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# Criminal Procedure

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# Criminal Procedure

## Criminal Procedure; arson-registration

Penal Code §457.1 (amended).  
SB 133 (Campbell); 1989 STAT. Ch. 311  
(Effective July 1, 1990)

Under existing law, a convicted arsonist<sup>1</sup> is required to register with local law enforcement<sup>2</sup> if the court finds a pattern of compulsive behavior.<sup>3</sup> Chapter 311 expands the law to allow a court to require registration<sup>4</sup> if the court finds that the arsonist: 1) Has a prior conviction of arson; 2) is convicted of multiple counts of arson relating to different events or occurrences; or 3) has shown compulsive behavior in committing the offense.<sup>5</sup>

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1. See CAL. PENAL CODE §§ 451 (includes those who willfully burn any structure, land, or property), 453 (includes those who possess flammable material with the intent to use such material to burn any structure) (West 1988).

2. A convicted arsonist must register with the chief of police, or the sheriff in an unincorporated area. *Id.* § 457.1(b) (amended by 1989 Cal. Stat. ch. 311, sec. 1, at \_\_\_\_).

3. CAL. PENAL CODE § 457.1(b) (amended by 1989 Cal. Stat. ch. 311, sec. 1, at \_\_\_\_) (the court must also indicate the reason for requiring the convicted arsonist to register). Registration must occur within 30 days of obtaining a new residence. CAL. PENAL CODE § 457.1(b) (West 1988) (amended by 1989 Cal. Stat. ch. 311, sec. 1, at \_\_\_\_). Any person who fails to register is guilty of a misdemeanor. *Id.* § 457.1(h).

4. The arsonist must register with local law enforcement. *Id.* § 457.1(b).

5. 1989 Cal. Stat. ch. 311, sec. 1, at \_\_\_\_ (amending CAL. PENAL CODE § 457.1(b)). See generally, K. MOLL, ARSON, VANDALISM AND VIOLENCE: LAW ENFORCEMENT PROBLEMS AFFECTING FIRE DEPARTMENTS 21 (1974) (discussing the need for more fire personell to aid in investigation and prevention of arson and related crimes); T. HAMMETT, ARSON INVESTIGATION AND PROSECUTION: A STUDY OF FOUR MAJOR AMERICAN CITIES 242 (1984) (computerized searches are used to aid in arson deterrence).

## Criminal Procedure; assault weapons—restrictions

Penal Code §§ 12275, 12275.5, 12276, 12276.5, 12277, 12280, 12285, 12286, 12288, 12290 (new); §§ 245, 12001.6, 12020.5, 12022, 12022.5 (amended).

AB 357 (Roos); 1989 STAT. Ch. 19\*

SB 292 (Roberti); 1989 STAT. Ch. 18\*

(Effective May 24, 1989)

In enacting Chapter 19,<sup>1</sup> the legislature places restrictions on all assault weapons<sup>2</sup> declaring that they are extremely dangerous, and have little value as hunting or sporting weapons.<sup>3</sup> Under Chapter 19 no person may possess an assault weapon unless the weapon has been registered<sup>4</sup> with the Department of Justice and is not used in a prohibited manner.<sup>5</sup> The sale, manufacture, importation, and distri-

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\* Amended by AB 566 (McClintock) 1989 Cal. Stat. ch. 1044, SB 1425 (C. Green) 1989 Cal. Stat. ch. 959, AB 1504 (Quackenbush) 1989 Cal. Stat. ch. 1167, and SB 956 (Davis) 1989 Cal. Stat. ch. 1284.

1. Chapter 19 includes the Roberti-Roos Assault Weapons Control Act. 1989 Stat. ch. 19, sec. 3, at \_\_\_\_ (enacting CAL. PENAL CODE §§ 12275, 12275.5, 12276, 12276.5, 12277, 12280, 12285, 12286, 12288, 12290).

2. See 1989 Cal. Stat. ch. 19, sec. 3, at \_\_\_\_ (enacting CAL. PENAL CODE § 12276(a-d)) (list of weapons defined as assault weapons). The manufacture of models identical to those listed, except for minor variations, may be suspended upon the Attorney General's request. *Id.* (enacting CAL. PENAL CODE § 12276.5(a)). After the weapon has been temporarily suspended, the court must set a hearing to decide whether the weapon will be permanently declared an assault weapon. *Id.* (enacting CAL. PENAL CODE § 12276.5(e)).

3. *Id.* (enacting CAL. PENAL CODE §§ 12275.5). The manufacture, importation, transportation, or distribution of assault weapons is a felony, punishable by imprisonment for up to eight years. *Id.* (enacting CAL. PENAL CODE § 12280(a)). Compare *United States v. Miller*, 307 U.S. 174, 178 (1939) (the purpose of the second amendment is to provide for a well regulated militia, thus instruments that don't affect this purpose are not protected by the second amendment) with *In re Ramirez*, 226 P. 914, 921 (Cal. 1924) (firearms are the proper subject for police power, thus the state can regulate the use and carrying of dangerous weapons and firearms in the interest of public safety). See generally N. Lund, *Second Amendment, Political Liberty, and the Right to Self Preservation*, 39 ALA. L. REV. 103, 103-130 (1987) (a criticism of *United States v. Miller* and a general defense of the right to bear and keep arms); S. HALBROOK, *THAT EVERY MAN BE ARMED-THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984) (a general analysis of second amendment rights); J. WRIGHT, *WEAPONS, CRIME AND VIOLENCE IN AMERICA* at 11 (1981) (most weapons owned in the United States are for hunting or sporting purposes, not for self defense).

4. Persons who lawfully owned assault weapons before June 1, 1989, must register them with the Department of Justice by January 1, 1990. 1989 Cal. Stat. ch. 19, sec. 3, at \_\_\_\_ (enacting CAL. PENAL CODE § 12285(a)).

5. *Id.* (enacting CAL. PENAL CODE § 12280(b)). An assault weapon can only be used while: (1) At the person's residence, place of business, or with permission on property owned by another; (2) on a target range; (3) at a shooting club; or (4) attending a firearms exhibition or display conducted by an approved organization. *Id.* (enacting CAL. PENAL CODE § 12285(c)(1-5)). See *id.* § 12286(a) (procedure for obtaining a permit). A person must obtain a permit to use a registered assault weapon in an unspecified manner. *Id.*

bution of assault weapons in California is also restricted.<sup>6</sup> Further, Chapter 19 prohibits advertisements for the sale of any prohibited assault weapon.<sup>7</sup>

Existing law provides for a sentence enhancement of two, three, or four years when a deadly weapon<sup>8</sup> or firearm is used in the commission of an assault.<sup>9</sup> Chapter 1167 increases this enhancement to three, six, or nine years and Chapter 18 increases this penalty to four, eight or twelve years when an assault weapon or a machine gun<sup>10</sup> is used.<sup>11</sup>

### COMMENT

Recent events, particularly the tragic shooting at the Cleveland Elementary School in Stockton, have increased public sentiment against assault weapons<sup>12</sup> and have resulted in legislation, such as the Roberti-Roos Assault Weapons Control Act, aimed at restricting, regulating, and controlling the use of assault weapons.<sup>13</sup> The Roberti-Roos Act may be subject to challenge on several constitutional theories.

By banning assault weapons from the state of California, the Act may be attacked as an unconstitutional infringement upon the second amendment right to keep and bear arms.<sup>14</sup> Many courts and scholars, however, believe that the right guaranteed by the second amendment

6. *Id.* (enacting CAL. PENAL CODE § 12280(a)). After January 1, 1990, assault weapons may not be sold to anyone other than a licensed gun dealer. *Id.* (enacting CAL. PENAL CODE § 12285(b)). A licensed gun dealer may sell an assault weapon out of state, to a person who has a permit, and may transport weapons between dealers. *Id.* (enacting CAL. PENAL CODE § 12290(a)). *See id.* (enacting CAL. PENAL CODE § 12290(b)) (definition of licensed gun dealer).

7. *Id.* sec. 1.5, at \_\_\_\_ (amending CAL. PENAL CODE § 12020.5).

8. *See People v. James*, 88 Cal. App. 3d 150, 160, 151 Cal. Rptr. 354, 360 (1978) (a deadly or dangerous weapon is one capable of inflicting great bodily injury or death and is used in a threatening manner).

9. CAL. PENAL CODE § 245(a) (West 1988). The penalty for use of a firearm in the commission of a felony is increased to three, four or five years, and the middle term must be imposed unless mitigating or aggravating circumstances exist. 1989 Cal. Stat. ch. 1044, sec. 5, at \_\_\_\_ (amending CAL. PENAL CODE § 12202.5(c)).

10. *See* CAL. PENAL CODE § 12200 (definition of machine gun).

11. 1989 Cal. Stat. ch. 1167, sec. 1, at \_\_\_\_ (amending CAL. PENAL CODE § 245(b)); 1989 Cal. Stat. ch. 18, sec. 1, at \_\_\_\_ (amending CAL. PENAL CODE § 245(a)(3)). Any person who uses an assault weapon or a machine gun in the commission of a felony, or who is convicted of murder or attempted murder by shooting at an occupied motor vehicle, causing great bodily injury or death to another, will be punished by an additional term of five years in the state prison. CAL. PENAL CODE § 12022.5(b) (amended by 1989 Cal. Stat. ch. 1044, sec. 5, at \_\_\_\_). If an assault weapon is used in the commission of a felony and is owned by the user, the court must order that the weapon be disposed of as provided in Penal Code section 12028. 1989 Cal. Stat. ch. 19, sec. 3, at \_\_\_\_ (enacting CAL. PENAL CODE § 12280(b)).

12. N.Y. Times, Jan. 28, 1989, at 1, col. 5.

13. 1989 Cal. Stat. ch. 19, sec. 3, at \_\_\_\_ (enacting CAL. PENAL CODE §§ 12275-12290).

14. *Id.* secs. 1-7, at \_\_\_\_ *See* U.S. CONST. amend. II.

is not an individual right, but is a collective right of the states to bear arms for a well regulated and authorized militia, and that individuals do not necessarily have a constitutional right to bear arms.<sup>15</sup> The most recent Supreme Court decision interpreting the second amendment was *United States v. Miller*.<sup>16</sup> The court in *Miller* upheld the National Firearms Act,<sup>17</sup> declaring that the second amendment only protects weapons which bear a reasonable relationship to the preservation of a well regulated militia, and that a shotgun with a barrel of less than eighteen inches had not been shown to have such a relationship.<sup>18</sup> Under a strict interpretation of *Miller*, the Roberti-Roos Act may be found unconstitutional since the Act restricts the use of assault weapons, which are oriented toward military use, and may be found to bear a reasonable relationship to the maintenance of a well regulated militia.<sup>19</sup>

However, in *Cases v. United States*,<sup>20</sup> the Third Circuit declared that the Supreme Court must have intended that the rule announced in *Miller* be specific to that case.<sup>21</sup> Otherwise, the court reasoned, almost all weapons would be constitutionally protected, since a military use could be found for almost any modern lethal weapon.<sup>22</sup> Further, the court reasoned that the *Miller* rule seemed to only allow individuals to possess distinctively military weapons, which it is inconceivable a private person would have any use for.<sup>23</sup> Thus the court in *Cases* held that even though a weapon may have a reasonable relationship to a well regulated militia it is not necessarily constitu-

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15. See Beard & Fields, *National Coalition to Ban Handguns Statement on the Second Amendment*, in 1982 THE RIGHT TO KEEP AND BEAR ARMS; REPORT OF THE SUBCOMMITTEE ON THE CONSTITUTION, OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE NINETEENTH CONGRESS 27, 30. See *United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942) (the Second Amendment was adopted so that the states may maintain a well regulated militia as a protection against possible encroachment by federal powers).

16. *United States v. Miller*, 307 U.S. 174 (1939). In *Miller*, Jack Miller and Frank Layton were charged with transporting a shotgun with a barrel of less than 18 inches across state lines, in violation of Title 26 of the United States Code. *Id.* at 177. The District court quashed the indictment, holding that section 11 of the Act, which prohibited this conduct, was in violation of the second amendment. *Id.*

17. 26 U.S.C.S. §§ 5801-5871 (Law. Co-op.) 1957.

18. *Miller*, 307 U.S. at 178.

19. See *Addison v. Williams*, 546 So. 2d 220 (La. 1989). The Colt AR-15, an assault weapon, is regularly used by the United States armed forces to kill humans during warfare. *Id.* Chapter 19 prohibits possession of any of the Colt AR-15 series weapons. 1989 Cal. Stat. ch. 19, sec. 3, at \_\_\_\_ (enacting CAL. PENAL CODE § 12276(5)).

20. 131 F.2d 916 (3rd Cir. 1942).

21. *Cases v. United States*, 131 F.2d 916, 922.

22. *Id.*

23. *Cases*, 131 F.2d at 922.

tionally protected.<sup>24</sup> The court stated that each case must be decided on its own facts.<sup>25</sup>

In deciding upon the constitutionality of Chapter 19, a court will most likely follow the mandate set forth in *Cases* to narrowly construe the *Miller* rule.<sup>26</sup> Chapter 19 bans the possession of weapons that have been found to have little societal value when weighed against the tremendous destructive capacity, thus, a court should find that the ban on assault weapons is reasonable, and not prohibited by the second amendment.<sup>27</sup>

The Roberti-Roos Act may also be upheld as a valid exercise of police power. Under a state's police power, the government can enact laws to protect the general welfare of society, as long as the laws are within constitutional limits.<sup>28</sup> California courts have upheld statutes banning the use of automatic weapons, reasoning that if the beneficial use of an item is grossly disproportionate to its harmful use, the state may absolutely prohibit its possession.<sup>29</sup> Thus, one may argue that because automatic weapons and assault weapons are sufficiently similar, and because assault weapons are disproportionately harmful to their beneficial use, the prohibition banning the possession of assault weapons would be a valid exercise of police power.

A possible argument against Chapter 19 is rooted in the first amendment. By not allowing assault weapons to be advertised in California, Chapter 19 may violate first amendment guarantees of freedom of speech. Courts have found that expression related only to economic interest, such as advertising, is commercial speech and is not given as much constitutional protection as other forms of expression.<sup>30</sup> The Supreme Court has allowed states to restrict commercial speech if the state has a substantial interest in doing so.<sup>31</sup>

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24. *Id.*

25. *Id.*

26. *Id.*

27. See 1989 Cal. Stat. ch. 19, sec. 3, at \_\_\_\_ (enacting CAL. PENAL CODE § 12275.5).

28. *In re Ramirez*, 226 P. 914, 921 (Cal. 1924).

29. *People v. Ferguson*, 129 Cal. App. 3d 300, 302, 18 P.2d 741, 742 (1933).

30. *Central Hudson Gas and Elec. v. Public Service Comm'n*, 447 U.S. 556, 561 (1979). Constitutional protection of speech turns on the nature of both the expression, and the government's reasons for wanting to regulate the speech. *Id.* See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

31. *Central Hudson*, 447 U.S. 556 at 564. See *Possadas de P.R. Assoc. v. Tourism Co. of P.R.*, 106 S. Ct. 2968 (1986). In upholding a ban on casino advertising, the Court reasoned that because the state has the power to completely prohibit the underlying conduct, the state could take the less intrusive step of prohibiting advertisement of that conduct. *Id.* at 2979.

Thus, if California's interest in banning assault weapons is substantial, the prohibition against advertising them will probably be upheld.<sup>32</sup>

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32. See 1989 Cal. Stat. ch. 19, sec. 3, at \_\_\_\_ (enacting CAL. PENAL CODE § 12275.5). The legislature declares that assault weapons have such a high rate of fire, and capacity for firepower, that they are a substantial danger to human beings, and this danger outweighs any recreational or sporting function the assault weapon may have. *Id.*

## **Criminal Procedure; biomedical research**

Penal Code § 3502 (amended); Welfare and Institutions Code § 1706 (new).  
SB 107 (Presley); 1989 STAT. CH. 1367

Existing law prohibits all biomedical research<sup>1</sup> on any prisoner in the state.<sup>2</sup> Chapter 1367 permits research<sup>3</sup> on the effects of vitamins, minerals and amino acids to be conducted on certain institutionalized minors<sup>4</sup> under the supervision of a research oversight committee.<sup>5</sup>

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1. See CAL. PENAL CODE § 3500(b) (West 1989) (definition of biomedical research).

2. *Id.* § 3502 (amended by 1989 Cal. Stat. ch. 1367, sec. 1, at \_\_\_\_). *But see* 1988 Cal Stat. Ch. 168 (permits medical personnel to solicit inmate volunteers to participate in confidential research to test for acquired immune deficiency syndrome). See also 21 C.F.R. §§ 50.1-.46 (1980) (a proposed Food and Drug Administration (FDA) regulation banning experimental drug research on prisoners). This proposed regulation was later stayed pending resolution of lawsuits challenging the regulation. 46 Fed. Reg. 35085 (July 7, 1981). In proposing the regulation, the FDA stated that it was implementing the recommendations of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. 45 Fed. Reg. 36386 (May 30, 1980). See generally NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, COMPENSATING FOR RESEARCH INJURIES, 43 Fed. Reg. 56174 (November 30, 1978).

3. See 1989 Cal. Stat. ch. 1367, sec. 2, at \_\_\_\_ (enacting CAL. WELF. & INST. CODE § 1706). The research is limited to administration of FDA approved, non-prescription vitamins, minerals, and amino acids, within recommended dosage levels, under the supervision of a physician. *Id.* Only wards who have given an informed consent may take part in the research. *Id.* See also CAL. PENAL CODE § 3521 (West 1982) (definition of informed consent by a ward).

4. See 1989 Cal. Stat. ch. 1367, sec. 2, at \_\_\_\_ (enacting CAL. WELF. & INST. CODE § 1706(c)) (research subjects are limited to wards of the Department of the Youth Authority who are 18 years of age or more).

5. *Id.* (enacting CAL. WELF. & INST. CODE § 1706(b)).

## **Criminal Procedure; blood and saliva samples**

Penal Code § 290.2 (amended).

SB 1408 (Hart); 1989 STAT. Ch. 1304

Under existing law, any person who is required to register as a sex offender<sup>1</sup> must provide two blood specimens and a saliva sample prior to being released from a correctional institution.<sup>2</sup> Chapter 1304 extends this requirement to offenders who have been convicted of first or second degree murder; assault with intent to commit mayhem, rape, sodomy, or other sexual crimes; sexual battery, and battery against jury members or public officials; assault with a deadly weapon; or assault with caustic chemicals.<sup>3</sup> Under existing law, the blood and saliva samples are filed with the Sex Registration Unit of the Department of Justice, where they are analyzed and categorized by blood groupings.<sup>4</sup> Chapter 1304 provides that the specimens and samples shall be provided to the Department of Justice, where they will be analyzed for deoxyribonucleic acid (DNA) and other genetic typing, which information shall be filed with the Sex Registration Unit of the Department of Justice, or kept in computerized records.<sup>5</sup>

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1. Sex offenders must register with the chief of police in the city of their domicile or the sheriff if they are domiciled in an unincorporated area. CAL. PENAL CODE § 290 (West 1988).

2. *Id.* § 290.2(a) (West Supp. 1989) (amended by 1989 Cal. Stat. ch. 1304, sec. 1.5, at \_\_\_\_).

3. 1989 Cal. Stat. ch. 1304, sec. 1.5, at \_\_\_\_ (amending CAL. PENAL CODE § 290.2(a)).

4. CAL. PENAL CODE § 290.2(b) (amended by 1989 Cal. Stat. ch. 1304, sec. 1.5, at \_\_\_\_). Instructions and containers for obtaining samples are provided by the Department of Justice. *Id.* Collected samples are sent to the Department of Justice for analysis of deoxyribonucleic acid (DNA) and other genetic typing. 1989 Cal. Stat. ch. 1304, sec. 1.5, at \_\_\_\_ (amending CAL. PENAL CODE § 290.2(b)). The analysis is kept in the offender's file maintained by the Sex Registration Unit of the Department of Justice, and is not included in the state's records on criminal history. *Id.* (amending CAL. PENAL CODE § 290.2(d)). The information is to be released only to law enforcement agencies or district attorney's offices. CAL. PENAL CODE § 290.2(d) (amended by 1989 Cal. Stat. ch. 1304, sec. 1.5 at \_\_\_\_).

5. 1989 Cal. Stat. ch. 1304, sec. 1, at \_\_\_\_ (amending CAL. PENAL CODE § 290.2(c)).



## **Criminal Procedure; child concealment**

Civil Code § 4604 (amended); Penal Code §§ 208, 277, 278.5, 279 (amended).

SB 1156 (Bergeson); 1989 STAT. Ch. 1428

Sponsor: California District Attorney's Association

Support: Attorney General's Office

Existing law provides an exception to a charge of kidnapping<sup>1</sup> when a person takes, detains, or conceals a child with intent to deprive another of the right of custody.<sup>2</sup> Chapter 1428 limits the exception to a parent<sup>3</sup> or other person granted access to the child by court order.<sup>4</sup> If a child is concealed in the absence of a court order but with good cause, the custodian who took the child must file a report with the law enforcement agency within a reasonable time.<sup>5</sup> Under existing law, persons who conceal a child may be punished in California if the child resides or is presently in the state.<sup>6</sup> Chapter 1428 expands the state's jurisdiction to include child concealment offenses where one of the child's guardians is a resident of the state at the time of the alleged violation.<sup>7</sup>

Existing law provides that if a child is concealed after a child custody order has been filed,<sup>8</sup> the district attorney must take all

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1. See CAL. PENAL CODE § 207 (West 1988) (definition of kidnapping).

2. *Id.* § 208(b) (amended by 1989 Cal. Stat. ch. 1428, sec. 2, at \_\_\_\_). See *id.* §§ 277 (amended by 1989 Cal. Stat. ch. 1428, sec. 3, at \_\_\_\_ (concealment of a child by a person having right of custody)), 278 (West 1988) (concealment of a child by a person without right of custody), 278.5 (amended by 1989 Cal. Stat. ch. 1428, sec. 4, at \_\_\_\_ (concealment of a child in violation of a custody or visitation decree)). See also 1989 Cal. Stat. ch. 1428, sec. 5, at \_\_\_\_ (amending CAL. PENAL CODE § 279(f)) (definition of right of custody). Child concealment statutes provide felony or misdemeanor penalties, punishable by up to three years imprisonment, a fine up to \$10,000, or both. *Id.* sec. 3, at \_\_\_\_ (amending CAL. PENAL CODE § 277); CAL. PENAL CODE § 278.5 (amended by 1989 Cal. Stat. ch. 1428, sec. 4, at \_\_\_\_). Up to four years imprisonment may be imposed against violators who lack a right of custody. CAL. PENAL CODE § 278. Kidnapping a minor under 14 years of age is punishable by up to 11 years imprisonment. *Id.* § 208(b) (amended by 1989 Cal. Stat. ch. 1428, sec. 2, at \_\_\_\_).

3. See 1989 Cal. Stat. ch. 1428, sec. 2, at \_\_\_\_ (amending CAL. PENAL CODE § 208(b)) (definition of parent includes biological parent, adoptive parent, and natural father). See also CAL. CIV. CODE § 7004(a) (West Supp. 1989) (definition of natural father).

4. 1989 Cal. Stat. ch. 1428, sec. 2, at \_\_\_\_ (amending CAL. PENAL CODE § 208(b)).

5. CAL. PENAL CODE § 277 (amended by 1989 Cal. Stat. ch. 1428, sec. 3, at \_\_\_\_). The custodian must show good faith and a reasonable belief that the action was necessary to protect the child. *Id.* The police report must be filed in the jurisdiction where the child had been living, within a reasonable time, and must set forth reasons for the child's concealment. 1989 Cal. Stat. ch. 1428, sec. 3, at \_\_\_\_ (amending CAL. PENAL CODE § 277).

6. CAL. PENAL CODE § 279(e) (amended by Cal. Stat. ch. 1428, sec. 5, at \_\_\_\_).

7. 1989 Cal. Stat. ch. 1428, sec. 5, at \_\_\_\_ (amending CAL. PENAL CODE § 279(e)).

8. See CAL. CIV. CODE § 4600.1 (West Supp. 1989) (filing procedure). See also *id.* §§ 5150-5174 (West 1983) (Uniform Child Custody Jurisdiction Act (UCCJA)). See generally

actions necessary to locate the missing child.<sup>9</sup> Under Chapter 1428, upon the district attorney's recommendation,<sup>10</sup> the court may grant temporary custody to an appropriate guardian where: (1) The location of the party in possession of the child is not known; (2) there is reason to believe that party may not appear for the proceeding;<sup>11</sup> or (3) the child is detained in violation of a court order.<sup>12</sup>

Existing law mandates that concealed children must be returned to their lawful guardian.<sup>13</sup> Under Chapter 1428, before a person accused of child concealment is arraigned, the court must impose a condition that the child be returned by a specific date.<sup>14</sup> Where conflicting custody orders exist, the court must hold a hearing within five court days to resolve the conflict.<sup>15</sup>

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Blakesley, *Child Custody-Jurisdiction and Procedure*, 35 EMORY L.J. 291 (1986) (analysis of child custody hearing jurisdictional issues under the UCCJA and the Federal Parental Kidnapping Prevention Act).

9. CAL. CIV. CODE § 4604(a) (West Supp. 1989).

10. See 1989 Cal. Stat. ch. 1428, sec. 1, at \_\_\_\_ (amending CAL. CIV. CODE § 4604(c)) (the recommendation must be made by a written declaration under penalty of perjury).

11. The court may order a party to appear personally or to bring the child, or the court may issue a warrant of arrest to secure their appearance. CAL. CIV. CODE § 5160 (West 1983).

12. 1989 Cal. Stat. ch. 1428, sec. 1, at \_\_\_\_ (amending CAL. CIV. CODE § 4604). The court may grant temporary custody to a parent or other person recommended by the district attorney, in order to return the child to the court's jurisdiction. *Id.* The district attorney must take all actions necessary to locate the party and child, ensure their appearance, and enforce custody and visitation decrees. CAL. CIV. CODE § 4604(b) (West Supp. 1989). The district attorney does not represent any party in a custody proceeding, but acts on behalf of the court. *Id.* § 4604(c) (amended by 1989 Cal. Stat. ch. 1428, sec. 1, at \_\_\_\_).

13. CAL. PENAL CODE § 279(b) (amended by 1989 Cal. Stat. ch. 1428, sec. 5, at \_\_\_\_).

14. 1989 Cal. Stat. ch. 1428, sec. 5, at \_\_\_\_ (amending CAL. PENAL CODE § 279(b)).

15. *Id.*

## **Criminal Procedure; controlled substance offenses—forfeiture of property**

Business and Professions Code § 25375 (new); § 24202 (amended); Health and Safety Code § 11471.1 (new); §§ 11470, 11473, 11488, 11488.4, 11488.5 (amended).

AB 1450 (Katz); 1989 STAT. Ch. 1195

Support: California Peace Officers Association; California Police Chiefs Association; California State Sheriffs Association; Cities of Oakland and Los Angeles; Daryl Gates, Los Angeles Chief of Police

Existing law provides for the forfeiture of certain property used

in connection with the violation of controlled substances<sup>1</sup> laws, including the forfeiture of vehicles used as instruments to facilitate the violation of these laws.<sup>2</sup> Chapter 1195 allows the forfeiture of any vehicle, and specified firearms and weapons, used in any manner to facilitate the violation of specified controlled substances laws.<sup>3</sup>

Chapter 1195 provides for the forfeiture of alcoholic beverage licenses if, with the licensee's knowledge and consent, the licensed premises are used, or intended to be used, to violate specified controlled substances laws.<sup>4</sup> Chapter 1195 also provides for a special hearing in which a court determines whether probable cause exists for forfeiture of an alcoholic beverage license due to violations of controlled substances laws.<sup>5</sup>

Existing law requires the Department of Alcoholic Beverage Control (Department) to determine whether grounds exist for the suspension or revocation of an alcoholic beverage license, when an arrest

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1. See CAL. HEALTH & SAFETY CODE §§ 11054-11058 (West Supp. 1989) (listing controlled substances).

2. CAL. HEALTH & SAFETY CODE § 11470 (West Supp. 1989). Examples of property subject to forfeiture are: Materials used for the manufacture or containment of controlled substances, books or records used to violate controlled substances laws, moneys or negotiable instruments furnished in exchange for controlled substances, and real property used to violate controlled substances laws. *Id.* See generally Diepenbrock, *California Forfeiture Statute: A Means For Curbing Drug-Trafficking?*, 15 PAC. L.J. 1035 (1984) (discussing Federal and California forfeiture statutes and their effectiveness as deterrents).

3. 1989 Cal. Stat. ch. 1195, sec. 1.3, at \_\_\_\_ (amending CAL. HEALTH & SAFETY CODE § 11470). Only firearms, weapons, or ammunition subject to Title 2 of Part 4 of the California Penal Code (dealing with the control of deadly weapons) can be forfeited. *Id.* Firearms, weapons, or ammunition which are possessed or used while violating controlled substances laws are also subject to forfeiture. *Id.* See generally 21 U.S.C.A. § 853 (West Supp. 1989) (federal law allows for the forfeiture of property used in any manner to facilitate the violation of drug laws).

4. 1989 Cal. Stat. ch. 1195, sec. 1.3, at \_\_\_\_ (amending CAL. HEALTH & SAFETY CODE § 11470(e)(2)). Both on-sale and off-sale alcoholic beverage licenses may be forfeited under Chapter 1195. *Id.*

5. *Id.* sec. 1.2, at \_\_\_\_ (enacting CAL. BUS. & PROF. CODE § 25375(c)). Ten-day notice of the hearing must be given to the licensee, during which time the license may not be sold or transferred. *Id.* (enacting CAL. BUS. & PROF. CODE § 25375(a)). However, the court may extend the ten-day period for good cause or upon the parties' stipulation. *Id.* The Attorney General or the District Attorney may establish that probable cause exists for forfeiture of the license through affidavit, declaration, deposition, prior judicial testimony, or other evidence, subject to rebuttal evidence presented by the licensee to refute the existence of probable cause. *Id.* (enacting CAL. BUS. & PROF. CODE § 25375(c)). If the court determines that there is probable cause, the court will order a peace officer to seize the license. *Id.* (enacting CAL. BUS. & PROF. CODE § 25375(d)). The officer must mail the seized license to the Department. *Id.* (enacting CAL. BUS. & PROF. CODE § 25375(f)). The department may then sell or transfer the forfeited license. *Id.* (enacting CAL. BUS. & PROF. CODE § 25375(h)). Any person who has an interest in the license may not exercise any of the license's privileges after the license has been seized. *Id.* (enacting CAL. BUS. & PROF. CODE § 25375(f)). If the hearing is not held within the allocated time limit, or if probable cause is not established at the hearing, the restriction on the license's sale or transfer must be dropped and the forfeiture petition must be dismissed. *Id.* (enacting CAL. BUS. & PROF. CODE § 25375(e)).

has been made for violations of alcoholic beverage licensing laws.<sup>6</sup> Chapter 1195 prohibits the Department from opening<sup>7</sup> a file, initiating an investigation of a licensee, or revoking or suspending a license when the licensee or the licensee's agent reports to a law enforcement agency that suspected violations of controlled substances laws have occurred on the licensed premises.<sup>8</sup>

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6. 1989 Cal. Stat. ch. 621, sec. 1, at 2604 (amending CAL. BUS. & PROF. CODE § 24202) (amended by 1989 Cal. Stat. ch. 1195, sec. 1, at \_\_\_\_). State and local law enforcement agencies are required to notify the department of arrests made for violations of alcoholic beverage licensing laws, so that an investigation may be made. *Id.*

7. The Department also may not add an entry to an existing file. 1989 Cal. Stat. ch. 1195, sec. 1, at \_\_\_\_ (amending CAL. BUS. & PROF. CODE § 24202(b)).

8. *Id.* (amending CAL. BUS. & PROF. CODE § 24202(b)). The department also may not take action based on improper activities described in the report. *Id.*

## **Criminal Procedure; controlled substances—transportation between noncontiguous counties**

Health and Safety Code §§ 11352, 11379, 11379.5 (amended).  
AB 1207 (Connelly); 1989 STAT. CH. 1102

Existing law prohibits transporting<sup>1</sup> controlled substances<sup>2</sup> or marijuana, and provides a penalty of three, four, or five years in prison, a fine up to \$10,000, or both.<sup>3</sup> Chapter 1102 increases the penalty for transporting controlled substances and marijuana between non-contiguous counties to three, six, or nine years in prison.<sup>4</sup>

DA

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1. Existing law also prohibits importing, selling, giving away, or attempting to transport or import controlled substances and marijuana. CAL. HEALTH & SAFETY CODE § 11352 (West Supp. 1989).

2. *See id.* §§ 11054-55 (West Supp. 1989) (list of controlled substances included); §§ 11056-58 (list of controlled substances which are included if they are narcotics, unless prescribed by a doctor).

3. *Id.* § 11352(b) (amended by 1989 Cal. Stat. ch. 1102, sec. 1, at \_\_\_\_). *See generally* Comment, *Illegal Transportation of Marijuana: Recent Judicial Construction of the California Statute*, 3 PAC. L.J. 670 (1972) (discussion of California Health and Safety Code section 11531, making it unlawful to transport marijuana).

4. 1989 Cal. Stat. ch. 1102, sec. 1, at \_\_\_\_ (amending CAL. HEALTH & SAFETY CODE § 11352(b)), *Id.* sec. 3, at \_\_\_\_ (amending CAL. HEALTH & SAFETY CODE § 11379.5(b)).

## Criminal Procedure; controlled substances—probation

Penal Code § 1203.07 (amended).

AB 1667 (Condit); 1989 STAT. Ch. 1135

Under existing law, any person convicted of specified controlled substance offenses must not be granted probation or a suspended sentence.<sup>1</sup> Chapter 1135 denies probation or a suspended sentence to any person who is convicted of, and has one or more prior convictions for, possession for sale, selling, or offering to sell cocaine base, cocaine, or methamphetamine.<sup>2</sup>

JMM

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1. See CAL. PENAL CODE § 1203.07(a) (West Supp. 1989) (amended by 1989 Cal. Stat. ch. 1135, sec. 2, at \_\_\_\_). The denial of probation or suspended sentence applies to the following violations: (1) Possession of 14.25 grams or more of a heroin substance under California Health and Safety Code section 11351; (2) sale of 14.25 grams or more of a heroin substance under California Health and Safety Code section 11352; (3) possession or sale of heroin by a person who has one or more prior convictions of California Health and Safety Code sections 11351 and 11352; (4) possession of 14.25 grams or more of any phencyclidine solution or any precursors of phencyclidine under California Health and Safety Code section 11378.5; (5) transportation, sale, or manufacture of phencyclidine or any of its analogs or precursors under California Health and Safety Code section 11379.5; (6) utilization of a minor to manufacture or sell specified controlled substances under California Health and Safety Code sections 11380 and 11380.5; (7) possession of piperidine, pyrrolidine, or morpholine, and cyclohexanone with intent to manufacture phencyclidine under section 11383 of the California Health and Safety Code. *Id.*

2. 1989 Cal. Stat. ch. 1135, sec. 1, at \_\_\_\_ (amending CAL. PENAL CODE § 1203.07(a)(11)). Chapter 1135 does not apply to prior convictions of transportation of a controlled substance under California Health and Safety Code sections 11352, 11379, and 11379.5. *Id.* The existence of any fact which would make a person ineligible for probation shall be alleged in the information or indictment and found to be true. *Id.* sec. 2, at \_\_\_\_ (amending CAL. PENAL CODE § 1203.07(b)). See *People v. Tanner*, 24 Cal. 3d 514, 521, 596 P.2d 328, 332, 156 Cal. Rptr. 450, 453 (1979) (the court, relying on legislative intent, held it could not invoke discretion to strike allegations under California Penal Code section 1385 when proper findings have been made to invoke operation of the statute barring probation for certain enumerated crimes); *People v. Ibarra*, 114 Cal. App. 3d 60, 65-66, 170 Cal. Rptr. 440, 443 (1980); *People v. Pacheco*, 176 Cal. App. 3d 100, 104, 221 Cal. Rptr. 369, 371-372 (1985) (followed *People v. Tanner*). See also *People v. Ruby*, 204 Cal. App. 3d 462, 465, 251 Cal. Rptr. 339, 341 (1988) (the court can use discretion under California Penal Code section 1385 to avoid a statutory prohibition under California Health and Safety Code section 11370 when not precluded by clear legislative intent).

## Criminal Procedure; controlled substances—sentence enhancement for conspiracy

Health and Safety Code §§ 11370.2, 11370.4 (amended).  
AB 2448 (Harris); 1989 STAT. Ch. 1326

Under existing law, anyone convicted of possessing, transporting, or furnishing specified controlled substances<sup>1</sup> must receive an additional prison term depending on the weight of the substance.<sup>2</sup> Chapter 1326 expands existing law by providing sentence enhancements and additional sentences to persons convicted of conspiring<sup>3</sup> to violate the specified controlled substance offenses.<sup>4</sup> Under Chapter 1326, a person who conspires to possess, transport, or furnish the controlled substances will receive an additional prison term depending on the weight of the substance.<sup>5</sup> Additionally, a person with a prior conviction for conspiracy to violate certain controlled substance offenses will receive a sentence enhancement.<sup>6</sup>

*JMM and KRI*

1. See CAL. HEALTH & SAFETY CODE § 11370.4(a) (West Supp. 1989) (the specified controlled substances are: Heroin, cocaine base as defined in California Health and Safety section 11054(1)(f), and cocaine as defined in California Health and Safety sections 11055(6)(b), 11370.4(c)). See also *id.* § 11370.4(b) (substances containing methamphetamine, amphetamine, or phenacyclidine and its analogs are also specified controlled substances).

2. *Id.* § 11370.4 (amended by 1989 Cal. Stat. ch. 1326, sec. 2, at \_\_\_\_). In addition, existing law provides certain sentence enhancements for prior convictions of these controlled substance offenses. *Id.* § 11370.2 (West Supp. 1989).

3. See CAL. PENAL CODE § 182 (West 1988) (definition of conspiracy).

4. 1989 Cal. Stat. ch. 1326, secs. 1.5, (amending CAL. HEALTH & SAFETY CODE § 11370.2); 2.5, at \_\_\_\_ (amending CAL. HEALTH & SAFETY CODE § 11370.4).

5. *Id.* sec. 2.5 at \_\_\_\_ (amending CAL. HEALTH & SAFETY CODE § 11370.4). The offender will receive an additional term of 3 years for conspiracy to violate California Health and Safety Code sections 11351, 11351.5 or 11352 (dealing with possession, sale and transfer of a controlled substance) if the substance exceeds 3 pounds by weight. *Id.* (amending CAL. HEALTH & SAFETY CODE § 11370.4(a)). The person will receive an additional term of 5 years when the substance exceeds 10 pounds, and an additional term of 10 years when the substance exceeds 25 pounds. *Id.* The offender will receive an additional term of 3 years for conspiracy to violate California Health and Safety Code sections 11378, 11378.5, 11379, or 11379.5 (dealing with possession, sale and transfer of a controlled substance) if the substance exceeds 3 pounds or 9 gallons. *Id.* (amending CAL. HEALTH & SAFETY CODE § 11370.4(d)). Also, the person will receive an additional term of 5 years if the substance exceeds 10 pounds or 33 1/3 gallons, and an additional term of 10 years if the substance exceeds 25 pounds or 62 1/2 gallons. *Id.* The court may strike the additional sentence if there are mitigating circumstances stated on the record. *Id.* (amending CAL. HEALTH & SAFETY CODE § 11370.4(e)).

6. *Id.* secs. 1.5, at \_\_\_\_ (amending CAL. HEALTH & SAFETY CODE § 11370.2); 2.5, at \_\_\_\_ (amending CAL. HEALTH & SAFETY CODE § 11370.4)). The person will receive a sentence enhancement of a full, separate, and consecutive three-year for each prior felony conviction of conspiracy to violate specified controlled substance offenses. *Id.* sec. 1.5, at \_\_\_\_ (amending

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CAL. HEALTH & SAFETY CODE § 11370.2(a)-(b)). In order to impose the conspiracy enhancements or the additional sentence, the trier of fact must find that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense. *Id.* secs. 1.5 at \_\_\_\_ (amending CAL. HEALTH & SAFETY CODE § 11370.2(e)); 2.5 at \_\_\_\_ (amending CAL. HEALTH & SAFETY CODE § 11370.4(b)(3)). See generally Shein, *Sentencing Drug Offenders; The Need to Sensitize the Sentencing Judge*, 24 CRIM. LAW BULL. 146 (1988) (article questions whether creating more prisoner's and more prisons will curtail crimes); *The War on Drugs: In Search of a Breakthrough*, 11 NOVA L. REV. 89 (1987) (collection of articles suggesting possible solutions to the national drug crisis).

## Criminal procedure; domestic violence— battery

Government Code § 6254 (amended); Penal Code § 243 (amended).  
AB 238 (Roybal-Allard); 1989 STAT. CH. 191

In enacting Chapter 191, the legislature declares that domestic violence is especially reprehensible, and deserves special consideration when imposing punishment.<sup>1</sup> Chapter 191 increases the penalty<sup>2</sup> when a defendant commits a battery<sup>3</sup> against a person with whom the defendant has or at one time had a relationship.<sup>4</sup> Further, Chapter 191 requires as a condition of probation<sup>5</sup> or a suspended sentence that the defendant participate in a batterer's treatment program.<sup>6</sup> Chapter 191 also prohibits public disclosure of the address of a victim of certain acts of domestic violence.<sup>7</sup>

KMS

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1. 1989 Cal. Stat. ch. 191, sec. 2, at \_\_\_\_ (amending CAL. PENAL CODE § 243(e)). Special consideration in punishment is needed to display society's condemnation. *Id.* See generally Beck, *Protecting Battered Women: A Proposal for Comprehensive Domestic Violence Legislation in New York*, 15 FORDHAM URBAN L. J. 999, 1001 (1987) (failure of the criminal justice system to punish the batterer indicates to the batterer that domestic abuse is acceptable behavior).

2. The penalty is increased to imprisonment for not more than one year. 1989 Cal. Stat. ch. 191, sec. 2, at \_\_\_\_ (amending CAL. PENAL CODE § 243(e)).

3. See CAL. PENAL CODE § 242 (definition of battery).

4. 1989 Cal. Stat. Ch. 191, sec. 2, at \_\_\_\_ (amending CAL. PENAL CODE § 243(e)). A relationship may include a fiancée, a fiancée, a noncohabitating former spouse or a dating relationship. *Id.* A dating relationship means frequent intimate associations, generally including sexual or affectional involvement. *Id.* (amending CAL. PENAL CODE § 243(f)(11)). See generally COMMITTEE ON CIVIL RIGHTS, UNDER RULE OF THUMB—BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE, 44-45 (1982) (judges tend to impose lenient sentences on defendants in domestic violence cases, including parole and suspended sentences instead of imprisonment).

5. See CAL. PENAL CODE § 1203(a) (West Supp. 1989) (definition of probation).

6. 1989 Cal. Stat. ch. 191, sec. 2, at \_\_\_\_ (amending CAL. PENAL CODE § 243(e)). See generally COMMITTEE OF CIVIL RIGHTS, UNDER RULE OF THUMB—BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE, 65 (1982) (analysis of mandatory counseling programs).

7. 1989 Cal. Stat. ch. 191, sec. 1, at \_\_\_\_ (amending CAL. GOV'T CODE § 6254(f)(2)). See CAL. PENAL CODE § 273.5 (West Supp. 1989) (the address of a victim of corporal injury must not be disclosed).

## Criminal Procedure; forfeiture of vehicle— driving under the influence of alcohol

Vehicle Code § 23198 (amended).

SB 310 (Seymour); 1989 STAT. Ch. 635

Support: Peace Officers Association, California Police Chiefs' Association, California State Sheriffs' Association, Judge James P. Gray of Central Orange County Judicial District, Judge Pamela Iles of South Orange County, MADD, Marin County Adult Criminal Justice Commission.

Opposition: None.

Existing law provides that under certain circumstances<sup>1</sup> the court may declare that a motor vehicle is a nuisance and may require forfeiture when the vehicle is involved in an alcohol-related violation.<sup>2</sup> Chapter 635 permits the court to declare a vehicle a nuisance where the owner of the vehicle is charged with: (1) Driving under the influence where the owner has two or more prior convictions<sup>3</sup> within a seven year period; (2) driving under the influence where the owner injures another and where the owner already has one or more prior violations<sup>4</sup> causing bodily injury in a seven year period; or (3) gross vehicular manslaughter.<sup>5</sup>

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1. On motion by the prosecution, a vehicle may be forfeited if the defendant: (1) Drives under the influence of alcohol or a controlled substance and causes bodily injury or is involved in a felony violation of driving while under the influence of drugs or alcohol; (2) owns the vehicle; and (3) has been involved in a previous violation of driving under the influence of drugs or alcohol in the past five years. CAL. VEH. CODE § 23198(a)(2) (West Supp. 1989) (amended by 1989 Cal. Stat. ch. 635, sec. 1, at \_\_\_\_).

2. *Id.* Forfeiture may be required for a violation of California Vehicle Code sections 23152 and 23153. *Id.* See Cal. Stat. ch. 479, sec. 3, at \_\_\_\_ (amending CAL. VEH. CODE § 23152) (it is illegal for a person to: (1) Drive while under the influence of under alcohol or drugs; or (2) drive with a 0.08% or more blood alcohol content); *id.*, sec. 4, at \_\_\_\_ (amending CAL. VEH. CODE § 23153) (it is unlawful, while driving a vehicle to have 0.08% or more blood alcohol content or to drive while under the influence of alcohol, and do any unlawful act which causes injury to another person).

3. A conviction of any combination of the following: (1) California Penal Code section 191.5 or 192(c)(3); or (2) California Vehicle Code section 23152 or 23153. 1989 Cal. Stat. ch. 635, sec. 1, at \_\_\_\_ (amending CAL. VEH. CODE § 23198). See CAL. PENAL CODE § 191.5 (West 1988) (gross vehicular manslaughter is the killing of another which proximately results from driving a vehicle with 0.10% blood alcohol content or while under the influence of alcohol and while driving with gross negligence). See *id.* § 192 (c)(3) (West 1988) (vehicular manslaughter is the killing of another while driving with 0.10% blood alcohol content or while under the influence of alcohol and without malice or gross negligence).

4. Conviction may be for any of the following: (1) California Penal Code section 191.5 or 192(c)(3); or (2) California Vehicle Code section 23152 or 23153. *Id.*

5. 1989 Cal. Stat. ch. 635, sec. 1, at \_\_\_\_ (amending CAL. VEH. CODE § 23198). Gross vehicular manslaughter is the accidental killing of another while driving under the influence. CAL. PENAL CODE § 192(c) (West 1988).



Under Chapter 635 a vehicle declared a nuisance must be sold<sup>6</sup> and the proceeds distributed to: (1) Pay for costs of the sale; (2) satisfy any outstanding charges on the vehicle; (3) satisfy any liens<sup>7</sup> on the vehicle; and (4) a general fund.<sup>8</sup>

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6. CAL. VEH. CODE § 23198(b) (amended by 1989 Cal. Stat. ch. 635, sec. 1, at \_\_\_\_). The owner may sell the vehicle if the owner is in the business of selling cars, otherwise the vehicle will be sold at a public auction. *Id.* § 23198(c) (amended by 1989 Cal. Stat. ch. 635, sec. 1 at \_\_\_\_).

7. A lien includes any community property interest in the vehicle. *Id.* § 23198(e)(4) (amended by 1989 Cal. Stat. ch. 635, sec. 1 at \_\_\_\_).

8. *Id.* § 23198(e) (amended by 1989 Cal. Stat. ch. 635, sec. 1, at \_\_\_\_). The proceeds are donated to the general fund of the city or county in which the violation occurred only where the violation involves serious bodily injury. *Id.* § 23198(e)(5) (amended by 1989 Cal. Stat. ch. 635, sec. 1, at \_\_\_\_).

## **Criminal Procedure; own recognizance release**

Penal Code § 1270 (amended).

AB 599 (Roybal-Allard); 1989 STAT. Ch. 514

(Effective September 20, 1989)

Under existing law, persons arrested for and charged with a non-capital offense may be released on their own recognizance.<sup>1</sup> Chapter 514 provides that if the charge is for a misdemeanor committed while in possession of a firearm, or other specified violent crimes,<sup>2</sup> the nature of the offense shall be a factor considered by the court in authorizing release on one's own recognizance.<sup>3</sup>

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1. CAL. PENAL CODE § 1270(a) (West 1982) (amended by 1989 Cal. Stat. ch. 514, sec. 1, at \_\_\_\_). If the charge is a misdemeanor, the defendant shall have the right to an own recognizance release, unless the court determines that it would not secure the defendant's appearance at the appropriate time. *Id.*

2. The enumerated crimes are Penal Code sections: 186.22 (street gang terrorism); 262 (spousal rape); 273.5, 273.6 (infliction of injury on spouse or violation of court order to restrain domestic violence); 273a, 273d, 647.6 (cruelty toward, corporal punishment, or molestation of a child); 368 (inflicting pain on elder or dependent adult); 417 (discharge of firearms); 422 (threatening to commit a crime resulting in serious bodily injury or death); 653k (use of switch-blade knives); 653m (harassing telephone calls); 1275 (feloniously obtaining bail bonds). 1989 Cal. Stat. ch. 514, sec. 1, at \_\_\_\_ (amending CAL. PENAL CODE § 1270(a)).

3. *Id.*

## Criminal procedure; pawnbroker—compensation

Business and Professions Code § 21636.5 (new); §§ 21626, 21628, 21636, 21638, 21647 (amended).

SB 1519 (Presley); 1989 STAT. Ch. 884

Under existing law, a peace officer may place a pawnbroker's<sup>1</sup> item on hold<sup>2</sup> if the officer has probable cause to believe the item is stolen.<sup>3</sup> When the property is no longer needed for a criminal investigation, the person who reported the property stolen must be notified of its location, and advised that payment to the pawnbroker in return for the item is neither required nor prohibited.<sup>4</sup> Under Chapter 884, if the owner does not press criminal charges against the alleged thief, to the extent that the owner has been reimbursed for the loss of the property, the owner must pay the pawnbroker, second hand dealer or coindealer, any "out of pocket" expenses incurred in acquiring the allegedly stolen property.<sup>5</sup>

KMS & PLJ

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1. This is applicable to secondhand dealers as well. CAL. BUS. & PROF. CODE § 21647 (West Supp. 1989) (amended by 1989 Cal. Stat. ch. 884, sec. 6, at \_\_\_\_).

2. When an article is placed on hold, the broker may not release the property to anyone unless a court order is obtained, or the pawnbroker receives written authorization from a member of the police force that placed the item on hold. *Id.* § 21647(a).

3. *Id.*

4. *Id.* § 21647(c). The hold elapses 60 days after notice is given to the person who reported the property stolen. *Id.*

5. 1989 Cal. Stat. ch. 884, sec. 6, at \_\_\_\_ (amending CAL. BUS. & PROF. CODE § 21647(c)). See generally *id.* sec. 1, at \_\_\_\_ (amending CAL. BUS. & PROF. CODE § 21626(b) (definition of coin dealer); *id.* sec. 2, at \_\_\_\_ (amending CAL. BUS. & PROF. CODE § 21628) (reporting requirements); *id.* sec. 3, at \_\_\_\_ (amending CAL. BUS. & PROF. CODE § 21636) (holding period and production requirements); *id.* sec. 4, at \_\_\_\_ (enacting CAL. BUS. & PROF. CODE § 21636.5 (forbidding a second hand dealer or coin dealer to promise that the seller may repurchase the property sold)).

## **Criminal Procedure; probation**

Penal Code § 1203 (amended).

AB 688 (Waters); 1989 STAT. Ch. 936

Support: Attorney General; Sheriff of Los Angeles County; California Association of Sheriffs and Police Chiefs; California Peace Officers Association; California Police Chiefs' Association; Chief Probation Officers of California; NRA of America; California Rifle and Pistol Association

Opposition: California Attorneys for Criminal Justice

Under existing law, probation cannot be granted to criminals convicted of certain offenses, except in unusual cases where it is in the best interest of justice.<sup>1</sup> Chapter 936 similarly restricts the granting of probation to persons who unlawfully possess a short-barreled rifle, short-barreled shotgun,<sup>2</sup> machine gun,<sup>3</sup> or silencer.<sup>4</sup>

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1. CAL. PENAL CODE § 1203(e) (West Supp. 1989) (amended by 1989 Cal. Stat. ch. 936, at \_\_\_\_). The following crimes have limited probation: (1) Using a deadly weapon in perpetration of arson, robbery, rape, burglary, murder, attempted murder, train wrecking, kidnapping, or escape from state prison; (2) using a deadly weapon upon another in perpetration of a crime; (3) willfully inflicting great bodily injury in perpetration of a crime; (4) being previously convicted twice of a felony; (5) any public official convicted of bribery, extortion, or embezzlement; (6) knowingly giving away phencyclidine; (7) intentionally committing arson that causes great bodily harm; and (8) causing injury or death by firing a gun from an automobile. *Id.*

2. See CAL. PENAL CODE § 12020 (definition of unlawful possession of a short-barreled rifle and a shotgun).

3. See *id.* § 12220 (definition of unlawful possession of a machine gun).

4. 1989 Cal. Stat. ch. 936, sec. 1, at \_\_\_\_ (amending CAL. PENAL CODE § 1203). See CAL. PENAL CODE § 12520 (definition of unlawful possession of a silencer).

**Criminal Procedure; probation and conditional sentence—  
rearrest**

Penal Code § 1203.2 (amended).

AB 1585 (Hughes); 1989 STAT. Ch. 1319

Under existing law, a probation or peace officer may rearrest a parolee without a warrant or other process.<sup>1</sup> Chapter 1319 expands the law by permitting a probation or peace officer to rearrest a person released on unsupervised conditional probation or one released on a conditional sentence.<sup>2</sup> However, Chapter 1319 limits existing law by requiring that the officer must know that the person violated a term or condition of the probation or conditional sentence.<sup>3</sup>

*KRI*

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1. CAL. PENAL CODE § 1203.2(a) (Deering Supp. 1989) (amended by 1989 Cal. Stat. ch. 1117, sec. 1, at \_\_\_\_).

2. 1989 Cal. Stat. ch. 1117, sec. 1, at \_\_\_\_ (amending CAL. PENAL CODE § 1203.2 (a)).

3. *Id.*

## **Criminal Procedure; statute of limitations**

Penal Code § 803 (amended).

AB 782 (N. Waters); 1989 STAT. Ch. 1312

Sponsor: Collateral Loan and Secondhand Dealers' Association

Under existing law, the running of the statute of limitations commences with the commission of a sexual assault on a minor.<sup>1</sup> Under Chapter 1312, the statute of limitations for filing a complaint is one year and commences when a child under the age of seventeen reports to a responsible adult or agency<sup>2</sup> that the child has been the victim of a sexual assault.<sup>3</sup>

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1. CAL. PENAL CODE §§ 800-802 (West Supp. 1989) (statutes of limitations for corresponding offenses are based on the duration and type of applicable punishment). *See id.* § 288 (West Supp. 1989) (establishing duration and type of punishment for lewd or lascivious acts on a child under the age of 14).

2. 1989 Cal. Stat. ch. 1312, sec. 1, at \_\_\_\_ (amending CAL. PENAL CODE § 803(f)) (defining responsible adult or agency as a person required to report the molestation of a minor pursuant to section 11166 of the California Penal Code). This limitation is only applicable if the defendant has previously committed a specified violation against the same victim within the limitation period specified in section 800 or 801 of the California Penal Code, and that period has expired. *Id.*

3. *Id.* The crimes against children affected by this legislation are violations of Penal Code Sections: 261 (rape); 286 (sodomy); 288 (committing a lewd act on a child under the age of 14); 288a (oral copulation); and 289 (the penetration of any foreign object into a genital or anal opening of a child, with the intent to sexually arouse, satisfy, or abuse). *Id.* Although the statute of limitations may bar the prosecution of a criminal suit for sexual misconduct with a child, the misconduct may be introduced at the penalty phase of a trial for another crime as evidence of the defendant's background and history. *People v. Jennings* 46 Cal. 3d 963, 980-981, 760 P.2d 475, 485-486, 251 Cal. Rptr. 278, 289 (1988).

## **Criminal Procedure; vehicles—removal**

Vehicle Code § 22651 (amended).

AB 998 (Pringle); 1989 STAT. Ch. 331

Existing law authorizes peace officers<sup>1</sup> and city and county traffic-enforcement employees to remove a vehicle under certain circum-

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1. *See* CAL. PENAL CODE §§ 830-830.6 (West 1985) (definition of peace officer).

stances.<sup>2</sup> Chapter 331 authorizes the impoundment of a vehicle which is illegally parked and blocking the movement of a legally parked vehicle.<sup>3</sup>

Under existing law, an officer who arrests a person driving or in control of a vehicle must take the arrested person before a magistrate<sup>4</sup> prior to impounding the vehicle.<sup>5</sup> Chapter 331 allows an officer to impound an arrested person's vehicle even though that person has not been before a magistrate.<sup>6</sup>

Existing law requires either the presentation of a valid driver's license or a current vehicle registration in order for an impounded vehicle to be released to the owner or the owner's agent.<sup>7</sup> Chapter 331 requires the presentation of both a driver's license and a vehicle registration to gain the release of an impounded vehicle.<sup>8</sup>

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2. CAL. VEH. CODE § 22651(a)-(q) (West Supp. 1989) (amended by 1989 Cal. Stat. ch. 331, sec. 1, at \_\_\_\_). Peace officers and city and county traffic-enforcement employees may remove a vehicle when the vehicle is: (1) Left unattended upon a bridge, viaduct, or causeway and obstructs traffic; (2) illegally parked so as to block the entrance to a private driveway, and it is impractical to move the vehicle; (3) illegally parked so as to prevent access by firefighting equipment to a fire hydrant, and it is impractical to move the vehicle; or (4) found on a highway or public land, and a report has been made that the vehicle is stolen or a complaint has been filed charging that the vehicle is embezzled. *Id.*

3. 1989 Cal. Stat. ch. 331, sec. 1, at \_\_\_\_ (amending CAL. VEH. CODE § 22651(r)). Impoundment must be in good faith for a recognized and proper purpose and not as a device to circumvent fourth amendment rights. *People v. Andrews*, 6 Cal. App. 3d 428, 437, 85 Cal. Rptr. 908, 914 (1970).

4. See CAL. PENAL CODE § 807 (definition of a magistrate).

5. CAL. VEH. CODE § 22651(h) (amended by 1989 Cal. Stat. ch. 331, sec. 1, at \_\_\_\_).

6. 1989 Cal. Stat. ch. 331, sec. 1, at \_\_\_\_ (amending CAL. VEH. CODE § 22651(h)).

7. CAL. VEH. CODE § 22651(p) (amended by Cal. Stat. ch. 331, sec. 1, at \_\_\_\_).

8. 1989 Cal. Stat. ch. 331, sec. 1, at \_\_\_\_ (amending CAL. VEH. CODE § 22651(o)-(p)).

## **Criminal Procedure; work furlough—job training**

Penal Code § 1208 (amended); Welfare and Institutions Code § 927 (amended).

SB 266 (Deddeh); 1989 STAT. CH. 48

Under existing law, certain county prisoners<sup>1</sup> and juvenile offenders<sup>2</sup>

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1. The work furlough administrator must determine that the prisoner is fit to continue with or seek employment, or to pursue an educational program. CAL. PENAL CODE § 1208(b) (West Supp. 1989) (amended by 1989 Cal. Stat. ch. 48, sec. 1, at \_\_\_\_).

2. The juvenile administrator determines whether the minor is suited for participating

may participate in work furlough programs<sup>3</sup> so that they may continue with employment, seek new employment,<sup>4</sup> or pursue their education.<sup>5</sup> Chapter 48 enables those who are eligible for work furlough to participate in job training programs.<sup>6</sup> Chapter 48 further provides that juveniles may apply for and receive assistance in locating a job training program.<sup>7</sup>

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in the work furlough program. CAL. WELF. & INST. CODE § 927 (amended by 1989 Cal. Stat. ch. 48, sec. 2, at \_\_\_\_).

3. Participants must be confined to the work furlough facility when they are not engaged in employment or education. CAL. PENAL CODE § 1208(d) (amended by 1989 Cal. Stat. ch. 48, sec. 1, at \_\_\_\_). The administrator deducts from the employment income the cost of the prisoner's board and expenses, administration costs, support of dependents, and preexisting debts. *Id.* § 1208(e) (amended by 1989 Cal. Stat. ch. 48, sec. 1, at \_\_\_\_). When the prisoner is discharged, any remaining funds will be paid to the prisoner. *Id.* Work furlough programs provide a desirable alternative to incarceration due to overcrowding of prisons and the programs help ease an inmate back into society. CAL. PENAL CODE § 6260 (West 1982). *See In re Head*, 42 Cal. 3d 223, 229-230, 721 P.2d 65, 68-69, 228 Cal. Rptr. 184, 187-88, (1986) (discusses the constitutional rights of prisoners). Additional rights may be granted by statute or regulation, such as the work furlough program established by California Penal Code sections 6260 to 6266, and inmates have a due process right to enforcement of such laws. *Id.* at 231, 721 P.2d at 70, 288 Cal. Rptr. at 189.

4. *See* CAL. PENAL CODE § 1208(i)(3) (West Supp. 1989) (amended by 1989 Cal. Stat. ch. 48, sec. 1, at \_\_\_\_) (definition of employment).

5. *Id.* § 1208(c) (amended by 1989 Cal. Stat. ch. 48, sec. 1, at \_\_\_\_). *See id.* § 1208(i)(1) (amended by 1989 Cal. Stat. ch. 48, sec. 1, at \_\_\_\_) (definition of education). The county board of supervisors must by ordinance determine that the employment or education is feasible as a part of the work furlough program. *Id.* § 1208(a).

6. 1989 Cal. Stat. ch. 48, sec. 1, at \_\_\_\_ (amending CAL. PENAL CODE § 1208(c)). The work furlough administrator must determine the prisoner is fit for participation in the program. *Id.*

7. *Id.* sec. 2, at \_\_\_\_ (amending CAL. WELF. & INST. CODE § 927(b)). The program may include assistance as provided in the Job Training Partnership Act. *Id.* *See* 29 U.S.C.A. §§ 1501-1781 (1985) (Job Training Partnership Act)). *See also* D. TOMPKINS & W. BUSH, FURLOUGH FROM PRISON (1973) (a comprehensive list of sources pertaining to prison furlough programs and work release).

## **Criminal Procedure; writs**

Penal Code § 1511 (new).

AB 1052 (Lempert); 1989 STAT. CH. 560

Under existing law, the prosecution in a criminal proceeding may only seek extraordinary writ review of an error when: (1) A statutory right to appeal exists; (2) the need for review outweighs the danger

of harassing the defendant; or (3) the court has exceeded its jurisdiction.<sup>1</sup> Chapter 560 expands the prosecution's right to seek extraordinary writ review by providing that the prosecution may, by writ of mandamus,<sup>2</sup> review, or prohibition,<sup>3</sup> seek review of an order granting discovery or a motion for severance.<sup>4</sup>

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1. CAL. PENAL CODE § 1238 (West Supp. 1989). *See* *People v. Superior Court of Lassen County*, 24 Cal. 3d 622, 626, 596 P.2d 691, 693, 156 Cal. Rptr. 626, 627 (1979) (absent express legislation to the contrary, courts have chosen not to expand a prosecutor's right to appeal). Prior versions of Chapter 1052 indicated that the legislature's intent was to abrogate the effect of *People v. Superior Court*, 69 Cal. 2d 491, 446 P.2d 138, 72 Cal. Rptr. 330 (1968). 1989 Cal. Stat. ch. 1052, sec. 1, at \_\_\_\_\_. The legislature deleted this language in the May 17, 1989, amendment. 1989 Cal. Stat. ch. 1052, sec. 1, at \_\_\_\_\_ (enacting CAL. PENAL CODE § 1511).

2. *See* CAL. CIV. PROC. CODE § 1085 (West Supp. 1989) (when a writ of mandate may be granted). A writ of mandamus may be denominated a writ of review. *Id.* § 1067 (West 1980). *See also* *American Mutual Liberty Insurance Co. v. Superior Court*, 38 Cal. App. 3d 579, 588, 113 Cal. Rptr. 561, 569 (1974) (writ of mandamus is used to order a lower court to perform an act that the law requires).

3. *See* CAL. PENAL CODE § 1102 (West Supp. 1989) (definition of writ of prohibition). *See also* *American Mutual Liberty Ins. Co. v. Superior Court*, 38 Cal. App. 3d 579, 588, 113 Cal. Rptr. 561, 569 (1974) (writ of prohibition prevents a lower court from proceeding when it has exceeded its jurisdiction).

4. 1989 Cal. Stat. ch. 1052, sec. 1, at \_\_\_\_\_ (enacting CAL. PENAL CODE § 1151).



