

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: May 13, 2016

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Proposition 47 – Misdemeanor Cite and Release vs. Misdemeanor Arrests

INTRODUCTION

In November 2014, the voters of the State of California passed Proposition 47, a law that reduced the classification of most “non-serious and non-violent property and drug crimes” from a felony to a misdemeanor. The law became effective on November 5, 2014. Since then, there appears to be confusion over the law, a misunderstanding about law enforcement’s implementation of the law, and questions about the prosecution of misdemeanor cases by the City Attorney’s Office.

By memorandum dated March 14, 2016, Councilmembers Cole and Gloria posed some questions and asked for legal analysis regarding the use of misdemeanor cite and release as it pertains to Proposition 47. This memo responds to those questions.

QUESTIONS PRESENTED

1. Under what circumstances is a police officer allowed to conduct a misdemeanor booking and arrest?
2. Under what circumstances must a police officer cite and release?
3. What steps may arresting officers take before releasing misdemeanor arrestees on citations?
4. Does the City Attorney’s Office “stack” misdemeanors when pursuing criminal prosecution?

SHORT ANSWERS

1. Peace officers may conduct a misdemeanor booking and arrest with a warrant, or without a warrant for misdemeanors committed in their presence. There is statutory authority for making arrests for some serious misdemeanors that are not committed in their presence. An

arrest is taking a person into custody, which requires actual restraint of the person, or by submission to the custody of an officer. Custody does not mean or require that the person be booked into jail.

2. Peace officers must cite and release anytime they make an arrest for a misdemeanor, unless one of the exceptions authorized by California Penal Code (Penal Code) section 853.6(i)(1) through (10) justifies non-release.

3. Before releasing a misdemeanor arrestee on a citation, officers may – but are not required to – book the arrestee in the field or at the police substation.

4. “Stacking” of charges is not a term used by the Office of the City Attorney when pursuing criminal prosecution. This Office charges all crimes provable beyond a reasonable doubt. Upon conviction, the court determines the sentence for each crime and whether sentences for multiple crimes run concurrently or consecutively. The San Diego Superior Court’s common practice for misdemeanor offenses is to impose concurrent sentences.

DISCUSSION

I. PEACE OFFICERS MAY CONDUCT A MISDEMEANOR BOOKING AND ARREST FOR MISDEMEANORS COMMITTED IN THEIR PRESENCE, AND FOR SOME SERIOUS MISDEMEANORS THAT ARE NOT COMMITTED IN THEIR PRESENCE

Under California law, crimes are classified as felonies, misdemeanors, or infractions. A felony is a crime punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions. Cal. Penal Code § 17. Generally, misdemeanors are punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding \$1,000, or by both. Cal. Penal Code § 19.

The laws of arrest are found in the Penal Code. An arrest is taking a person into custody. Cal. Penal Code § 834. An arrest requires either that the person is actually restrained or that the person submits to the authority of the officer. Cal. Penal Code § 835. “There can be no arrest without either touching or submission.” *California v. Hodari D.*, 499 U.S. 621 (1991).

A peace officer may make an arrest pursuant to an arrest warrant. Without a warrant, a peace officer may make an arrest whenever: (1) the officer has probable cause to believe that the person to be arrested has committed a public offense in the officer’s presence; (2) the person arrested has committed a felony, although not in the officer’s presence; or (3) the officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed. Cal. Penal Code § 836(a).

A booking, or to book, signifies the recordation of an arrest in official police records, and the taking by the police of fingerprints and photographs of the person arrested, or any of these acts following an arrest. Cal. Penal Code § 7, subs. 21.

Both an arrest and a booking can take place without incarceration. An arrest is not synonymous with taking a person to jail. Similarly, a booking does not mean a person was booked into jail.

Thus, under Penal Code section 836(a)(1), a peace officer may conduct a misdemeanor booking and arrest for any misdemeanor that occurs in his or her presence. “It is well established that the power to arrest for the commission of a misdemeanor is dependent on the offense having been committed in the arresting person’s presence.” *People v. Johnson*, 123 Cal. App. 3d 495, 499 (1981). In addition, for some serious misdemeanor crimes, state law includes a specific exemption from the “presence” requirement. These include domestic violence (Cal. Penal Code § 836(c)(1)), DUI (Cal. Veh. Code § 40300.5), and assaults against an elder, a firefighter, or a paramedic (Cal. Penal Code §§ 836(d), 836.1).

II. PEACE OFFICERS MUST CITE AND RELEASE ANY TIME THEY MAKE AN ARREST FOR A MISDEMEANOR, UNLESS ONE OF THE EXCEPTIONS AUTHORIZED BY PENAL CODE SECTION 853.6(i)(1) THROUGH (10) JUSTIFIES NON-RELEASE

To be a valid arrest, officers must take a person into custody, in a case *and in a manner authorized by law*. Cal. Penal Code § 834 (emphasis added). To do otherwise is a “false” arrest. The manner of arrest for misdemeanors authorized by law is set forth in section 853.6 of the California Penal Code, which states, in part: “In any case in which a person is arrested for an offense declared to be a misdemeanor . . . that person *shall . . . be released* according to the procedures set forth by this chapter, although nothing prevents an officer from first booking an arrestee pursuant to subdivision (g).” Cal. Penal Code § 853.6(a)(1) (emphasis added). The word “shall” means that the person must be released after being cited for the crime. The officer *may book* the arrested person at the scene or at the arresting agency prior to release. Cal. Penal Code § 853.6(g). The word “may” means the booking prior to release is permissive.

Thus, while a peace officer may have authority to book and arrest a person for a misdemeanor crime, whether that person may be booked into jail is a separate analysis. Booking an arrestee into jail on a misdemeanor offense is the exception, not the rule.

The cite and release requirements for misdemeanors are mandatory, unless an officer can justify non-release under one of the ten statutory exceptions. “Whenever any person is arrested by a peace officer for a misdemeanor, that person *shall be released* according to the procedures set forth by this chapter unless one of the following is a reason for nonrelease” Cal. Penal Code § 853.6(i) (emphasis added). The exceptions for nonrelease are listed below. (The “*Examples*” are not contained in the Penal code but are provided to help explain the exceptions.)

- (1) The person arrested was so intoxicated that he or she could have been a danger to himself or herself or to others.
- (2) The person arrested required medical examination or medical care or was otherwise unable to care for his or her own safety.

- (3) The person was arrested under one or more of the circumstances listed in Sections 40302 and 40303 of the Vehicle Code.
- (4) There were one or more outstanding arrest warrants for the person.
- (5) The person could not provide satisfactory evidence of personal identification.
- (6) The prosecution of the offense(s) for which the person was arrested, or the prosecution of any other offenses, would be jeopardized by immediate release of the person arrested. (*Example:* The person is under the influence of a controlled substance and evidence must be collected to pursue prosecution.)
- (7) There was a reasonable likelihood that the offense or offenses would continue or resume, or that the safety of persons or property would be imminently endangered by release of the person arrested. (*Example:* Once a person has been cited for an offense such as narcotics possession and the narcotics have been taken from the person, there is no reasonable likelihood that the offense will continue.)
- (8) The person arrested demanded to be taken before a magistrate or refused to sign the notice to appear.
- (9) There is reason to believe that the person would not appear at the time and place specified in the notice. (*Example:* The person has history of FTAs or no fixed address.)
- (10) The person was subject to Penal Code section 1270.1. (Section 1270.1 relates to release on bail for persons arrested for felonies and other serious offenses.)

Cal. Penal Code § 853.6(i)(1)-(10).

Unless one of these exceptions applies, in all other cases after being arrested and cited, the person must be released.

III. BEFORE RELEASING A MISDEMEANOR ARRESTEE ON A CITATION, AN OFFICER MAY – BUT IS NOT REQUIRED TO – BOOK THE ARRESTEE IN THE FIELD OR AT THE POLICE SUBSTATION

As stated above, although a person cited for a misdemeanor must be released, the officer may book the arrestee prior to release on a signed promise to appear. Officers may book arrested persons at the scene or at the arresting agency, prior to release. Cal. Penal Code § 853.6(g). “Booking” does not always mean the act of booking someone into jail, as with a physical custodial arrest. It can also mean the act of fingerprinting and photographing an arrestee prior to release on a written notice to appear. *See* Cal. Penal Code § 7, subs. 21. Pursuant to state law, officers have discretion to book arrestees prior to release, but are not required to.

The San Diego Police Department’s implementation of Proposition 47 is consistent with the practice of the Los Angeles Police Department. This is relevant because the memo from Councilmembers Cole and Gloria attached a document titled, “One Minute Brief,” from the Los Angeles County District Attorney. A summary of San Diego’s Training Bulletin and the Los Angeles policy follows, for comparison:

**SAN DIEGO POLICE DEPARTMENT POLICY
COMPARED TO CITY/COUNTY OF LOS ANGELES**

SDPD Training Bulletin, 12/23/2014

III. Guidelines

A. Misdemeanor Cite and Release

Whenever any person is arrested by a peace officer for a misdemeanor, that person shall be released according to the guidelines listed in PC 853.6, unless one of the following is a reason for non-release. The back page of the ARJIS 8 lists the following reasons. Note: The presumption is an arrestee will be released with a misdemeanor citation/notice to appear, unless one of the below 10 criteria can be met authorizing a bodily arrest.

B. Exceptions to Cite and Release

C. Booking Arrestees Prior to Release

Even with cite and release, nothing prevents officers from “booking” an arrestee prior to release on a notice to appear...Per section PC 853.6(g), officers may book the arrested person at the scene or at the arresting agency prior to release.

**Los Angeles District Attorney's Office, One Minute Brief,
11/21/2014**

In general, the cite-and-release procedure set forth in section 853.6 is mandatory; the statute declares that, subject to [10] specified exceptions, misdemeanor arrestees 'shall' be released under that procedure. *Schmidlin v. Palo Alto* (2008) 157 Cal. App. 4th 728, 760. The officer may book the arrested person at the scene or at the arresting agency prior to release. Cal. Penal Code § 853.6(g).

Bottom Line: Upon lawful arrest for a misdemeanor (including former felonies), officers may transport the person for booking before release on citation and written promise to appear in court.

Thus, both agencies require, via policy, compliance with state law. The Los Angeles District Attorney's process, and the San Diego Police Department's, both mirror state law.

IV. THE CITY ATTORNEY'S OFFICE CHARGES ALL CRIMES THAT ARE PROVABLE BEYOND A REASONABLE DOUBT, BUT THE COURT IMPOSES THE SENTENCE AND DETERMINES WHETHER IT RUNS CONCURRENTLY OR CONSECUTIVELY

"Stacking" is not a term used by the Office of the City Attorney when pursuing criminal prosecution. This Office charges all crimes that are provable beyond a reasonable doubt, and often more than one provable crime per event occurs. When a single charge or multiple charges are alleged and proven, the final sentencing outcome is up to the court, not the prosecutor. Generally, when a defendant is convicted of multiple charges, the courts may impose sentences on multiple charges that run either consecutively or concurrently.

The San Diego Superior Court's common practice is to impose concurrent sentences when there are multiple misdemeanor charges. For example, if a defendant is convicted of three separate charges, or even three counts of the same charge, each count may carry a maximum sentence of up to 364 days. The court would generally sentence the defendant for one of those crimes, and have the sentences for the other crimes run concurrently. In effect, instead of a defendant facing up to nearly three years in custody, the sentence would actually be just less than one year.

CONCLUSION

State law requires that officers cite and release for misdemeanor offenses, unless an exception applies. Under California Penal Code section 836, peace officers may make arrests for misdemeanors committed in their presence, but this does not mean that the person arrested is booked into jail. Rather, pursuant to Penal Code section 853.6, officers *must* cite and release suspects unless there is an exception that justifies non-release. Officers *may* book arrestees in the

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field or at a police substation prior to releasing them on a citation. The City Attorney's Office charges all misdemeanor crimes that are provable beyond a reasonable doubt. Upon conviction, the court imposes the sentence and determines whether the sentence runs consecutively or concurrently.

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By /s/ Linda L. Peter

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