

County of Santa Clara

Office of the District Attorney

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Dolores A. Carr
District Attorney

To: Public Intoxication Task Force Members

From: District Attorney Dolores A. Carr *Dolores A Carr*

Re: Review of PC 647(f) Reports Released by City of San Jose

Date: May 5, 2009

The District Attorney's Office has reviewed each of the two hundred eighty-two (282) *Penal Code* § 647(f) incident reports released by the City of San Jose in March 2009. Two hundred (200) of these reports document incidents occurring in 2007 and eighty-two (82) document 2008 and 2009 events. The latter group of reports document events occurring after SJPD began increased utilization of Preliminary Alcohol Screening Device [PAS] testing in these cases. Additionally, we obtained and reviewed criminal case history information associated with each incident report to determine case outcome.

We considered how the relevant data might be useful to the Task Force in considering: non-criminal sanctions and alternatives to arrest; and objective evidence used to support arrests. All numeric values in this report, including percentages, are approximate values. In approximately 10% of the cases, criminal case history information could not be ascertained.

A) GENERAL COMMENTS

- 1) **Arrest** - It probably bears repeating that the District Attorney and her staff do not participate in evaluating the sufficiency of evidence available in the field to support the arrest of an offender in a given case. The decision whether or not probable cause exists for arrest is made by peace officers, not prosecutors. Officers are generally entrusted to rely upon their training and experience in choosing whether to make an immediate arrest, document the events in a report for consideration of obtaining a later arrest warrant, or issue an informal warning or otherwise defer enforcement action.

Except in limited cases involving significant pre-arrest investigation, the District Attorney's Office is typically not aware of the fact of a

misdemeanor arrest and the facts underlying that arrest unless and until we are asked to review a police report for consideration of criminal charges or we review a prosecution commenced by the filing of a citation or an officer-generated criminal complaint.

The standard of evidence necessary to arrest a subject for a criminal offense is "probable cause." Probable cause to arrest exists when the facts known to the arresting officer would lead an officer of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person arrested is guilty of a crime. This is a considerably lower standard of proof than what is necessary to sustain a criminal conviction – that is, proof beyond a reasonable doubt (see below).

2) **Prosecution** - As noted above, a misdemeanor criminal prosecution is typically instituted in one of three ways:

a) **Citation** - Pursuant to *Penal Code* § 853.6, and subject to limitations for certain types of crimes, a peace officer is directed to release a person arrested for a misdemeanor (who does not demand to be taken before a magistrate) upon a written promise to appear in court. The promise to appear (citation) must contain the name and address of the arrestee, the date and time where the arrestee must appear, a listing of the crime(s) charged and the signature of the arrestee. Most of these incident reports were commenced in this way (96% of the 2007 reports and 96% of the 2008/2009 reports). This is what the District Attorney's Office would expect in 647(f) cases, based on how these cases have historically been processed.

When a misdemeanor prosecution is commenced by way of citation, the citation is the charging document (complaint) and there is no review by the District Attorney's Office of the decision to prosecute.

b) **Officer-Generated Criminal Complaint** - The District Attorney's Office has delegated discretion and authority to prepare and file misdemeanor criminal complaints without review by the District Attorney's Office to local law enforcement agencies in a limited number of case types, such as 647(f)'s. However, none of the reviewed incident reports resulted in prosecutions commenced in this fashion; and

c) **District Attorney Reviewed Criminal Complaint** – This is the norm for most other criminal prosecutions in Santa Clara County. Typically, District Attorney review is sought in 647(f) cases when additional charges are being requested by the arresting agency. The four-part inquiry followed by the District Attorney's Office in such instances is as follows:

Has a public offense been committed?

Is the identity of the perpetrator known?
Can the offense be proven beyond a reasonable doubt? and
Should there be a prosecution under all the circumstances of the case, or
in other words, is filing charges the right thing to do?

We review all the relevant reports and criminal history information and decide whether to issue or decline to file criminal charges. It should be noted that this decision occurs days after the arrest.

Finally, although a case may be rejected on the basis that the available evidence will not support a conviction (proof beyond a reasonable doubt), that does not necessarily mean that the arrest itself was not based upon probable cause.

3) **Process –**

The first time a person who has been cited or arrested for a misdemeanor, (including a 647(f)), appears in court is for his/her arraignment. Neither the DA nor the Public Defender appears on that court calendar. Most 647(f) cases resolve here, based on an offer by the court.

Should a misdemeanor case not resolve at arraignment, a deputy district attorney will appear at any subsequent pretrial conferences and trial.

The outcome of the released cases are as follows:

Dismissal in exchange for proof of completion of ten (10) Alcoholics Anonymous meetings (24% of 2007 cases and 15% of 2008/2009 cases);

Unconditional Dismissal (4% of 2007 cases and 5% of 2008/2009 cases);

Plead Guilty (59% of 2007 cases and 21% of 2008/2009 cases);

Plead Guilty to other charges (6% of 2007 cases and 7% of 2008/2009 cases);

Prosecution pending (1% of 2007 cases and 22% of 2008/2009 cases);

One or more Failure to Appear (41% of 2007 cases and 43% of 2008/2009 cases); and

Jury Trial (0% of 2007 cases and 0% of 2008/2009 cases).

B) REPORT CONTENT

Based on the reviewed incident reports, it appears the San Jose Police Department (SJPD) employs the following forms in *Penal Code* § 647(f) cases:

Pre-Booking Information Sheet Santa Clara County (*Exhibit A* – see attached example);

Pre-Booking Information Sheet Drunk in Public (*Exhibit B* – see attached example);

Affidavit re Probable Cause and Bail Setting (*Exhibit C* – see attached example); and

Standard Police Report and Supplemental Crime Report forms.

Exhibit A and *Exhibit C* appear to be printed on NCR-type paper. This creates problems when officers write on anything placed over the form, unintentionally transmitting information onto other forms. They are often difficult to read and/or include irrelevant information.

Exhibit A and *Exhibit C* are utilized by all law enforcement agencies in Santa Clara County. *Exhibit B* (specific to Drunk in Public Arrests) appears unique to SJPD. Some issues created by this form (*Exhibit B*) are:

- 1) It is often left blank. If completion of the form is mandatory, why are supervisors signing off on blank ones? If use of the form is not mandatory, why are supervisors allowing an unnecessary (and blank) form to be included in the case file?
There appear to be fewer blank forms in the 2008/2009 reports when compared to the 2007 reports.
- 2) It is often completed in a cursory fashion. Although there is an area in the form for “Observations”, that section rarely contains anything beyond one word entries. In fact, although the form provides a space for “Orientation” and prompts the user “Does subj. know where he is and time,” that information is very rarely included. Likewise, although there is a section entitled “Performance Test”, that section is rarely completed (often, the entry under “Standing Balance” in this section is the same for “Walking Ability” in the “Observations” section); and
- 3) Redundancy. This issue may explain why the forms are sometimes blank or incomplete. For example, the “Clothing Worn” section seems to call for the same information in the inventory section in the first form. Finally, only one report packet in the 2007 reports has an entry which refers to an account contained in another form – i.e., “see Felony Aff, attached”, while this procedure was followed approximately six times in the 2008/2009 reports.

Consideration should be given to eliminating the Pre-Booking Information Sheet Drunk in Public (*Exhibit B*) and ensuring that officers are trained to include all relevant information on the remaining forms, and, when necessary, via the use of standard crime report and supplemental crime report forms.

C) OBSERVATIONS

Penal Code § PC 647(f) investigations were initiated after a call for service in **55% of the 2007 cases and in 74% of the 2008/2009 cases;**

Penal Code § PC 647(f) investigations were initiated after an officer viewed suspicious activity ("on view") between calls for service in **46% of the 2007 cases and in 26% of the 2008/2009 cases;**

There was a sole suspect in **90% of the 2007 cases and in 82% of the 2008 cases;**

There was violence in **14% of the 2007 cases and 20% of the 2008/2009 cases;**

There was a threat of violence in **6% of the 2007 cases and 12% of the 2008/2009 cases;**

Suspects were found in possession of a weapon in **2% of the 2007 cases and in 0% of the 2008/2009 cases;**

Suspects had evidence of pre-existing injuries in **6% of the 2007 cases and 4% of the 2008/2009 cases;**

Officers used force in **7% of the 2007 cases and 6% of the 2008/2009 cases;**

Suspects received medical attention in **5% of the 2007 cases and 0% of the 2008/2009 cases;**

Suspects displayed evidence of extreme intoxication (including, but not limited to, loss of control of bodily functions) in **15% of the 2007 cases and in 17% of the 2008/2009 cases;** and

PAS tests were utilized in **2% of the 2007 cases and 50% of the 2008/2009 cases (in the 2008/2009 cases, an additional 37% of suspects refused a PAS test and a further 2% failed to complete the test).**

Some of the foregoing information may be useful to the Task Force in assessing what percentage of *Penal Code* § PC 647(f) arrestees would be expected to be disqualified from referral to, or participation in, a non-criminal alternative program (i.e. sobering station) based upon criteria such as evidence of violence, threat of violence, injuries, etc.

AFFIDAVIT RE PROBABLE CAUSE AND BAIL SETTING

THE AFFIANT, A PEACE OFFICER FOR THE STATE OF CALIFORNIA (AGENCY) SANTA JOSE POLICE
 STATES THAT: ON (DATE) 2-21-07, (NAME) _____
 EST TIME) 2042 (BOOKING TIME) 0145, WAS BOOKED AT THE SANTA CLARA
 COUNTY JAIL ON THE FOLLOWING CHARGES:

SANTA JOSE POLICE
 = (CEN#) _____
 WAS BOOKED AT THE SANTA CLARA
 CASE# 074-052-0946

REF. NO.	ON-VIEW FELONY CHARGE(S)	ON-VIEW MISD. CHARGE(S)	SCHEDULED BAIL
()		<u>647(E) P.C.</u>	<u>250</u>
()			
()			
()			
()			
()			

(DO NOT ADD IN BAIL FOR OFFENSES THAT ARE THE SAME COURSE OF ACTION)

() BAIL SET BY COURT BAIL SCHEDULE TOTAL: \$ 250
 () BAIL SET BY MAGISTRATE TOTAL: \$ _____ Judge _____
 AUTHORIZED SIGNATURE: _____

DIRECTIONS FOR COMPLETION

What facts led you to believe that the defendant committed the above felony/misdemeanor offense(s)? State reasons for initial contact/car stop. Describe actions of the defendant, addressing the elements of the offense(s), including symptoms of intoxication FSTs; injuries and how inflicted. If you relied on third party information, describe incident and state who can establish the facts:

REASONS FOR STOP/SEARCH/ARREST

ON 2/21/07 AT APPROXIMATELY 2042 HRS I WAS WORKING MONTEREY RD. I OBSERVED S-I CHALLENGING STAFF AND TOWNS TO EIGHT S-I HAD APPARENTLY GAIT, SLURRED SPEECH, BLOOD SHOT EYES AND A STROG odor of ALCOHOLIC BEVERAGES ON HIS BREATH. WHILE SPEAKING TO S-I HE STATED HE HAD DRANK A LOT OF ALCOHOLIC BEVERAGES AFTER FINISHING HANDICAPPS ON S-I'S WRIST HE TOLD ME HE WAS GOING TO BEAT MY ASS WHILE SLURRING HIS SPEECH. S-I WAS TRANSPORTED TO THE MAIN AIL

EACH APPLICABLE SECTION BELOW MUST BE COMPLETED:

- 1) Was the suspect armed? (Yes/No) Describe weapon: _____ Fled only (Yes/No) _____
- 2) Did the suspect resist arrest? (Yes/No) Combative to officer(s)? (Yes/No) Describe _____
- 3) Assault victim info: Age _____ Ht _____ Wt _____ Sex _____ Relationship to suspect _____
- 4) Injuries sustained by victim: None _____ Minor _____ Moderate _____ Major _____
- 5) Type of theft: Person _____ Residence _____ Commercial _____ Other (describe) _____
- 6) Property taken and approximate value: _____
- 7) Property recovered: None _____ Partial _____ Full Recovery _____
- 8) Controlled substances involved: (Type) _____ Presumptive test results _____
 (Required Information) \$ Value _____ Quantity _____
- 9) Threats to victim(s) or witness(es): including information leading you to believe that the defendant may injure the victim(s)/witness(es) (threats, prior violence, etc.) or may flee prior to a court appearance: _____
HE WAS GOING TO BEAT MY ASS

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declare under penalty of perjury, that the foregoing is true and correct.

[Signature]
 Signature of Affiant/Badge Number _____

RIDEWAY
 Affiant/Print name _____

2/21/07
 Date _____

DISTRIBUTION: WHITE- Court BLUE-Booking Jacket CANARY-Classification GREEN- OR PINK-Arrestee

EXHIBIT C

