McGeorge Law Review

Volume 7 | Issue 1 Article 20

1-1-1976

Criminal Procedure

University of the Pacific; McGeorge School of Law

Criminal Procedure

Criminal Procedure; disclosure of grand jury testimony

Penal Code §924.6 (new).
AB 284 (Brown); STATS 1975, Ch 34
Support: State Bar of California; California District Attorneys' Association; California Peace Officers' Association
Opposition: Attorney General

Chapter 34 adds Section 924.6 to the Penal Code to provide that a court which has empaneled a grand jury shall, upon application of either the defendant or the people, order disclosure of all or part of testimony of witnesses, even though no indictment has been returned. Such an order shall be made in connection with pending or subsequent criminal proceedings if the court determines, at an *in camera* hearing which shall include a review of the testimony, that the testimony is relevant and appears to be admissible. Prior to the addition of this section, a transcript of grand jury testimony was prepared and made available to the parties only when an indictment was returned.

COMMENT

The doctrine of secrecy of grand jury proceedings is generally considered to have its origins in the Earle of Shaftsbury Trial (8 How. St. Tr. 759) decided in 1681 [J. WIGMORE, 8 EVIDENCE IN TRIALS AT COMMON LAW §2360 (McNaughton rev. ed. 1961)]. In that case the grand jury insisted that its proceedings be conducted in private to avoid control of its activities by the crown [*Id.*]. Thus it appears that the original rationale for the doctrine of secrecy was to protect the jury and the accused from abuses by the crown. As the government became less distrusted, however, the original rationale declined in importance, and it became common practice to permit the prosecutor to be present during grand jury proceedings [Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 457-58 (1965)]. Modernly four reasons are given for maintaining grand jury secrecy: (1) to permit the grand jurors to perform their duties free from apprehension; (2) to assure that witnesses will testify willingly and freely; (3) to prevent the guilty accused from fleeing from arrest or suborning perjury; and (4) to protect the innocent accused

from the embarrassment of publication of the charges [J. WIGMORE, 8 EVIDENCE IN TRIALS AT COMMON LAW §2360 (McNaughton rev. ed. 1961)].

There exists today a widely recognized exception to the doctrine of secrecy. Most jurisdictions permit the introduction of prior grand jury testimony at trial for the purpose of impeaching a witness [*Id.* at §2363]. California has recognized this exception, in cases where an indictment is returned, since 1897 [*See* Draper, *State Experience Points the Way for Improvement of Federal Criminal Procedure*, 42 CAL. S.B.J. 34, 36 (1967)]. In that year, a statute [CAL. STATS. 1897, c. 142 at 204] was enacted which permitted a district attorney to order that a transcript of grand jury testimony be made and required that in such a case a copy be given to the defendant upon his arraignment after indictment. A 1927 amendment [CAL. STATS. 1927, c. 684 at 1156] required that a transcript be made in all cases where an indictment was returned. The provision requiring delivery of a copy to the defendant was retained. Prior to the enactment of Chapter 34, however, there was no provision for the preparation of a transcript of grand jury testimony in cases where *no* indictment was returned. Thus it appears that when no indictment was returned, but the people proceeded against the defendant on a misdemeanor or separate felony charge arising from the same occurrence, the defendant had no means to review a witness' testimony before the grand jury for the purpose of impeachment at the trial.

In 1970 the Sacramento Grand Jury desired to deliver the results of a bribery investigation to the Joint Legislative Committee on Ethics, even though it had returned no indictment. In an opinion requested by the Sacramento District Attorney, the Attorney General of California advised that a grand jury transcript could not be made public nor given to a government agency when no formal charge was made [53 OPS. ATT'Y GEN. 200 (1970)]. The opinion cited the four commonly given reasons for secrecy of grand jury proceedings set forth above [*Id.* at 202], and the then existing statutes which provided that a transcript be prepared only when an indictment was returned [*Id.* at 201]. In 1973 a bill identical in substance to Chapter 34 [A.B. 1151, 1971 Regular Session] was vetoed by then Governor Reagan. In the veto message, the former Governor labeled the bill an "unnecessary and undesirable expansion of the criminal process" [JOURNAL OF THE CALIFORNIA ASSEMBLY 9185 (1973 Reg. Sess.)]. It was argued that if the people proceeded against the defendant on another theory, the defendant would be adequately protected by having access to the grand jury proceedings

leading to the subsequent indictment [*Id.*]. The Governor reiterated the reasoning of the Attorney General, saying that secrecy is required to encourage witnesses to testify freely and to protect those who are innocent from publication of the accusations [*Id.*].

It would seem that the rationale for nondisclosure of grand jury testimony as set forth by the Attorney General and the former Governor is inapposite to the provisions of Chapter 34. While it appears that the *deliberations* of the jury must remain secret, it is difficult to understand how the jurors themselves will be threatened by the disclosure of testimony given by a *witness*. Secondly, prior law already provided that the testimony of a witness could be made public after an indictment was returned [CAL. PEN. CODE §938.1]. It is doubtful, therefore, that a witness will be inhibited by the additional possibility of limited disclosure pursuant to Chapter 34. Fear of the accused fleeing arrest is not a consideration, as the provisions of Chapter 34, by their own terms, apply only when the accused is a party to a pending or subsequent criminal prosecution. There is no danger of the accused influencing testimony before the grand jury, as disclosures under Chapter 34 occur only after that testimony has been heard. Nor is the danger of tampering with witnesses at trial increased, as formerly the accused had the right to know the names of the witnesses appearing against him [CAL. PEN. CODE §§864, 865, 943]. There is little value in protecting the accused from publication of the previous charges, as Chapter 34 disclosures arise only when he or she stands accused of another crime. What value there was in this protection would seem more than offset by the opportunity of the accused to impeach adverse witnesses through the use of prior grand jury testimony. It is true that under prior law a defendant had access to the transcripts of the grand jury hearing which led to the pending or subsequent indictment [CAL. PEN. CODE §938.1]. It would seem, however, that to provide full protection to the defendant it is necessary that he or she be permitted to review *all* prior testimony of an adverse witness relating to the occurrence for which he or she now stands trial.

The defendant is not the sole beneficiary of the provisions of this chapter. The new section permits disclosure of testimony upon application of *either* party. Thus the chapter provides the prosecuting attorney with a tool to insure that the testimony of his own witnesses remains consistent. The prosecutor may also use grand jury testimony of the accused against him or her at a subsequent trial [People v. LaRue, 28 Cal. App. 2d 748, 754, 83 P.2d 725, 728-29 (1938)].

It should be noted that Chapter 34 provides only a very limited excep-

tion to the doctrine of grand jury secrecy. There must be a pending or subsequent criminal proceeding involving the same accused, the court hearing the application for disclosure must sit *in camera*, and the testimony may be disclosed only if it is both admissible and relevant to the pending or subsequent proceeding. Furthermore, the disclosure authorized by Chapter 34 may be constitutionally required. In *Pittsburgh Plate Glass Co. v. United States* [360 U.S. 395 (1959)], the Supreme Court held that discovery of grand jury proceedings was discretionary with the trial court judge [*Id.* at 401]. The Court's opinion did not reach constitutional issues, however, and was limited to an interpretation of Rule 6(e) of the Federal Rules of Criminal Procedure [*Id.* at 399]. In *Brady v. Maryland* [373 U.S. 83 (1963)] it was held that the suppression by the prosecution of evidence favorable to the accused which is material to the issue of guilt or innocence of the defendant, is a violation of due process [*Id.* at 87]. Because the prosecutor is present during the presentation of evidence before the grand jury, such testimony is known to him and therefore may fall within the *Brady* rule. Finally, in *Davis v. Alaska* [415 U.S. 308 (1974)] it was held that the sixth amendment right to confrontation is paramount to a state policy of confidentiality of juvenile criminal records [*Id.* at 309]. In that case the defendant wished to impeach a juvenile witness by use of the minor's criminal record to show an ulterior motive for his identification of the defendant [*Id.* at 311]. By analogy, it seems that the right to confrontation as guaranteed by the sixth amendment may also be paramount to the confidentiality of grand jury proceedings.

Criminal Procedure; grand jury reports

Penal Code §939.91 (new).
AB 1044 (Chel); STATS 1975, Ch 467
Support: City of Long Beach; California Organization of Police and Sheriffs
Opposition: California District Attorneys' Association; California Peace Officers' Association

Section 939.91 has been added to the Penal Code to provide that when a grand jury investigation is completed and no indictment is returned, the person who was the subject of that investigation may request the grand jury to declare that charges against him or her were investigated and dismissed. The new section further provides that a person called as a witness before a grand jury may request a declaration that his or her appearance before that body was exclusively as a witness and

did not involve charges against him or her. If requested and approved by the court which impaneled the grand jury, these declarations must be made by the grand jury at the completion of its investigation, and in no event later than the end of the grand jury's term.

Prior statutory law did not specifically prohibit reports of this nature, and there is case law which appears to have permitted such reports. In *Irwin v. Murphy* [129 Cal. App. 713, 19 P.2d 292 (1933)], for example, it was held that a grand jury may report the results of an investigation even when no indictment or presentment is returned [*Id.* at 717, 19 P.2d at 293]. While that case concerned a report of misconduct, the court stated that "[t]he duty of a grand jury is to protect the citizen against unfounded accusation" [*Id.*]. Arguably there exists in the mind of the public an implied accusation in the simple fact that one is called before a grand jury. Thus, under former law, it appears that declarations of this nature could have been issued at the discretion of the jury. The new section makes such declarations mandatory when requested by a witness or the accused and approved by the court which impaneled the grand jury.

Criminal Procedure; arrest records

Labor Code §432.7 (amended); Penal Code §11105 (repealed), §§849.5, 851.8, 11105, Article 6 (commencing with §13300) (new); §§851.6, 11105.5, 11115, 11116, 11120, 11140 (amended).
SB 299 (Moscone); STATS 1975, Ch 904
Opposition: Attorney General; California District Attorneys' Association; California Peace Officers' Association
AB 1277 (Sieroty); STATS 1975, Ch 1117
Support: California Trial Lawyers Association; League of California Cities
AB 1674 (Lockyer); STATS 1975, Ch 1222

A record of an arrest may bar a person from public and private employment even though he or she is subsequently found to be innocent of the charges for which arrested [Karabian, *Record of Arrest: The Indelible Stain*, 3 PAC. L.J. 20, 21 (1972)]. Chapters 904 and 1117 appear to be attempts by the legislature to protect an innocent person from the adverse effects of an arrest record. Chapter 904 has added Section 851.8 to the Penal Code to permit the trial judge, upon the motion of any party, to order the sealing of all records concerning the case, including arrest and detention records, when the defendant has been ac-

quitted *and* it appears to the presiding judge that the defendant is "factually innocent of the charge." If such an order is made, the judge must inform the defendant of his right to thereafter state that he was not arrested for the charge, and that he was found innocent of the charge.

Chapter 1117 has added Section 849.5 to the Penal Code to protect those persons who are arrested but against whom no charges are filed. The new Section 849.5 provides that when a person is arrested and released, and no accusatory pleadings are filed, any record made of the arrest must indicate that the person was released. In addition, Penal Code Section 851.6 has been amended to require that when a person is arrested, released, and no accusatory pleadings are filed, the person arrested shall be given a certificate by the arresting agency which describes the action taken as a "detention." Furthermore, the records of the arresting agency and the Bureau of Criminal Identification and Investigation must be altered so as to refer to the action taken as a detention.

Chapter 1222 has repealed the previously existing provisions of Penal Code §11105 and has added a new Penal Code Section 11105 to require the Department of Justice to establish and maintain a "state summary criminal history information." The contents of this summary shall be made available to the state courts, various law enforcement agencies, probation and parole officers, public defenders and defendants' attorneys of record, and to any state, city, or county agency when the information is required to implement a statute or regulation. Certain other persons and agencies, such as federal peace officers and federal courts, may also be furnished information from the summary upon a showing of compelling need. Chapter 1222 further requires local criminal justice agencies to establish a "local summary criminal history information" by January 1, 1978. Information from this summary may be disseminated in the same manner as that from the state summary.

COMMENT

By providing for the sealing of criminal records, Chapter 904 amply protects the person who is found "factually innocent" from the stigma of a criminal record. In providing this protection, however, the chapter appears to create serious problems in regard to the person who is *acquitted* but who is *not* found to be factually innocent. Because the criminal records of the "factually innocent" person may be sealed, there may arise in the minds of many a logical inference that the person whose records have not been sealed has been found "factually guilty" by the court, and

that such person's acquittal was obtained merely by the procedural maneuvering of an attorney. While *criminal penalties* may not be imposed based upon this determination, the branding of a person as "factually guilty" may bar the person from certain types of employment and cause irreparable damage to his or her standing in the community. The social stigma involved may be even greater than that which attaches to the person who was convicted and has subsequently "paid his debt to society" and has been rehabilitated. In spite of the harm which may occur to a person as a result of not being found "factually innocent," Chapter 904 provides no guidance as to the manner in which this determination is to be made. It appears that Section 851.8 permits a person to be found not factually innocent based upon a showing of guilt by less than the beyond a reasonable doubt standard required for criminal conviction. It also appears that the court may consider illegally obtained evidence in making this determination, as the exclusion of relevant evidence would seem to be the primary reason a person who is not convicted of the crime would be found *not* factually innocent. Furthermore, the factually innocent determination, by express provision in Section 851.8, is to be made by the presiding judge. Therefore the net effect of Chapter 904 may be to create a procedure whereby a person may, by inference, be found "factually guilty" of a crime without the protection afforded by the exclusion of illegally obtained evidence, without a determination beyond a reasonable doubt, and without a trial by a jury of peers.

Criminal Procedure; dismissals

Penal Code §1387 (amended).
SB 487 (Song); STATS 1975, Ch 1069
Support: State Bar of California
Opposition: California District Attorneys' Association; California Peace Officers' Association

Chapter 1069 has amended Section 1387 of the Penal Code to provide that dismissal of a felony charge is a bar to further prosecution for the same offense if the action has previously been dismissed. This bar to further prosecution arises if both dismissals were pursuant to one or more of the following Penal Code Sections: (1) Section 1381, which requires that a person sentenced for one offense be brought to trial on any other pending charge within 90 days; (2) Section 1381.5, which requires that a person incarcerated in a federal prison be brought to trial on a state offense within 90 days of a federal authority's assent to release

for trial; (3) Section 1382, which requires that an information be filed within 15 days of the time a person is held to answer, and that a person be brought to trial within 60 days of the filing of an information or indictment, or declaration of mistrial or an order for a new trial; or (4) Section 1385, which permits a court, on its own motion or that of the prosecuting attorney, to dismiss an action when such dismissal is in the furtherance of justice. A court may make an exception to this bar to prosecution only when it finds that substantial new evidence has been discovered by the prosecution which could not, by due diligence, have been found prior to the dismissal.

COMMENT

Prior to this amendment, Section 1387 provided a bar to further prosecution only in cases where the charge dismissed was a misdemeanor. Thus there was no statutory restriction on the number of times felony charges relating to the same offense could be filed. The absence of such a restriction emasculated the defendant's statutory right to be brought to trial within 60 days [CAL. PEN. CODE §1382], in that when a defendant raised the right it was possible to simply dismiss the charges and then immediately re-arrest him or her on the same charges. It appears, however, that a person harassed by multiple prosecutions for the same offense was able to find some relief in case law. In *People v. Williams* [71 Cal. 2d 614, 456 P.2d 633, 79 Cal. Rptr. 65 (1969)] the California Supreme Court, while holding that the facts before it did not present such a case, stated, in dicta, that there are circumstances which would make a new prosecution under the then existing Section 1387 violative of the constitutional right to a speedy trial [*Id.* at 623, 456 P.2d at 637, 79 Cal. Rptr. at 69]. The court did not, however, elaborate on what those circumstances might be. In an earlier case [Barker v. Municipal Ct., 64 Cal. 2d 806, 415 P.2d 809, 51 Cal. Rptr. 921 (1966)] it was held that it was not necessary for a person to rely on the statutory scheme to assert the constitutional right to a speedy trial, as the provisions of the Penal Code are merely supplementary to the state and federal constitutions [*Id.* at 812, 415 P.2d at 813, 51 Cal. Rptr. at 925 (1966)]. Presumably, then, even under former law a person could rightfully claim that a series of prosecutions and dismissals had delayed trial to the point of violating the *constitutional* right to a speedy trial and that therefore further prosecution was barred.

The amended Section 1387 now provides a felony defendant some measure of *statutory* protection from prosecutorial abuse by allowing,

after a complaint is dismissed, only one further complaint based on the same occurrence. It should be noted, however, that this amendment still does not allow the felony defendant the full benefit of the various statutory rights to a speedy trial [CAL. PEN. CODE §1381 *et seq.*] as when these rights are first exercised, the felony defendant finds that rather than being free from further criminal proceedings as provided, he or she is subject to re-arrest and a second prosecution.

Criminal Procedure; pretrial discovery

Penal Code §1430 (new); §859 (amended).
AB 1019 (Sieroty); STATS 1975, Ch 799
Support: State Bar of California

Chapter 799 has added Penal Code Section 1430, and has amended Penal Code Section 859, to require a prosecuting attorney to deliver or make available to a defendant copies of all relevant police, arrest, and crime reports within two calendar days of the first court appearance of counsel, or of the determination that the defendant can represent himself. If the charges against the defendant are dismissed before the reports are delivered or inspected, the duty to disclose terminates unless it is otherwise required by law. The duty to deliver or make these documents available does not extend to portions of such reports which are privileged, provided that the defendant or counsel has been notified that privileged information has not been disclosed [For discussion of government privileges, see Comment, *Governmental Privileges: Roadblock to Effective Discovery*, 7 U.S.F. L. REV. 282 (1973)]. The chapter further provides that it is the intent of the California Legislature that no provision of this chapter shall be construed to limit existing rights of discovery in criminal cases [CAL. STATS. 1975, c. 799, §3, at].

COMMENT

Prior to the enactment of Chapter 799, procedures for discovery in criminal cases, with the exception of matters relating to identity of informants [CAL. EVID. CODE §§1041, 1042], were controlled exclusively by case law [4B CALIFORNIA FORMS OF PLEADING AND PRACTICE ANNOTATED, *Criminal Procedure*, 105 (1972)]. In *Brady v. Maryland* [373 U.S. 83 (1963)] the U.S. Supreme Court held that where evidence exists which is favorable to the accused on the issues of guilt or punishment, and such evidence is requested by him or her, suppression of that evidence violates due process [*Id.* at 87]. Earlier, the California

Supreme Court had declared that upon a proper showing, the defendant in a criminal case has the right to discovery of material evidence at trial [People v. Riser, 47 Cal. 2d 566, 585-86, 305 P.2d 1, 13 (1956)] and before trial [Powell v. Super. Ct., 48 Cal. 2d 704, 707-09, 312 P.2d 698, 700 (1957)]. The cases have not, however, specified at what point in time before trial the right to discovery arises [4B CALIFORNIA FORMS OF PLEADING AND PRACTICE ANNOTATED, *Criminal Procedure*, 107 (1972)]. Some courts allowed discovery at the preliminary hearing, while others did not permit discovery until after an information or indictment was returned [*Id.*]. By requiring that the reports be delivered or made available to the defendant within two days of the first appearance in court by counsel, Sections 859 and 1430 appear to set the time for discovery, at least in relation to "police, arrest, and crime reports."

While Chapter 799 presumably resolves the problem of the proper time for discovery, it appears to raise other issues. For example, what will qualify as a police, arrest, or crime report is not made clear by its language. In *People v. Torres* [19 Cal. App. 3d 724, 731, 97 Cal. Rptr. 139, 143 (1971)] it was held that notes made during a police interrogation are discoverable. Another case held that experts' reports concerning the examination of real evidence were also discoverable [People v. Johnson, 38 Cal. App. 3d 228, 235, 113 Cal. Rptr. 303, 308 (1974) (hereinafter referred to as *Johnson*)]. Whether such reports as these fall within the provisions of this chapter is not apparent upon the face of the bill.

Prior case law also provided that the prosecuting attorney was required to disclose evidence favorable to the accused, even when there was no request for such from the defendant, if such evidence was "substantial" and "material" [In re Ferguson, 5 Cal. 3d 525, 532, 487 P.2d 1234, 1239, 96 Cal. Rptr. 594, 599 (1971) (hereinafter referred to as *Ferguson*)]. Apparently these two elements are no longer required if the evidence falls within the provisions of this chapter. However the meaning of the word "relevant" as used in the new and amended sections may be the source of future controversy. Section 210 of the California Evidence Code defines "relevant evidence" as "evidence, including that relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." In *Johnson*, the Evidence Code definition of relevance was utilized to determine what evidence was discoverable. The *Ferguson* Court, however, without spe-

cifically using the word "relevant," determined that the defendant did not receive a fair trial because the prosecution failed to disclose information which might have led the defendant to *other* evidence favorable to his case. Whether police, arrest, and crime reports which may lead a defendant to other evidence are "relevant" within the meaning of Chapter 799 is not readily apparent.

Finally, Sections 859 and 1430 provide neither a remedy for the defendant nor a sanction against the prosecuting attorney should there be a failure to disclose relevant reports. It appears probable that the prosecutor alone will review the specified reports to determine if they are relevant and thus whether they fall within the provisions of this chapter. It also seems apparent that because the prosecution or the police have control over the reports covered by these sections, it will be difficult for a defendant to ferret out violations of its provisions. Because there will be no one looking over the prosecutor's shoulder, it would seem that only a relatively severe penalty for violation will compel any greater diligence in compliance with the chapter than that compelled by the prosecutor's own conscience. The court-created sanctions set forth in *Ferguson* and *Johnson* do not seem adequate, in that in each of those cases the court granted the defendant a new trial *only* upon a showing that the defendant's use of undisclosed evidence might have led to an acquittal. The inherent difficulty in showing this degree of prejudice, considered together with the small probability that a violation of Sections 859 and 1430 will ever be discovered, indicates that the remedy established by case law provides little incentive for strict compliance.

See Generally:
1) *Suppression: The Prosecution's Failure to Disclose Evidence Favorable to the Defense*, 7 U.S.F. L. REV. 348 (1973).

Criminal Procedure; opening statements

Penal Code §1093 (amended).
AB 522 (Meade); STATS 1975, Ch 195
Support: State Bar of California; California Trial Lawyers' Association

Section 1093 of the Penal Code has been amended to provide a defendant the option of presenting his or her opening statement either prior or subsequent to the presentation of evidence by the people. This option may be exercised even though the people choose not to make an opening statement.

Often when there exists a particularly strong defense, or when the people have presented a spirited opening, the defendant will find it tactically desirable to present his or her opening statement immediately following that of the people [I. GOLDSTEIN & F. LANE, GOLDSTEIN TRIAL TECHNIQUE §10.06 (2d ed. 1969)]. The language of the former Section 1093 did not permit the defendant this option, as it specified that the defendant's opening statement would follow the presentation of the people's evidence. However Section 1094 of the Penal Code permitted the court "for good reasons" to depart from the order of trial specified in Section 1093. In addition, in *People v. Struve* [190 Cal. App. 2d 358, 360, 12 Cal. Rptr. 47, 48 (1961)] the court, interpreting Section 1094, held that altering the prescribed order of trial to allow the defendant to present his or her opening statement before the presentation of the people's evidence was a matter entirely within the discretion of the court. Thus it seems that in practice the defendant was normally permitted to choose at what point in the trial his or her opening statement would be presented. As amended, Section 1093 codifies this practice by specifically granting this option to the defendant. It should be noted, however, that because Section 1094 remains unchanged, this and all other matters relating to the order of trial appear to remain within the discretion of the court.

Criminal Procedure; false evidence

Penal Code §§800, 1473 (amended).
AB 48 (Cullen); STATS 1975, Ch 1047
Opposition: California District Attorneys' Association; California Peace Officers' Association

Chapter 1047 has amended Penal Code Section 1473 to specifically permit the granting of a writ of habeas corpus on the grounds that the person seeking the writ was imprisoned on the basis of false evidence. To obtain the writ, the false evidence must have been introduced at a hearing or trial relating to that person's incarceration, and the evidence must have been material and probative on the issue of guilt or punishment. The writ may be obtained even though the person prosecuting it entered a plea of guilty, if the person at the time of the plea believed the evidence to be factual, and this belief was a material factor in the entering of the guilty plea. It is further provided that whether the prosecution knew or should have known the evidence was false is immaterial to the granting of a writ under this section.

Section 800 of the Penal Code has been amended to provide that the statute of limitations for violations of Penal Code Section 132 (offering false evidence) and Section 134 (preparing false evidence) shall run for three years following the *discovery* of the crime. Prior to this change the section required that an indictment, information, or certification be filed within three years of the *commission* of the offense.

COMMENT

Prior to this amendment the writ of habeas corpus was the proper remedy for a person incarcerated on the basis of false evidence [People v. Adamson, 34 Cal. 2d 320, 327, 210 P.2d 13, 16 (1949)]. To obtain this writ, however, a petitioner was required to demonstrate by a preponderance of evidence that false evidence was introduced against him, and that representatives of the state knew the evidence was false at the time it was introduced [In re Imbler, 60 Cal. 2d 554, 560, 387 P.2d 6, 8, 35 Cal. Rptr. 293, 296 (1963)]. Thus it appears that prior to this chapter a person who was imprisoned on the basis of false evidence had no recourse if the prosecutor entered the evidence without knowledge of its falsity. The amended section creates a remedy for a person in this position by specifically providing that the prosecutor's knowledge or lack thereof is immaterial to the granting of a writ. This change brings California law in accord with current federal practice [*See* Mesarosh v. United States, 352 U.S. 1 (1956)].

Chapter 1047 does not specify the degree of proof required to establish that false evidence was introduced or that the introduction of false evidence affected the result of the trial. A prior California Supreme Court case, *In re Imbler* [60 Cal. 2d 554, 387 P.2d 6, 35 Cal. Rptr. 293 (1963)], established the requirement that a person seeking a writ of habeas corpus show, by a preponderance of evidence, that the use of false testimony may have affected the outcome of the trial [*Id.* at 560, 387 P.2d at 8, 35 Cal. Rptr. at 296]. A provision in an earlier version of Assembly Bill 48 provided that a writ could *not* be *denied* unless it was shown *beyond a reasonable doubt* that the outcome was *not* affected [A.B. 48, 1975-76 Regular Session, *as amended*, May 1, 1975]. This provision was deleted by Senate amendment [A.B. 48, 1975-76 Regular Session, *as amended*, June 13, 1975]. Thus it appears that the legislature intended to retain the preponderance of evidence standard set forth in *Imbler*. In a 1975 case, however, the prosecution had withheld evidence which tended to impeach one of its witnesses [People v. Ruthford, 14 Cal. 3d 399, 534 P.2d 1341, 121 Cal.

Rptr. 261 (1975)]. In ordering a new trial, the court held that suppression of the evidence violated due process, and therefore it was encumbent upon the prosecution to show beyond a reasonable doubt that the petitioner was not prejudiced [*Id.* at 408, 534 P.2d at 1348, 121 Cal. Rptr. at 268]. If suppression of evidence tending to show that testimony is false is a violation of due process, it would seem that the actual introduction of false testimony would be an even greater violation, and therefore would similarly require that the prosecution prove beyond a reasonable doubt that the defendant was not harmed.

See Generally:
1) Comment: *Relief from Convictions Based upon Perjured Testimony—A Proposal for a Reasonable Standard*, 11 SANTA CLARA LAWYER 316 (1971).

Criminal Procedure; release of defendant upon writ of habeas corpus

Penal Code §1506 (amended).
AB 1283 (Sieroty); STATS 1975, Ch 1080
Opposition: Attorney General; California District Attorneys' Association; California Peace Officers' Association

Section 1506 of the Penal Code guarantees the right of the people to appeal a final order discharging a defendant upon a writ of habeas corpus. Prior to the enactment of Chapter 1080, Section 1506 did not permit a defendant to be released pursuant to a grant of habeas corpus when the people appealed the ruling, unless such release was upon bail. As amended, Section 1506 *requires* a court, upon the granting of a writ of habeas corpus, to admit the defendant to bail, to release the defendant on his or her own recognizance, or to release him or her on any other conditions the court deems just and reasonable. Such a release shall be subject to the same limitations, terms, or conditions which may be imposed on a defendant awaiting trial. Therefore, if a judge does not release a defendant who has obtained a writ on his or her own recognizance or in some other manner, he or she must release such a defendant upon bail. There is no provision, however, limiting the amount at which bail may be set, although the constitutional guarantee against excessive bail could come into play [CAL. CONST. art. 1, §6]. Thus, while this amendment appears to be designed to facilitate the release of a defendant who has obtained a writ during the pendancy of an appeal by the people, it would appear that a judge may make it difficult for a defendant to obtain his or her discharge by imposing a large bail requirement.

Criminal Procedure; prisoner civil rights

Penal Code Article 1 (commencing with §2600) (repealed); Article 1 (commencing with §2600) (new); Chapter 3 (commencing with §2600) (amended).
AB 1506 (Sieroty); STATS 1975, Ch 1175

Section 2600 of the Penal Code now provides that a person sentenced to imprisonment in a state prison can be deprived of rights during confinement only if the deprivation is necessary in order to provide for the reasonable security of the institution in which such person is confined and for the reasonable protection of the public. Previously, a sentence of imprisonment in a state prison for any term suspended all the civil rights of the confined person, except for the following: (1) rights restored by a decision of the Adult Authority or the judge who imposed the sentence; (2) specified rights which could not be abridged, including the right to inherit real or personal property; (3) the right to correspond with members of the State Bar or holders of public office (subject to inspection for contraband by prison authorities); (4) the right to ownership of all written material produced by them during the period of their imprisonment; and (5) the right to purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the United States Post Office, subject to prison authority inspection of material and exclusion of matter which was determined by authorities to be obscene or to tend to incite violence [CAL. STATS. 1941, c. 106, §15, at 1091]. Although the provisions of the Penal Code did not place any other restrictions on the deprivation of civil rights, the California Supreme Court has required a showing that valid and compelling institutional considerations be present before rights can be taken away [In re van Geldern, 5 Cal. 3d 832, 489 P.2d 578, 97 Cal. Rptr. 698 (1971)].

Section 2601 of the Penal Code as added by Chapter 1175, retains the specified rights of prisoners enumerated above and expands some of those provisions to give prisoners the right to inherit, own, sell, or convey real or personal property, including all written and artistic material produced or created by persons during the period of their imprisonment. However, the Department of Corrections is authorized to restrict or prohibit sales or conveyances made for business purposes. Furthermore, Chapter 1175 has amended Section 2601 to add "legal material" to the list of types of printed material which prisoners may purchase, receive, and read, while excepting materials describing the making of any weapon, explosive, poison, or destructive device from this list.

Additionally, the provisions which allow prison authorities to censor materials are deleted, except that officials may open and inspect packages received by inmates and establish reasonable restrictions as to the number of materials which an inmate may have at one time. This provision apparently complies with the holding of the United States Supreme Court in *Procunier v. Martinez* [416 U.S. 396 (1974)] in which the Court stated that censorship of prisoner mail is justified only if such regulation furthers an important or substantial governmental interest unrelated to the suppression of expression and if the limitation on first amendment freedoms is no greater than is necessary or essential to the protection of the particular governmental interest involved [*Id.* at 413]. Section 2601 also gives prisoners the right to have personal visits (restricted only as necessary for the reasonable security of the institution), to initiate civil actions, to marry, to create a power of appointment, and to make a will.

See Generally:
1) Bergesen, *California Prisoners: Rights Without Remedies*, 25 STAN. L. REV. 1 (1972).
2) Comment, *Restoration of Rights to Felons in California*, 2 PAC. L.J. 718 (1971).
3) 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 292-93 (1975).

Criminal Procedure; prisoners—discipline

Penal Code §2657 (new).
SB 1188 (Nejedly); STATS 1975, Ch 726
Support: California Department of Corrections

Prior to the enactment of Chapter 726, no provision of law prevented a prisoner confined to a state prison from being institutionally disciplined by prison authorities for a charged criminal offense for which he or she had been acquitted by a court of law. Chapter 726 has added Section 2657 to the Penal Code to prohibit prison authorities from disciplining any prisoner when the sole reason for such discipline is the alleged criminal act or omission of the prisoner for which he or she has been acquitted. Further, Section 2657 also requires that the fact of the prisoner's acquittal be clearly noted in any file retained by the Department of Corrections that refers to such act or omission. This legislation was apparently prompted by the Department of Correction's policy of permitting the punishment of prisoners acquitted of a crime when it is felt by the authorities that the prisoner did in fact commit the offense. However, subsequent to the introduction of Senate Bill 1188 in the legislature, the Department of Corrections re-evaluated this practice and revised their procedure to require that the verdict of the court be accepted

as the final determination of guilt or innocence [Letter from Walter L. Barkdull, Assistant Director, Department of Corrections, to Senator John A. Nejedly, July 15, 1975 (on file at the *Pacific Law Journal*)]. Therefore, the enactment of Chapter 726 codifies Department policy.

See Generally:
1) WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Trial* §314 (1963) (dismissal where person imprisoned).

Criminal Procedure; probation

Health and Safety Code §§11350, 11351, 11352, 13370 (amended); Penal Code §§1203.06, 1203.07 (new), §§1203, 1203.03 (amended); Welfare and Institutions Code §§3052, 3200 (amended).

SB 268 (Robbins); STATS 1975, Ch 1087

Support: California District Attorneys' Association; California Peace Officers' Association

SB 278 (Deukmejian); STATS 1975, Ch 1004

Support: California District Attorneys' Association; California Peace Officers' Association

Opposition: California Probation, Parole, and Correctional Association; California Public Defenders' Association

Chapters 1004 and 1087 have been enacted to prohibit the granting of probation to, or suspension of sentence for, persons convicted of certain crimes. Chapter 1087 has added Section 1203.07 to the Penal Code to prohibit the granting of probation to any person: (1) convicted pursuant to Health and Safety Code Section 11351 for possession for sale of one-half ounce or more of a narcotic listed in that section; (2) convicted pursuant to Health and Safety Code Section 11352 for importation, sale, or offering for sale one-half ounce of a narcotic listed in that section; or (3) convicted pursuant to Section 11351 or 11352 for importation, sale, offering for sale, or possession of *any* amount of a narcotic listed in those sections when such person has a previous conviction under either section.

While prohibiting the granting of probation in certain narcotic cases, Chapter 1087 removes former restrictions on the granting of parole. Health and Safety Code Section 11350 has been amended to delete a former requirement that a person could not be released or paroled until completion of a minimum of two years confinement for a first conviction, or five years confinement for a subsequent conviction relating to possession of narcotics. Similar provisions of Health and Safety Code Sections 11351 (possession for sale) and 11352 (importation, sale, or

offering for sale) which established minimum periods of confinement have also been deleted. Furthermore, Chapter 1087 amends Penal Code Section 1203.03 to provide that time spent as an inpatient or outpatient in a California Rehabilitation Center shall be credited to a term of imprisonment imposed in the same case.

Section 1203.06, as added by Chapter 1004, prohibits the granting of probation to, or suspension of sentence for, any person who used a firearm in the commission of any of the following crimes: (1) murder; (2) assault with intent to commit murder in violation of Penal Code Section 217; (3) kidnapping in violation of Penal Code Section 207; (4) robbery in violation of Penal Code Section 211; (5) kidnapping for ransom in violation of Penal Code Section 209; (6) first degree burglary as defined in Penal Code Section 460; (7) rape by force or violence in violation of Subdivision (2) of Penal Code Section 261; (8) rape by threat of bodily harm in violation of Subdivision (3) of Penal Code Section 261; (9) assault with intent to commit rape, sodomy, or robbery in violation of Penal Code Section 220; or (10) escape from confinement in violation of Penal Code Sections 4530 and 4532. In addition, Section 1203.06 provides that a person who was formerly convicted of one of these ten crimes, and who is subsequently convicted of *any* felony in which he or she used a firearm, may not be granted probation. "Use" of a firearm for the purposes of this section is defined as displaying it in a menacing manner, intentionally firing it, or intentionally striking a person with it.

Both Chapters 1087 and 1004 require that the circumstances leading to the denial of probation or suspension of sentence be specifically charged in the information or indictment. The charge must then be found true by one of the following: (1) admission in open court; (2) the jury trying the issue of guilt; (3) trial by the court sitting without a jury; or (4) the court where guilt is established by a plea of guilty or nolo contendere. Since a plea of nolo contendere does not admit the truth of the charges, it appears that this section may require litigation of the issue of the use of a firearm when a nolo plea is entered. Neither chapter prohibits the adjournment of proceedings in order to procure treatment for narcotic addiction pursuant to Division 3 (commencing with §3000) of the Welfare and Institutions Code, or to provide treatment for mentally disordered defendants pursuant to Division 6 (commencing with §6000) of the Welfare and Institutions Code.

Formerly, Penal Code Section 1203 required the prosecuting attorney to concur before probation could be granted in certain cases. This pro-

vision was held to violate the separation of powers doctrine set forth in the California Constitution [CAL. CONST. art 3, §1, art. 4, §1; People v. Clay, 18 Cal. App. 3d 964, 970, 96 Cal. Rptr. 213, 217 (1971); People v. McManis, 26 Cal. App. 3d 608, 619, 102 Cal. Rptr. 889, 896 (1972)]. Consequently Section 1203 has been amended to permit the granting of probation without the concurrence of the prosecutor.

Criminal Procedure; drug diversion program

Penal Code §1000.3 (repealed); §§1000.3, 1000.5 (new); §§1000, 1000.1, 1000.2, 1000.4 (amended).
AB 1274 (Sieroty); STATS 1975, Ch 1267
Opposition: Attorney General; California District Attorneys' Association; California Peace Officers' Association

Prior to the enactment of Chapter 1267, the Campbell-Moretti-Deukmejian Drug Abuse Treatment Act [CAL. PEN. CODE §1000 *et seq.*], which provides a mechanism to direct narcotic and drug law violators from the criminal justice system into a noncriminal rehabilitation program [6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 288 (1975)], was scheduled to terminate January 1, 1977 [CAL. STATS. 1974, c. 1014, §1, at]. Chapter 1267 has amended Section 1000.4 to extend the termination date until January 1, 1979. Chapter 1267 has also made minor amendments in the diversion procedure.

Section 1000 of the Penal Code has also been amended by Chapter 1267 to make the diversion program no longer applicable to cases involving possession of methylamene or phenylacetone with the intent to manufacture methyamphetamine. However, the program has been extended to now encompass (1) violations of Health and Safety Code Sections 11550 (unlawful use or being under the influence of a controlled substance) and 11358 (unauthorized cultivation, harvesting, or processing of marijuana for personal use), (2) violations of Penal Code Sections 381 (unlawfully under the influence of certain poisons) and 647 (inability to care for oneself or others in a public place due to unlawfully being under the influence of a controlled substance), and (3) violations of Business and Professions Code Section 4230 (possession of certain drugs without a prescription). Furthermore, Chapter 1267 has deleted the former requirement of Section 1000 that a defendant not have a probation or parole violation to be eligible for the program. However, the diversion program is not available to a defendant whose parole or probation has been revoked without being completed, nor is it available to

one who has been diverted or convicted of a felony within the previous five years.

In *People v. Superior Court* [11 Cal. 3d 59, 520 P.2d 405, 113 Cal. Rptr. 21 (1974)], the California Supreme Court decided that the separation of powers doctrine prohibited a district attorney from preventing the diversion of a qualified defendant. Thus, Section 1000.2 has been amended by Chapter 1267 to no longer require the approval of the district attorney prior to diversion. However, if a district attorney determines a defendant to be eligible, he or she must now advise both the defendant and his or her attorney to this effect (§1000.1). Among other things, this notice should include a full description of the procedures of the diversion investigation (§1000.1). Section 1000.1 also prohibits the use of any statement by the defendant to a probation officer or drug worker subsequent to diversion in any action or proceeding; and if the diversion is denied or revoked, no statement made during the investigation may be used in any sentencing proceeding.

Sections 1000.3 and 1000.5 have also been added to the Penal Code by Chapter 1267. Section 1000.3 provides for both a court hearing to be held if a probation department feels the defendant has violated the conditions of the program, and for a dismissal of charges when the defendant has satisfactorily completed the program. Section 1000.5 provides that a satisfactory completion of the program will also permit a defendant to state that he or she has never been arrested or diverted from the offense for which he or she was charged.

See Generally:
1) Comment, *Diversion and the Judicial Function*, 5 PAC. L.J. 764 (1974).
2) 4 PAC. L.J., REVIEW OF SELECTED 1972 CALIFORNIA LEGISLATION 405 (1973) (statewide program for the prevention of narcotic and drug abuse).

Criminal Procedure; driving while intoxicated

Vehicle Code §§13201.5, 13352.5 (new); §13201 (amended).
SB 330 (Gregorio); STATS 1975, Ch 1133

Prior to the enactment of Chapter 1133, a court was *permitted* to suspend a driver license upon a person's first conviction for driving under the influence of intoxicants. Upon a second conviction within a five year period, however, the court was *required* to suspend a person's driving privileges. Likewise, a third conviction within a seven year period resulted in revocation of those privileges [CAL. VEHICLE CODE §13352]. These penalties were imposed *in addition* to the fines or imprisonment mandated by Vehicle Code Section 23102 (driving under the influence

of alcohol or drugs). The only way in which a court could encourage a convicted person to seek treatment was through Section 23102(c), which allows the court, upon a person's first conviction only, to reduce the minimum fine from $250.00 to $150.00 if such person attends a driver education or alcohol abuse program.

Chapter 1133 provides an alternative to the suspension or revocation of a drivers' license when a person is convicted of driving under the influence of intoxicants. Section 13201.5 has been added to the Vehicle Code to permit a court to refrain from suspending driving privileges if the person convicted agrees to participate, for at least one year, in a program for the treatment of alcohol abuse, provided that the program meets the standards established by the Office of Alcohol Program Management. These standards shall include: (1) close and regular supervision of the person, including biweekly face to face meetings; (2) fee standards and provisions for indigents established by the Office of Alcohol Program Management; and (3) a variety of treatment services for problem drinkers and alcoholics. Section 13201.5 further requires periodic reports on the progress of a person attending such a program, and an immediate report should such person fail to comply with the rules of the program. If the court finds the person has failed to comply with the rules of the program, it shall order the person's driving privileges suspended for the period prescribed by law. Section 13352.5 has also been added to the Vehicle Code to prohibit the Department of Motor Vehicles from suspending or revoking the driver license of a person attending a treatment program under the provisions set forth above.

The programs set forth in Chapter 1133 are to be established on a "demonstration basis" during the period of January 1, 1976 to December 31, 1977. During this period, these programs are to be implemented in the four or fewer counties deemed most appropriate by the Office of Alcohol Program Management. The provisions of the chapter will become applicable to all counties commencing on January 1, 1978. Furthermore, the provisions of this chapter do not preclude voluntary participation in driver training in lieu of suspension of a driver license, or commitment to any other program for drinking drivers established by law.

Criminal Procedure; resentencing of juveniles

Welfare and Institutions Code §1737 (amended).
SB 260 (Zenovich); STATS 1975, Ch 1103

Since 1964 Penal Code Section 1168 (relating to sentencing of adult felons) has permitted a court to recall a sentence when such action is deemed warranted by a psychiatric diagnostic study of the defendant conducted pursuant to Penal Code Section 5079 [CAL. STATS. 1963, c. 1856, §12, at 3833]. This authority to resentence has proved desirable where a psychiatric study reveals that the defendant would receive greater rehabilitative benefit from probation than from incarceration [*See* People v. Barnes, 239 Cal. App. 2d 705, 707, 49 Cal. Rptr. 77, 78 (1966)], and in situations where a diagnostic study demonstrates that a sentence should not have been imposed [*See*, Holder v. Super. Ct., 1 Cal. 3d 779, 781, 463 P.2d 705, 706, 83 Cal. Rptr. 353, 354 (1970)]. The resentencing provision has been considered an alternative to Penal Code Section 1203.03, which sets forth a procedure for obtaining a diagnostic study prior to sentencing [*Id.* at 782 n.3, 463 P.2d at 707 n.3, 83 Cal. Rptr. at 355 n.3].

Even though commitment of a *juvenile* to the Youth Authority has been held to be a pronouncement of sentence [People v. Navarro, 7 Cal. 3d 248, 271, 497 P.2d 481, 497, 102 Cal. Rptr. 137, 153 (1972)], under former statutory law there was no provision authorizing a court to reconsider such a commitment. To remedy this situation, Chapter 1103 has amended Welfare and Institutions Code Section 1737 to authorize a court to reconsider the commitment of a juvenile if it is deemed warranted by a diagnostic study approved by the Director of Youth Authority. Reconsideration may be accomplished under this section on the court's own motion within 120 days of initial commitment, and any time thereafter upon the recommendation of the Director. Any time served prior to resentencing must be credited towards the term subsequently imposed.

Criminal Procedure; reports of child abuse

Penal Code §11161.6 (new); §11161.5 (amended).

AB 1063 (Robinson); STATS 1975, Ch 226

Support: California District Attorneys' Association; California Peace Officers' Association

Section 11161.5 of the Penal Code requires specified individuals to report instances of suspected child abuse or molestation to the local police and juvenile probation department or, in the alternative, to the county welfare department or county health department. Individuals required to make such reports include physicians, teachers, dentists, licensed day-care workers, and social workers. Failure to report is a mis-

demeanor punishable by a fine of $500, a sentence of six months in jail, or both (§11162). To facilitate discovery of child abuse by eliminating the reporter's fear of being sued by parents for malicious prosecution, libel, or slander, persons required to report enjoy immunity from any civil or criminal liability for making a report (§11161.5). Chapter 226 has amended Section 11161.5 to remove immunity from those who, with malice, make a false report. The requirement that the report be *both* false and malicious is probably indicative of a legislative intent to protect reports made with malice but with a reasonable belief of suspected child abuse, since discovering child abuse is in the public interest regardless of the reporter's motive [Comment, *The California Legislative Approach to the Problem of Wilful Child Abuse*, 54 CAL. L. REV. 1805, 1819 (1966)].

Chapter 226 has also added Section 11161.6 to the Penal Code to provide that probation officers *may* report suspected child abuse to the government authorities listed in Section 11161.5. Furthermore, probation officers have been accorded the same immunity as those required to report.

COMMENT

The argument against *requiring* probation officers or social workers to report child abuse is that fear of prosecution may create such hostility in parents that social workers or probation officers working with the family may not be able to effect positive changes. To the extent that this argument is valid, it would seem that social workers should be removed from the category of those *required* to report child abuse, and allowed to, in a manner similar to probation officers, use their discretion in determining whether to file such reports [Comment, *The Battered Child: Logic in Search of Law*, 8 SAN DIEGO L. REV. 364, 382-83 (1971)].

See Generally:

1) Kohlman, *Malpractice Liability for Failing to Report Child Abuse*, 49 CAL. S.B.J. 118 (1974) (noting physicians are not being prosecuted for failure to report child abuse and suggesting alternative civil remedies).

Criminal Procedure; nolo contendere

Penal Code §1016 (amended).
AB 1276 (Sieroty); STATS 1975, Ch 687
Support: State Bar of California
Opposition: California District Attorneys' Association

Prior to amendment by Chapter 687, Section 1016 of the Penal Code required a prosecuting attorney's consent before a defendant was per-

mitted to plead nolo contendere to a criminal charge. Chapter 687 has amended Section 1016 to delete this requirement, leaving the acceptance of a nolo plea to the sole discretion of the court. The chapter further amends section 1016 to require that the court ascertain whether the defendant completely understands the plea, understands that the plea will be considered the same as a guilty plea, and understands that he or she will be found guilty based on the plea.

COMMENT

There are many reasons why a defendant may wish to enter a plea of nolo contendere rather than a plea of guilty. The language of Section 1016 provides one of the reasons, in that it states "[t]he legal effect of such a plea shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based." Other reasons why a defendant may prefer a nolo plea include a desire to avoid the publicity of a trial while not wanting to admit guilt, an inability or unwillingness to present evidence establishing innocence, and an honest uncertainty as to guilt or innocence where complex laws are involved [Note, *Use Of The Nolo Contendere Plea In Subsequent Contexts*, 44 S. CAL. L. REV. 737 (1971)].

There appears to have been no articulated rationale for the former requirement that the prosecuting attorney consent to the entering of a nolo plea. The rationale was even less apparent when one considered that no such requirement existed in relation to any of the other five defendants' pleas authorized by Penal Code Section 1016. Furthermore, few prosecutors' offices have stated a coherent policy as to when consent to a nolo plea should be given [*Id.* at 751]. Furthermore, it is contended that a more liberal use of the nolo contendere plea will save trial time, on the assumption that some defendants would prefer a trial on the merits to a plea of guilty, but would forego a trial if permitted to plead nolo contendere [STATE BAR OF CALIFORNIA, 1974 CONFERENCE RESOLUTION 1-33]. It is also argued that there is no valid reason to deny a defendant the option of pleading nolo contendere, as in a criminal proceeding it has the same effect as a plea of guilty [*Id.*].

Criminal Procedure; classification of offenses

Penal Code §17 (amended).
SB 488 (Song); STATS 1975, Ch 664

Opposition: California District Attorneys' Association; California Peace Officers' Association

Prior to the enactment of Chapter 664, Section 17 of the Penal Code provided, *inter alia,* that where an offense charged could be classified as either a felony or a misdemeanor, the consent of the prosecutor and defendant was required before a magistrate was permitted to determine that the offense was a misdemeanor. In 1971 the California Supreme Court determined that this provision was in violation of the California Constitution [Esteybar v. Municipal Ct., 5 Cal. 3d 119, 485 P.2d 1140, 95 Cal. Rptr. 524 (1971)]. In that case the defendant was charged with possession of one marijuana cigarette, an offense which at that time could be classified as either a felony or a misdemeanor under former Health and Safety Code Section 11530. The policy of the district attorney prosecuting the case was to consent to a misdemeanor charge only if a defendant plead guilty. In arguing to uphold Section 17, the people contended that the information and indictment process is regulated by the legislature, and that a magistrate's functions at a preliminary hearing were therefore properly regulated by statute [*Id.* at 126, 485 P.2d at 1144, 95 Cal. Rptr. at 528]. The court, however, noted that a prosecutor exercises executive powers while a magistrate exercises judicial powers [*Id.* at 127, 485 P.2d at 1145, 95 Cal. Rptr. at 529]. Therefore, it was held that a prosecutor's interference with a magistrate's discretion in determining the classification of a particular offense violated Article 3, Section 1 (separation of powers, currently Article 3, Section 3) of the California Constitution [*Id.*]. Chapter 664 has deleted the provision of Penal Code Section 17 which required the prosecutor's and defendant's consent for classification of an offense as a misdemeanor, causing the classification to be a matter entirely within the discretion of the magistrate, and thus Section 17 has been brought into conformity with the Supreme Court's interpretation of the California Constitution.

Criminal Procedure; telephone calls after arrest

Penal Code §851.5 (repealed); §851.5 (new).
AB 1199 (Torres); STATS 1975, Ch 1200
Support: State Bar of California

Chapter 1200 has added a new Section 851.5 to the Penal Code to provide that a person who is arrested has a right to complete two telephone calls immediately upon being booked which, except where physically impossible, must occur no later than three hours after arrest.

The opportunity to make these calls will be afforded at no expense to the arrested person if the calls are within the local telephone area. This section now specifies that the right includes calls to two of the following: (1) an attorney, or if the arrested person has no funds, to a public defender or other attorney assigned to represent indigents; (2) a bail bondsman; and (3) a relative or other person. It is further provided that a sign setting forth this right must be posted in a conspicuous place at all police stations. The opportunity to make these calls must be given immediately upon request, or as soon as practicable. The arrested person may not be interrupted in the exercise of this right for the purpose of interrogation, nor may there be any monitoring of, eavesdropping upon, or recording of any telephone call to an attorney. Furthermore, it is provided that it is a misdemeanor for any public officer or employee to wilfully deprive an arrested person of the rights afforded by this chapter.

Prior to the enactment of this chapter, former Penal Code Section 851.5 provided that an arrested person had the right, immediately after booking and not later than three hours after arrest, to complete two telephone calls at his or her own expense. That section specified that one call could be made to an attorney, employer, or relative, and the other to a bail bondsman. It also provided that the calls were to be made in the presence of a public officer or employee. The California Supreme Court determined that the language of former Section 851.5 stating that the right arose immediately after booking was not intended to be limiting, but that the right arose at booking and extended indefinitely [In re Newbern, 55 Cal. 2d 500, 506, 360 P.2d 43, 46, 11 Cal. Rptr. 547, 550 (1961)].

COMMENT

The apparent purpose of Chapter 1200, which originated from a State Bar of California resolution, is to bring about the early entry of counsel in criminal proceedings [*See* STATE BAR OF CALIFORNIA, 1974 CONFERENCE RESOLUTION 1-22]. Strict interpretation of former Section 851.5 would seem to indicate that the right to telephone an attorney terminated if the arrested person utilized one call to contact a relative or employer, as the language specified that the remaining call was to be completed to a bail bondsman. The new Section 851.5, however, states that the calls may be made to two of three possible persons, one of which is an attorney. Thus under the new section, a call to a relative or other person, or a call to a bail bondsman, will not preclude a second call

to an attorney. This language appears more likely to encourage early contact between an arrested person and counsel.

While Chapter 1200 eliminates the former requirement that telephone calls be made in the presence of a public officer or employee, it does not entirely foreclose the possibility that an arrested person's call will be overheard. The chapter proscribes the monitoring of, eavesdropping upon or recording of any telephone call to an *attorney*. Federal law prohibits the interception of any telephone call by use of a device [18 U.S.C. §§2510, 2511 (1970)]. Neither of these statutes, however, prohibit eavesdropping on an arrested person, using only the unassisted ear, when he or she is exercising the right given by this chapter to telephone a person other than an attorney.

As introduced, Assembly Bill 1199 provided that the person arrested had to be advised by the arresting officer of the right to make the specified calls. A Senate amendment deleted this requirement and substituted the requirement of posting signs which explain the right [A.B. 1199, 1975-76 Regular Session, *as amended*, August 13, 1975]. This amendment would seem to diminish the practical effect of Chapter 1200 as in the excitement of an arrest situation even the most conspicuous sign is apt to be overlooked. The right to make telephone calls is of little value to the person who has not observed the sign and is therefore ignorant of the right.

Criminal Procedure; appeals

Penal Code §1238.5 (new).
SB 1211 (Rains); STATS 1975, Ch 1195
Support: State Bar of California

Penal Code Section 1237 permits a defendant to appeal from a judgment and from any order affecting the substantial rights of the party made after judgment. Chapter 1195 has added Section 1238.5 to the Penal Code to permit a defendant, upon an appeal by the prosecution, to file an appeal after the expiration of the time normally available to seek review. The section provides that the time limit for appeal is reinstated when the prosecution files notice of an appeal after the expiration of the time allowed for the defendant to appeal. This provision relates only to review of otherwise reviewable orders and rulings made during the time normally available to the defendant to seek review. The new section also directs the Judicial Council to establish rules for consolidation of the people's and the defendant's appeals.

Formerly, Penal Code Section 1252 required an appellate court, upon an appeal by the *defendant*, to consider and pass upon those trial court rulings adverse to the people as requested by the Attorney General. In *People v. Burke* [47 Cal. 2d 45, 301 P.2d 241 (1956)], the California Supreme Court held that the requirement that appellate courts pass upon the rulings adverse to the state pursuant to Section 1252 was for the purpose of deciding issues that may be considered again on retrial [*Id.* at 54, 301 P.2d at 246-47]. In addition, the court stated that unless the verdict was overturned, there was no need for the appellate court to pass upon such rulings [*Id.*]. It would appear that this rationale will apply to defendants' appeals under new Section 1238.5, so that upon consolidation of appeals, the defendant's contentions will be considered only if the people are successful in their appeal.

Criminal Procedure; city attorneys as defense counsel

Government Code §41805 (new).
AB 2245 (Chimbole); STATS 1975, Ch 556

Section 41805 has been added to the Government Code by Chapter 556 to permit city attorneys, not exercising prosecutorial responsibilities for the cities which employ them, to defend, assist in the defense, or act as counsel for any person accused of a crime. However, the city must *expressly* relieve such an attorney of all prosecutorial duties. Furthermore, the defendant must *expressly* waive any rights created as a result of a potential conflict of interest that may arise from the city attorney's position with the city, and the crime that the defendant is charged with must not concern a violation of any ordinance of the city or cities by which the attorney is employed. The section expressly states that its provisions do not preclude a city from limiting or prohibiting private practice of attorneys in its employ.

COMMENT

In *People v. Rhodes* [12 Cal. 3d 180, 524 P.2d 363, 115 Cal. Rptr. 235 (1974)] the California Supreme Court declared that a city attorney with prosecutorial responsibilites could not defend or assist in the defense of a person accused of a crime [*Id.* at 187, 524 P.2d at 367, 115 Cal. Rptr. at 239]. However, if a city attorney has been relieved of his or her prosecutorial duties, and the defendant knowingly waived any potential conflict of interest, courts have allowed a city attorney to

act as defense counsel [Montgomery v. Super. Ct., 46 Cal. App. 3d 657, 673, 121 Cal. Rptr. 44, 55 (1975)]. Therefore, it appears that Chapter 556 merely codifies the restrictions on city attorneys' activities which were already established by the courts.

See Generally:
1) CAL. GOV'T CODE §§37103, 53060 (authorization for cities to employ personnel for "special services," including prosecutorial duties).

Criminal Procedure; evidence in a criminal trial

Penal Code §1418.6 (new).
AB 1056 (Hayden); STATS 1975, Ch 156
Support: California District Attorneys' Association; California Peace Officers' Association

Sections 1418 and 1418.5 of the Penal Code provide for the return to the owner of all exhibits after final disposition of a criminal case. The final disposition is when the subject and res jurisdiction have ceased in both the trial and appellate courts [45 OPS. ATT'Y GEN. 119 (1965)]. Therefore, for example, if a theft case is appealed, the victim may not be able to recover his or her stolen property for some time if it was used as an exhibit in the trial. Chapter 156 has added Section 1418.6 to the Penal Code to remedy this problem in certain situations.

Upon the stipulation of the parties in a criminal case, the court may now release exhibits to the owner or his or her agent if no prejudice will be suffered by either party, and a full photographic record is made of the released material. This section will not apply to material which may not be legally possessed, or to weapons which the defendant had in his or her possession at the time of arrest or used in the commission of the crime for which he or she was convicted [CAL. PEN. CODE §1419].

COMMENT

Although Section 1418 also provides that a court "may" release the evidence upon final disposition, the court in *Franklin v. Municipal Court* [26 Cal. App. 3d 926, 103 Cal. Rptr. 354 (1972)] held that a judge was *required* to return the material unless there were either conflicting claims or the possession of the material was illegal [*Id.* at 897, 103 Cal. Rptr. at 362]. The court held that allowing a judge to use his or her discretion in returning personal property was a violation of due process [*Id.*]. Since Sections 1418 and 1418.6 are similar in that they are designed to return property to its owner, it would appear that if all the

requirements of the new Section 1418.6 are met, a judge will have no choice but to return evidentiary material before the final determination of a criminal case. However, since it is the court who will determine if these requirements have been met, a judge can still retain exhibits until final disposition of a case by finding that the return of the exhibit will result in prejudice to either the defendant or prosecution.

Criminal Procedure; mentally disordered jail inmates

Government Code §18862 (new); Penal Code §§4011.8, 6055 (new); §4011.6 (amended); Welfare and Institutions Code §§1756.1, 5352.5, 5403, 5404.1, 5651.1, 7228 (new); §5328 (amended).
AB 1228 (Lanterman); STATS 1975, Ch 1258
Support: California Association for Mental Health; Los Angeles County Conference of Local Mental Health Directors

Pursuant to the provisions of Section 4011.6 of the Penal Code, whenever it appears to a person in charge of a jail or any judge in the county in which the jail is located that an incarcerated person may be mentally disordered, the jailor or judge may have the prisoner transferred to a mental health facility for a 72 hour period of treatment and evaluation. After this transfer, the prisoner is subject to additional periods of involuntary confinement pursuant to the Lanterman-Petris-Short Act [CAL. WELF. & INST. CODE §5000 *et seq.*]. Chapter 1258 has amended Section 4011.6 to provide that a prisoner is now also subject to conservatorship proceedings for gravely disabled persons [CAL. WELF. & INST. CODE §5350 *et seq.*], if he meets the criteria for imposition of a conservatorship. Also, whenever a prisoner is transferred to a mental health facility, the court must now notify both the prosecuting attorney and counsel for the prisoner of such transfer. If the person in charge of the mental health facility determines that arraignment or trial would be detrimental to the well-being of the prisoner, statutory time requirements for such proceedings are suspended. Unless such a determination is made, statutory time requirements for arraignment or trial in any pending criminal proceedings remain in effect.

Section 4011.8 has been added to the Penal Code to provide that a prisoner may make an application for inpatient or outpatient mental health care. Permission for such treatment, if it is to be undertaken outside the jail, must be obtained from the person in charge of the jail or a county judge in addition to the county mental health director. If

criminal charges are pending, both counsel for the prisoner and the prosecuting attorney must be notified by the court if approval for voluntary treatment is given. The denial of an application for voluntary treatment is reviewable only by mandamus. Furthermore, time spent in inpatient or outpatient treatment *is* to count as a part of the prisoner's sentence.

Provision has been made by Chapter 1258 for the return of a prisoner to jail to complete an unfinished term at the termination of treatment (§4011.8). No provision is made for the release of a prisoner from a treatment facility at the time his or her jail sentence expires; however, in practice, the prisoner who has been receiving voluntary mental health services is free to refuse further treatment and be released at that time [Letter from Christopher J. Walt, Consultant, Assembly Ways and Means Committee, to *Pacific Law Journal*, September 12, 1975 (on file at the *Pacific Law Journal*)].

Section 5328 of the Welfare and Institutions Code delineates the standards of confidentiality which apply to mental health records. Chapter 1258 has amended this section to allow a probation officer to receive confidential treatment information, with the exception of information which has been given in confidence by members of the prisoner's family. Information released pursuant to this section may only be used for purposes of evaluation leading to a recommendation for sentencing after written agreement has been made by the prisoner. Such information is then transmitted to the court in a separate report; following sentencing this report is permanently sealed.

Chapter 1258 has also added Section 5352.5 to the Welfare and Institutions Code to authorize the initiation of conservatorship proceedings for the following persons: (1) those found not guilty by reason of insanity; (2) those found incompetent to stand trial; (3) those who have been transferred from a jail to a mental health facility; (4) prison inmates who have been transferred to a state hospital; and (5) Youth Authority wards. It is specifically stated that the initiation or existence of a conservatorship shall not affect any pending criminal proceeding.

Finally, Chapter 1258 has added Section 7228 to the Welfare and Institutions Code to require an evaluation by the State Department of Health of every person committed to a state hospital as not guilty by reason of insanity, incompetent to stand trial, or as a mentally disordered sex offender to determine his or her propensity for dangerous behavior or escape. After such evaluation, any person so committed who does not require a secure treatment setting must be treated in a state hospital

as near to the prisoner's home as possible. In the past, the Department of Health has treated all persons committed pursuant to the Penal Code or as mentally disordered sex offenders in two secure state hospitals, Atascadero (San Luis Obispo County), and Patton (San Bernardino County) [Final Report, Assembly Select Committee on Mentally Disordered Criminal Offenders, on file at the office of Asssemblyman Frank Lanterman].

See Generally:
1) *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).
2) Comment, *Civil Commitment of the Mentally Ill in California: The Lanterman-Petris-Short Act*, 7 LOYOLA L. REV. 93 (1975).

Criminal Procedure; mentally disordered prisoners

Penal Code §§1026.1, 1370.3 (new); §§1026, 1026a, 1370, 1374 (amended); Welfare and Institutions Code §§5402.1, 5710.1, 6325.1 (new); §§6316, 6317, 6318, 6319, 6321, 6322, 6323, 6324, 6325, 6327, 6328, 6330, 7375 (amended).
AB 1229 (Lanterman); STATS 1975, Ch 1274
Support: California Association for Mental Health; Los Angeles County Conference of Local Mental Health Directors
Opposition: California State Employees' Association

Chapter 1274 adds flexibility to the system of treating mentally ill offenders by specifying procedures for local commitment and outpatient treatment of such persons as alternatives to hospitalization. Detailed procedures for outpatient care of persons found mentally incompetent to stand trial, persons found not guilty by reason of insanity, and mentally disordered sex offenders (MDSO's) have been added to both the Penal Code and the Welfare and Institutions Code. In addition, MDSO's may now be placed in public or private mental health facilities as an alternative to commitment to a state hospital.

Prior to the enactment of Chapter 1274, persons found incompetent to stand trial were committed to a state hospital or local mental health facility by order of the court at a hearing held to determine the defendant's competency to stand trial [CAL. PEN. CODE §1370]. Once committed to the facility, the defendant could be placed on outpatient status on the recommendation of the superintendent of the facility (§1374). Persons found not guilty by reason of insanity were committed only to a state hospital until sanity was restored (§1026), but could be released

for outpatient care after court approval and following at least 90 days of inpatient care for non-capital offenders or three years for capital offenders, provided that they were no longer a danger to the health and safety of others [CAL. WELF. & INST. CODE §7375(c)].

Chapter 1274 has amended Sections 1026 and 1370 and added Sections 1026.1 and 1370.3 (discussed *infra*) to the Penal Code to provide that persons found incompetent to stand trial or found not guilty by reason of insanity may be placed by the court in a state hospital or other mental health facility or placed on outpatient status. The order for treatment may be issued by the court only after an evaluation of the defendant by the county mental health director or his designee. Furthermore, a person who has been charged with or convicted of certain violent crimes, such as murder or forcible rape, must undergo at least 90 days of evaluation and treatment before he or she can be placed on outpatient status.

If the superintendent of the state hospital or other facility to which the defendant has been committed is of the opinion that the defendant is not a danger to the health and safety of others and will benefit from outpatient care, the defendant's status may be changed to that of outpatient through procedures delineated in Penal Code Section 1374 and Welfare and Institutions Code Section 7375.

If the prosecuting attorney desires to challenge a decision to place a defendant on outpatient status, a hearing must be held on the matter. If the placement is approved, the outpatient supervisor is required to provide a progress report to the court every 90 days [CAL. PEN. CODE §§1026.1(a), 1370.3(a), 1374(b); CAL. WELF. & INST. CODE §7375(d)(1)]. The maximum period for outpatient care is one year, renewable by the court upon recommendation of the county mental health director or his designee, or the supervisor of the state hospital or other facility [CAL. PEN. CODE §§1026.1(a), 1370.3(a), 1374(b); CAL. WELF. & INST. CODE §7375(d)(1)]. In addition, if at any time the outpatient supervisor is of the opinion that a defendant on outpatient status requires inpatient care, he or she must notify the committing court, the prosecuting attorney, and the defendant's attorney of his or her intent to transfer the patient to inpatient care. The court may disapprove of the transfer, approve it, or take no action, in which case the transfer is deemed approved. The order for transfer is reviewable by writ of habeas corpus only [CAL. PEN. CODE §§1026.1(c), 1370.3(c), 1374(d); CAL. WELF. & INST. CODE §7375(d)(4)]. Alternatively, if the prosecuting attorney is of the opinion that an outpatient defend-

ant is a danger to the health and safety of others, he or she may petition the court for a hearing to determine whether outpatient treatment may continue. At the hearing, the court may order the defendant committed or returned to an inpatient facility, and this order is reviewable only by writ of habeas corpus [CAL. PEN. CODE §§1026.1(d), 1370.3(d), 1374(e); CAL. WELF. & INST. CODE §7375(d)(4)]. While a transfer request made pursuant to this section is pending, the defendant may be subjected to involuntary treatment procedures of the Lanterman-Petris-Short Act [CAL. PEN. CODE §§1026.1(e), 1370.3(e), 1374(f); CAL. WELF. & INST. CODE §7375(d)(5)].

Welfare and Institutions Code Section 6300 *et seq.* provides for the classification, commitment, and treatment of mentally disordered sex offenders. Section 6316 provides that if the court determines that a person is an MDSO, he or she may be committed to a state hospital for an indefinite period of time. Chapter 1274 has amended this section to provide that as an alternative to state hospital commitment, the court may also, at its discretion, place the MDSO in an appropriate public or private mental health facility after an evaluation of the MDSO by the county mental health director or his designee. All other sections referring to treatment and care of an MDSO in a state hospital have also been amended to reflect the alternative of care in a public or private mental health facility.

Furthermore, procedures for transfer of MDSO's between state hospitals and other mental health facilities have been delineated by the addition of Section 6325.1 to the Welfare and Institutions Code. Either the defendant or the prosecuting attorney may petition the court to contest the transfer.

One of the most significant changes made by Chapter 1274 is the addition of procedures for outpatient treatment of MDSO's. In contrast to the procedures used for persons found incompetent to stand trial or not guilty by reason of insanity, an MDSO cannot be placed by the court directly on outpatient treatment, but must first be committed by the court to a state hospital or local mental health facility. The remaining provisions concerning granting or revocation of outpatient status, progress reports, and the one-year maximum treatment period are identical to those which apply to incompetent or insane defendants [CAL. WELF. & INST. CODE §6325.1]. Finally, the same prohibition against the release of an inpatient to outpatient status before 90 days of inpatient treatment pursuant to Penal Code Sections 1026 and 1370 (*supra*) applies to an MDSO who has been found guilty of a specified violent crime or an act which poses a threat of bodily harm to another.

The ability of psychiatrists to predict with accuracy the dangerousness of mental patients has been criticized as unreliable. Dangerousness has sometimes been found in patients predicted as nondangerous; the opposite problem has also been pointed out [Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974)]. As Chapter 1274 requires a determination of non-dangerousness before a patient may be released to outpatient status, an inaccurate determination may result in the release of dangerous individuals and the detention as inpatients of non-dangerous persons who could benefit from outpatient care and pose no threat to society. However, it appears that these considerations have been outweighed in the passage of this legislation by considerations of a genuine need for outpatient services for defendants and the sufficiency of the safeguards built into this legislation.

See Generally:

1) Parker, *California's New Scheme for the Commitment of Individuals Found Incompetent to Stand Trial*, 6 PAC. L.J. 484 (1975) (Penal Code and Welfare and Institutions Code treatment of defendants).
2) Note, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).