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Criminal Procedure

University of the Pacific; McGeorge School of Law

Criminal Procedure

Criminal Procedure; evidence of a rape victim's prior sexual conduct

Evidence Code §§782, 1127d (new); §1103 (amended); Government Code §13961.5 (new).
SB 1678 (Robbins); STATS 1974, Ch 569
AB 3657 (Sieroty); STATS 1974, Ch 1091
AB 3660 (Sieroty); STATS 1974, Ch 1093
Support: California District Attorneys' and Police Officers' Associations; National Organization for Women
Opposition: A.C.L.U.; California Public Defenders' Association

Limits the circumstances under which evidence of an alleged rape victim's prior sexual conduct may be introduced on the issues of consent and credibility; provides for free medical examinations of victims of rape; prohibits specified instructions from being given to juries in rape trials.

Credibility of Victim

Section 782 has been added to the Evidence Code to provide that in any prosecution for rape [CAL. PEN. CODE §261] or for aiding and abetting another in committing rape [CAL. PEN. CODE §264.1], or for assault with intent to commit, attempt to commit, or conspiracy to commit such crimes, a defendant wishing to introduce evidence of the complaining witness' prior sexual conduct for the purpose of attacking her *credibility* must make a written motion and affidavit to the court and prosecutor. The motion must state that the defendant has an offer of proof regarding evidence of sexual conduct of the victim which is relevant to the issue of the complaining witness' credibility; the affidavit must state the offer of proof. If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of any jury and at such hearing shall allow questioning of the complaining witness regarding the offer of proof made by the defendant. If the court finds that the evidence elicited at the hearing and proposed to be offered by the defendant is relevant pursuant to section 780 (general rules as to credibility), and is not inadmissible pursuant to Evidence Code Section 352 (authority of judge to exclude unduly

time consuming, prejudicial, or confusing evidence), the court may make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted. Hence, unless the defendant first proves to the court that the evidence proposed to be introduced is relevant to the alleged victim's credibility, and thereafter adheres to the limitations imposed by the court on the questions which may be asked and the type of evidence which may be introduced, the defendant will be unable to introduce any evidence of the witness' prior sexual conduct in nearly all cases.

Consent

Section 1103 of the Evidence Code relates to the admissibility of evidence concerning a character trait of the victim of a crime. Chapter 569 has amended section 1103 to provide that in any prosecution for the above-mentioned crimes, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' prior sexual conduct are not admissible by the defendant to prove that the complaining witness consented to engage in sexual intercourse with the defendant. Such evidence is, however, admissible by the defendant to prove consent when (1) the evidence is of the complaining witness' prior sexual conduct with the defendant, or (2) the prosecutor introduces any evidence relating to the complaining witness' prior sexual conduct, in which case the defendant may cross-examine the witness who gives such testimony and offer relevant evidence limited to the purpose of rebutting the evidence introduced by the prosecution. Evidence admissible pursuant to section 780, relating to the credibility of the victim, is not made inadmissible by section 1103.

Chapter 1093 has added section 1127d to the Evidence Code to prohibit judges from instructing juries that they may infer that a female who has previously consented to acts of sexual intercourse with persons other than the defendant would therefore be more likely to consent to sexual intercourse again. Section 1127d prohibits such instructions in any trial for rape, unlawful sexual intercourse, or for attempt to commit, or assault with intent to commit such crimes. Judges are also prohibited from instructing juries that evidence of previous acts of sexual conduct by the victim may be considered by itself in judging the credibility of the witness.

Medical Examinations

Chapter 1091 has added section 13961.5 to the Government Code to prohibit any hospital or other emergency facility, either public or

private, from charging for the examination of a victim of a sexual assault when the examination is for the purpose of gathering evidence for possible prosecution. Such costs, in the case of a county, city, or district hospital, must be paid by the county, and in the case of a private hospital must be paid by the local governmental agency in the jurisdiction where the alleged offense occurred.

COMMENT

The effect of chapter 569 will be to overturn existing California case law. California courts have consistently held that evidence of a woman's previous sexual conduct is germane to the issue of whether or not the victim consented to sexual intercourse with the defendant, and that questions relating to such conduct are permissible. [*See, e.g.*, People v. Walker, 150 Cal. App. 2d 594, 310 P.2d 110 (1957)]. Moreover, California courts have demonstrated a willingness to go far in ruling evidence relevant in sex offense cases when the issue of consent is contested [*See In re* Ferguson, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971) (failure of prosecuting attorney to disclose to rape defendant that husband of mentally disturbed prosecutrix had been hospitalized as a sex degenerate is reversible error)]. Although the decisions characterizing such evidence as relevant are now superseded, the issue remains whether such questions may be asked by the defendant as a matter of constitutional right. Evidence Code Section 210 defines "relevant evidence" as evidence, including evidence relevant to the credibility of a witness, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the action. Section 351 stipulates that except as otherwise provided by statute, all relevant evidence is admissible. The issue which may be raised, therefore, is whether the limitations now imposed by section 1103 are the result of a proper exercise of the legislature's power to define what evidence is relevant, or whether section 1103 is a constitutionally impermissible limitation on a rape defendant's sixth amendment right to confront adverse witnesses.

In *Pointer v. Texas* [380 U.S. 400 (1965)] the United States Supreme Court ruled that a criminal defendant's sixth amendment right to confront witnesses includes the right to cross-examine them, that such right is a fundamental right of criminal defendants, and that defendants in state prosecutions enjoy this right via the due process clause of the fourteenth amendment. In *Davis v. Alaska* [94 S. Ct. 1105 (1974)] the Court held that a statute which prohibits a criminal de-

fendant from cross-examining a juvenile witness about the juvenile's criminal record violates due process. In *Davis* a critical link in the prosecutor's case against a burglary defendant was the testimony of a minor who previously had been convicted of a burglary. Under Alaska law, evidence of the prior conviction of a juvenile could not be introduced in adult proceedings except in presentencing hearings. Hence, when the defense attorney attempted to cross-examine the witness about his juvenile conviction for the purpose of showing that the witness, as a person who had himself been convicted of burglary and placed on probation, "might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation," [94 S. Ct. at 1108] the trial court sustained the prosecutor's objection that such questioning should be prohibited. In reversing the conviction the United States Supreme Court stated that the state's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as cross-examination designed to probe for bias on the part of an adverse witness. The Court concluded that the juvenile's potential bias warranted cross-examination into his penal history, and that the minor's right to have his past remain a secret "is outweighed by petitioner's right to probe into the influence of possible bias on the testimony of a crucial identification witness." [94 S. Ct. at 1112].

Davis implies that evidence of a witness' prior *criminal* conduct is constitutionally relevant to the issue of credibility, which is central to the purpose of cross-examination. Questions which are designed to disprove an element of the crime (*e.g.*, consent) with which the defendant is charged are also central to the purpose of cross-examination. Therefore, the issue is whether evidence of a witness' prior *sexual* conduct is constitutionally relevant to the issue of *consent*. It would appear that there are sound reasons for distinguishing between *Davis*-type cases and rape trials, and that the legislature's determination of what evidence is relevant at rape trials is a constitutionally permissible one. The rationale for this conclusion is that evidence of prior criminal conduct is a more valid reason for rejecting the credibility of a witness than is evidence of prior sexual conduct. In short, one kind of evidence is of much greater relevance to the issue at hand than is the other. *Davis* would thus seem to fall short of providing a constitutional argument against limiting questions on past sexual conduct. Furthermore, if as in *Davis,* the defendant desires to cast doubt on the credibility of the complaining witness, section 752 expressly *permits* the credibility of such witness to be tested under the strict control of the court.

Cross-examination of a rape victim has typically been used to prove the defendant's contentions that the alleged victim consented to engaging in sexual intercourse with the defendant. This consent, according to prior law, could be inferred on the principle that a woman who had once consented to such an act would be more likely to consent again, and that therefore the defendant did not impose himself upon the alleged victim by force. To put the argument in the format of Evidence Code Section 210, evidence of the fact that an alleged rape victim had previously consented to engaging in an act of sexual intercourse "tended in reason" to prove a "disputed fact that is of consequence to the action." Chapter 569, however, is clearly a legislative rejection of the notion that the fact that a woman has previously consented to sexual intercourse leads to the conclusion that it is more likely that she consented to an act of sexual intercourse with the *particular* defendant on a *particular* occasion. Chapter 569 expresses the legislature's sentiment that evidence of a woman's prior sexual conduct is simply not relevant to the issue of her consent on a *given occasion.* It is strongly arguable, therefore, that chapter 569 is a proper exercise of the legislature's power under section 351 to make such evidence inadmissible. Furthermore, to the extent that chapter 569 does limit a defendant's right of cross-examination, such a limitation could be balanced against (1) the victim's right to privacy, a right expressly enjoyed in common with all Californians (CAL. CONST. art. I, §1]; and (2) the state's interest in encouraging victims of serious crimes to testify against the perpetrators of such crimes.

A further objection to chapter 569 is that it might not, in some cases, work to achieve its purpose of limiting the admissibility of evidence relating to a woman's prior sexual conduct. This is because section 782, unlike section 1103, relates not to the issue of whether the alleged victim consented to engaging in sexual intercourse with the defendant but to the credibility of the victim. Since the procedures enacted by section 782 may in some cases permit the trier of fact to hear evidence of the victim's sexual conduct under the procedures delineated above and for the purpose of determining *credibility*, section 782 has the effect of permitting the trier of fact to hear the same evidence which section 1103 (relating to *consent*) will normally serve to exclude. Whether it is realistic to expect the trier of fact to be able to ignore, for purposes of determining consent, the same evidence it hears for purposes of determining the victim's credibility, seems questionable. Perhaps it was in anticipation of this problem that the legislature added section 1127d to the Evidence Code to prohibit judges from instructing juries that

evidence of a woman's prior sexual conduct may be considered in determining the complaining witness' credibility. Previously, rape trial juries were customarily instructed that evidence that the complaining witness was a woman of "unchaste character" could be considered in judging her credibility [CALJIC No. 10.06]. Hence, although section 782 of the Evidence Code expressly permits the credibility of a complaining witness to be attacked by introducing evidence of her prior sexual conduct, section 1127d prohibits the jury from being *instructed* that such evidence may indeed be considered by them in judging the witness' credibility. The net effect of these changes is that the jury may hear and consider such evidence in judging the truthfulness of the alleged victim, but the judge may not *affirmatively direct their attention* in his instructions to that particular evidence. Pursuant to section 1127d therefore, it appears that the trial judge in rape and related offense cases may only give instructions on the issue of the witness' credibility which do not refer to the sexual conduct of the complaining witness [*See, e.g.*, CALJIC Nos. 2.20-2.26].

Criminal Procedure; rape trials

Evidence Code §1127e (new).
AB 3658 (Sieroty); STATS 1974, Ch 1092

Prior to the enactment of chapter 1092, California judges instructed juries in rape trials on the importance of evidence which tended to demonstrate the "unchaste character" of the alleged victim (CALJIC Nos. 10.06, 10.13, 10.67). CALJIC No. 10.06, for example, states: "A woman of unchaste character can be the victim of a forcible rape but it may be inferred that a woman who has previously consented to sexual intercourse would be more likely to consent again." Chapter 1092 has been enacted to add section 1127e to the Evidence Code to provide that the term "unchaste character" may not be used in any instruction given to the jury in rape and unlawful sexual intercourse trials, or at any trial for attempt to commit, or for assault with intent to commit, such crimes.

COMMENT

Section 1127e raises a number of unanswered questions. Because section 1127e only specifically prohibits the use of the term "unchaste character" in jury instructions, it might appear that a different phrase with a similar meaning could be substituted in its place. Any such

attempt at circumventing the purpose of the statute, however, would arguably run afoul of the general rule of statutory construction that statutes are to be construed so as to give effect to the intent of the legislature. It is not clear from the language of chapter 1092 whether the intent of the legislature in enacting section 1127e was to prohibit the use of *any* jury instruction which refers to the victim's prior sexual history.

Criminal Procedure; voir dire examination of jurors

Penal Code §1078 (amended).
AB 279 (Crown); STATS 1974, Ch 960
Support: State Bar of California; District Attorneys of California
Opposition: Attorney General

Chapter 960 has amended section 1078 of the Penal Code to expressly stipulate that *voir dire* examination of prospective jurors in criminal cases shall be conducted orally and directly by counsel. Section 1078 formerly provided that counsel must be given the opportunity to reasonably examine veniremen, but did not expressly provide for direct examination of prospective jurors by counsel. In *People v. Crowe* [8 Cal. 3d 815, 506 P.2d 193, 106 Cal. Rptr. 369 (1973)] the California Supreme Court held that section 1078 did not *require* the trial court to permit direct examination by counsel and concluded that permitting counsel to submit questions to the judge, who then asked prospective jurors the questions which the judge found to be relevant, met the statutory requirement of section 1078. The effect of chapter 960, therefore, is to supersede the decision in *Crowe* and to give counsel the automatic right to examine prospective jurors.

COMMENT

Penal Code Section 1078, in addition to permitting counsel to examine veniremen, makes it the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. This dual aspect of section 1078 (examination of veniremen by counsel *and* examination by the court) has resulted in a series of court cases which have tried to resolve the conflict arising out of the judge's duty to select a fair jury and the attempts by some counsel to use *voir dire* to select a jury favorable to their client. In *Crowe* the court noted that in the past it had

> found it necessary to admonish trial judges that they had been placing too literal an interpretation upon the duty of the trial court,

> and paying too little attention to the right of counsel. The subsequent exploitation of the *voir dire* for partisan advantage has reversed the situation: it is now time to stress that counsel's right is only to a *reasonable* examination of prospective jurors—reasonable in length, in method, in purpose, and in content.

The court found that "direct examination by counsel has perverted the purpose of *voir dire*, and transformed the examination of jurors into a contest between counsel for the selection of a jury partial to his cause and for the attainment of rapport with the jurors so selected, a contest which may overshadow the actual trial on the merits." [8 Cal. 3d 815, 828, 506 P.2d 193, 202, 106 Cal. Rptr. 369, 378 (1973)].

If it is true that direct examination of veniremen by counsel prevents or inhibits the selection of an impartial jury, then section 1078 works at cross-purposes: if direct *voir dire* examination works to select a partial jury, then the trial judge will be unable to select a fair and impartial jury. Hence, an issue exists as to whether a judicial interpretation of this conflict can be made which will save the statute, or whether it will be invalidated *in toto*. However, section 1078 appears to be capable of a harmonious interpretation. Section 1078 expressly makes it the duty of the trial court judge to select a jury which is fair and impartial. It would appear, then, that if the examination of prospective jurors becomes a contest for the selection of a jury favorable to one side, then the trial court judge could properly prohibit such questioning as being unreasonable in purpose. Although chapter 960 does regulate *who* may conduct *voir dire* examination, it does not affect either the manner or the purpose of conducting such examination. Presumably, existing case law which defines the parameters of "reasonable examination" would then continue in effect.

See Generally:
1) Lamp Chimney Co. v. Brass & Copper Co., 91 U.S. 656, 663 (1875) (resolution of conflicts arising from contradictory provisions of same statute).
2) 4 WITKIN, CALIFORNIA PROCEDURE, *Trial* §§111-120 (2d ed. 1971).
3) WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* §§406-407 (1963).
4) Comment, *The Attorney-Conducted Voir Dire of Jurors: A Constitutional Right*, 39 BROOKLYN L. REV. 290 (1972).
5) Goodman, *Should California Adopt Federal Civil Procedure?*, 40 CAL. L. REV. 184 (1952).

Criminal procedure; extradition expenses

Penal Code §1557 (repealed); §1557 (new).
AB 2697 (Dixon); STATS 1974, Ch 998
Support: California District Attorneys' and Peace Officers' Associa-

tion; County Supervisors' Association of California
Opposition: Department of Corrections

This chapter expands the types of extradition expenses for which local governments may be reimbursed by the state. Section 1557 of the Penal Code provides that the state, upon approval of the Governor, will pay those expenses incurred by a *local* government in producing witnesses and evidence in a sister state if, without such witnesses or evidence, the sister state will not surrender the fugitive. Section 1557 also permits the Governor, in unusual cases, to authorize payment of the expenses of producing witnesses to appear in a sister state on behalf of the *fugitive* in *opposition* to his extradition, provided that the appearance of such witnesses has been authorized in advance by the Governor. Under previous law the state would pay only (1) travel expenses of the employee who was to return the fugitive, (2) statutory fees paid to the sister state for the detention and surrender of the fugitive, and (3) money paid to the authorities of the sister state for the fugitive's subsistence while detained. Now the state will pay these expenses as well as the costs of producing witnesses upon the approval of the Governor. Under the previous law there was no requirement for the Governor's approval before the local government could be reimbursed by the state. However, since extradition is only possible when the Governor demands, on behalf of the local jurisdiction, the rendition of the fugitive, to additionally require the approval of the Governor for extradition expenditures appears to create a procedurally unnecessary step.

Also, under previous law the extradition expenses were not chargeable to the state if the fugitive was not arraigned or brought to trial. Instead it remained a charge upon the jurisdiction which sought the fugitive. However, chapter 998 does not include such a provision and the state must now reimburse local governments for extradition expenses whether or not the fugitive is arraigned or brought to trial. Payments to local agencies are to be made in accordance with the rules of the Board of Control.

Criminal Procedure; arraignment

Penal Code §976 (amended).
AB 4421 (Dixon); STATS 1974, Ch 881

Prior to the enactment of chapter 881, a criminal defendant could be arraigned only before the court in which the accusatory pleading was filed. As amended, section 976 of the Penal Code now provides

that in counties having a population exceeding 4,000,000, a criminal defendant who is to be arraigned in a municipal court and is in custody may be arraigned before any municipal court within the county nearest to the place in which he is being held. Prior to being taken to the place of arraignment, the defendant is also allowed to make three telephone calls in addition to any other calls to which he is entitled by law. This new legislation will apply solely to the County of Los Angeles, and in such a populous county the effect is primarily one of convenience in conducting the judicial process.

Criminal Procedure; written not guilty pleas

Vehicle Code §40519 (amended).
SB 2295 (Song); STATS 1974, Ch 1264

Vehicle Code Section 40519 formerly allowed persons who had received notice to appear on an infraction in a court outside the county of their residence to plead not guilty in writing in lieu of appearing in person. Section 40519 has been amended by chapter 1264 to extend this privilege to persons receiving notice to appear for an infraction in *any* court. Chapter 1264 also provides that, effective January 1, 1976, such notice must carry a written message on the back, informing the recipient of the provisions of this section. An infraction is any offense not punishable by imprisonment [CAL. PEN. CODE §19c] and most commonly denotes a violation of the Vehicle Code [*Cf.* CAL. VEHICLE CODE §40000.1].

Criminal Procedure; own recognizance releases

Penal Code §§1318.4, 1318.6 (amended).
AB 2364 (Vasconcellos); STATS 1974, Ch 202
Support: State Bar of California; California Trial Lawyers' Association

Penal Code Section 1318.6 formerly provided that a criminal defendant who had been released on his own recognizance could thereafter be required to post bond or be returned to custody. Chapter 202 has been enacted to provide that a defendant who has been released on his own recognizance may be returned to custody only after an open, in-court determination has been made that conditions have occurred which justify such action. Specifically, section 1318.6 now provides that the court in which the charges against the defendant are pending may re-

quire the defendant to give either bail or other security when that court makes an open determination that the defendant has failed to appear or has violated any condition of the release, or that there has been a change in circumstances increasing the risk that the defendant will fail to appear, or that additional facts have been presented which were not shown at the time of the order releasing the defendant. The court may order that the defendant be committed to actual custody until he gives such bail or security. Prior to amendment there was no requirement of an open, in-court determination that the order releasing the defendant should be revoked or modified, nor was the revoking judge or magistrate limited to the conditions now set forth in section 1318.6 as grounds for revoking the order releasing the defendant on his own recognizance. The section does not require that notice of the in-court determination be given to the defendant.

Section 1318.4 of the Penal Code has been amended to require a defendant seeking to be released on his own recognizance to file with the clerk of the court a signed statement agreeing that the order of release may be revoked, or bail or other security required, by any court of competent jurisdiction upon a finding made in open court that any of the conditions specified in section 1318.6 have occurred.

See Generally:
1) Comment, *Trends in Own Recognizance Release: From Manhattan to California*, 5 PAC. L.J. 675 (1974).

Criminal Procedure; payment of appointed counsel fees

Penal Code §987.8 (amended).
SB 1546 (Biddle); STATS 1974, Ch 1199
(*Effective September 24, 1974*)

Section 987.8 of the Penal Code formerly provided for a hearing to be held at the end of the trial of a criminal defendant to whom appointed counsel had been furnished, in order to determine his ability to pay for a part or all of his defense. If the court determined that the defendant could bear some or all of such costs an order of repayment was issued which had the same force and effect as a civil judgment. Section 987.8 was ruled unconstitutional in *People v. Amor* [35 Cal. App. 3d 344, 110 Cal. Rptr. 701 (1973)] as being violative of due process in that it did not require the trial court to give notice to the defendant that (1) by accepting court appointed counsel he could become liable for the entire cost of his defense, (2) that a hearing to determine his

ability to pay the cost of his defense would be held after trial, and (3) that the repayment order would have the full force and effect of a civil judgment. Chapter 1199 amends section 987.8 to require the trial court, prior to furnishing counsel for a defendant, to notify him of the post-trial hearing, his liability if he is able to repay some or all of the defense costs, and the effect of the repayment order. The court in *Amor* suggested that such notice would satisfy the requirements of due process [35 Cal. App. 3d at 347, 110 Cal. Rptr. at 703]. In addition, chapter 1199 requires that the defendant shall be entitled to have the opportunity to be heard in person, to present witnesses and other documentary evidence, to confront and cross-examine witnesses, to have disclosed to him the evidence of his ability to pay, and to receive a written statement of the findings of the court.

COMMENT

The court in *Amor* hinted that section 987.8 might be constitutionally infirm on grounds other than due process, but did not delineate those grounds. The California Supreme Court in *In re Allen* [71 Cal. 2d 388, 455 P.2d 143, 78 Cal. Rptr. 207 (1969)] held that a trial court judge could not require a defendant to repay the cost of his appointed counsel as a condition of receiving probation. Reasoning that defendants would forego the assistance of counsel rather than face the prospect of paying attorneys' fees, the court concluded that conditioning the granting of probation upon repayment of appointed counsels' fees constituted an unconstitutional impediment to the free exercise of the right to counsel as guaranteed by the sixth amendment. A similar statute enacted in Kansas [KAN. STAT. ANN. §22-4513 (Supp. 1970)] was ruled unconstitutional in *Strange v. James* [323 F. Supp. 1230 (D. Kan. 1974)], the court reasoning that persons fearful of being forced to repay defense costs would waive the right to be represented by appointed counsel. This was held to be an unconstitutional infringement on the right to counsel [323 F. Supp. at 1233]. Furthermore, not all criminal defendants can refuse to be represented by counsel even when such assistance is not desired by the defendant [*See, e.g.*, People v. Rhinehart, 9 Cal. 3d 139, 507 P.2d 642, 107 Cal. Rptr. 34 (1973) (youth incapable of defending himself could not refuse appointed counsel)]. Under chapter 1199, therefore, some defendants not seeking the assistance of counsel will be required to accept and pay for such assistance if able to do so.

Criminal Procedure; mentally disordered persons

Penal Code §4011.6 (amended).
SB 607 (Petris); STATS 1974, Ch 22
Support: Municipal Court, Berkeley-Albany Judicial District

Section 4011.6 of the Penal Code provides that the person in charge of a city or county jail, or any judge in the county in which the jail is located, may remand any person in custody in such jail to a facility for a 72-hour period of treatment and evaluation pursuant to section 5150 of the Welfare and Institutions Code (Lanterman-Petris-Short Act) when it appears to such person in charge, or judge, that the person in custody may be mentally disordered. Once such a person is remanded to, or detained in, such a facility, specified provisions of the Lanterman-Petris-Short Act shall apply to the prisoner. The Lanterman-Petris-Short Act provisons relate to (1) the detention of mentally disordered persons for evaluation and treatment, (2) certification for intensive treatment, (3) additional intensive treatment for suicidal persons, (4) post-certification procedures for imminently dangerous persons, and (5) the legal and civil rights of persons involuntarily confined [CAL. WELF. & INST. CODE §5150 *et seq.*]. Section 4011.6 has been amended to require the remanding authority to supply to the facility information setting forth the reasons such person is being taken to the facility. It further requires the treating facility to transmit a confidential report to the remanding authority concerning the condition of the prisoner. A new report shall be transmitted at the end of each period of confinement authorized by the Lanterman-Petris-Short Act.

See Generally:
1) Comment, *Civil Commitment of the Mentally Ill in California: The Lanterman-Petris-Short Act*, 7 LOY. L.A.L. REV. 93 (1974).
2) 3 PAC. L.J., REVIEW OF SELECTED 1971 CALIFORNIA LEGISLATION 330 (1972).

Criminal Procedure; commitment of mentally incompetent criminal defendants

Penal Code §§977.1, 1368.1, 1370.2, 1375.5 (new); §§1026, 1026a, 1367, 1368, 1369, 1370, 1372, 1373, 1374 (amended); Welfare and Institutions Code §§5369, 5370 (new); §§5008, 7250 (amended).
AB 1529 (Murphy); STATS 1974, Ch 1511
SB 2249 (Grunsky); STATS 1974, Ch 1423
(*Effective September 28, 1974*)
Support: Attorney General; California Public Defenders' Association

Redefines those unable to stand trial as mentally incompetent rather than insane; requires a trial on the issue of the mental competence of certain defendants; delineates the procedures to be followed when a defendant is adjudged mentally incompetent; requires periodic reports from the superintendent of the facility to which the defendant is committed; provides for the return to court of committed defendants and their release from custody under certain circumstances; provides that committed defendants may be treated on an out-patient basis; permits defendants defined as "gravely disabled" to be civilly committed to mental health treatment facilities.

The Penal Code formerly permitted criminal defendants who had been found to be "presently insane" (*i.e.*, insane at the time they appeared before a court) to be committed indefinitely to state mental hospitals (former Penal Code §1367 *et seq.*). In *Jackson v. Indiana* [406 U.S. 715 (1972)] the United States Supreme Court held that a similar commitment scheme denied such defendants equal protection of the laws and violated due process. The Court held that the Indiana statute was violative of equal protection because it subjected criminal defendants to *commitment* standards more lenient, and *release* standards more stringent, than the standards generally applicable to persons committed under Indiana's civil commitment scheme. The result of such a scheme, said the Court, was to condemn persons against whom charges were made, but not yet proved, to permanent institutionalization without the showing required for commitment or the opportunity for release afforded by ordinary *civil* commitment procedures. The Court also held that the Indiana scheme violated due process and ruled that a defendant committed under it may not be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competency in the near future. If his return to competency in the near future is not foreseeable, the Court stated, then the defendant must either be released or committed pursuant to civil proceedings applicable to those not charged with crimes.

In *In re Davis* [8 Cal. 3d 798, 505 P.2d 1018, 106 Cal. Rptr. 178 (1973)] the California Supreme Court adopted the rule of *Jackson* and held that when there is no reasonable likelihood that a defendant will return to competency to stand trial in the foreseeable future, he must either be released or commitment proceedings should be initiated against him pursuant to the California civil commitment scheme [CAL. WELF. & INST. CODE pt. 1 (commencing with §5000)]. Chapter 1511

is expressly stated as being the legislative response to the *Davis* holding and is designed to bring California's criminal commitment procedure into conformity with the guidelines laid out in *Jackson* and *Davis.*

Precommitment Procedures

Chapter 1511 initially delineates the procedures to be followed in committing mentally incompetent defendants to mental health treatment facilities. Specifically, amended section 1367 provides that a person may not be *tried* or *sentenced* while he is *mentally incompetent.* Section 1367 formerly used the term "insane" in place of the new phrase "mentally incompetent." But the definition of both terms is the same. A person is "insane" or "mentally incompetent" when, as a result of a mental disorder, he is unable to understand the nature of the proceedings against him, and to rationally assist counsel in the conduct of a defense [CAL. PEN. CODE §1367]. Section 1368 has been amended by chapter 1511 to delineate the procedures by which a trial on the issue of the defendant's competency may be conducted. Specifically, section 1368 provides that when a doubt arises as to the mental competence of the defendent, the court shall state that doubt on the record and, upon its own or defense counsel's motion, shall recess the proceedings for a reasonable time to permit the defendant's counsel to form an opinion as to his client's competency to stand trial. If counsel believes that the defendant is or may be mentally incompetent, then the question of the defendant's competence shall be determined at a special hearing. Even if counsel believes that the defendant is competent, the court may nevertheless order such a hearing on its own motion. All such hearings shall be in the superior court, and except as provided in section 1368.1 (discussed *infra*), all criminal proceedings shall cease until the conclusion of such hearings. Section 1368 formerly required a court which doubted the present sanity of a criminal defendant to hold a *trial* on the issue of sanity before any further criminal proceedings could be conducted.

Section 1368.1 has been added to the Penal Code to provide additional assurance that criminal defendants will not be committed to state mental health facilities needlessly. Specifically, section 1368.1 has been added to the Penal Code to provide that when the charge against the defendant is a felony, the competency hearing may not be held until after filing of the indictment or information. This provision will eliminate the occasional case where a defendant, not yet indicted, could be placed in a mental institution [Comment, *Incompetency to Stand*

Trial, 81 HARV. L. REV. 454, 468 (1967)]. A demurrer or a motion to dismiss pursuant to sections 995 (insufficiency of indictment or information) or 1538.5 (motion to return property or suppress evidence) may be made at any time. If the charge is a misdemeanor, the defense may demur or move to dismiss on the ground that there is not probable cause to believe that a public offense has been committed and that the defendant is guilty thereof, or make a motion under section 1538.5. In ruling upon such a motion or demurrer the court may, if necessary, hear any matter of law or fact which is capable of fair determination in the absence of the defendant (§977.1). This will permit defendants who are unable to render assistance to their counsel in preparation of their defense to be released when the charges leveled against them are not brought in conformity with proper procedure. Such motions or demurrers, if originated in the municipal or justice court, must be made in the court having jurisdiction over the misdemeanor complaint before a competency hearing is held in the superior court. If the information or indictment has been filed, then the competency hearing will proceed pursuant to section 1369.

Section 1369 formerly delineated the procedures pursuant to which a trial on the issue of the defendant's sanity was conducted. This section has been amended to outline the procedures to be followed at the competency hearing. The defendant shall be entitled to have the issue of his competency tried by the court or a jury. The court shall first appoint a psychiatrist or licensed psychologist and other appropriate experts to examine the defendant. If the defendant is not seeking a finding of incompetence, two psychiatrists, licensed psychologists or a combination thereof shall be appointed, one named by the defendant and one by the prosecution. The party contending that the defendant is mentally incompetent shall first introduce evidence. Each party then may introduce rebuttal evidence and deliver final arguments. The defendant shall be presumed to be competent unless proven otherwise by a preponderance of the evidence. A jury verdict finding the defendant to be mentally incompetent must be unanimous. Although section 1369 formerly provided for a jury trial on the issue of the defendant's sanity, it did not provide for the appointment of psychiatrists to examine the defendant.

Commitment of Criminal Defendants

Section 1370 formerly described the procedures to be followed after the sanity trial had been conducted. If the defendant was found sane,

the trial proceeded or judgment was imposed. If, however, the defendant was found to be insane, the trial or imposition of sentence was suspended until the defendant regained his sanity. Until such time, the defendant was placed in a state mental hospital. It was this provision for indefinite commitment of a criminal defendant which was the basis of the holdings in *Jackson* and *Davis*. As amended, section 1370 insures that defendants found to be mentally incompetent to be tried or sentenced and thereafter placed in mental hospitals will not remain so confined indefinitely. When a defendant is adjudged as incompetent, he shall be placed in any available public or private facility which will promote his restoration to sanity until such time as his competency is restored. Within 90 days of a commitment made pursuant to this section, the superintendent of the facility to which the defendant has been committed shall prepare a written report concerning the defendant's progress toward restoration of his mental competence and deliver such report to the court. If the report indicates a substantial likelihood that the defendant will regain his mental competence in the foreseeable future, he will remain in the treatment facility.

Section 1375.5 has been added to provide that time spent by the defendant in a treatment facility or time spent as an outpatient shall be credited to any term of imprisonment to which the defendant is sentenced in a criminal trial which was suspended under section 1370. Prior to enactment of chapter 1511, no such statutory provision existed to credit the time a defendant spent in a mental hospital against any sentence eventually imposed. Copies of the progress report shall also be given to the defendant and others designated by him. Such reports shall be made at six month intervals or until the defendant becomes mentally competent. If the report indicates that there is *no substantial likelihood* that the defendant will regain his mental competence in the foreseeable future, the court shall order that he be returned to the court where he will be released or committed under the civil procedures of the Lanterman-Petris-Short Act [CAL. WELF. & INST. CODE §5000 *et seq.*]. Under Penal Code Section 1370 a defendant who has been committed to a mental health treatment facility pursuant to section 1370(a) but who is, according to a determination of the court, receiving no treatment for his mental impairment, must be returned to the committing court. There is, however, no provision contained in chapter 1511 as to what is to be done with such defendants returned to the court. It is possible that such persons may be redirected to another treatment facility, but chapter 1511 does not supply a clear answer.

Termination of Criminal Commitment

A defendant who is still hospitalized after 18 months shall be returned to the court for a second competency trial held pursuant to section 1369 (§1370(b)(2)). If the defendant who is so returned appears to the court to be "gravely disabled" as defined in section 5008(h)(2) of the Welfare and Institutions Code (discussed *infra*), the court shall order the conservatorship investigator of the county of commitment to initiate conservatorship proceedings for him. Section 1370 further provides that a defendant who has not yet regained his mental competence at the end of three years from the date of commitment, or a period of commitment equal to the maximum term of incarceration for the most serious offense with which the defendant is charged (whichever is sooner), shall be returned to the committing court. This provision of section 1370 appears inconsistent with section 1370(b)(2), which provides for the return of defendants at the end of eighteen months rather than after three years. However, this apparent inconsistency is reconcilable by reference to section 1374. Section 1374 has been amended to provide that when the superintendent of the facility to which the defendant has been committed believes that the defendant is not a menace to others, he may allow the defendant to be treated as an outpatient after giving 15 days notice to the district attorney and after court approval. A defendant who has been *confined* less than 18 months, but who is being treated on an outpatient basis, will be returned to the court three years after commitment. Whenever any defendant who appears to the court to be gravely disabled (discussed *infra*) is so returned, or is returned after 18 months of commitment after a second incompetency trial, the court shall order the conservatorship investigator of the county to initiate conservatorship proceedings for such defendant pursuant to chapter 3 (commencing with §5350) of the Welfare and Institutions Code. Any hearing held pursuant to such conservatorship proceedings shall be held in the superior court of the committing county.

Chapter 1423 has amended sections 1026 and 1026a of the Penal Code, as well as section 7250 of the Welfare and Institutions Code, to require that when an application for release from a state mental hospital is made to the superior court of the county in which the inmate is confined, all documents requested by such court shall be forwarded to that court from the county of commitment. Presumably this will enable the court to more effectively deal with applications for release by making available to the court more relevant information than was

available previously. Before the enactment of chapter 1423, there was no requirement that such information be forwarded.

Dismissal of Pending Criminal Charges

Criminal charges pending against a committed defendant remain subject to dismissal pursuant to Penal Code Section 1385 (dismissal in furtherance of justice), and if dismissed the defendant shall be released from any commitment imposed pursuant to this chapter, but without prejudice to the initiation of civil proceedings under the Lanterman-Petris-Short Act (discussed *infra*). Section 1370.2, as added to the Penal Code, provides that any misdemeanor charges pending against a person adjudged mentally incompetent may be dismissed, provided that 10 days notice of any motion to dismiss is given to the district attorney. When conservatorship proceedings have been initiated and criminal charges are still pending against a defendant, Penal Code Section 1372, as amended, requires the conservator of a person who has regained his mental competency to certify such fact to the court, sheriff, district attorney, and counsel for the defense. Within two judicial days the court shall conduct a hearing to determine if release should be granted pending conclusion of the proceedings.

Civil Commitment of Mentally Incompetent Defendants

Once defendants have been returned to the committing court pursuant to section 1370, chapter 1511 provides a detailed procedure whereby they may be *civilly* committed to mental health treatment facilities pursuant to the Lanterman-Petris-Short Act. Under Welfare and Institutions Code Article 1 (commencing with §5150), Article 2 (commencing with §5200), Article 4 (commencing with §5250), and Chapter 3 (commencing with §5350), a conservator may be appointed for "gravely disabled" persons. Such persons are defined as those unable to care for their person or their basic needs [CAL. WELF. & INST. CODE §5008(h)]. Section 5008 has been amended to include *within* the definition of "gravely disabled" those persons who are found to be incompetent under Penal Code Section 1370 *and* against whom the criminal charge is a felony involving death, great bodily harm, or a serious threat to the physical well-being of another. Under chapter 1511, therefore, civil conservatorship proceedings may be initiated for those charged with violations of the type discussed above.

When a defendant who has been returned to the committing court pursuant to section 1370 of the Penal Code does not have charges pending against him related to death, or serious bodily injury or threat

thereof, it appears that certain provisions of the Lanterman-Petris-Short Act may be utilized to civilly confine the defendant for 107 days if the court or jury finds that the defendant (1) as a result of a mental disorder, is a danger to himself or to others; and (2) has threatened or harmed someone. In special circumstances, the conservatee may be detained for up to 90 additional days [CAL. WELF. & INST. CODE §§5150, 5250, 5300]. This procedure is identical to the one ordinarily employed to civilly commit nondefendants. Such defendants will be detained in mental health treatment facilities for a little more than six months, at most, even though they are not mentally competent to stand trial or be sentenced.

Section 5370 has been added to permit the initiation of conservatorship proceedings against any person who has been charged, regardless of whether action is pending or has been initiated pursuant to section 1370 of the Penal Code. Section 5369 has been added to require the conservator of a person who has criminal charges pending against him and who has been found mentally incompetent under Penal Code Section 1370, to notify the court, sheriff, and district attorney of the committing county, and the defendant's attorney, when and if the defendant returns to competency. In such cases the court shall order the return of the defendant to the court in which criminal charges are pending.

Criminal Procedure; release of mentally disordered persons

Welfare and Institutions Code §7375 (amended).
AB 1291 (Keene); STATS 1974, Ch 326

Welfare and Institutions Code Section 7375 provides procedures for the release from state hospitals and redelivery to law enforcement authorities of mentally disordered defendants and criminals who have recovered from their infirmities. Prior to the enactment of chapter 326, there was no requirement that an open-court hearing be held on the issue of paroling inmates from mental health treatment facilities. Chapter 326 has amended section 7375 to provide that persons committed to a state hospital pursuant to section 1026 of the Penal Code (defendant who pleads not guilty by reason of insanity) may be released therefrom, once the statutorily prescribed minimum period of confinement has passed, pursuant to the following procedure: (1) The medical director of the hospital must certify to the committing court his opinion that the person has improved to such an extent that he is no longer a danger to the health and safety of others, and that the person

will benefit from release on parole; and (2) within 30 days after receiving the director's opinion, and after giving notice to the prosecuting attorney, the court shall conduct an open hearing to approve or disapprove the recommendation of the director.

If parole is granted, it may include release of the person to the custody of the local mental health facility for one or more periods of up to 30 days each in order to facilitate the person's readjustment to the community pending a determination with regard to his restoration to sanity. If the recommendation is disapproved, subsequent recommendations may be made by the director after six months have lapsed. Previously, such subsequent recommendations could not be made until one year had passed from the date of the previous hearing.

COMMENT

Chapter 326 is unclear as to the question of how the open-court hearing on the prisoner's release on parole is to be conducted. It appears that such hearings are analogous to parole release hearings, except that the prisoner dealt with under chapter 326 is confined in a mental health treatment facility rather than in a state prison. In *In re Sturm* [11 Cal. 3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974)], the California Supreme Court dealt with the question of what procedural due process guarantees are required in a parole release hearing, and held that whether a particular procedure in a parole release hearing violates due process depends upon (1) the objectives of the challenged procedure, (2) the potential unfairness to the prisoner, and (3) the availability of alternative procedures which are less burdensome to the prisoner. Specifically, *Sturm* held that at a minimum, due process requires the Adult Authority to support its determinations on parole applications with a statement of the reasons for its decisions. Since chapter 326 deals essentially with parole release decisions, it is likely that the *Sturm* formula could be applied in determining what procedural rights are to be enjoyed by prisoners about to be released from state mental hospitals. It should be noted that chapter 326 does not affect the standards employed in making the decision to release a prisoner, but only changes the *procedure* utilized in the decision making process.

Criminal Procedure; superior court sessions

Government Code §69801 (new).
SB 417 (Biddle); STATS 1974, Ch 1186

Chapter 1186 has added section 69801 to the Government Code to permit extra sessions of the Superior Court of San Bernardino County to be held on the grounds of an institution of the Department of Corrections. Facilities in which a pilot project may be established to hold such extra sessions may be leased for up to 50 years from the state (pursuant to §14670 of the Government Code) with the concurrence of the county board of supervisors, a majority of the superior court judges of the county, and the Director of the Department of Corrections. Extra sessions may be held only in facilities which are on prison grounds but are separate and apart from the other facilities of the institution. Chapter 1186 also requires the Judicial Council to report to the legislature on the operation of any court which is holding extra sessions pursuant to section 69801.

COMMENT

Chapter 1186 is unique since it enacts the first California statute which expressly authorizes court sessions to be held on prison grounds. According to the Legislative Counsel's analysis, proponents of this measure intend to establish a courtroom facility at the California Institution for Men at Chino, and this appears to have been the legislative intent behind the chapter. Permitting superior court sessions to be held on prison grounds will presumably afford greater prison and courtroom security whenever prisoners reenter the judicial arena. Conducting court sessions in a prison atmosphere may, however, prove highly prejudicial to prisoners in several situations. If a jury trial is held on prison grounds, the atmosphere surrounding the jurors may impress upon them an attitude of bias against the prisoner. Such a bias could prevent the prisoner from having a fair trial and therefore constitute reversible error.

Criminal Procedure; laboratory and technical assistance

Penal Code §11050.5 (amended).
AB 1756 (Crown); STATS 1974, Ch 114
Support: California Defense Investigators' Association; California Public Defenders' Association
Opposition: California District Attorneys' and Peace Officers' Associations

Chapter 114 has amended Penal Code Section 11050.5 in an effort to balance the technical facilities and personnel which are available to the district attorney with the technical facilities and personnel available to the public defender. Section 11050.1 formerly provided that the Attorney General could make available to specified agencies the De-

partment of Justice's laboratory facilities, personnel, and technical experts. Such assistance was given, as a matter of policy, only to agencies concerned with the investigation of crime or for purposes of apprehending and prosecuting criminals.

As amended, section 11050.5 *permits* the Attorney General, upon request by any public defender, to make available to such public defender the Department of Justice's laboratory facilities, personnel, and technical experts for the purpose of assisting in the representation by such public defender of persons in criminal proceedings. The Attorney General may contract with each county whose public defender requests such assistance for the reasonable cost of supplying such assistance. Unless such a contract is made, no such assistance shall be given to the public defender. Section 11050.5 also *requires* that the Attorney General shall forward to the district attorney of the county in which the public defender is located a copy of all information supplied under the section to the public defender. This section, therefore, requires the Department of Justice to supply information to those agencies prosecuting and defending the same defendant. As it is possible that such a provision may create a conflict of interests in a given situation, the section provides that if the requirement that copies of the information be sent to the local district attorney is found to be invalid on its face or in a particular case, the provision allowing a public defender to receive the assistance of the Department of Justice shall be inoperative.

See Generally:
1) WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Discovery* §§271-274 (1963), (Supp. 1973).

Criminal Procedure; destruction of controlled substances

Health and Safety Code §11479 (new).
SB 939 (Biddle); STATS 1974, Ch 598

Under existing provisons of the Health and Safety Code, controlled substances (drugs and narcotics specified in division 10, commencing with §11000) are subject to destruction upon issuance of a court order (§§11474, 11474.5, 11486). Chapter 598 has added section 11479 to the Health and Safety Code to permit the head of a publicly operated crime laboratory, whenever it receives material suspected of being a controlled substance, to destroy without a court order that amount of the seized substance which exceeds ten pounds, if samples and photographs of the substance are taken, and an analysis thereof made, and if the chief of police approves the detailed request of the laboratory for the destruction of the substance. At least 30 days prior to the

destruction of the substance, written notice must be given to the defendant or his attorney, stating that requests for samples of the substance must be made prior to the date of destruction.

Criminal Procedure; newsman's privilege

Evidence Code §1070 (amended).
AB 3148 (Sieroty); STATS 1974, Ch 1456
SB 1858 (Song); STATS 1974, Ch 1323
Support: California Newspaper Publishers' Association

Prior to the amendment of Evidence Code Section 1070, persons connected with newspapers and news broadcasting companies could not be cited for contempt when they refused to disclose, in a judicial, legislative, or administrative hearing, the *source* of any information acquired in their capacity as newsmen. Section 1070 has been amended to extend the protection afforded by the "newsman's privilege" in two particulars. First, the privilege may now be exercised by persons employed by magazines or other periodical publications. Previously, section 1070 did not protect such persons [Cepeda v. Cohane, 233 F. Supp. 465 (S.D.N.Y. 1964)]. Secondly, section 1070 has been amended to provide that not only may newsmen refuse to disclose the source of their information, but they may also refuse to disclose any unpublished information obtained or prepared in gathering, receiving, or processing information for communication to the public. "Unpublished information" includes information not disseminated to the public by the newsman, whether or not related to any information which has been disseminated. "Unpublished information" includes, but is not limited to, notes, outtakes (mistakes or parts of tape edited out), photographs and tapes, as well as any data not itself disseminated to the public through a communications media.

COMMENT

In *Farr v. Superior Court* [22 Cal. App. 3d 60, 99 Cal. Rptr. 342 (1971), *cert. denied*, 490 U.S. 1011 (1972)], the court affirmed an order citing appellant for contempt when he refused to disclose the source of information which he obtained from one of the attorneys involved in a murder trial. The attorneys in that trial were prohibited by an Order re Publicity from releasing for public dissemination the content or nature of any testimony which might be given at trial. Farr, a newspaper columnist, thereafter acquired from one of the attorneys

subject to the order, a copy of evidence which was to be introduced at trial. Soon afterwards, Farr wrote a column describing in substantial detail the evidence he had obtained.

The attorneys in the case were subpoenaed by the court. Each denied that he gave the evidence in question to Farr, and Farr refused to reveal the source of his information. Farr justified his refusal to answer on the basis of Evidence Code Section 1070, which, he claimed, immunized him from the power of contempt. The court disagreed and cited Farr for contempt. In affirming the contempt citation, the appellate court held that under the specific facts in litigation, section 1070 was an unconstitutional infringement on the judiciary's power [22 Cal. App. 3d at 69, 99 Cal. Rptr. at 348]. The court found that courts have a constitutional duty to ensure that criminal defendants enjoy a fair trial as well as a duty to control officers of the court [22 Cal. App. 3d at 70, 99 Cal. Rptr. at 348], and that section 1070 infringed upon those duties, thereby violating the separation of powers doctrine. *Farr* did not, however, state that the newsman's privilege to withhold information at trials is in *all* cases unconstitutional. *Farr* may only stand for the proposition that when an order of the court has been violated, thereby resulting in publicity prejudicial to a criminal defendant, the newsman in that *particular* case may not be immunized from the judicial power of contempt. On the other hand, *Farr* may be an invalidation of section 1070 in *all* cases. Clarification of the meaning of *Farr* will have to await further litigation involving the "newsman's privilege." The amendments to section 1070 effected by chapters 1456 and 1323 purport to expand and clarify the "privilege," but do not address the basic issue raised in *Farr*. The "newsman's privilege" is not an absolute privilege to withhold information in *all* litigation, for it is merely an immunity from a contempt of court or similar administrative or legislative body sanction, and is not a privilege preventing him from being pressured through *other* means to reveal his source of information. A judge may still strike whatever defenses a newsman may have in a libel action or may still render a default judgment against him. Nor does section 2043 of the Code of Civil Procedure expressly immunize newsmen from its sanctions for failure to permit discovery.

Criminal Procedure; organic therapy

Penal Code Article 2 (commencing with §2670) (new).
AB 2296 (Sieroty); STATS 1974, Ch 1513
Support: State Bar of California

Provides that organic therapy, as defined, may be administered to persons involuntarily confined only if administered pursuant to a court order; requires that before any competent person so confined may be treated with organic therapy, such person's informed consent must first be given; provides that organic therapy may be administered to an incompetent person only after a court hearing is held; permits temporary use of shock treatment in emergencies without prior court approval.

"Organic therapy" is the term used to describe various kinds of medical treatments and operations used to affect or alter a person's thought processes, sensations, feelings, perceptions, and mentations or mental activity generally. Organic therapy has recently been used on California state prison and mental hospital inmates, several of whom have likened their experiences under such treatment to dying [Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237, 246 (1974)]. Chapter 1513 has added article 2 (commencing with §2670) to the Penal Code to provide that any application of organic therapy (defined extensively in §2670.5) to a competent person involuntarily confined must be administered pursuant to the person's informed consent. The refusal of such competent person to submit to organic therapy prohibits all applications of organic therapy to him except in emergencies. Organic therapy may be administered to an incompetent person only after a court hearing has been held.

Specifically, section 2670 has been added to the Penal Code to declare that all persons enjoy a fundamental right to be free from enforced interference with their thought processes through the use of organic therapy. To effectuate this declaration, section 2670.5 prohibits the administration of organic therapy to state prisoners unless the prisoner first gives his informed consent to such treatment, which consent may be withdrawn at any time. Organic therapy shall be applied to a consenting inmate only after compliance with the requirements of sections 2675 through 2680 (dealing with a court hearing). A person who lacks the capacity to give his informed consent, however, may be administered organic therapy other than psychosurgery if the warden or superintendent of the facility in which the person is confined secures a superior court order to administer such treatment in accordance with sections 2675 through 2680. No person lacking the competency to give his informed consent to psychosurgery may be administered such treatment in any case. This section does not prohibit the administration of drugs intended to cause adverse reactions to the ingestion of

alcohol or drugs, provided that such administration of drugs is not connected with such program of conditioning.

Section 2671 provides that, notwithstanding section 2670.5, if a confined person attempts to or actually does inflict substantial physical harm upon another, or presents as a result of a mental disorder an imminent threat of substantial harm to himself or others, the attending physician may authorize the use of shock treatments for up to seven days in any three-month period in order to alleviate such danger. Shock treatments may also be administered without prior judicial approval for up to three months in any one-year period to persons consenting to such treatment.

Section 2672 defines "informed consent" as meaning that a person must knowingly, intelligently, and without duress or coercion, clearly and explicitly manifest to the attending physician his consent to the proposed organic therapy. Persons diagnosed as mentally ill, disordered, abnormal, or defective are not to be automatically deemed incapable of giving informed consent. Persons incapable of overtly manifesting their consent to the attending physician and persons unable to understand the information specified in section 2673 shall, however, automatically be deemed incapable of consenting to organic therapy.

Chapter 1513 also prescribes in detail those procedural steps which are prerequisite to performing organic therapy on an inmate, including: (1) the physician must provide the inmate with complete information; (2) the warden must obtain the inmate's consent and must in all cases petition the court for authorization; (3) the inmate may petition the court to prohibit approved therapy and be given counsel and medical experts if he is financially unable to retain same; (4) a hearing on the petition conforming to due process guarantees; (5) determination of the inmate's capacity to give consent; and (6) review of whether there is a compelling reason justifying the proposed treatment, whether the organic therapy represents sound medical practice, and whether alternate therapeutic techniques are available (§§2673-2679).

All inmates shall be informed of their rights under this chapter, and shall be entitled to communicate with, and be visited by, specified persons free from censorship or interference. Violations of this chapter are punishable under the provisions of chapter 4 (commencing with §2650) relating to the protection of prisoners (§2650), the unauthorized punishment of prisoners (§2651), and the prohibition against the infliction of cruel and unusual punishments or injurious treatments upon prisoners (§2652). No provision of chapter 1513 pro-

hibits the imposition of civil liability upon physicians and facilities who administer organic therapy to persons in violation of this chapter.

Criminal Procedure; diversion of criminal drug offenders

Penal Code §1000.4 (amended).
AB 3096 (Vasconcellos); STATS 1974, Ch 1014

Chapter 2.5 (commencing with §1000) of the Penal Code provides a mechanism to divert narcotic and drug law violators from the criminal justice system into a noncriminal rehabilitation program. The diversion program allows defendants charged with specified drug-related offenses to participate in a rehabilitation program rather than face criminal prosecution. The charges pending against the defendant are dismissed upon successful completion of the diversion program. Section 1000.1 requires the probation department to prepare a report on a criminal defendant who is eligible for the diversion program, and section 1000.2 delineates the procedures to be followed by the court in considering the diversion of a criminal offender. Section 1000.4 of the Penal Code has been amended to extend the operation of chapter 2.5 to January 1, 1977. The full effect of this extension is questionable, however, since a provision of chapter 2.5 has been declared unconstitutional. Specifically, section 1000.2 provides that a defendant may not be diverted under the provisions of chapter 2.5 unless the district attorney concurs in the determination to divert. In *People v. Superior Court* [11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974)], the California Supreme Court held that the decision to divert a defendant into a rehabilitation program pursuant to section 1000.2 is an exercise of judicial power, and that the provision of section 1000.2 requiring the consent of the prosecutor before a trial court may order that a qualified defendant be diverted violates the separation of powers doctrine. The practical effect of chapter 1014, therefore, is that the full benefits of the diversion program will be retained for another two years without the unconstitutional invasion of judicial authority objected to in *People v. Superior Court.*

See Generally:
1) Comment, *Diversion and the Judicial Function,* 5 PAC. L.J. 764 (1974).

Criminal Procedure; criminal offender record information

Penal Code §13126 (repealed); §§13125, 13150, 13152, 13153, 13177 (amended).
SB 2217 (Song); STATS 1974, Ch 790

Chapter 790 has been enacted to define and limit the kinds of information which may be included in criminal offender record information systems compiled pursuant to chapter 2 (commencing with §13100) of the Penal Code. Chapter 2 was added to the Penal Code in 1973 [CAL. STATS. 1973, c. 992] to establish procedures governing criminal offender record information systems [See 5 PAC. L.J., REVIEW OF SELECTED 1973 CALIFORNIA LEGISLATION 336 (1974)]. Chapter 790 specifies that it shall become operative on July 1, 1978, which is also the effective date of chapter 2 (commencing with §13100) of the Penal Code. Section 13125 formerly provided that state and local criminal offender record information systems could include, but were not limited to, a list of specified kinds of information such as personal data, arrest data, and court data. Section 13126 formerly specified that the Department of Justice could modify this list to include other information in criminal offender record information systems. Chapter 790 has repealed section 13126 and the Department of Justice is no longer free to modify the information list specified in section 13125. Section 13125 has also been amended to expand slightly the list of information which may be included in criminal offender record information systems to include an individual's jail history and whether he has ever been cited and released. Conforming technical changes have been made in section 13150 (reporting of information), section 13152 (forms specified by the Department of Justice on which information is to be compiled), and section 13152 (data related to arrests for intoxication). Section 13177 has been amended to provide that chapter 790 shall not be construed to prohibit the Department of Justice from acquiring any other information which, by statute, it may obtain from criminal justice agencies. Prior to amendment, section 13177 provided that the Department of Justice could require criminal justice agencies to report information *other* than the kind specified in section 13125, or require that it be reported more quickly, or promulgate other regulations that would improve criminal justice information systems. The net effect of chapter 790, therefore, is to greatly curtail the power of the Department of Justice to acquire information about citizens which is not specifically mentioned by statute.

Criminal Procedure; citizens' complaints

Penal Code §832.5 (new).
AB 1305 (Crown); STATS 1974, Ch 29
Support: California District Attorneys' and Peace Officers' Associations

Chapter 29 adds section 832.5 to the Penal Code to require city police and sheriffs' departments to establish procedures to investigate citizens' complaints against the personnel of such departments and to make available to the public written descriptions of those procedures. Though section 832.5 mandates the establishment of complaint investigation procedures, each department remains free to adopt its own procedures.

COMMENT

It is at least questionable whether chapter 29 does or can apply to a chartered city with the power of "home rule." The California Constitution provides that chartered cities "may make and enforce all ordinances and regulations in respect to *municipal affairs*, subject only to restrictions and limitations provided in their several charters . . . ." [CAL. CONST. art. XI, §5(a) (emphasis added)]. It is further provided that it "shall be competent in all city charters to provide . . . for: (1) the constitution, regulation, and government of the city police force . . . ." [CAL. CONST. art. XI, §5(b)]. The issue which may arise under chapter 29, then, is whether a statute which compels city police departments to establish a citizen complaint investigation procedure is an unconstitutional infringement on the right of charter cities to "make and enforce all . . . regulations in respect to municipal affairs." Because the term "municipal affairs" is undefined by the constitution, California courts will have to determine if such regulations are "municipal affairs," or are matters of "statewide concern." A matter of "statewide concern" is definitionally not a "municipal affair," and may therefore be regulated by general state law [Baron v. Los Angeles, 2 Cal. 3d 535, 539, 469 P.2d 353, 355, 86 Cal. Rptr. 673, 675 (1970)]. If a matter is of "statewide concern," the general law of California is said to preempt any chartered city ordinances and regulations. Whether or not a subject *is* of "statewide concern" is a question which "must be determined from the legislative purpose in each individual instance." [Santa Clara v. Von Raesfeld, 3 Cal. 3d 239, 246, 474 P.2d 976, 979, 90 Cal. Rptr. 8, 11 (1970)]. In passing upon chapter 29, therefore, California courts will have to decide whether the state legislature considered regulation of police investigations into citizens' complaints to be of such importance that "it is the intent and purpose of such general law to occupy the field to the exclusion of municipal regulations." [Baron v. Los Angeles, 2 Cal. 3d 535, 539, 469 P.2d 353, 355, 86 Cal. Rptr. 673, 675 (1970)]. Neither the

bill itself nor the legislative background material available indicates what the legislature's intent was in enacting chapter 29.

See Generally:
1) Sato, *"Municipal Affairs" in California*, 60 CAL. L. REV. 1055 (1972).
2) Comment, *Strumsky And The Source Of California Chartered City Powers*, this volume at 85.

Criminal Procedure; blood and urine tests

Government Code §27491.25 (amended).
AB 2623 (Bannai); STATS 1974, Ch 204
Support: California District Attorneys' and Peace Officers' Associations

Government Code Section 27491.25 formerly required the coroner to take blood samples of persons who had died in motor vehicle accidents, in order to determine the alcoholic and barbituric acid contents of the body. As amended, section 27491.25 requires the coroner to also take urine samples from the deceased for the same purpose. In addition, the coroner may, under Government Code Section 27491.4, use such blood and urine samples to determine the amphetamine derivative contents of the body.

COMMENT

Dr. Thomas Noguchi, Los Angeles County Coroner, indicates that 50 percent of the vehicle drivers involved in fatal traffic accidents have at least a trace of alcohol in their bloodstreams, that 10 percent have traces of barbituric acid in their bloodstreams, and that one to three percent have evidence of amphetamine derivatives in their bloodstreams. [*California Assembly Committee on Health, Coroner's Blood Tests*, Jan. 14, 1974 (public hearing) (testimony of Dr. Thomas Noguchi)]. It is anticipated that requiring coroners to take urine samples from traffic accident victims will reveal the presence of amphetamine derivatives more often than will blood samples alone because amphetamine derivatives dissipate more rapidly in the bloodstream than in urine. The practical effect of chapter 204, therefore, will be to increase the likelihood that definitive evidence of amphetamine intoxication will be available in criminal and civil actions.