisions exist in the Florida Rules of Criminal Procedure. Rule 3.111(a) ("A person entitled to appointment of counsel as provided herein shall have counsel appointed when the person is formally charged with an offense, or as soon as feasible after custodial restraint, or at the first appearance before a committing judge, whichever occurs earliest."); Rule 3.130(c)(1) ("When the judge determines that the defendant is entitled to court-appointed counsel and desires counsel, the judge shall immediately appoint counsel. This determination must be made and, if required, counsel appointed no later than the time of the first appearance and before any other proceedings at the first appearance.").

and an effective immigration advisal, prior to the entry of a plea of guilty or no contest. Effective representation must also include, in the case of detained individuals, a prompt analysis by counsel of whether detention is compelled or whether the individual should be released.

Lastly, the State should ensure that courts collect and publish data concerning prompt access to counsel, and pleas entered at all stages of the legal proceedings. This information should include, *e.g.*, demographic and charge information; whether and when pleas are offered and taken; whether an individual is represented; whether an interpreter is used for a court proceeding and in what language; whether and when an individual waives their right to counsel and/or other rights; and case outcomes.

We welcome the opportunity to continue to engage with the Committee on this important issue.

Sincerely,

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Exhibit L

Letter from California Attorneys for Criminal Justice



Advocates for the Defense for over 45 years!

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California Law Revision Commission
Committee on Revision of the Penal Code
Michael Romano, Chairperson

RE: Standards for Judicial Determination of Probable Cause, Assignment of Counsel and Arraignment on a Complaint

Introduction

CACJ is California's association of criminal defense lawyers. There are more than 1,000 attorney members of the Association with experience in the courts throughout the state. We are writing to express our interest and concern over the harmful and potentially unconstitutional delays in the initial stages of criminal prosecutions under current statutes and policies.

There are many issues surrounding warrantless arrests and the first appearance of the defendant on a new complaint which we believe need to be addressed by legislative action. This letter will focus on four of them. First, the timely determination of probable cause to support the arrest. Secondly, the practice of releasing an inmate when the statutory period for arraignment has expired but then re-arresting them at the jail door. Third, the time in which the accused must appear before a magistrate. Fourth, the necessity of advice by counsel at the first appearance in a court.

Our experience has been that there are multiple jurisdictions in California currently failing to meet constitutional requirements in each of these situations. This letter will briefly review the constitutional standards which apply, and the current statutes. It will then move on to suggestions for improvement in the protection and implementation of the right to liberty, and to be free from unreasonable seizure.

CONSTITUTIONAL STANDARDS

Ironically the leading case on the maximum delay allowed before a judicial determination of probable cause following arrest arose in California: *County of Riverside v. McLaughlin*, 500 U.S. 44;[111 S. Ct. 1661; 114 L.Ed.2d 49] (1991)(*McLaughlin*). The Supreme Court held that the Fourth Amendment requires a judicial determination of probable cause without unreasonable delay, and in any event before 48 hours have elapsed. (*McLaughlin* 500 U.S. at 62-63.) No exclusions for holidays or weekends are allowed. (*Id.*) The majority opinion arrived at the 48 hour limit by “balancing” the right to be free from unreasonable seizure against the practical governmental interest in orderly proceedings. Justice Scalia’s dissent did not recognize the validity of “balancing.” He focused on the historical formulation “without delay” and the precedent of *Gerstein v. Pugh* (1975) 420 U.S. 103, 124-25 stating that a judicial determination of probable cause is required "either before or promptly after arrest," Justice Scalia concluded that with modern police and court practices 24 hours should be the outside limit to determine probable cause for a warrantless arrest.

The right to counsel is also relevant in the evaluation of procedures at the outset of a criminal case. Under both the state and federal Constitutions, a defendant has a right to counsel at all critical stages of a criminal prosecution. (U.S. Const., 6th Amend.; Cal. Const., art I, § 15; *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1004 (*Gardner*); *People v. Doolin* (2009) 45 Cal.4th 390, 453; *People v. Rouse* (2016) 245 Cal.App.4th 292, 296-297 (*Rouse*)). Critical stages are those "events or proceedings in which the accused is brought in confrontation with the state, where potential substantial prejudice to the accused's rights inheres in the confrontation, and where counsel's assistance can help to avoid that prejudice." (*Gardner*, at pp. 1004-1005; *Rouse*, at p. 297 ["" "[T]he essence of a 'critical stage' is . . . the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel." [Citation.]' ").) Thus, arraignments are a critical stage where there is a right to the advice of counsel. (*Gardner*, at p. 1005; *Rouse*, at p. 297.)

CALIFORNIA’S STATUTORY SCHEME

Penal Code §813 allows a magistrate to issue an arrest warrant based on the filing of a felony complaint. Section 817 provides for issuing an arrest warrant based on a statement of probable cause from an officer. In each case the magistrate must have sufficient facts to make an independent determination of probable cause. This requirement is express in §817(a)(1), and required by case law for §813 in *People v. Sesslin* (1968) 68 Cal.2d 418, 421.

When an arrest is made without a warrant, as permitted by Penal Code §836, Penal Code §849(a) requires that “the person arrested, if not otherwise released, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before the magistrate.” Section 825(a) requires that the defendant in all cases (with or without an arrest warrant) “be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays. Section 825(b) extends the time to the following day when the court is not in session at the 48th hour.

Neither §825 nor §849 have a requirement for a judicial determination of probable cause. For misdemeanors where the accused is in custody at the time of arraignment, on motion of the defendant, the court must make a determination of probable cause “immediately” unless a continuance is granted for good cause, not to exceed 3 days. (Penal Code §991.) For felonies §859 requires that the accused be brought before the court once a complaint is filed “without unreasonable delay.” Section 859b requires that a preliminary hearing be set at least 2 court days and less than 10 court days from the arraignment. Thus the Prelim becomes the point for a judicial determination of probable cause, at least two days after arraignment.

Under *McLaughlin* the maximum delay allowed for the probable cause determination is 48 hours after arrest. But our statutes fall far short in requiring this “prompt” determination, with no requirement at all for a warrantless felony arrest. For an accused in custody on a felony the first required determination of probable cause could be 48 hours excluding weekends and holidays, plus the next judicial day, plus ten judicial days to the prelim. So an arrest on Thursday evening, with arraignment on the next Tuesday, and preliminary hearing the second Tuesday after that would comply with our statutes but violate the Constitution. Nineteen days before a determination of probable cause for the arrest.

Our statutes also fall short in assuring the availability and advice of counsel at the first court appearance and arraignment. There is nothing which requires the court to address the issue of counsel until the first appearance for arraignment on a complaint. (See Penal Code §§859, 987.) There is no statute requiring notice to counsel of an arrest, which effectively eliminates the opportunity for a pre-arraignment reduction of bail as provided in §1269c. As a result most courts in the state simply wait to ask the accused if they have counsel or request appointed counsel at the first appearance. (See, e.g. Penal Code §859.) Then the arraignment is continued, usually from two to five days if the defendant is in custody. The setting of bail or release conditions is usually continued to the same date.

This procedure violates the right to have counsel at each critical stage, since as noted above arraignment is a critical stage.

PROPOSALS FOR LEGISLATION

1. Determination of Probable Cause

Amend Penal Code §849, incorporating the probable cause determination and the 48 hour standard. For example:

Penal Code §849(a) - When an arrest is made without a warrant by a peace officer or private person, an affidavit alleging facts to establish probable cause to believe a crime was committed and the arrested person committed it shall be presented to a magistrate without delay, and in no case more than 24 hours after the arrest. The magistrate shall promptly determine whether the affidavit establishes probable cause. The determination shall be made no more than 24 hours after submission of the affidavit. If the magistrate finds an absence of probable cause the accused shall

be immediately released from custody pursuant to §849(b).

(b) The person arrested, if not otherwise released, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before the magistrate.

2. Participation of Counsel Prior to Probable Cause Determination

A good case can be made for the probable cause finding after arrest being a critical stage, with a right to counsel. However, it is necessary to consider the procedure for arrest under a warrant alongside the warrantless arrest. As noted above, Penal Code §§ 813 and 817 spell out the procedure for a determination of probable cause for issuing an arrest warrant. An affidavit with facts sufficient to support a finding of probable cause is required, but there is no provision for notice to or participation of the defendant or counsel. Under the pragmatic “balancing” approach of *McLaughlin* it could be said that there is no reason to give the accused more procedural rights for being arrested without a warrant. We make no specific proposal at this time for informing or appointing counsel to participate in the probable determination under proposed §849.

3. Release and Re-Arrest on the Same Incident

If a person is arrested without a warrant and they are not brought to court within the time allowed by §825 they must be released. Holding them any longer "violates a fundamental right of the arrested person and is in disobedience of the law." (*People v. McDowell* (1962) 204 Cal.App.2d 734, 736; **See also** *People v. Powell*, (1967) 67 Cal.2d 32, 58-59.)

However, in the competitive world of policing there can be resistance to releasing a “bad guy” because the DA or court did not achieve a timely appearance. This has led to many situations where the person is released from custody, but rearrested by an officer waiting outside the jail door. The jail then treats this as “restarting” the §825 clock for a court appearance. This practice is a violation of the fundamental right to liberty, and is patently illegal. To address this practice the requirement to release and the prohibition on a second arrest should be express in our statutes. For Example:

Penal Code §825(a)(3) - When the time to appear before a magistrate as required in (a)(2) has expired, and whether the arrest was with or without a warrant, the inmate shall be released promptly as provided in §849©. The person may not be re-arrested for the incident which led to the original arrest without a new warrant or process from a court.

Penal Code §849© - A peace officer shall release from custody a person arrested with or without a warrant who has not appeared before a magistrate within the time allowed by §825(a).

Penal Code §849(d) (currently ©) - The record of arrest of a person released pursuant to paragraph (1), (3), or (5) of subdivision (b) shall include a record of release. Thereafter, the arrest shall not be deemed an arrest, but a detention only.

4. Advice of Counsel at First Court Appearance.

As noted above the first court appearance for arraignment on charges is a critical stage where the accused is entitled to the advice of counsel. However, in many counties the court applies the procedure described in §859 - when the accused appears before the court there is an inquiry into whether they are able to retain counsel, or are requesting appointment of counsel. If the defendant is in custody the case is continued for arraignment for three to five days for counsel to appear. If the accused is out of custody the continuance will be for two or three weeks.

In practice this delays the arraignment, consideration of bail, and ultimately the resolution of the case. For those in custody it means that “being brought before the magistrate” within the time specified in §§825 and 859 does not accomplish the intended result of prompt proceedings - two or three days to get to court and three to five more to have counsel to accomplish anything becomes the norm.

In other jurisdictions an attorney (or attorneys) is assigned to handle the arraignment calendars for both felonies and misdemeanors. They receive or view the citations or complaint filed with the court, then have a brief conversation with each defendant who appears for the calendar. The defendants are advised of their basic rights, notified of the charges, and advised about bail or release procedures. Counsel can ask for information that would help secure release, and for the defendant’s eligibility for appointed counsel etc. This “counseling” attorney is not formally appointed to handle the cases, but represents each person for the first court appearance.

This pre-arraignment advice is usually handled by the Public Defender or an appointed counsel office. The time to counsel can sometimes delay the start of the calendar, and requires some assistance of court staff and cooperation from the prosecutor’s office. But as cases are called and handled by counsel the calendar moves much more swiftly and efficiently. With misdemeanor matters some may be resolved at the first appearance, saving court time and appointed counsel costs. In other words, with advice of counsel at the first court appearance the process is not only more fair, but moves more quickly and more efficiently, resulting in a net decrease in costs.

The pre-arraignment counseling might be required by addition to the Penal Code, for example:

Penal Code §987.01 - In all cases the court shall assign counsel to advise the accused prior to and during the arraignment. This shall be a limited purpose assignment, and counsel may be provided by the public defender, appointed counsel firms or private counsel under agreement with the court. Designation as the counsel for arraignment services shall have no bearing on the appointment of counsel, if any, to represent the defendant through the balance of the proceedings.

5. Prompt Arraignment

Beyond the constitutional requirement for a prompt determination of probable cause, the defendant and the state both have an interest in seeing that a complaint is filed and the accused appears before a court as quickly as possible. Penal Code §825 requires the accused be brought before the magistrate “without unnecessary delay” and within 48 hours excluding Sundays and holidays. (Penal Code §825(a)(1).) With the range of modern procedures available to the prosecutor and the court, the additional extension of time permitted by §825(a)(2) should be repealed.

Thank you for your attention to these concerns. CACJ is attempting to address the concerns of hundreds of attorneys, thousands of defendants, and the application of constitutional standards in the day-to-day of criminal justice.

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Executive Director
California Attorneys for Criminal Justice