

## Felony Prosecution

California law requires the District Attorney (DA) to follow specific procedures when initiating a felony prosecution. If the DA does not, a court has no jurisdiction to try the accused. The law requires an **indictment** or an **information** to be the **first pleading filed in a felony case. This has not been the DAs' practice for decades.**

In 98% of felony cases since 1951, DAs have chosen neither indictment nor information, but an unlawful, fictitious document to be the **first** pleading filed. The filing is fraudulent and felonious (violation of Penal Code (PC) § 115(a)); therefore, the prosecution and conviction is void. Upon discovery of this jurisdictional defect in any case, **the prisoner must be released.**

As stated above, felonies must be prosecuted by **indictment** or **information**:

PC § 682: "In pertinent part: Every public offense must be prosecuted by indictment or information, except: 3. Misdemeanors and infractions; 4. A felony to which the defendant has pleaded guilty to the complaint before a magistrate, where permitted by law."

PC § 737: "All felonies shall be prosecuted by indictment or information, except as provided in Section 859a."

PC § 951: "An indictment or information may be in substantially the following form: The people of the State of California against A.B. In the superior court of the State of California, in and for the county of \_\_\_\_\_. The grand jury (or the district attorney) of the county of \_\_\_\_\_ hereby accuses A.B. of a felony (or misdemeanor), to wit: (giving the name of the crime, as murder, burglary, etc.), in that on or about the \_\_\_ day of \_\_\_, 19 \_\_\_, in the county of \_\_\_\_\_, State of California, he (here insert statement of act or omission, as for example, "murdered C.D."). **No form is available for any other manner of pleading.**

The **California Supreme Court** has confirmed the law: "The California Constitution specifies that felonies [shall] be prosecuted either by 'indictment or, after examination and commitment by a magistrate, by information.' (Cal. Const., art. I, § 14.) Penal Code section 949 reads in pertinent part, 'The first pleading on the part of the people in the superior court in a felony case is the indictment, information, or the complaint in any case certified to the superior court under [Penal Code] Section 859a.' The People of the State of California are the plaintiff in every criminal proceeding (Pen. Code, § 684), and the public prosecutor has the sole responsibility to represent the People of the State of California in the prosecution of criminal offenses. (*Dix v. Superior Court*, (1991) [ *supra*,] 53 Cal.3d 442, 451 [ 279 Cal.Rptr. 834, 807 P.2d 1063].) Accordingly, 'the **first pleading by the prosecution** in felony cases may be either an **indictment** or an **information**.' (4 Witkin Epstein, *Cal. Criminal Law* (3d ed. 2000) Pretrial Proceedings, § 169, p. 374, italics added.) *Guillory v. Superior Court*, 31 Cal.4th 168, 173-174 (Cal. 2003). (Bold emphasis added.)

Therefore, the **first** pleading on the part of the people filed by the DA in order to lawfully begin the prosecution of a felony offense, can be, by law, **only** an indictment or an information (Government Code (GC) § 26502):

GC § 26502: "Indictments and informations. The district attorney shall draw all indictments and informations."

The rule for interpreting statutory law is the Latin term *expressio unius est exclusio alterius*: "A principle in statutory construction: when one or more things of a class are expressly mentioned others of the same class are excluded." *Webster's Dictionary; Thomas Reuters Practical Law*. **The district attorney has not been given authority by the Legislature to draw (create) any other accusatory pleading for prosecuting a felony.**

[Fact: As a practical reality, an information **cannot** be the **first** pleading filed by the DA in a felony case, inasmuch as PC § 738 requires a preliminary examination of the case and an order to hold the accused; and the examination must establish probable cause of commission of a felony (PC § 866(b)), **before** an information may be filed:

PC § 738: "**Before an information is filed** there must be a preliminary examination of the case against the defendant and an order holding him to answer made under Section 872. The proceeding for a preliminary examination must be commenced by written complaint, as provided elsewhere in this code.;"

PC § 866(b): "It is the **purpose of a preliminary examination** to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery." (Emphasis added.)]

A plea is available to the defendant for an indictment or an information, but **none** for any other mode of felony pleading (PC § 1016).

PC § 1002: "The only pleading on the part of the defendant is either a demurrer or a plea."

PC § 1016: "There are six kinds of pleas to an indictment or an information, or to a complaint charging a misdemeanor or infraction." **No plea is available to any other mode of accusatory pleading charging a felony**

Under California and federal law, no court can acquire jurisdiction to try a person for an offense unless he is charged in the particular form and mode required by law. And, a person may not be punished for a crime without a formal and sufficient accusation. *Albrecht v. United States*, 273 U.S. 1, 8 (1927); *People v. Vasilyan*; (2009) 174 Cal.App.4<sup>th</sup> 443, 449-50.

In sum, a valid information being unavailable to the prosecutor, only an **indictment** may initiate a felony prosecution. In any event, if an indictment (or information) is not the first pleading filed by the prosecution in a felony case —as required by the California Constitution, Penal Code, interpreted and held by the California Supreme Court, e.g., *Guillory v. Superior Court*, *supra*— **any other accusatory “pleading”** filed by the prosecution is fraudulent and an illegal filing, confers no jurisdiction upon the court, is a violation of the State and Federal Constitutions’ guarantee of due process, and, exposes the People and the Peoples’ representatives to harm, the State to civil liability and the District Attorney and involved public employees to both civil and criminal liability for false arrest/imprisonment, for which there is no immunity (GC § 820.4).

## Judgment of Conviction

What should be obvious to the DA, is that **without jurisdiction**:

- there can be no written judgment entered on the record (Code of Civil Procedure § 664) and any “judgment” rendered orally is void:

**California Supreme Court:** “What shall be final process in criminal actions is prescribed in the four hundred and sixty-third section of the Act which regulates proceedings in criminal cases. It is a certified copy of the **judgment** as entered in the minutes of the Court.” *Ex parte Gibson*, 31 Cal. 619, 622 (Cal. 1867); (PC § 1207) (emphasis added).

“A void judgment is not entitled to the respect accorded a valid adjudication, but may be entirely disregarded, or declared inoperative by any tribunal in which effect is sought to be given to it. It is attended by none of the consequences of a valid adjudication. It has no legal or binding force or efficacy for any purpose or at any place. It is not entitled to enforcement. All proceedings founded on the void judgment are themselves regarded as invalid.” 30A Am Jur Judgments 44, 45.

## No Indictment? No Judgment? No Prison!

The executing officer (Sheriff) without a certified copy of a valid judgment from the court clerk, acts without authority when transporting any person from a county jail to a state prison (California Department of Corrections and Rehabilitation (CDCR)) (PC §§ 1202a, 1207, 1213):

- “when a judgment has been pronounced, a certified copy of the entry thereof in the minutes shall be forthwith furnished to the officer whose duty it is to execute the judgment, and no other warrant or authority is necessary to justify or require the execution thereof, except when judgment of death is rendered.” ... “the writ does not contain a certified copy of the judgment, nor does it appear that such copy was furnished to the officer whose duty it was to execute the judgment. The prisoner is therefore entitled to his discharge, and it is so ordered.” *Gibson, supra* at 623;
- the Director (Secretary) of CDCR has no authority to accept custody of any person without a **judgment** (PC § 1202a; Ca.Cd.Reg. 15 § 3273);
- the Receiving Sergeant of CDCR has no authority to accept delivery of any person without a court order (**judgment**), and may not imprison any person without affixing the print of the right index finger of the person on the commitment order/**judgment** (CDCR DOM § 72020.4.1);
- the CDCR Legal Processing Unit cannot process the case and calculate the term without a **judgment** (CDCR DOM § 72020.5.4.1); and

“Unconditional release” appropriate if ‘there is no jurisdiction to detain the applicant.’” *Walberg v. Israel*, 776 F.2d 134, 136 (7<sup>th</sup> Cir. 1985).

CDCR “Inmates” may prove the above true by asking the prison Records Unit to produce an Indictment and a court order/judgment (signed by the judge and bearing the inmate’s fingerprint) from CDCR’s records. Not there? Hmm. **Demand release!** Go home.

Family and friends may prove the above true by going to the Superior Court in the county of “conviction” and getting from the Clerk a certified copy of the first pleading charging a felony (Indictment or Information) and a copy of the judgment. Not there? Hmm. **Demand their release!** If not you, then who?

DAs, Sheriffs and involved CDCR employees being *noticed* by inmate, family and friends; by simply reading and finding the above to be true, ought immediately to **demand** the Court release the inmate: or face the consequences for malicious false arrest/imprisonment.

Innocence or guilt **is not** relevant. The proper Constitutional application of the due process guarantees of lawful arrest, trial and imprisonment **is** relevant and required by law. When those guarantees are not provided, the remedy is release of the prisoner.

*For additional confirming information, law, points and authorities: see <https://www.givesendgo.com/F4FWOP> and click on the hyperlinks.*