

## **Sample Authority and Information to Support Request for Destruction or Return of Property**

**This document has been produced at the request of law enforcement to provide assistance with requests for destruction and return of property. This information in this document is intended to be used as a tool to assist but is not warranted to address every scenario that may arise.**

### **Drugs and paraphernalia**

Health and Safety Code §11469 et seq. discusses seizure and disposition of controlled substances. The most relevant section within that chapter are as follows:

§11473. Order for destruction upon conviction; exceptions

(a) All seizures under provisions of this chapter, except seizures of vehicles, boats, or airplanes, as specified in subdivision (e) of Section 11470, or seizures of moneys, negotiable instruments, securities, or other things of value as specified in subdivision (f) of Section 11470, shall, upon conviction of the owner or defendant, be ordered destroyed by the court in which conviction was had.

(b) Law enforcement may request of the court that certain uncontaminated science equipment be relinquished to a school or school district for science classroom education in lieu of destruction.

§11473.5. Order for destruction; seized property in possession of government official; cases without trials or convictions; exceptions

(a) All seizures of controlled substances, instruments, or paraphernalia used for unlawfully using or administering a controlled substance which are in possession of any city, county, or state official as found property, or as the result of a case in which no trial was had or which has been disposed of by way of dismissal or otherwise than by way of conviction, shall be destroyed by order of the court, unless the court finds that the controlled substances, instruments, or paraphernalia were lawfully possessed by the defendant.

(b) If the court finds that the property was not lawfully possessed by the defendant, law enforcement may request of the court that certain uncontaminated instruments or paraphernalia be relinquished to a school or school district for science classroom education in lieu of destruction.

§11479. Destruction of controlled substances without court order; requirements; special requirements for growing or harvested cannabis

Notwithstanding Sections 11473 and 11473.5, at any time after seizure by a law enforcement agency of a suspected controlled substance, except in the case of growing or harvested cannabis, that amount in excess of 10 pounds in gross weight may be destroyed without a court order by the chief of the law enforcement agency or a designated subordinate. In the case of growing or harvested cannabis, that amount in excess of two pounds, or the amount of cannabis a medicinal cannabis patient or designated caregiver is authorized to possess by ordinance in the city or

county where the cannabis was seized, whichever is greater, may be destroyed without a court order by the chief of the law enforcement agency or a designated subordinate. Destruction shall not take place pursuant to this section until all of the following requirements are satisfied:

(a) At least five random and representative samples have been taken, for evidentiary purposes, from the total amount of suspected controlled substances to be destroyed. These samples shall be in addition to the 10 pounds required above. When the suspected controlled substance consists of growing or harvested cannabis plants, at least one 2-pound sample or a sample in the amount of medicinal cannabis a medicinal cannabis patient or designated caregiver is authorized to possess by ordinance in the city or county where the cannabis was seized, whichever is greater, shall be retained. This sample may include stalks, branches, or leaves. In addition, five representative samples of leaves or buds shall be retained for evidentiary purposes from the total amount of suspected controlled substances to be destroyed.

(b) Photographs and videos have been taken that reasonably and accurately demonstrate the total amount of the suspected controlled substance to be destroyed.

(c) The gross weight of the suspected controlled substance has been determined, either by actually weighing the suspected controlled substance or by estimating that weight after dimensional measurement of the total suspected controlled substance.

(d) The chief of the law enforcement agency has determined that it is not reasonably possible to preserve the suspected controlled substance in place, or to remove the suspected controlled substance to another location. In making this determination, the difficulty of transporting and storing the suspected controlled substance to another site and the storage facilities may be taken into consideration.

Subsequent to any destruction of a suspected controlled substance pursuant to this section, an affidavit shall be filed within 30 days in the court that has jurisdiction over any pending criminal proceedings pertaining to that suspected controlled substance, reciting the applicable information required by subdivisions (a), (b), (c), and (d) together with information establishing the location of the suspected controlled substance, and specifying the date and time of the destruction. In the event that there are no criminal proceedings pending that pertain to that suspected controlled substance, the affidavit may be filed in any court within the county that would have jurisdiction over a person against whom those criminal charges might be filed.

### **Explanation**

You will notice that section 11473 only applies in cases where there is a conviction. Section 11473.5 applies in other situations. When you submit a request for destruction the Court needs to know which items fall into which category. This means that you need to provide the Court with clear information as to which code section applies to each item sought to be destroyed. The easiest way to do this is to provide different exhibits to the declaration. For example, you may set out all the items sought to be destroyed which are found property in one exhibit and then state in your declaration that all of the items set out in Exhibit A are sought to be destroyed pursuant to H & S §11473.5 as found property. You can then have an exhibit which sets out all the items that were confiscated, etc. but no case was filed. In your declaration you will state that the items set out in Exhibit B are sought to be destroyed pursuant to H & S §11473.5. You should make it clear that no case has been filed and the statute of limitations has run. If you know that the DA has specifically declined to prosecute you can say that. You

should also tell the Court how you know no case was filed. What did you do to ascertain this fact? For example you may want to say that following the departments established procedure, you or the person most knowledgeable has researched the DA Star system and the Court's Odyssey case management system and has ascertained that no case has been filed associated with the property sought to be destroyed. You would then have a third exhibit with all of the items that are related to a court case that was disposed of by means other than conviction. In your declaration you will state that the items set out in Exhibit C are sought to be destroyed pursuant to H & S §11473.5. For these items you need to provide the court case number. Finally, you should have a fourth exhibit that has all of the items related to a court case that resulted in a conviction. In your declaration you will state that the items set out in Exhibit D are sought to be destroyed pursuant to H & S §11473. For these items you need to provide the court case number. For any items associated with a court case you must tell the court that the cases have been disposed of and the time for appeal has run. You should also tell the court how you know that the case is complete and the time for appeal has run. What did you do to ascertain this fact? For example you may want to say that following the departments established procedure, you or the person most knowledgeable has researched the DA Star system and the Court's Odyssey case management system and has ascertained that the case associated with each item sought to be destroyed been fully adjudicated, the right to appeal has run, and the items no longer have any evidentiary value.

As an alternative to having 4 exhibits you can have one exhibit and have a column on your exhibit that clearly states the authority and category, i.e. §11473.5, found property.

For all drug cases you must also make it clear that the property was not lawfully in possession of the individual from whom it was seized. For example, prescription medication where the person has a current valid prescription or medical marijuana. Example - Individuals who are immune from prosecution under the Compassionate Use Act and who therefore possess marijuana legally under California law, are entitled to the return of such marijuana seized by law enforcement (City of Garden Grove v. Superior Court (2007) 157 Cal. App. 4th 355).

We have had law enforcement agencies file petitions to preserve a sample and destroy the rest under H & S §11479. The law does not require you to bring a petition or obtain an order from the Court prior to destruction. You must comply with a-d above before you destroy, but that does not require a court order. You need to file the affidavit with the Court after you destroy.

### **Property Other than Drugs and Guns**

PC §1407. Property in custody of peace officer; holding subject to provisions of chapter When property, alleged to have been stolen or embezzled, comes into the custody of a peace officer, he shall hold it subject to the provisions of this chapter relating to the disposal thereof.

PC § 1408. Property in custody of peace officer; order for delivery to owner; payment of expenses

On the application of the owner and on satisfactory proof of his ownership of the property, after reasonable notice and opportunity to be heard has been given to the person from whom custody of the property was taken and any other person as required by the magistrate, the magistrate before whom the complaint is laid, or who examines the charge against the person accused of stealing or embezzling it, shall order it to be delivered, without prejudice to the state, to the owner, on his paying the necessary expenses incurred in its preservation, to be certified by the magistrate. The order entitles the owner to demand and receive the property.

PC § 1410. Property not delivered to owner; proof of title; order for restoration by trial court

If the property stolen or embezzled has not been delivered to the owner, the court before which a trial is had for stealing or embezzling it, upon the application of the owner to the court and on proof of his title, after reasonable notice and opportunity to be heard has been given to the person from whom custody of the property was taken and any other person as required by the court, may order it to be restored to the owner without prejudice to the state.

PC § 1411. Unclaimed property delivered to county officer; notice to owner or holder of security interest; failure to claim; disposition; application to property placed on hold

(a) If the ownership of the property stolen or embezzled and the address of the owner, and the address of the owner of a security interest therein, can be reasonably ascertained, the peace officer who took custody of the property shall notify the owner, and a person having a security interest therein, by letter of the location of the property and the method by which the owner may obtain it. This notice shall be given upon the conviction of a person for an offense involving the theft, embezzlement, or possession of the property, or if a conviction was not obtained, upon the making of a decision by the district attorney not to file the case or upon the termination of the proceedings in the case

PC § 1413 Person in charge of property section; record of property allegedly stolen or embezzled; delivery to owner; review by magistrate; liability

(b) The clerk or person in charge of the property section may, upon satisfactory proof of the ownership of property held pursuant to Section 1407, and upon presentation of proper personal identification, deliver it to the owner. Such delivery shall be without prejudice to the state or to the person from whom custody of the property was taken or to any other person who may have a claim against the property. Prior to such delivery such clerk or person in charge of the property section shall make and retain a complete photographic record of such property. The person to whom property is delivered shall sign, under penalty of perjury, a declaration of ownership, which shall be retained by the clerk or person in charge of the property section.

PC § 1417. Exhibits introduced in criminal actions; retention until final determination

All exhibits which have been introduced or filed in any criminal action or proceeding shall be retained by the clerk of the court who shall establish a procedure to account for the exhibits properly, subject to Sections 1417.2 and 1417.3 until final determination

of the action or proceedings and the exhibits shall thereafter be distributed or disposed of as provided in this chapter.

PC § 1417.5. Disposition of Exhibits

Except as provided in Section 1417.6, 60 days after the final determination of a criminal action or proceeding, the clerk of the court shall dispose of all exhibits introduced or filed in the case and remaining in the clerk's possession, as follows:

(a) If the name and address of the person from whom the exhibit was taken is contained in the court record, the clerk shall notify the person that he or she may make application to the court for release of the exhibits within 15 days of receipt of the notification.

(b) The court shall order the release of exhibits free of charge, without prejudice to the state, upon application, to the following:

(1) First, the person from whom the exhibits were taken into custody, provided that the person was in lawful possession of the exhibits.

(2) Second, a person establishing title to, or a right to possession of, the exhibits.

(c) If the party entitled to an exhibit fails to apply for the return of the exhibit prior to the date for disposition under this section, the following procedures shall apply:

(1) Exhibits of stolen or embezzled property other than money shall be disposed of pursuant to court order as provided in Section 1417.6.

(2) Exhibits of property other than property which is stolen or embezzled or property which consists of money or currency shall, except as otherwise provided in this paragraph and in paragraph (3), be transferred to the appropriate county agency for sale to the public in the same manner provided by Article 7 (commencing with Section 25500) of Chapter 5 of Part 2 of Division 2 of Title 3 of the Government Code for the sale of surplus personal property. If the county determines that any property is needed for a public use, the property may be retained by the county and need not be sold.

(3) Exhibits of property, other than money, currency, or stolen or embezzled property, that are determined by the court to have no value at public sale shall be destroyed or otherwise disposed of pursuant to court order.

(4) Exhibits of money or currency shall be disposed of pursuant to Section 1420.

PC § 1536. Disposition of property taken; retention subject to order of court in which offense triable

All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable.

PC § 1540. Restoration of property; property not described in warrant; no probable cause

If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken.

## Explanation

We often receive requests for return of property where the authority cited is PC §1417 et seq. This authority does not apply to law enforcement. This authority is for exhibits introduced or filed in a criminal action. These items should be in the court's possession or perhaps in the possession of the party or attorney. This authority does not apply to items held by law enforcement that were never part of the court case. Any request that relies on this authority will not be granted.

We often receive applications to return property where the only authority cited is PC §1536. This is the authority that requires law enforcement to hold onto the property. Standing alone this authority is not enough for the Court to order the return of the property to the owner. It is the case law that provides that during and after the pendency of a criminal action, section 1536 empowers the Court to entertain a summary proceeding by "nonstatutory" motion, for the release of property seized under a search warrant. See **People v. Superior Court** (1972) 28 Cal.App.3d 600, 609; **Buker v. Superior Court** (1972) 25 C.A.3d 1085, 1089, **People v. Icenogle** (1985) 164 Cal.App.3d 620, **People v. Hopkins** (2009) 171 Cal. App. 4th 305, 308. Additional case law provides that property seized without a warrant is still under the jurisdiction of the Court, even if no charges have been filed or the property has not been offered or received into evidence. See **Gershenvorn v. Superior Court** (1964) 227 Cal. App. 2d 361. This allows the Court to decide a nonstatutory motion for release of property not seized pursuant to a warrant and not an exhibit in a court case. Finally, the Court's inherent power to control and prevent the abuse of its process is additional authority that should be cited. **People v. Superior Court** (1972) 28 Cal.App.3d 600, 608.

So your application, the document that sets out the authority to support your request, should cite to §1536, the court's inherent authority and the applicable case law. For example, if you are asking to return property seized pursuant to a warrant state that, return of the property is requested pursuant to PC §1536, **People v. Icenogle** (1985) 164 Cal.App.3d 620, **People v. Hopkins** (2009) 171 Cal. App. 4th 305, 308 and the Court's inherent authority as addressed in **People v. Superior Court** (1972) 28 Cal.App.3d 600, 608.

Often we receive request for return of property seized pursuant to a warrant. The most often stated reason for the return is that the items seized did not contain any indicia of a crime. The proper authority for this request is PC §1540. If the seized property is not that described in the warrant, or if there is "no probable cause for believing the existence of the grounds on which the warrant was issued," the magistrate must order the property restored to the person from whom it was taken. PC §1540. When making such a request please include a copy of the warrant and tell the Court to whom the property will be returned.

We often get requests from law enforcement to return property to its rightful owner. The application and declaration reveal that the property was seized from an individual and the property was determined to be stolen property. Law enforcement is asking for an order to return the property to the rightful owner. Technically these types of requests are improper. There are a number of ways to get this property back to the rightful owner and none of them involves an ex parte order for return of property. The law is set out above – PC §1407-1413. The property can be returned at trial, the owner can file a

motion for return of property or the property officer can return the property. Nowhere does the law require the law enforcement agency to motion the court for return of the property. If you return property to the rightful owner you need to comply with all of the requirements of PC § 1413. Note that only a portion of this statute was cited above.

### **Declaration as Evidence**

The purpose of permitting a declaration under penalty of perjury, in lieu of a statement made under oath, is to help insure that declarations contain a truthful factual representation and are made in good faith. The ability to use declarations is a great convenience, but the trade-off is that strict compliance with the statute is required and one cannot invent procedures which seem similar and call the result a "declaration." In order for the Court to consider the declaration as proper evidence to support the request being made they must be properly sworn as required by Code of Civil Procedure § 2015.5. You have 2 options:

- 1) I certify (or declare) under penalty of perjury that the foregoing is true and correct." This **must** be followed by the date and **place of signing**, and a signature line.
- 2) "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct." This one only requires that date a signature line.

When you have first-hand knowledge of all of the facts that you are setting out in your declaration to should start the declaration by saying that say the following facts are true of my own personal knowledge, and if called upon as a witness I can testify competently to each of them. If you do not have personal knowledge of all the facts, for example if someone other than you logged the evidence or if someone other than you conducted the search the DA or Court records you should start your declaration by saying that the following facts true of my own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that I believe it to be true.

### **Firearms**

There are a number of statutes that relate to firearms. This resource is not meant to be exhaustive but should provide you with support for most of your request. All references are to the Penal Code unless expressly stated otherwise.

§ 16520 Defines Firearm

§ 18000. Disposition of weapon upon conviction

(a) Any weapon described in Section 19190, 21390, 21590, or 25700, or, upon conviction of the defendant or upon a juvenile court finding that an offense that would be a misdemeanor or felony if committed by an adult was committed or attempted by the juvenile with the use of a firearm, any weapon described in Section 29300, shall be surrendered to one of the following:

- (1) The sheriff of a county.
- (2) The chief of police or other head of a municipal police department of any city or city and county.

(3) The chief of police of any campus of the University of California or the California State University.

(4) The Commissioner of the California Highway Patrol.

(b) For purposes of this section, the Commissioner of the California Highway Patrol shall receive only weapons that were confiscated by a member of the California Highway Patrol.

(c) A finding that the defendant was guilty of the offense but was insane at the time the offense was committed is a conviction for the purposes of this section.

#### §18005. Sale or destruction of surrendered weapon

(a) An officer to whom weapons are surrendered under Section 18000, except upon the certificate of a judge of a court of record, or of the district attorney of the county, that the retention thereof is necessary or proper to the ends of justice, may annually, between the 1st and 10th days of July, in each year, offer the weapons, which the officer in charge of them considers to have value with respect to sporting, recreational, or collection purposes, for sale at public auction to persons licensed pursuant to Sections 26700 to 26915, inclusive, to engage in businesses involving any weapon purchased.

(b) If any weapon has been stolen and is thereafter recovered from the thief or the thief's transferee, or is used in a manner as to constitute a nuisance under Section 19190, 21390, 21590, or 29300, or subdivision (a) of Section 25700 without the prior knowledge of its lawful owner that it would be so used, it shall not be offered for sale under subdivision (a) but shall be restored to the lawful owner, as soon as its use as evidence has been served, upon the lawful owner's identification of the weapon and proof of ownership, and after the law enforcement agency has complied with Chapter 2 (commencing with Section 33850) of Division 11 of Title 4.

(c) If, under this section, a weapon is not of the type that can be sold to the public, generally, or is not sold under subdivision (a), the weapon, in the month of July, next succeeding, or sooner, if necessary to conserve local resources, including space and utilization of personnel who maintain files and security of those weapons, shall be destroyed so that it can no longer be used as a weapon subject to surrender under Section 18000, except upon the certificate of a judge of a court of record, or of the district attorney of the county, that the retention of it is necessary or proper to the ends of justice.

(d) No stolen weapon shall be sold or destroyed pursuant to subdivision (a) or (c) unless reasonable notice is given to its lawful owner, if the lawful owner's identity and address can be reasonably ascertained.

#### §18120. Effect of order; Surrender of firearms and ammunition

(a) A person subject to a gun violence restraining order issued pursuant to this division shall not have in his or her custody or control, own, purchase, possess, or receive any firearms or ammunition while that order is in effect.

(b)

(1) Upon issuance of a gun violence restraining order issued pursuant to this division, the court shall order the restrained person to surrender all firearms and ammunition in the restrained person's custody or control, or which the restrained person possesses or owns pursuant to paragraph (2).

(2) The surrender ordered pursuant to paragraph (1) shall occur by immediately surrendering all firearms and ammunition in a safe manner, upon request of any law enforcement officer, to the control of the officer, after being served with the restraining order. A law enforcement officer serving a gun violence restraining order that indicates that the restrained person possesses any firearms or ammunition shall request that all firearms and ammunition be immediately surrendered. Alternatively, if no request is made by a law enforcement officer, the surrender shall occur within 24 hours of being served with the order, by surrendering all firearms and ammunition in a safe manner to the control of the local law enforcement agency, selling all firearms and ammunition to a licensed firearms dealer, or transferring all firearms and ammunition to a licensed firearms dealer in accordance with Section 29830. The law enforcement officer or licensed firearms dealer taking possession of any firearms or ammunition pursuant to this subdivision shall issue a receipt to the person surrendering the firearm or firearms or ammunition or both at the time of surrender. A person ordered to surrender all firearms and ammunition pursuant to this subdivision shall, within 48 hours after being served with the order, do both of the following:

(A) File with the court that issued the gun violence restraining order the original receipt showing all firearms and ammunition have been surrendered to a local law enforcement agency or sold or transferred to a licensed firearms dealer. Failure to timely file a receipt shall constitute a violation of the restraining order.

(B) File a copy of the receipt described in subparagraph (A) with the law enforcement agency that served the gun violence restraining order. Failure to timely file a copy of the receipt shall constitute a violation of the restraining order.

(c)

(1) Except as provided in paragraph (2), any firearms or ammunition surrendered to a law enforcement officer or law enforcement agency pursuant to this section shall be retained by the law enforcement agency until the expiration of any gun violence restraining order that has been issued against the restrained person. Upon expiration of any order, any firearms or ammunition shall be returned to the restrained person in accordance with the provisions of Chapter 2 (commencing with Section 33850) of Division 11 of Title 4. Firearms or ammunition that are not claimed are subject to the requirements of Section 34000.

(2) A restrained person who owns any firearms or ammunition that are in the custody of a law enforcement agency pursuant to this section is entitled to sell any firearms or ammunition to a licensed firearms dealer or transfer any firearms or ammunition to a licensed firearms dealer in accordance with Section 29830, provided that the firearm or firearms or ammunition are otherwise legal to own or possess and the restrained person otherwise has right to title of the firearm or firearms or ammunition.

(d) If a person other than the restrained person claims title to any firearms or ammunition surrendered pursuant to this section, and he or she is determined by the law enforcement agency to be the lawful owner of the firearm or firearms or ammunition, the firearm or firearms or ammunition shall be returned to him or her pursuant to Chapter 2 (commencing with Section 33850) of Division 11 of Title 4.

§18250. Authority of peace officer to take temporary custody of firearm at scene of domestic violence

(a) If any of the following persons is at the scene of a domestic violence incident involving a threat to human life or a physical assault, is serving a protective order as

defined in Section 6218 of the Family Code, or is serving a gun violence restraining order issued pursuant to Division 3.2 (commencing with Section 18100), that person shall take temporary custody of any firearm or other deadly weapon in plain sight or discovered pursuant to a consensual or other lawful search as necessary for the protection of the peace officer or other persons present:

- (1) A sheriff, undersheriff, deputy sheriff, marshal, deputy marshal, or police officer of a city, as defined in subdivision (a) of Section 830.1.
  - (2) A peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2.
  - (3) A member of the University of California Police Department, as defined in subdivision (b) of Section 830.2.
  - (4) An officer listed in Section 830.6, while acting in the course and scope of the officer's employment as a peace officer.
  - (5) A member of a California State University Police Department, as defined in subdivision (c) of Section 830.2.
  - (6) A peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2.
  - (7) A peace officer, as defined in subdivision (d) of Section 830.31.
  - (8) A peace officer, as defined in subdivisions (a) and (b) of Section 830.32.
  - (9) A peace officer, as defined in Section 830.5.
  - (10) A sworn member of the Department of Justice who is a peace officer, as defined in Section 830.1.
  - (11) A member of the San Francisco Bay Area Rapid Transit District Police Department, as defined in subdivision (a) of Section 830.33.
- (b) This section shall become operative on January 1, 2016.

#### §18255. Receipt for firearm taken into custody

- (a) Upon taking custody of a firearm or other deadly weapon pursuant to this division, the officer shall give the owner or person who possessed the firearm a receipt.
- (b) The receipt shall describe the firearm or other deadly weapon and list any identification or serial number on the firearm.
- (c) The receipt shall indicate where the firearm or other deadly weapon can be recovered, the time limit for recovery as required by this division, and the date after which the owner or possessor can recover the firearm or other deadly weapon.

§18260. Delivery of firearm or deadly weapon to police department or sheriff's office  
Any peace officer, as defined in subdivisions (a) and (b) of Section 830.32, who takes custody of a firearm or deadly weapon pursuant to this division, shall deliver the firearm within 24 hours to the city police department or county sheriff's office in the jurisdiction where the college or school is located.

#### §18270. Return of stolen firearm from temporary custody

If a firearm or other deadly weapon has been stolen and has been taken into custody pursuant to this division, it shall be restored to the lawful owner upon satisfaction of all of the following conditions:

- (a) Its use for evidence has been served.
- (b) The owner identifies the firearm or other deadly weapon and provides proof of ownership.

(c) The law enforcement agency has complied with Chapter 2 (commencing with Section 33850) of Division 11 of Title 4.

§18275. Sale or destruction of firearm taken into temporary custody after designated period of time

(a) Any firearm or other deadly weapon that has been taken into custody and held by any of the following law enforcement authorities for longer than 12 months, and has not been recovered by the owner or person who had lawful possession at the time it was taken into custody, shall be considered a nuisance and sold or destroyed as provided in subdivisions (a) and (b) of Section 18000 and subdivisions (a) and (b) of Section 18005:

(1) A police, university police, or sheriff's department.

(2) A marshal's office.

(3) A peace officer of the Department of the California Highway Patrol, as defined in subdivision (a) of Section 830.2.

(4) A peace officer of the Department of Parks and Recreation, as defined in subdivision (f) of Section 830.2.

(5) A peace officer, as defined in subdivision (d) of Section 830.31.

(6) A peace officer, as defined in Section 830.5.

(b) If a firearm or other deadly weapon is not recovered within 12 months due to an extended hearing process as provided in Section 18420, it is not subject to destruction until the court issues a decision, and then only if the court does not order the return of the firearm or other deadly weapon to the owner.

§29300. Owning, possessing or use of firearm as nuisance in specified circumstances; Exceptions

(a) Except as provided in subdivision (c), a firearm of any nature owned or possessed in violation of Chapter 1 (commencing with Section 29610), Chapter 2 (commencing with Section 29800), or Chapter 3 (commencing with Section 29900) of Division 9 of this title, or Chapter 3 (commencing with Section 8100) of Division 5 of the Welfare and Institutions Code, or used in the commission of any misdemeanor as provided in this code, any felony, or an attempt to commit any misdemeanor as provided in this code or any felony, is, upon a conviction of the defendant or upon a juvenile court finding that an offense which would be a misdemeanor or felony if committed by an adult was committed or attempted by the juvenile with the use of a firearm, a nuisance, and is subject to Sections 18000 and 18005.

(b) A finding that the defendant was guilty of the offense but was insane at the time the offense was committed is a conviction for the purposes of this section.

(c) A firearm is not a nuisance pursuant to this section if the firearm owner disposes of the firearm pursuant to Section 29810.

(d) This section does not apply to any of the following:

(1) Any firearm in the possession of the Department of Fish and Game.

(2) Any firearm that was used in the violation of any provision of the Fish and Game Code or any regulation adopted pursuant thereto.

(3) Any firearm that is forfeited pursuant to Section 5008.6 of the Public Resources Code.

§29830. Persons prohibited from owning or possessing firearms or ammunition; transfer of firearms or ammunition to firearms dealer for storage; storage fee; notice to Department of Justice; return of firearms

(a) Any person who is prohibited from owning or possessing a firearm or ammunition pursuant to this article, or who is prohibited from owning or possessing a firearm or ammunition pursuant to any other law, may transfer or cause to be transferred, any firearm or firearms or ammunition in his or her possession, or of which he or she is the owner, to a firearms dealer licensed pursuant to Section 26700 to 26915, inclusive, for storage during the duration of the prohibition, if the prohibition on owning or possessing the firearm will expire on a date specified in the court order.

(b) A firearms dealer who stores a firearm or firearms or ammunition pursuant to subdivision (a), may charge the owner a reasonable fee for the storage of the firearm or firearms or ammunition.

(c) A firearms dealer who stores a firearm or firearms or ammunition pursuant to subdivision (a) shall notify the Department of Justice of the date that the firearms dealer has taken possession of the firearm or firearms or ammunition.

(d) Any firearm that is returned by a dealer to the owner of the firearm pursuant to this section shall be returned in accordance with the procedures set forth in Section 27540 and Article 1 (commencing with Section 26700) and Article 2 (commencing with Section 26800) of Chapter 2 of Division 6.

§33800. Issuance of receipt upon taking firearm into custody

(a) When a firearm is taken into custody by a law enforcement officer, the officer shall issue the person who possessed the firearm a receipt describing the firearm, and listing any serial number or other identification on the firearm.

(b) The receipt shall indicate where the firearm may be recovered, any applicable time limit for recovery, and the date after which the owner or possessor may recover the firearm pursuant to Chapter 2 (commencing with Section 33850).

(c) Nothing in this section is intended to displace any existing law regarding the seizure or return of firearms.

§33855. Requirements for return

No law enforcement agency or court that has taken custody of any firearm may return the firearm to any individual unless the following requirements are satisfied:

(a) The individual presents to the agency or court notification of a determination by the department pursuant to Section 33865 that the person is eligible to possess firearms.

(b) If the agency or court has direct access to the Automated Firearms System, the agency or court has verified that the firearm is not listed as stolen pursuant to Section 11108, and that the firearm has been recorded in the Automated Firearms System in the name of the individual who seeks its return.

(c) If the firearm has been reported lost or stolen pursuant to Section 11108, a law enforcement agency shall notify the owner or person entitled to possession pursuant to Section 11108.5. However, that person shall provide proof of eligibility to possess a firearm pursuant to Section 33865.

(d) Nothing in this section shall prevent the local law enforcement agency from charging the rightful owner or person entitled to possession of the firearm the fees described in Section 33880. However, an individual who is applying for a background check to retrieve a firearm that came into the custody or control of a court or law

enforcement agency pursuant to Section 33850 shall be exempt from the fees in Section 33860, provided that the court or agency determines the firearm was reported stolen to a law enforcement agency prior to the date the firearm came into custody or control of the court or law enforcement agency, or within five business days of the firearm being stolen from its owner. The court or agency shall notify the Department of Justice of this fee exemption in a manner prescribed by the department.

§33875. Retention of firearm after notification of owner

Notwithstanding any other provision of law, no law enforcement agency or court shall be required to retain a firearm for more than 180 days after the owner of the firearm has been notified by the court or law enforcement agency that the firearm has been made available for return. An unclaimed firearm may be disposed of after the 180-day period has expired.

§34000. Sale or destruction of firearm no longer needed, unclaimed or abandoned

(a) Notwithstanding any provision of law or of any local ordinance to the contrary, when any firearm is in the possession of any officer of the state, or of a county, city, or city and county, or of any campus of the University of California or the California State University, and the firearm is an exhibit filed in any criminal action or proceeding which is no longer needed or is unclaimed or abandoned property, which has been in the possession of the officer for at least 180 days, the firearm shall be sold, or destroyed, as provided for in Sections 18000 and 18005.

(b) This section does not apply to any firearm in the possession of the Department of Fish and Game, or which was used in the violation of any provision in the Fish and Game Code, or any regulation under that code.

§34005. Alternatives to destruction of firearms and parts

(a)(1) An officer having custody of any firearm that may be useful to the California National Guard, the Coast Guard Auxiliary, or to any military or naval agency of the federal or state government, including, but not limited to, the California State Military Museum and Resource Center, located in Sacramento, and at branch museums located at the California National Guard facilities at Camp Roberts, Camp San Luis Obispo, and Los Alamitos Armed Forces Reserve Center, may, upon the authority of the legislative body of the city, city and county, or county by which the officer is employed and the approval of the Adjutant General, deliver the firearm to the commanding officer of a unit of the California National Guard, the Coast Guard Auxiliary, or any other military agency of the state or federal government, in lieu of destruction as required by any of the provisions listed in Section 16580.

(2) Any state agency, county, municipality, or special purpose district may offer any excess military weapons or equipment, such as historical war equipment like artillery, tanks, or armored vehicles, to the California State Military Museum and Resource Center or any branch museum described in paragraph (1).

(3) The officer delivering a firearm pursuant to this subdivision shall take a receipt for it, which contains a complete description of the firearm, and shall keep the receipt on file in his or her office as a public record.

(b) Any law enforcement agency that has custody of any firearms, or any parts of any firearms, which are subject to destruction as required by any of the provisions listed in Section 16580, may, in lieu of destroying the weapons, retain and use any of them as

may be useful in carrying out the official duties of the agency. Alternatively, upon approval of a court, the agency may do either of the following:

(1) Release the weapons to any other law enforcement agency for use in carrying out the official duties of that agency.

(2) Turn over to the criminalistics laboratory of the Department of Justice or the criminalistics laboratory of a police department, sheriff's office, or district attorney's office, any weapons that may be useful in carrying out the official duties of the respective agencies.

(c)

(1) Any firearm, or part of any firearm, which, rather than being destroyed, is used for official purposes pursuant to this section, shall be destroyed by the agency using the weapon when it is no longer needed by the agency for use in carrying out its official duties.

(2) Firearms or weaponry donated to the California State Military Museum and Resource Center may be disposed of pursuant to Section 179 of the Military and Veterans Code.

(d)

(1) Any law enforcement agency that has custody of any firearms, or any parts of any firearms, which are subject to destruction as required by any of the provisions listed in Section 16580, may, in lieu of destroying the firearms, obtain an order from the superior court directing the release of the firearms to the sheriff.

(2) The sheriff shall enter those weapons into the Automated Firearms System (AFS), via the California Law Enforcement Telecommunications System, with a complete description of each weapon, including the make, type, category, caliber, and serial number of the firearms, and the name of the academy receiving the weapon entered into the AFS miscellaneous field.

(3) The sheriff shall then release the firearms to the basic training academy certified by the Commission on Peace Officer Standards and Training, so that the firearms may be used for instructional purposes in the certified courses. All firearms released to an academy shall be under the care, custody, and control of the particular academy.

(4) Any firearm, or part of any firearm, which is not destroyed, and is used for the purposes authorized by this section, shall be returned to the law enforcement agency that had original custody of the firearm when it is no longer needed by the basic training academy, or when the basic training academy is no longer certified by the commission.

(5) When those firearms are returned, the law enforcement agency to which the firearms are returned, shall on the date of the return, enter into the Automated Firearms System (AFS), via the California Law Enforcement Telecommunications System, a complete description of each weapon, including the make, type, category, caliber, and serial number of the firearms, and the name of the entity returning the firearm.

#### §34010. Notification of retention or destruction

Any law enforcement agency that retains custody of any firearm pursuant to Section 34005, or that destroys a firearm pursuant to Sections 18000 and 18005, shall notify the Department of Justice of the retention or destruction. This notification shall consist of a complete description of each firearm, including the name of the manufacturer or brand name, model, caliber, and serial number.

## **Explanation**

You should review Division 3 (Surrender, Disposal, and Enjoining of Weapons Constituting a Nuisance) of Title 2 (Weapons Generally) of Part 6 (Control of Deadly Weapons). This division provides that unlawfully concealed weapons (firearms, dirks, daggers, switchblade knives, or explosive substances other than fixed ammunition), unlawfully possessed weapons, or weapons used in the commission or attempted commission of a felony or misdemeanor are nuisances that must be surrendered to law enforcement officers. (P.C. 18000.) These nuisance weapons must be sold at public auction, returned to the rightful owner, or destroyed. (P.C. 18005.) A proper request for destruction that is relying upon §18005 should tell the court that the either the weapon(s) are not the type that can be sold to the public generally or the specific weapon(s) did not sell at auction. Under this authority the destruction is supposed to be in July, if it is not in July you should tell the Court why not. You should also have a standard statement that neither the Court nor DA has certified that retention is necessary. A proper request should tell the Court that reasonable notice was given to the lawful owner or if not why not.

We have not received any request for destruction where the firearm has been surrendered pursuant to a gun violence restraining order but I anticipate that we could see these in the future. See §18120(c)(1).

Division 4 of Title 2 of Part 6 addresses Seizure of Firearm or Other Deadly Weapon at the Scene of Domestic Violence. Firearms and other deadly weapons found by law enforcement officers in plain sight or discovered in a consensual or other lawful search in a family violence incident are temporarily confiscated. (P.C. 18250.) A weapon that is not claimed by the rightful owner within 12 months is a nuisance and sold or destroyed as provided in P.C. 18000 and P.C. 18005. (P.C. 18275.) However, a proper request needs to tell the court that you gave the proper receipt required by §8255. If you do not have specific first-hand knowledge that the receipt was issued you can rely on standard business practice. That is you state that it is the standard business practice of the department that whenever any officer takes a firearm into custody at the scene of domestic violence the officer issues a receipt containing all of the information required by §18255. You then say that upon information and belief the standard business practice was followed for all weapons sought to be sold or destroyed. You should also be telling the Court that the extended hearing process exception does not apply to the weapon(s).

Several weapons enhancement statutes, in addition to providing extra punishment for the use of a firearm during the commission or attempted commission of a felony, require, if the defendant is the owner, that the firearm be deemed a nuisance and disposed of as provided in §18000 and 18005. (See, e.g., P.C. 12022(b)(3), 12022.5(e), 12022.53(k).)

Pursuant to §29300 upon conviction for illegal possession of a firearm or conviction of any felony or misdemeanor or attempted felony or misdemeanor in which a firearm is used; the firearm is a nuisance and subject to disposal as provided in 18000 and 18005. However, the firearm is not a nuisance if the owner disposes of it under §29810. If seeking destruction based upon a conviction you must cite to §29300 and not just rely

upon §§ 18000 and 18005. We need to know the authority that makes the gun a nuisance.

You should review Division 11 Firearm in Custody of Court or Law Enforcement Agency or Similar Situation (§33800- §34010). One item that we never see in the petitions is compliance with §33800. It is a simple matter to say that when the firearm(s) were taken into custody the officer issued a receipt that complied with §33800. If you do not have specific first-hand knowledge that the receipt was issued you can rely on standard business practice. That is you state that it is the standard business practice of the department that whenever any officer takes a firearm into custody that was in the possession of an individual the officer issues the individual a receipt containing all of the information required by §33800.

If you have complied with §33800 and the owner now wants their gun back you cannot simply return a firearm to the rightful owner. That person needs to file an application with the DOJ per §33850. Law enforcement has to check for proof that the person is eligible to possess firearms, has to make sure the gun is not listed as stolen and that it is recorded in AFS in the name of the person seeking return. See §33855. This process does not require court intervention. We get requests from law enforcement to return firearms to their rightful owners. You do not need a court order to return them – you just need to follow the law.

We have received requests to destroy firearms where the agency tells us that the owner of the firearm is prohibited from owning a firearm and therefore the gun must be destroyed. This is not an accurate statement. There are options set out in §§29830, 33850(b) and 33870. You must provide the Court with additional authority to destroy not just that the owner is prohibited from owning a firearm. You also need to tell the Court why the person from whom you confiscated the firearm is prohibited from owning it.

If you are relying upon this §33875 to destroy a gun you need to be able to tell the court when you notified owner that the gun was available for return. Without this information you cannot rely upon §33875 in conjunction with §34000 for destruction.