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University of the Pacific; McGeorge School of Law

Criminal Procedure

Issuance of Search Warrants; oral statements

Penal Code §§1526, 1528, 1534 (amended).

SB 306; STATS 1970, Ch 809

Chapter 809 amends Section 1526, 1528 and 1534 liberalizing procedures for obtaining search warrants.

Section 1526 is amended to provide that a magistrate issuing a warrant may take an oral statement under oath which shall be recorded and transcribed and such transcription is deemed to be an affidavit; the recording of the sworn statement and the transcribed statement must be certified by the magistrate receiving them and filed with the clerk of the court. This procedure may be followed in lieu of the requirement that the magistrate issuing the warrant examine under oath the complainant seeking the warrant and take an affidavit in writing subscribed by the affiant.

This Section was amended in 1957 (*Stats. 1957, c. 1882, p. 3288*) to modify the requirement that a magistrate *must* examine the complainant under oath before issuing a warrant (*as originally enacted 1872*) and provided that the magistrate *may* examine the complainant under oath but *must* take their affidavits in writing and subscribed.

Section 1528, which formerly required the magistrate's signature, now allows, as an alternative, a magistrate to orally authorize a peace officer to sign the magistrate's name on the warrant. This warrant will then be termed a duplicate original search warrant. The duplicate original warrant is considered a search warrant. Under these circumstances the magistrate must sign the original, enter the exact time of issuance, and file it.

Section 1534 (*time limit for execution and return of warrant*) was amended slightly as to form, and a subsection (b) was added to prescribe the entering of exact time of execution on the duplicate original now authorized by amended Section 1528.

This legislation was proposed by the District Attorneys Association. It was originally designed to provide for oral authorization to search. Since this was not acceptable to the legislature, the legislation was

amended to provide the aforementioned limited liberalization of procedures for obtaining a search warrant.

References:
1) Comment, *Constitutional Law—Search and Seizure—Does Mere Suspicion Amount to Probable Cause*, 23 S. CAL. L. REV. 242 (1950).
2) Annot., 85 A.L.R. 113 (1933).
3) 21A MCKINNEY'S CAL. DIG. *Searches and Seizures* §§1, 2 (1958).

Search Warrants

Penal Code §1533 (amended).

AB 139; STATS 1970, Ch 47

This amendment to Section 1533 clarifies the time period during which a search warrant may be served. Prior to amendment, Section 1533 provided that a magistrate may, in his discretion, upon a showing of good cause, permit a search warrant to be served at any time of the day or night. In the absence of such a direction in the warrant, the Section provided that the warrant may be served only during the daytime.

Pursuant to the amendment a search warrant without a provision permitting service either during day or night shall only be served between the hours of 7 o'clock a.m. and 10 o'clock p.m.

Arrests and Custody

Penal Code §142 (amended).

SB 603; STATS 1970, Ch 829

Prior to amendment the law provided that a sheriff, coroner, keeper of a jail, constable or other peace officer who willfully refuses to receive or arrest any person charged with a criminal offense is punishable by a fine not exceeding $4,000, or by imprisonment in a state prison for not more than 5 years or in a county jail for not more than one year, or by both such fine and imprisonment.

This amendment deletes specific reference to coroners, sheriffs, keepers of the jail and constables, who are now included within the phrase "peace officers". "Keepers of the jail" is an archaic term that no longer is in use. Thus, a generic term, "any peace officer," has been used for accuracy and broad inclusiveness.

The nature of a peace officer has changed since this law was first enacted and there are now many kinds of peace officers with extremely

limited authority. The words "who has the authority to receive or arrest a person charged with a criminal offense" were added to modify the term "peace officer" so a Department of Motor Vehicles investigator, for instance, whose status is limited solely to Vehicle Code violations, is not required to arrest a bank robber.

References:

1) 34 OPS. CAL. ATTY. GEN. 229 (1959).
2) 2 WITKIN, CALIFORNIA CRIMES, *Crimes Against Government Authority* §873 (1963).
3) Comment, *Some Proposals for Modernizing the Law of Arrest*, 39 CAL. L. REV. 96 (1951).

Arrest and Detention; release from custody

Penal Code §§849, 851.6 (amended).

AB 1416; STATS 1970, Ch 1603

This amendment to Section 849 provides that a peace officer may release from custody any person arrested without a warrant whenever such person was arrested only for being under the influence of a narcotic, drug or restricted dangerous drug *and* such person is delivered to a facility or hospital for treatment and no further proceedings are desirable. Such arrest will not be deemed an arrest but merely a detention and the person need not be taken before a magistrate.

Section 851.6 is also amended to require the issuance of a certificate describing such action as detention in case of an arrest and release pursuant to Section 849.

Prior to this amendment a peace officer could release only persons arrested for intoxication or when he was satisfied there were insufficient grounds on which to base a criminal complaint.

The purpose of the amendment is to grant first time drug offenders a chance to be turned over to local clinics for treatment. The measure was intended to remove the fear of arrest from hindering effective drug rehabilitation.

References:

1) WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Proceedings Before Trial* § 122 (1963).
2) Barrett, *Police Practices and the Law—From Arrest to Release on Charge*, 50 CAL. L. REV. 11 (1962).
3) Annot., 98 A.L.R. 966 (1964).

Appointed Counsel; reimbursement of expense

Penal Code §§987.4 (new); 987a, 987b (renumbered).
SB 429; STATS 1970, Ch 723

Section 987.4 is added to the Penal Code to provide that when the public defender represents a minor in a criminal proceeding, at a county expense, the court may order the parent or guardian to reimburse the county if it determines the parent or guardian has the ability to pay.

The addition of Section 987.4 allows a court to order the parent or guardian of a minor who has been defended in a criminal proceeding at county expense to pay part or all of the expense if the court determines that the parent or guardian is able to pay the expenses. Similar provisions already apply to proceedings in a juvenile court (*Welfare and Institutions Code Sections 634, 700 and 903.1*).

Sections 987a and 987b have been renumbered by this amendment to become Sections 987.2 and 987.6, respectively, but no changes in the text of the sections were made, Section 987.2 (*old 987a*) provides that counsel assigned to represent a person in a criminal trial is entitled to reasonable compensation from the county. The Section also allows the county to be reimbursed when the public defender defends a prison inmate, and requires appointment of counsel for indigents in a justice or municipal court when necessary to provide an adequate and effective defense for the defendant. Section 987.6 (*old 987b*) requires the Department of Finance to pay up to 10 percent of amounts actually expended by the counties in providing counsel (whether for the public defender or private attorneys) for indigents.

Bail; review of order

Penal Code §1320 (amended).
AB 886; STATS 1970, Ch 562

Section 1320 is amended to allow a defendant to waive his right to an automatic review of his bail.

In 1969 the Legislature enacted Penal Code Section 1320. This section requires court review of the bail amount within five days if the defendant has been unable to obtain bail for his release. This automatic review was designed to further the policy favoring release of prisoners awaiting trial.

The experience with this Section resulted in a number of problems.

The reviews were an unwelcomed addition to very heavy calendars, especially in Los Angeles, where the original bail was considered to already be reasonably low and few reviews resulted in any change. In addition, prisoner transportation costs have increased greatly. Also, proponents noted that courts in various counties interpreted the Section ambiguously. Some required the defendant's presence at the review, others did not, and still others ignored the provisions of Section 1320 altogether.

As this amendment was originally introduced it provided that the review may be held without the presence of the defendant. However, in its final version that provision has been removed and Section 1320 now allows a defendant to waive his automatic review. There is speculation whether this change will meet the problems, since it fails to clarify the problem of whether or not the defendant is required to be present at the review.

References:

1) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 169.
2) Comment, *Bail in the United States: A System in Need of Reform*, 20 HAST. L.J. 380 (1968); *The San Francisco Bail Project*, 55 A.B.A.J. 135 (1969); Comment, *Tinkering with the California Bail System*, 56 CAL. L. REV. 1134 (1968); Comment, *The Bail System: Is it Acceptable?* 29 OHIO ST. L.J. 1005 (1968).

Bail; personal recognizance

Penal Code §§1269c, 1320.5 (new).

AB 2315; STATS 1970, Ch 1213

A person may receive a hearing on the issue of reduction in bail by a petition to the court which issued the warrant of arrest (*Penal Code 1289*). This procedure applies to both misdemeanors and felonies. After reasonable advance notice has been given to the prosecuting attorney a hearing will be held to determine if there is good cause for the reduction. If there is good cause the bail would be lowered since the purpose of bail is to merely insure the appearance of the defendant at trial.

If the arrestee is able to show good cause at a hearing for reduction of bail, a magistrate other than the magistrate who originally set the bail is empowered to lower the amount of bail required. In order to have a proper hearing for defendant to show good cause why bail should be reduced, notice of the hearing must be given to the prosecuting attorney charged with the duty of prosecuting the defendant for the offense for

which the arrest was made. Section 2969c is limited to that period of time between the original determination of bail and the arraignment of the defendant.

Section 1320.5 makes the provisions added in Section 1269c applicable to one who has had his bail set and seeks to be released on his own recognizance.

Penal Code Section 1318 allows any magistrate to release a defendant on his own recognizance with the showing of good cause if it appears that he will surrender himself to custody.

This statute prevents any magistrate, other than he who originally determined the bail, from releasing the defendant prior to his arraignment unless there is first a hearing to show good cause, notice of which must be given to the prosecuting attorney.

References:

1) WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Proceedings Before Trial*, §§148-166 (1963).
2) Zander, *Bail: A Re-appraisal*, 1967 CRIM. L. REV. 25, 100, 128 (1967); Samuels, *Bail Principles*, 116 NEW L.J. 1269 (1966); Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109 (1966); Bottomley, *Granting of Bail; Principles and Practices*, 31 MODERN L. REV. 40 (1968).

Pleas; nolo contendere

Penal Code §859a (amended).

AB 717; STATS 1970, Ch 373

The amendment to Section 849a provides that with the consent of the magistrate and district attorney or other counsel for the people the defendant may plead nolo contendere to the offense charged or to any other lesser offense which is necessarily included in the offense with which the defendant is charged.

This Section applies only to felonies not punishable by death. Prior to the amendment, the defendant was allowed to plead guilty to such felonies, but a plea of nolo contendere was not allowed.

Return of Property or Suppression of Evidence

Penal Code §1538.5 (amended).

SB 680; STATS 1970, Ch 1441

This Chapter amends Section 1538.5 of the Penal Code relating to motions to suppress illegally-obtained evidence.

Under present Section 1538.5 a defendant may move for the return of property or the suppression of evidence obtained by an unreasonable search and seizure. If this motion is granted and the people appeal, the defendant must be released if he is in custody and may not be returned to custody unless the proceedings are resumed in the trial court and he is lawfully ordered by the court to be returned to custody. [*Section 1538.5 (k)*]

Previously there have been no conditions, bail, or agreement to return attaching to such releases.

Section 1538.5 is now amended to provide that when a motion to return property or suppress evidence is granted, and either the case is dismissed in the furtherance of justice or the people appeal, in a misdemeanor case, the defendant shall be released on his own recognizance, rather than released without any condition attached. Therefore a defendant will be required to enter into some obligation of record.

The amendments also provide, with respect to cases where such a motion is granted and the people file a petition for a writ of mandate or prohibition or a notice of intention to file such petition, that the defendant shall be released on his own recognizance *unless* he is charged with a capital offense, in a case where the proof is evident and the presumption great, or he is charged with a homicide offense and the court orders that the defendant be discharged from actual custody on bail. Those charged with capital offenses, where the proof is evident and the presumption great, can be retained in custody. These amendments were introduced at the request of the California District Attorneys Association.

One additional change was added to Senate Bill 680 to conform its language with Assembly Bill 1748 which also amended Section 1538.5. AB 1748 was passed and chaptered as Chapter 1289, however, when SB 680 was chaptered as 1441, it superseded the amendments enacted by Chapter 1289. (*See Government Code Section 9605*).

This final amendment affects paragraph (h) of Section 1538.5 which permits the defendant to make a motion to the court during trial for an order to return the property or suppress evidence when he did not have an opportunity prior to the trial. The amendment deletes the words "*Furthermore, the court in its discretion may entertain the motion during the course of the trial.*" Some attorneys believed that this language enabled the trial court to use discretion in permitting the defendant to renew a motion to return or suppress evidence during trial that had previously been made and denied during pretrial proceedings.

However, the California Supreme Court has construed Section 1538.5(h) contrary to this view holding that paragraph (h) only applies to motions "made or entertained for the first time at trial." [*People v. O'Brien*, 79 Cal. Rptr. 313, (1969)]. The intent of the author of this amendment was to conform the statute to the court's opinion.

References:

1) WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Appeal* §§639B, 66A, *Habeas Corpus and Other Extraordinary Writs* §779 (Supp. 1969); WITKIN, CALIFORNIA EVIDENCE, *Exclusion of Illegally Obtained Evidence* §§43-149, *Introduction* §§8-38B (Supp. 1969).
2) Pitler, *"Fruit of the Poisonous Tree"*, 56 CAL. L. REV. 594 (1964).

Motion to Return Property or Suppress Evidence

Penal Code §§1238, 1538.5 (amended).

AB 1748; STATS 1970, Ch 1289

When the court grants a motion for the suppression of evidence pursuant to Section 1538.5, it may also, on its own motion, or upon application by the prosecuting attorney, order the action be dismissed (*Section 1385*) prior to trial.

Pursuant to Section 1238(a)(7) such dismissal may be appealed by by the prosecuting attorney on behalf of the people. Appellate courts have been split as to whether they can go behind the dismissal and review the propriety of the trial court's order granting defendant's motion to suppress evidence. This amendment to Section 1238 adds paragraph (c) providing that an appellate court may review the trial court's order granting defendant's motion to return or suppress evidence at the time of an appeal for dismissal of the case based on the suppression of evidence. Section 1538.5, amended by Chapter 1289, had been superseded by the passage and chaptering of Senate Bill 680, also amending Section 1538.5 (*See Chapter 1441*). The change to Section 1538.5 which Chapter 1289 would have made has been included in the amendments of Chapter 1441. That synopsis is at page 382 and should be read to provide complete awareness of all amendments to Penal Code Section 1538.5 enacted during the 1970 session.

References:

1) WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§302-305 (1963).
2) Comment, *Methods of Challenging Searches and Seizures in California*, 54 CAL. L. REV. 1070 (1966).

Presence of Defendant at Trial

Penal Code §1043 (amended).

SB 857; STATS 1970, Ch 1255

The provisions of Section 1043 concerning the presence of the defendant at a felony trial are amended to provide for instances where his absence will not prevent continuation of his trial.

In any case in which the defendant, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly that the trial cannot be carried on with him in the courtroom his removal from the courtroom will not prevent continuation of his trial up to and including the return of verdict. This will not apply, however, if the defendant is being tried for an offense punishable by death.

Any defendant who has been removed because of his conduct may reclaim his right to be present at the trial when he is willing to conduct himself in a proper, respectful manner.

Defendant still has the right to waive his right to be present at the trial in accordance with Penal Code Section 977.

Previously, Section 1043 provided that if the defendant failed to appear at any time during the course of the trial and before the jury has retired for its deliberation, or the case has been finally submitted to the judge, and after the exercise of reasonable diligence his presence cannot be procured, the court shall declare a mistrial and the case may be retried.

There is no longer any reference to this provision in the amended version of the Section; thus, it is unclear what procedural steps are to be followed if the defendant is absent from the trial for other than the above reasons.

There are no changes in the procedure if the defendant in a misdemeanor case fails to appear in person at the time set for trial or during the course of trial.

References:

1) WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* §388-392 (1963).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 197.
3) Stout, *Appellate Review of Criminal Convictions on Appeal*, 43 CAL. L. REV. 381, 404 (1955).
4) 15B WEST'S CAL. DIG. *Criminal Law* §636 (1) (Supp. 1970).

Criminal Judgments; post conviction statements

Penal Code §1203.01 (amended).

AB 1060; STATS 1970, Ch 344

Chapter 344 amends Penal Code Section 1203.01 to allow a judge and a district attorney discretion in the filing of post conviction statements where a probation officer's report has been filed.

Before this amendment was enacted, the judge and district attorney were *required* to file with the county clerk immediately after the rendering of the judgment a brief statement of their views on the person convicted and the crime committed, whether or not the probation officer filed a report. This amendment makes these reports discretionary when the probation officer has filed a report. If the probation office does not file a report, however, the judge and district attorney must then file a report.

As before, the defendant's attorney and the law enforcement agency may also file statements of their views with the county clerk if they desire. The clerk is still required to mail a copy of all statements to the Department of Corrections where the defendant is imprisoned, to the defendant, and to the district attorney.

References:

1) WITKIN, CALIFORNIA CRIMINAL PROCEDURE §621 (Supp. 1969).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 207; CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1968 CODE LEGISLATION 202.

Appeal Judgment; remanding to trial court for further proceedings

Penal Code §1260 (amended).

SB 859; STATS 1970, Ch 850

This amendment to Section 1260 permits the appellate courts on criminal appeals to remand a cause to the trial court for such further proceedings as may be just under the circumstances. The purpose of the amendment is to avoid the unnecessary expense of an entire new trial where the hearing need be only on a limited issue.

Under the amended Section, if the proceedings in the trial court are resolved in favor of the defendent, then the conviction can be set aside and a new trial held if necessary. If, on the other hand, the proceedings are resolved in favor of the prosecution, the conviction can be sustained

without the expense of a total retrial. The District Attorneys Association requested the modification of the original code.

Prior to this amendment, Section 1260 provided that the court could reverse, affirm, or modify a judgment or order appealed from, or reduce the degree of the offense or the punishment imposed, and could set aside, affirm, or modify any or all proceedings subsequent to, or dependent upon, such judgment or order, or if proper, order a new trial but they could not remand to the trial court a limited issue.

References:

1) Comment, *Criminal Law, Modification of Verdict on Appeal,* 18 CAL. L. REV. 320 (1930); Stout, *Appellate Review of Criminal Convictions on Appeal,* 43 CAL. L. REV. 381 (1955); Comment, *Trial Courts' Power to Reduce Punishment Fixed by Juries in First Degree Murder Trials,* 13 HAST. L.J. 474, 476 (1962); Vernier, Selig, *The Reversal of Criminal Cases in the Supreme Court of California,* 2 S. CAL. L. REV. 381 (1928).
2) Annot., 29 A.L.R. 313 (1924); Annot., 89 A.L.R. 295 (1934).

Probation; modification, revocation, termination

Penal Code §§1203.04 (new); 1203.2 (amended).

AB 998; STATS 1970, Ch 333

Section 1203.2 is amended to establish a new procedure for modification, revocation, or termination of probation.

Probation may be modified, revoked, or terminated in one of the following ways:

a) The court may move to modify, revoke or terminate probation. Notice must be given to the probationer and probation officer and a copy of the motion must be given to the probation officer.

b) A petition may be instituted by the district attorney. Notice must be given to the probationer and probation officer. The court shall then refer a copy of the petition to the probation officer.

c) The probationer may petition for a modification or termination. Notice and a copy of his petition must be given to the probation officer.

The probation officer must prepare a probation report and submit it to the court. The court must read and consider the report and make its determination accordingly.

Section 1203.04 is added, and requires the clerk of the court to submit a copy of the probation order and any subsequent changes to the law enforcement agency which originally made the arrest or investigation.

Under the old law it was necessary to rearrest or obtain a warrant for the rearrest of the probationer to revoke or terminate his probation.

References:

1) 18 OPS. ATTY. GEN. 189 (1951).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 172.
3) Comment, *Revocation of Conditional Liberty—California and the Fed. System*, 28 S. CAL. L. REV. 158 (1954); Note, *Criminal Law—Probation—Right to Hearing on Revocation*, 24 S. CAL. L. REV. 118 (1950).
4) Annot., 29 A.L.R.2d 1074 (1953).

Completion of Probation; dismissal of charges

Penal Code §1203.4 (amended).

AB 1872; STATS 1970, Ch 539

Section 1203.4 allows a person who has fulfilled his probation to have all charges against him and their principle consequences dismissed.

At any time after all conditions of probation have been fulfilled, a defendant will be allowed to withdraw his plea of guilty or nolo contendere and enter a plea of not guilty. If he was convicted after a plea of not guilty, the court shall set aside the verdict. In either case any accusations or information will be dismissed and he will be released from all penalties and disabilities. However, in any subsequent prosecution the prior conviction may be pleaded and proved and has the same effect as if the information had not been dismissed.

The amendment to Section 1203.4 allows this procedure only if the defendant is not then charged with the commission of a crime, is not serving a sentence or is not on probation for any offense.

This bill was enacted in response to a judicial comment in *People v. Bradley* [248 Cal. App. 2d 887 (1968)] noting the anomaly between Sections 1203.4 and 1203.4a of the Penal Code. Section 1203.4a allows a court to set aside the verdict if a person convicted of a *misdemeanor* but *not* given probation: 1) has fully complied with the sentence of the court, 2) has waited one year from the date of the pronouncement of judgment, 3) is not then serving a sentence for any offense or charged with the commission of a crime, and 4) has lived an honest and upright life. Section 1203.4, however, allowed a felon or misdemeanant who *has* been granted probation to be granted relief if he has merely fulfilled the conditions of his probation, regardless of whether he is serving a sentence for another crime. This anomaly had made it more difficult for a person convicted of a minor offense to be granted

dismissal relief than for one who was convicted of a serious offense, but given probation.

Presumably, the relief offered by Sections 1203.4 and 1203.4a is intended as an inducement for the convicted defendant to lead a relatively crime-free life. This purpose was not achieved when the courts follow the language of Section 1203.4 to grant relief to persons who are then serving a term in state prison for a subsequent felony.

References:

1) People v. Johnson, 134 CAL. 2d 140 (1955); People v. Bradley, 248 CAL. 2d 887 (1967).
2) 2 WITKIN, CALIFORNIA CRIMES, *Punishment for Crimes* §1087 (1963).
3) Baum, *Wiping Out a Criminal or Juvenile Record*, 40 CAL. S.B.J. 816 (1965).

Coroners; blood tests

Government Code §27491.25 (new); Health and Safety Code §7303 (new).

AB 485; STATS 1970, Ch 1355

Chapter 1355 adds Section 27491.25 to the Government Code, and adds Section 7303 to the Health and Safety Code, relating to blood tests. Coroners are now required to take blood samples from a person who dies as a result of a motor vehicle accident for the purpose of determining the alcoholic and barbituric acid derivative contents of the body. The statute applies to a decedent who was a driver, occupant or pedestrian.

Chapter 1355 also requires both negative and positive findings to be reduced to writing or preserved on tape and excludes from such mandatory testing deceased persons under the age of 15. It further excludes the need for such testing when death occurs more than 24 hours after the accident.

Section 7303 of the Health and Safety Code prohibits embalmers from embalming a body when they have reason to believe a person died as a result of a motor vehicle accident unless they have permission of the coroner, his appointed deputy coroner, or a judge in the county, if there is no coroner. This is the present accepted practice as many funeral directors are currently deputy coroners.

Reference:

1) *National Traffic and Motor Vehicle Safety Act*, 15 U.S.C. §1381 (Supp. II 1966).

Records of Arrest

Penal Code §851.6 (amended).

SB 80; STATS 1970, Ch 794

Section 851.6 as originally enacted in 1969 stated that in any case in which an individual was arrested without a warrant and was later released without being formally charged with a crime the releasing officer was required to issue a certificate describing the action as a detention.

This amendment to Section 851.6 gives the same right to persons arrested and released before November 10, 1969 (*the date Section 851.6 was enacted*). The person arrested without a warrant and released before November 10, 1969 without being formally charged with a crime need only request a certification of detention be issued. If the records of the arrest are available the arresting officer or one who succeeded to the duties of the arresting officer or his superior is required to issue the certificate.

The authority of the peace officer to release any person arrested without a warrant and not formally charged with a crime is pursuant to paragraph (1) of subdivision (b) of Section 849. If the peace officer is satisfied that there is no ground for making a criminal complaint against the person arrested he may release the person and any record of the arrest shall include a record of the release and thereafter shall not be deemed an arrest but rather a detention.

References:

1) WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Proceedings Before Trial* §122 (1963).
2) CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1969 CODE LEGISLATION 170.

Motor Vehicles; implied consent law, requirement to complete test

Vehicle Code §13353 (amended).

AB 623; STATS 1970, Ch 733

SB 241; STATS 1970, Ch 1103

The amendments to Section 13353 by Chapters 1103 and 733 are identical. Both amend the "Implied Consent" law which requires that a motorist, suspected of driving under the influence of intoxicating liquor submit to one of three alternative tests, blood, urine, or breath or suffer the possible suspension of his driving privilege for a period of six months.

The amendment adds that beside failure to submit to one of the tests, failure to complete at least one of the tests may also result in the suspension of the driving privilege for a period of six months. If the person arrested is incapable or states that he is incapable of completing any chosen test, he has the choice and shall be so advised by the officer that he has the choice of submitting to and completing any of the remaining tests. If the person fails to complete a chemical test, and the officer files a sworn statement that he has reasonable cause to believe that the person was driving a motor vehicle under the influence of intoxicating liquor and failed to complete at least one test, the person's driving privilege shall be suspended for six months.

This Section is also amended to provide that any person arrested on suspicion of operating a motor vehicle on a public highway under the influence of intoxicating liquor shall be advised that he does *not* have the right to have an attorney present before stating whether he will submit to a test, before deciding which test to take, or during the administration of the test chosen. This is an embodiment of present case law. [See *Whalen v. Municipal Court of City of Alhambra*, 79 Cal. Rptr. 523 (1969) defendant not entitled to consult with attorney prior to the administration of a field sobriety test; *Wethern v. Orr*, 76 Cal. Rptr. 807 (1969) concerning duty of officer to advise arrested person that constitutional rights to counsel and to remain silent are not applicable to decision to take *chemical test* for intoxication.]

Reference:

1) Karabian, *California's Impjlied Consent Act: An Examination and Evaluation*, 1 LOYOLA L. REV. 23 (1968); Note, *Forcible Administration of Blood Tests*, 14 U.C.L.A. L. REV. 680 (1967); Cranston, *Problem of the Drinking Driver*, 54 A.B.A.J. 995 (1968); Ruffin, *Intoxication Tests and the Bill of Rights: A New Look*, 2 CAL. W. L. REV. 1 (1966); Comment, *Some Problems Concerning the California Implied Consent Statute*, 1 U. W. L. A. L. REV. 67 (1969).